Symbolic Judgments or Judging Symbols: Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes under the Statutes of the International Criminal Tribunals

Hilmi Mohammad Ahmad Zawati

Institute of Comparative Law
Faculty of Law
McGill University, Montreal

June 2010

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of Doctor of Civil Laws (DCL)

To my wife and children,
Without whose constant patience,
Self-sacrifice,
devotion, and relentless support,
this dissertation
could not have been completed.

Abstract

This thesis argues that the abstractness and lack of accurate description and labelling of gender-based crimes in the statutory laws of the international criminal tribunals and courts infringe the principle of fair labelling, lead to inconsistent verdicts and punishments, and cause inadequate prosecution of such crimes. Accordingly, this inquiry deals with gender-based crimes as a case study and with fair labelling as a legal principle and a theoretical framework.

This topic is both critical and timely, and contributes to the existing scholarship in many different ways. This study is the first legal analysis to focus on the dilemma of prosecuting and punishing wartime gender-based crimes in the statutory laws of the international criminal tribunals and the ICC with reference to the principle of fair labelling. Moreover, this inquiry emphasises that applying the principle of fair labelling to wartime gender-based crimes would help the tribunals in delivering fair judgements and breaking the cycle of impunity for these crimes. Finally, this thesis presents a modest model of coherent legal analysis for reconceptualizing, defining, and labelling gender-based crimes that would assist the tribunals in their efforts to reformulate and amend their basic laws, a substantial step towards effectively identifying and prosecuting gender-based crimes.

This analysis consists of four interrelated chapters, including an introduction and a conclusion. The introductory chapter begins by outlining the central focus and theoretical legal framework that guides my investigation and analysis of the dilemma of prosecuting gender-based crimes in the *ad hoc* international criminal tribunals and the ICC. As well, it discusses fair labelling, which has become a recognized legal principle in criminal law over the past three decades. Furthermore, this chapter provides justifications for the inquiry by elucidating why an analysis of the failure of the international criminal tribunals to adequately prosecute gender-based crimes in the light of the principle of fair labelling is of critical importance.

Chapter two concentrates on fair labelling as a common legal principle and a legal framework that guides my work. After examining the intellectual development of the principle of fair labelling, elucidating its scope and justification, and illustrating its applicability to gender-based crimes, this chapter analyzes its relation to other criminal law principles and concepts, including *nullum crimen sine lege*; *mens rea*; proportionality; multiple wrongdoing; the moral or socio-pedagogical influence of punishment; and the doctrine of joint criminal enterprise (JCE). It also looks into the landscape of international gender justice and examines the codification of gender-based crimes as crimes against humanity and war crimes under the statutory laws of the international criminal tribunals and in light of the principle of fair labelling.

Chapter three addresses the dilemma of prosecuting gender-based crimes in the international criminal tribunals. It starts by scrutinizing feminist legal literature and tracing its controversial arguments relating to the prosecution of gender-based crimes in these supranational judicial bodies. Then it moves on to examine the case law of the international criminal tribunals and to analyse, in the light of the principle of fair labelling, their shortcomings related to major cases of gender-based crimes. In this connection, it discusses violations of other principles and concepts, particularly the offender's right to fair warning or maximum certainty, the right to fair trial without due delay, and the right to fair sentencing.

Finally, after summarising the main findings of this inquiry, chapter four concludes by confirming that the lack of accurate description and labelling of gender-based crimes in the statutory laws of the international criminal tribunals and courts violate the principle of fair labelling, lead to inconsistent verdicts and punishments, and inadequate prosecution of such crimes. Moreover, it underlines the options for reform within the statutory laws of these judicial bodies in the light of the principle of fair labelling. This reform would help the tribunals and the ICC to eliminate inconsistent prosecutions and overcome shortcomings in addressing gender-based crimes within their jurisprudence.

Résumé

Cette thèse argumente que la simplification, le manque d'étiquetage et l'absence de descriptions précises des crimes sexistes dans les lois constitutives des tribunaux criminels internationaux vont tous à l'encontre du principe du *fair labelling* ainsi qu'à plusieurs autres principes de justice fondamentale. Par conséquent, cela conduit à des verdicts et à des peines inconsistantes ainsi qu'à une poursuite judiciaire inadéquate de ces crimes. Bref, cette thèse utilise les crimes sexistes en tant qu'étude de cas et le *fair labelling* en tant que principe juridique et en tant qu'encadrement théorique.

Ce sujet est à la fois critique et opportun. De plus, cette étude contribue à la scolarité existante de plusieurs façons. En effet, il s'agit de la première analyse juridique qui se concentre sur le dilemme entourant la poursuite judiciaire et les peines des crimes de guerres sexistes dans les lois constitutives des tribunaux étudiés, et ce, sous l'optique du principe du *fair labelling.* De plus, cette étude souligne que l'application de ce dernier principe aux crimes de guerres sexistes aiderait les tribunaux à formuler des décisions justes et à briser le cycle de l'impunité entourant ces crimes. Finalement, cette thèse présente un exemple modeste d'analyse juridique cohérente voulant la réconceptualisation, l'étiquetage et la définition des crimes sexistes, et ce, afin d'assister les tribunaux dans leurs efforts de reformulation et d'amendement de leurs lois constitutives. En effet, ceci représentera une étape substantielle permettant d'identifier et de mieux poursuivre judiciairement les crimes sexistes.

Cette analyse est divisée en quatre chapitres, incluant l'introduction et la conclusion. Le chapitre introductif débute en traçant l'idée centrale et en présentant l'encadrement juridique théorique qui guidera mon étude et mon analyse de la problématique entourant la poursuite judiciaire des crimes sexistes dans les tribunaux criminels internationaux *ad hoc* et la Cour Pénale Internationale. De plus, ce chapitre discute plus en détails le *fair labelling*, un principe juridique de droit criminel reconnu depuis maintenant 30 ans. Ensuite, ce chapitre présente des justifications à cette étude en élucidant pourquoi l'analyse de l'échec des tribunaux criminels étudiés

à poursuivre des crimes sexistes est d'une importance capitale, et ce, encore une fois, sous l'optique du *fair labelling*.

Le deuxième chapitre se concentre sur le *fair labelling* en tant que principe juridique commun et en tant qu'encadrement juridique guidant mon analyse. Après avoir examiné le développement intellectuel, la portée et la justification du principe du *fair labelling* et après avoir illustrer son applicabilité aux crimes sexistes, ce chapitre analyse la relation qu'a ce principe avec les autres principes et concepts de droit criminel, tel que le *nullum crimen sine lege*; la *mens rea*; la proportionnalité, le *multiple wrondgoing*, l'influence moral et socio-pédagogique des peines ainsi que la doctrine du *joint criminal entreprise*. De plus, ce deuxième chapitre explore le paysage de la justice de genre internationale et examine la codification des crimes sexistes en tant que crimes contre l'humanité et crimes de guerres, et ce, à la fois sous la perspective des lois constitutives des tribunaux criminels internationaux et sous le prisme du principe du *fair labelling*.

Le troisième chapitre traite de la problématique entourant la poursuite des crimes sexistes dans les tribunaux criminels internationaux. Ce chapitre débute par examiner la littérature juridique féministe et par tracer les arguments controversés ayant trait à la poursuite des crimes sexistes dans ces institutions supranationales. Ensuite, ce chapitre examine la jurisprudence des tribunaux criminels internationaux et analyse, sous la perspective du *fair labelling*, leurs défauts dans les grandes jurisprudences ayant trait aux crimes sexistes. De plus, ce troisième chapitre examine les violations des autres principes et concepts, tel que le droit de l'accusé au *fair warning*, au *maximum certainty*, à un procès juste sans délai indue et son droit de recevoir une sentence juste.

Finalement, et après avoir résumé les principaux constats de cette analyse, le quatrième chapitre conclut en soulignant les options de réforme des lois constitutives des tribunaux criminels internationaux, et ce, sous la perspective du *fair labelling*. Cette réforme a pour but d'aider les tribunaux et la Cour Pénale Internationale à éliminer les poursuites inconsistantes et à surmonter les défauts de leurs jurisprudences lorsqu'ils adressent les crimes sexistes.

Acknowledgements

My good fortune, as regards writing this thesis, was the opportunity to work with two of the McGill Faculty of Law's brightest professors: Payam Akhavan and Frédéric Mégret. I am grateful to them for their encouragement and boundless patience in guiding me through the steps of this project. I have learned a great deal from their valuable suggestions, unique perspectives, and intellectual stimulation. I am likewise profoundly grateful to Professors René Provost, Vrinda Narain, Noah Weisbord and Bruce Broomhall—my thesis committee members—for their helpful comments and suggested readings.

During the preparation of this thesis, I have been greatly privileged to come to know and deal with a number of people: professors, legal scholars, and judges. I am especially grateful to Justice Teresa Doherty of the Special Court for Sierra Leone (SCSL), for her interesting comments on chapter one of this thesis and for giving me the opportunity to discuss with her the failure of the SCSL Trial Chamber II to convict perpetrators of forced marriage, a common crime that came to light during the 1990s' civil war in Sierra Leone. I am also thankful to Valerie Oosterveld, Professor of Law at the University of Western Ontario, for her encouragement and suggestions on the earlier draft of chapter one of the thesis and for providing me with her inspiring works. My gratitude is further extended to Göran Sluiter, Professor of Law at the University of Amsterdam; and Guenael Mettraux, former associate legal officer and former defence counsel at the International Criminal Tribunal for the Former Yugoslavia (ICTY), for providing me with their conference papers.

The library staff members at Nahum Gelber Law Library were also very helpful in making research materials available. I would like to express my sincerest thanks to Mary Lourenço, Carlos Rojas and Ramon Lasso. I owe a great debt of appreciation to my editor Steve Millier for his highly skilled and professional work in editing the rough draft of this thesis.

Finally, no words can fully express my debt to my wife and children for their patience and endless support, since this thesis was written during time that rightly belonged to them.

Abbreviations

AFRC	Armed Forces Revolutionary Council
CCL10	Control Council Law No.10
CDF	Civil Defence Forces
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers of the Courts of Cambodia
EoC	Elements of Crimes
FRY	Federal Republic of Yugoslavia
ICC	International Criminal Court
ICSTB	International Convention for the Suppression of Terrorist Bombing
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
JCE	Joint Criminal Enterprise
LRCC	Law Reform Commission of Canada
PrepCom	Preparatory Committee
RPA	Rwandese Patriotic Army
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
SPSC	Special Panels for Serious Crime Panels in East Timor

Contents

Chapter Three

Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes in the International Criminal Tribunals

Chapter Four
Conclusion

Chapter One
Introduction: Thesis Design and Structure

I. Prelude

In the last two decades or so, the international criminal justice system has achieved great progress through the recognition of several overlooked gender-based crimes and by the establishment of a number of international criminal judicial bodies, specifically the International Criminal Tribunal for the Former Yugoslavia (ICTY),[1] the International Criminal Tribunal for Rwanda (ICTR),[2] the Special Court for Sierra Leone (SCSL),[3] and the International Criminal Court (ICC).[4] Since the setting up of the ICTY and the ICTR in 1993 and 1994 respectively, wartime rape has been recognised, for the first time, as a crime against humanity in the statutory laws of international criminal tribunals,[5] and is

[1] UN Security Council's Resolution 827 (1993), *Approving the UN Secretary-General's Report, Deciding to Establish the Tribunal, and Specifying Implementing Tasks* (25 May 1993), UN Doc. S/RES/827 (1993); 32 I.L.M. 1203-1205 (1993) [hereinafter UNSC Res. 827].

[2] UN Security Council's Resolution 955 (1994), *Adopting the Statute of the International Criminal Tribunal for Rwanda* (8 November 1994), UN Doc. S/RES/955 (1994), 33 I.L.M. 1598-1613 (1994) [hereinafter UNSC Res. 955].

[3] UN Security Council's Resolution 1315 (2000), *The Establishment of the Special Court for Sierra Leone* (4 August 2000), UN Doc. S/RES/1315 (2000).

[4] Establishment of an International Criminal Court, GA Res. A/RES/52/160 (28 January 1998).

[5] *Statute of the International Criminal Tribunal for the Former Yugoslavia,* United Nations SCOR, 48th Sess., 3175. Annex, at 40, UN Doc. S/25704, 3 May 1993. (As Amended on 19 May 2003 by Security Council's Resolution 1481) [hereinafter The Statute of the ICTY]; *Statute of the International Criminal Tribunal for Rwanda*, UN Security Council's Resolution S/RES/955 (1994) Annex, Adopted in the Security Council's 3454th meeting on 8 November 1994 [hereinafter The Statute of the ICTR].

now prosecuted and punished as an act of genocide,[6] torture,[7] enslavement,[8] act of terrorism,[9] gender-based persecution,[10] and a crime against humanity.[11] Yet,

[6] *Prosecutor* v. *Alfred Musema,* (2000) Judgement and Sentence, 27 January 2000, ICTR-96-13- T [hereinafter Musema Judgement]; *Alfred Musema* v. *The Prosecutor,* (2001) Appeal Judgement, 16 November 2001, ICTR-96-13-A [hereinafter Musema Appeal Judgement]; *Prosecutor* v. *Jean-Paul Akayesu,* (1998) Judgement, 2 September 1998, ICTR-96-4-T [hereinafter Akayesu Judgement]; *Prosecutor* v. *Jean-Paul Akayesu,* (2001) Appeal Judgement, 1 June 2001, ICTR-96-4-A [hereinafter Akayesu Appeal Judgement].

[7] *Prosecutor* v. *Anto Furundžija,*(1998) Judgement, 10 December 1998, IT-95-17/1-T [hereinafter Furundžija Judgement]; *Prosecutor* v. *Anto Furundžija,* (2000) Appeal Judgement, 21 July 2000, IT-95-17/1-A (Furundžija Appeal Judgement]; *Prosecutor* v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo,* (1998) Judgement, 16 November 1998, IT-96-21[hereinafter Čelebići Judgement]; *Prosecutor* v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo,* (2001) Appeal Judgement, 20 February 2001, IT -96-21-A [hereinafter Čelebići Appeal Judgement]; *Prosecutor* v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo,* (2001) Sentencing Judgement, 9 October 2001, IT -96-21- T*bis*-R117 [hereinafter Čelebići Sentencing Judgement]; *Prosecutor* v. *Zdravko Mucić, Hazim Delić and Esad Landžo,* (2003) Judgement on Sentence Appeal, 8 April 2003, IT-96-21-A*bis* [hereinafter Čelebići Judgement on Sentence Appeal].

[8] *Prosecutor* v. *Dragoljub Kunarac, Radomir Kovač and Zoran Vuković,* (2001) Judgement, 22 February 2001, IT-96-23-T and IT-96-23/1-T [hereinafter Kunarac Judgement]; *Prosecutor* v. *Dragoljub Kunarac, Radomir Kovač and Zoran Vuković,* (2002) Appeal Judgement, 12 June 2002, IT-96-23-A and IT-96-23/1-A [hereinafter Kunarac Appeal Judgement].

[9] In the case *Prosecutor* v. *Issa Sesay, et al*., Trial Chamber I of the SCSL concluded that rape and other forms of sexual violence were rampantly committed against the civilian population in various districts of Sierra Leone as a weapon of terror. The chamber found that rape was not intended merely for personal satisfaction or a means of sexual gratification, but committed with the specific intent of spreading fear and terror amongst the civilian population in order to break their will and ensure their submission to the rebels' control. Accordingly, the Chamber considered such acts of sexual violence as part of the rebels' campaign to terrorise the civilian population of Sierra Leone. See *Prosecutor* v. *Issa Hassan Sesay, Morris Kallon, Augustine Gbao,* (2009) Judgment, 2 March 2009, SCSL-04-15-T, at paragraphs 1347-1348 & 1352 [hereinafter Sesay Judgement].

[10] *Prosecutor* v. *Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać,* (2001) Judgement, 2 November 2001, IT-98-30/1-T [hereinafter Kvočka Judgement]; *Prosecutor* v. *Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać,* (2005) Appeal Judgement, 28 February 2005, IT-98-30/1-A [hereinafter Kvočka Appeal Judgement]; *Prosecutor* v. *Dragan Nikolić,* Sentencing Judgement. Case No. IT-94-2-S, 18 December 2003 [hereinafter Nikolić Sentencing Judgement]; *Prosecutor* v. *Dragan Nikolić.* Judgement on Sentencing Appeal. Case No. 94-2-A, 4 February 2005 [hereinafter Nikolić Judgement on Sentencing Appeal].

[11] *Prosecutor* v. *Laurent Semanza,* (2003) Judgement and Sentence, 15 May 2003, ICTR-97-20-T [hereinafter Semanza Judgement and Sentence]; *Laurent Semanza* v. *The Prosecutor,* (2005) Appeal Judgement, 20 May 2005, ICTR-97-20-A [hereinafter Semanza Appeal

despite the incredible legal achievements and developments in the *ad hoc* tribunals' gender-specific jurisprudence—and the significant progress in statutes of the ICC [12] and the SCSL[13]—many commentators have maintained that these judicial bodies have continuously failed to respond adequately to gender-based crimes committed during the 1990s armed conflicts in the former Yugoslavia, Rwanda, and Sierra Leone. These criticisms however, have not provided a coherent conceptual framework within which the importance of prosecuting crimes of sexual violence can be assessed. This thesis argues that the criminal law principle of fair labelling provides the most compelling argument in favour of the reconceptualization and prosecution of crimes of sexual violence.

After defining the central legal argument of this thesis, explaining the major elements of the research—mainly gender-based crimes as a case study and the principle of fair labelling as a theoretical legal framework that guides my research

---

Judgement]; *Prosecutor* v. *Mikaeli Muhimana,* (2005) Judgement and Sentence, 28 April 2005, ICTR-95-IB-T [hereinafter Muhimana Judgement and Sentence]; *Prosecutor* v. *Sylvestre Gacumbitsi,* (2004) Judgement, 17 June 2004, ICTR-2001-64-T [hereinafter Gacumbitsi Judgement].

[12] The ICC Statute broadened the concept of rape to cover other sexual assaults as crimes against humanity and war crimes. Article 7(1)(g) states that "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity," are crimes against humanity. Moreover Article 8(2)(b)(xxii) considered "committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7(2)(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva conventions," to be war crimes. See *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (17 July 1998), 37 I.L.M. 999-1069 (Entered into force on 1 July 2002) [hereinafter the Rome Statute of the ICC].

[13] Similarly, Article 2(g) of the Statute of the Special Court for Sierra Leone provides that "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence," as crimes against humanity. See *Statute of the Special Court for Sierra Leone*, UN Doc. S/2002/246, appendix II, 2178 U.N.T.S. 138. (06/03/2002) [hereinafter The Statute of the Special Court for Sierra Leone].

and analysis—this introductory chapter pinpoints the importance of this thesis and specifies its contribution to the existing scholarship. Moreover, this chapter provides a brief snapshot of the historical development of the prosecution of gender-based crimes in the international military tribunals established post-WWII. Furthermore, it sheds light on the structure of this inquiry and surveys the working materials used in its construction.

II. Central Argument and Theoretical Framework

This thesis argues that the abstractness, lack of accurate description and labelling of gender-based crimes in the statutory laws of the international criminal tribunals and courts infringe the principle of fair labelling, lead to inconsistent verdicts and punishments, and constitute a barrier to justice. Accordingly, this inquiry deals with gender-based crimes as a case study and with fair labelling as a legal principle and a theoretical framework. Gender-based crimes provide a particularly illuminating case–study, not so much because of their brutality, but due to the historical invisibility of such crimes, in both customary and conventional international humanitarian and human rights law. The tremendous developments in international criminal justice and the "surfacing" of gender-based crimes since the establishment of the international criminal tribunals for the former Yugoslavia and Rwanda in early 1990's has given rise to considerable scholarship which leaves unanswered the theoretical significance of labelling crimes of sexual violence under specific categories.

Despite the remarkable progress in the statutory laws and jurisprudence of the international criminal tribunals on gender-based crimes, many feminist legal scholars have considered these developments as inadequate if not a "complete" failure.[14] While some of these scholars called for more crimes to be recognized by the statutes of the international criminal tribunals, particularly the Rome Statute of the ICC, others argued that these crimes should be prosecuted specifically as crimes of sexual violence rather than being subsumed under other categories such as torture or genocide. These arguments however, do not provide a conceptual justification for such distinct categorization. This thesis argues that the principle of fair labelling provides the most persuasive and comprehensive justification for the impulse to materialize gender-based crimes in response to their perceived lack of description, categorization, and labelling in the statutory laws of the tribunals which leads to inconsistent verdicts and punishments, and inadequate prosecution of such crimes.

---

[14] See generally, Askin, *infra* note 20, at 340; B. Nowrojee, "Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?, Occasional Paper 10 (Geneva: United Nations Research Institute for Social development, 2005); B. Stephens, "Humanitarian Law and Gender Violence: An End to Centuries of Neglect?," (1999) 3 Hofstra Law and Policy Symposium 87-109; C. Coan, "Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia," (2000) 26:1 North Carolina Journal of International Law and Commercial Regulation 183-237; Copelon, *infra* note 19, at 218 & 223-224; G. Carlton, "Equalized Tragedy: Prosecuting Rape in The Bosnian Conflict under the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia," (1997) 6:1 Journal of International Law and Practice 92-109; R. Copelon, "Surfacing Gender: Reconceptualizing Crimes against Women in Time of War," in A. Stiglmayer, ed., *Mass Rape: The War against Women in Bosnia-Herzegovina* (Lincoln, Neb.: University of Nebraska Press, 1994) 197. Reprinted in (1994) 5:2 Hastings Women's Law Journal 243-266 & in L. Lorentzen & J. Turpin, eds., *The Women and War Reader* (New York, N.Y.: New York University Press, 1998) 63-79 & in N. Dombrowski, ed., *Women and War in the Twentieth Century: Enlisted with or without Consent* (New York, N.Y.: Garland Publishing, Inc., 1999) 332-359; S. Eaton, "Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime," (2004) 35:4 Georgetown Journal of International Law 873-919.

Fair labelling—the theoretical framework that guides my thesis in analysing the international criminal tribunals' failure to adequately prosecute gender-based crimes during and after armed conflicts—originates in English national criminal law. As a legal principle applicable to the legislature,[15] it requires that crimes be separated from one another, categorized, described and labelled in order to reflect their degree of wrongfulness and relative gravity. In other words, the description of an offence should match both the wrong done and the moral blameworthiness of the offender. Accordingly, specifying the names of crimes without providing a clear technical definition and label for each of them—in such a way that "the label applied to an offence ought fairly to represent the offender's wrongdoing"[16]—would undermine the judicial process. Using the same label for crimes similar in nature but different in their blameworthiness transmits a wrong pedagogical message to society and does not reflect the real nature of the wrongdoing or its scale of harm, for: "when a crime occurs, justice must not only be done, it must be seen to be done."[17] Hence, subdividing and labelling gender-based crimes would ensure a proportionate response to law-breaking and respond to fairness

[15] Ashworth, *infra* note 23, at 88.

[16] A. Ashworth, "The Elasticity of *Mens Rea*," in C. Tapper, *Crime, Proof, and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworths, 1981) 53 [hereinafter the Elasticity of Mens Rea].

[17] A. Simester & G. Sullivan, *Criminal Law: Theory and Doctrine* (Portland, Or.: Hart, 2007) 32 [hereinafter Simester & Sullivan]; B. Mitchell, "Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling," 64:3 Modern Law Review 398 [hereinafter Mitchell].

requirements that offenders be labelled and punished in proportion to their wrongdoing. [18]

Nonetheless, reconceptualizing gender-based crimes in the light of the principle of fair labelling, for the purpose of this thesis, doesn't simply mean adding more crimes to the existing list of statutory laws overseen by the tribunals, but entails as well describing, classifying, and labelling these crimes in a way that the conviction responds to the wrongdoing. Of course, convicting a person for any gender-based crime is important, but more important is that the conviction be legally justified in relation to the committed crime so as to send a message to society, on the one hand, and to assure victims and perpetrators that justice has been efficiently rendered. Moreover, the principles of fundamental justice require that the offender be convicted of the crime that he committed, not of another crime.

In this connection, one may argue that while adding more crimes to the existing list would fairly bring justice for both victims and perpetrators, it would leave little room to judges' discretion. One may go further and argue that, in this case, the court should acquit a crime suspect whose wrongdoing is not explicitly stated in the statutory laws of the tribunals. This thesis challenges these notions on the basis that adding more crimes to the existing list would not totally abrogate "any other form of sexual violence of comparable gravity" rather than reducing crimes under the chapeau of this norm, the matter that it would not quash the

[18] The Elasticity of Mens Rea, *supra* note 16, at 56.

judge's discretion, but rationalize it. On the contrary, adding well-described and labelled gender-based crimes would help the court prosecute these crimes appropriately and bring perpetrators to justice.

III. Justification and Contribution to Scholarship

This topic is both critical and timely, and contributes to the existing scholarship in many different ways. First**,** this study is the first legal analysis to focus on the dilemma of prosecuting and punishing wartime gender-based crimes in the statutory laws of the international criminal tribunals and the ICC with reference to the principle of fair labelling. It asserts that the abstractness and ambiguity of gender-based crimes, manifested in the lack of accurate description and labelling of each crime, have resulted in the failure of the tribunals to prosecute and punish these crimes adequately. Second**,** this inquiry emphasises that applying the principle of fair labelling to wartime gender-based crimes—by separating crimes from one another and labelling them in order to reflect their degree of wrongfulness and real gravity—would help the tribunals in delivering fair judgements and breaking the cycle of impunity for these crimes. Third, while most scholarly works today focus on the latest developments and achievements of international gender justice, no study has yet addressed the shortcomings of the international criminal system in this area with the detail or comprehensiveness that it warrants. Fourth, this study affirms that rape and other forms of sexual violence in war settings should be prosecuted separately as a crime in itself, not as a subsection of war crimes or crimes against humanity—a notion that was

strongly supported by Justice Teresa Doherty of the SCSL while she was commenting on an earlier draft of this introductory chapter. Indeed, isolated wartime rape incidents are as vicious and horrible to victims as are those inflicted systematically and on a large-scale. Fifth, this thesis reveals that the ambiguity and lack of clear definition of each gender-based crime in the statutory laws of the international criminal tribunals violates the defendant's right for a fair trial and offends the principle of legality *nullum crimen sine lege*, which is embodied in the provisions of the Rome Statute of the ICC (Article 22). This article provides that no one shall be held criminally responsible for a conduct unless it constitutes—at the time it takes place—a crime within the jurisdiction of the Court, on the one hand, and requires that the definition of a crime shall be strictly construed and not be extended by analogy, on the other. Sixth, this thesis presents a modest model of coherent legal analysis for reconceptualizing, labelling, and defining gender-based crimes. Seventh, it boosts the growing dialogue about wartime rape and other sexual violence and examines the role of international criminal law in preventing future abuses of women in armed conflict. And finally, it contributes to the construction of a legal literature that would enhance the international criminal tribunals in their efforts to reformulate and amend their basic laws, a substantial step towards effectively identifying and prosecuting gender-based crimes.

IV. Historical Overview

While wartime rape has been prohibited by national and international regulations on armed conflict for hundreds of years,[19] the prosecution of gender-based crimes in international military and criminal tribunals is a new legal phenomenon.[20] This marginalization may be attributed to the fact that rape has been historically accepted as a natural consequence of war and a form of collateral damage affecting women, rather than an actual war crime. Despite the

---

[19] Rape began to be prohibited in national military codes as early as the fourteenth and fifteenth centuries. The Ordinances of War promulgated by Richard II (1385) outlawed rape of women and subjected convicted persons to capital punishment by hanging. Similarly, Henry V drew on the laws of Richard II, particularly in the provisions denouncing rape of women. Henry V's Ordinances of War (July 1419) also declared rape a capital offence. Moreover, Articles 44 and 47 of the Lieber Code (1863), which was enacted during the American civil war, also prohibited rape under the penalty of death. See Askin, *infra* note 20, at 299; L. Clifford, et al., *International Justice Failing Rape Victims,* Online: Tribunal Update 483 (5 January 2007) <http://www.iwpr.net/?p=tri&s=f&o=328311&apc_state=henptri> (Accessed on: 21 October 2009); *The Lieber Code*, U.S. Department of Army, General Orders No. 100 (April 1863), reprinted in *The Law of War*, vol. 1 (New York, N.Y.: Random House, 1972) 158-186), Articles 44 & 47 [hereinafter the Lieber Code]; R. Copelon, "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law," (2000) 46 McGill Law Journal 220 [hereinafter Copelon]; T. Meron, "Rape as a Crime under International Humanitarian Law," (1993) 87:3 The American Journal of International Law 425 [hereinafter Meron]; T. Meron, Henry's Wars and Shakespeare's Laws (New York, N.Y.: Oxford University Press, 2002) 143-144 [hereinafter Shakespeare's Laws].

[20] The first documented international criminal prosecution of a gender-based crime can be traced back to 1474, when Sir Peter van Hagenbach stood trial in Breisach, Germany, before 27 judges of the Holy Roman Empire. He was convicted of war crimes—including rape committed by troops under his command—and sentenced to death. Kelly Askin emphasises that Sir Hagenbach was convicted because he did not actually declare war. Had he done so, the rapes would have been considered permissible. See A-M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: the ICC and the Practice of the ICTY and the ICTR* (Antwerpen, Belgium: Intersentia, 2005) 4 [hereinafter de Brouwer]; K., Askin, "Prosecuting Wartime Rape and other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles," (2003) 21:2 Berkeley Journal of International Law 299 [hereinafter Askin]; K. Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (The Hague, The Netherlands: Martinus Nijhoff Publishers, 1997) 5 [hereinafter Prosecution in International War Crimes Tribunals]; D. Luping, "Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 436 [hereinafter Luping].

fact that sexual violence was utilized on a large scale during World War II, where thousands of women and girls were forced into concentration camps and brothels for rape and sexual slavery, the drafters of the statutory laws of the International Military Tribunal (IMT)[21] and the International Military Tribunal for the Far East (IMTFE)[22] signally failed to list rape as a war crime or a crime against humanity.[23] Likewise, the trial judges at both tribunals had largely ignored rape and other forms of sexual violence, although they were broadly documented during the war and despite the fact that the trial records include evidence of horrific sexual violence as means of torture, involving different types of gender-based crimes, mainly rape, sexual mutilation, nudity, and forced abortion.[24] Even in the trials of minor war criminals, held by the Allied forces under Control

---

[21] Charter of the International Military Tribunal (IMT), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 8 August 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280.

[22] *Charter of the International Military Tribunal of the Far East (IMTFE),* 19 January 1946, 26 Apri1, 1946, T .I.A.S. No.1589, 4 Bevans 20.

[23] M. Cherif Bassiouni argues that rape was implicitly included in the statutes of the IMT and the IMTEF as a crime against humanity under the leadings "inhuman acts" and "ill treatment." However, Bassiouni's interpretation infringes both fair labelling and the *nullum crimen sine lege* principles, which require that a crime shall be explicitly classified and labelled, while its definition must be strictly constructed and not be extended by analogy. See A. Ashworth, *Principles of Criminal Law*, fifth ed., (New York, N.Y.: Oxford University Press, 2006) 88 [hereinafter Ashworth]; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (London: Kluwer Law International, 1999) 125 [hereinafter Bassiouni]; The Rome Statute of the ICC, *supra* note 12, at Article 22.

[24] *Trial of Major War Criminals before the International Military Tribunals*, November 14, 1945-October 1, 1946 (Nuremberg, Germany: [s.n.], 1947-1949) VI: 170 & VII: 494.

Council Law No.10 (CCL10),[25] rape and other sexual-based crimes were treated at a minimal level, although this treaty explicitly recognized rape as a crime against humanity. By the same token, although sexual violence was documented and prosecuted, the IMTFE judges had failed to deal with it as a separate crime. Instead, it was subsumed under charges of command responsibility for other atrocious crimes.[26] A closer look at the above discussion reveals that gender-based crimes were treated at both tribunals as less important offences and the victims considered as second-class casualties of war. This in turn emphasizes the perception that wartime rape was, and still is, a by-product of war, while the tribunals failed to show any noticeable progress in the prosecution of gender-based crimes during armed conflict.

In the aftermath of the Yugoslav dissolution war and the Rwandan genocide of the early 1990s, the UN Security Council—based on reports submitted to the

---

[25] *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946) at Article II(1)(c) [hereinafter CCL10].

[26] J. McHenry, "The Prosecution of Rape under International Law: Justice that is Long Overdue," (2002) 35:4 Vanderbilt Journal of Transnational Law 1277 [hereinafter McHenry]; K. Nahapetian, "Selective Justice: Prosecuting Rape in the International Criminal Tribunals for the Former Yugoslavia and Rwanda," (1999) 14 Berkeley Women's Law Journal 127 [hereinafter Nahapetian]; P. Kuo, "Prosecuting Crimes of Sexual Violence in an International Tribunal," (2002) 34 Case Western Reserve Journal of International Law 307 [hereinafter Kuo]; R. Goldstone, "Prosecuting Rape as a War Crime," (2002) 34 Case Western Reserve Journal of International Law 279 [hereinafter Goldstone]; S. Healey, "Prosecuting Rape under the Statute of the War Crimes Tribunals for the Former Yugoslavia," (1995) 21:2 Brook Journal of International Law 330 [hereinafter Healey]; S. Wood, "A Woman Scorned for the 'Least Condemned' War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda," (2004) 13:2 Columbia Journal of Gender and Law 282 [hereinafter Wood]; T. Meron, "Reflections on the Prosecution of War Crimes by International Tribunals," (2006) 100 American Journal of International Law 567 [hereinafter Meron].

Security Council by the Commission of Experts Established Pursuant to Security Council's Resolution 780 to investigate, examine and analyze crimes committed on the territory of former Yugoslavia,[27] as well as on various reports provided by the Independent Commission of Experts to report acts of genocide and other serious crimes perpetrated in Rwanda[28]—established the ICTY and the ICTR to prosecute and punish those responsible for serious violations of international humanitarian law that took place during the conflicts. Both tribunals were founded under Chapter VII of the UN Charter, which constituted a binding obligation on the international community to carry out the decisions taken by these tribunals in enforcing the law. The commissions' reports documented several kinds of massive and systematic sexual violence and revealed that rape and other forms of sexual violence were repeatedly committed as part of a larger policy to destroy, in whole or in part, a certain national or ethnic group. On the whole, the ICTY and the ICTR—in spite of several shortcomings that will be the

---

[27] UN Security Council's Resolution 780 (1992), *Requesting the UNSC to Establish an Impartial Commission of Experts to Analyze Information Submitted Pursuant to Resolution 771 (on Violations of International Humanitarian Law) and Obtained through its Own Investigations and to Provide Conclusions* (6 October 1992), UN Doc. S/RES/780 (1992), 31 I.L.M. 1476 (1992); UN Security Council, *Final Report of the Commission of Experts Established Pursuant to Security Council's Resolution 780 (1992)*, UN Doc. S/1994/674 (27 May 1994); UN Security Council, *Annex II, Rape and Sexual Assault: A Legal Study*, UN SCOR, UN Doc. S/1994/674/Annex II (27 May 1994); UN Security Council, *Annex IX, Rape and Sexual Assault*, UN SCOR, UN Doc. S/1994/674/Annex IX (28 December 1994); UN Security Council, *Annex IX. A, Sexual Assault Investigation*, UN SCOR, UN Doc. S/1994/674/Annex IX. A (28 December 1994).

[28] UN Security Council's Resolution 935 (1994), *Requesting the Secretary-General to Establish, As a Matter of Urgency, an Impartial Commission of Experts to Examine and Analyze Information Submitted Pursuant to the Present Resolution* (1 July 1994), UN Doc. S/RES/935 (1994); UN Security Council, *The Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, UN Doc. S/1994/1405 (9 December 1994).

object of discussion in the following chapters—made tremendous progress in gender justice and were the first international criminal tribunals to recognize explicitly rape as a crime against humanity in their statutory laws, and prosecute it as an act of genocide, torture, slavery, and a crime against humanity.

When the civil war in Sierra Leone came to an end in 2002, after a period of conflict in which widespread rape, sexual torture, and sexual slavery were routinely committed against women and girls,[29] the SCSL was created by an agreement between the United Nations and the government of Sierra Leone to prosecute persons who bore the greatest responsibility for serious violations of international humanitarian law.[30] In addition to its groundbreaking decisions on the immunity of a head of state[31] and the conscription and use of children in armed conflict,[32] the SCSL made notable progress in the prosecution of gender-based crimes, particularly sexual slavery and forced marriage.[33] In this respect, it

---

[29] B. Nowrojee, "Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims," (2005) 18 Harvard Human Rights Journal 85 [hereinafter Nowrojee]; T. Doherty, "Developments in the Prosecution of Gender-Based Crimes - the Special Court for Sierra Leone Experience," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 328 [hereinafter Doherty]; V. Oosterveld, "Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 408 [hereinafter Oosterveld].

[30] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002), 2178 U.N.T.S. 138.

[31] *Prosecutor* v. *Charles Ghankay Taylor*. Indictment of 3 March 2003, SCSL-03-01-PT; *Decision on Immunity from Jurisdiction (Prosecutor* v. *Charles Ghankay Taylor.)*, Decision of 31 May 2004, SCSL-03-01-PT.

[32] *Decision on Child Recruitment (Prosecutor* v. *Norman)*, Decision of 31 May 2004, SCSL-04-14-AR72(E).

[33] *Prosecutor* v. *Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, (2007) Trial Judgement, 20 June 2007, SCSL-2004-16-T., at 701 [hereinafter Brima Trial Judgement].

is worth noting that ten out of thirteen indicted war crimes suspects were accused of sexual-based crimes. However, notwithstanding these achievements, the SCSL—as did other preceding *ad hoc* international criminal tribunals—fell short of adequately prosecuting gender-based crimes due to, *inter alia*, the ambiguity of gender-based crimes in its statutory laws, procedural problems, lack of a clear prosecutorial strategy, and limitations on the Court's jurisdictions and mandates.

With the turn of the millennium, the Rome Statute of the ICC entered into force, leading to the establishment of the ICC on the 1st of July 2002. This event has been considered a turning point in international gender justice and the prosecution of gender-based crimes. This is due to the fact that the Rome statute is the first international treaty of an international criminal court to explicitly recognize a wide range of gender-based crimes under the jurisdiction of the ICC, including "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other forms of sexual violence of comparable gravity" [34] as well as crimes against humanity and war crimes. The ICC is the first permanent international criminal judicial body with "the power to exercise its jurisdiction over persons for the most serious crimes of international concern," [35] including gender-based crimes.

However, in spite of the fine-sounding norms of the Rome Statute and the performance of the ICC, there are deficiencies in the statutory laws, including

[34] In spite of that, the Court failed to define and label these crimes as distinct crimes. See The Rome Statute of the ICC*, supra* note 12, at Article 7(1)(g) & Article (8)(2)(b)(xxii).

[35] *Ibid*. at Article 1.

abstractness and ambiguity of gender-related norms, which will be discussed in the following chapters in the light of the fair labelling principle. These obstructions have hindered the ICC from fulfilling its obligations to adequately investigate and prosecute gender-based crimes and sexual violence in different war torn countries other than the Central African Republic, Congo, Uganda, and Sudan.

V. Structure and Scope

This analysis consists of four interrelated chapters, including an introduction and a conclusion. As well, there is a selected comprehensive bibliography of relevant primary and secondary sources, arranged alphabetically by format under several main headings. The introductory chapter begins by outlining the central focus and theoretical legal framework that guides my investigation and analysis of the dilemma of prosecuting gender-based crimes in the *ad hoc* international criminal tribunals and the ICC. As well, it discusses fair labelling, which has become a recognized legal principle in criminal law over the past three decades. Furthermore, this chapter provides justifications for the inquiry by elucidating why an analysis of the failure of the international criminal tribunals to adequately prosecute gender-based crimes in the light of the principle of fair labelling is of critical importance. Moreover, it provides a brief historical overview of the development of the prosecution of gender-based crimes under customary and conventional international criminal law, as well as under the statutory laws of the international criminal tribunals, established post-WWII. In

addition, it sheds light on the structure and subsequent chapters of this inquiry. Finally, it explains the method and working materials used in drafting this work.

Chapter two concentrates on fair labelling as a criminal law principle and a legal framework that guides my work. It also looks into the landscape of international gender justice and examines the codification of gender-based crimes as crimes against humanity and war crimes under the statutory laws of the international criminal tribunals and courts in light of the principle of fair labelling. After examining the intellectual development of the principle of fair labelling, elucidating its scope and justification, and illustrating its applicability to gender-based crimes, this chapter analyzes its relation to other criminal law principles and concepts, including *nullum crimen sine lege* (the principle of legality); *mens rea*; proportionality; multiple wrongdoing; the moral or socio-pedagogical influence of punishment, and joint criminal enterprise (JCE).

As noted at the outset of this work, fair labelling, as a legislative criminal legal principle, requires that the criminal law should meaningfully reflect the crime through a strict and well-constructed definition. In addition, it stipulates that an offence should be labelled according to its gravity, and that a proportion between crime and punishment must be established.[36] This is another function for the law, i.e., to go beyond setting grounds for the punishment of wrongdoings to ensure that the stigma and punishment attached to the offender reflect the crime

[36] P. Almond, "Understanding the Seriousness of Corporate Crime: Some Lessons for the New 'Corporate Manslaughter' Offence," (2009) 9:2 Criminology and Criminal Justice 149 [hereinafter Almond].

properly.[37] Moreover, fair labelling necessitates that convicted persons should be labelled according to the role that each of them played in the commission of the offence, while the label must reflect the wrongdoer's culpability.[38] Labelling offenders with the same label, as if they are guilty of the same crime—for instance, JCE III—offends the principle of fair labelling, which emphasizes discrimination between different levels of culpability and establishing proportionality between the wrongdoing, the stigma, and the punishment attached to it.[39] In other words, each offence must be defined and labelled in a way that reflects the relative seriousness of the offence and then be punished accordingly. In *R.* v. *Martineau*, the Canadian Supreme Court indicated that the principles of fundamental justice required a *mens rea* reflecting the particular nature of the crime,[40] and proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender.[41]

---

[37] A. Simester & G. Sullivan, *Criminal Law: Theory and Doctrine* (Portland, Or.: Hart, 2007) 30-31 [hereinafter Simester & Sullivan]; Ashworth, *supra* note 23, at 88; G. Williams, "Convictions and Fair Labelling," (1983) 42:1 The Cambridge Law Journal 93 [hereinafter Williams]; J. Chalmers & F. Leverick, "Fair Labelling in Criminal Law," (2008) 71:2 Modern Law Review 227 [hereinafter Chalmers & Leverick].

[38] See *R.* v. *Gordon*, [2009] 94 O. R. (3d) 1, at. p. 8 [hereinafter *R.* v. *Gordon*].

[39] R. Cryer, et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007) 308 [hereinafter Cryer].

[40] *R.* v. *Vaillancourt*, [1987] 2 S. C. R. 63; 1987 S. C. C. 78, at p. 3 [hereinafter *R.* v. *Vaillancourt*].

[41] A case in point is *R.* v. *Martineau* before the Supreme Court of Canada. In this case, the respondent and his friend Tremblay broke into a house. Tremblay shot and killed two people after robbing them. When Martineau, who had no intention to kill, asked Tremblay why he proceeded to kill the people, the latter answered "they saw our faces." Martineau responded "but they couldn't see mine 'cause I had a mask on." Martineau was convicted of second degree murder under s.213(a) and (d) and on s.21(1) and (2) of the Canadian Criminal Code. The Court of

In this respect, the principle of fair labelling coincides with *nullum crimen sine lege*, the principle of legality. Fair labelling requires, in codifying gender-based crimes, that each crime be categorized, defined, and labelled as a distinct crime in the statutory laws of the international criminal tribunals and the Rome Statute of the ICC, and be presented under its label. For example, convicting a defendant of genocidal rape in the ICC, which is not explicitly classified and defined in the statutory laws of the tribunals and courts, offends the principle of legality under Article 22 of the Rome Statute of the ICC, which implies that no one should be held criminally responsible under the court's statute unless the conduct in question constitutes a crime under the jurisdiction of the court, and the definition of a crime shall be strictly constructed and not be extended by analogy.[42]

Appeals held that s.213(a) was inconsistent with ss.7 and 11(d) of the Charter of Rights and Freedoms for reasons given in *R.* v. *Vaillancourt* and that it was not saved by s.1 of the Charter. The principles of fundamental justice require that a conviction for murder be based upon proof beyond a reasonable doubt of subjective foresight of death. The stigma and punishment attached to murder should be reserved for those who choose intentionally to cause death or who choose to inflict bodily harm knowing that it is likely to cause death. Requiring subjective foresight of death in the context of murder preserves proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender. The mental element, *mens rea*, with respect to death is necessary before a culpable homicide can be treated as murder and gives risk to the moral blameworthiness that justifies the stigma and punishment attaching to a murder conviction. The court quashed the convictions and ordered a new trial. See Canadian Criminal Code, R.S.C., 1985, s.213(a)&(d) and s.21(1)&(2); *Charter of Human Rights and Freedoms,* Constitution Act, 1982 (79) Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, (Entered into force on 17 April 1982), at ss.7 and 11(d) [hereinafter the Canadian Charter]; *R.* v. *Martineau*, [1990] 2 S.C.R. 633, at p. 3 [hereinafter *R.* v. *Martineau*]; *R.* v. *Vaillancourt*, *supra* note 40, at 3.

[42] The Rome Statute of the ICC, *supra* note 12, at Article 22.

As Andrew Ashworth points out, the principle of fair labelling attempts to present to society the nature and degree of the gravity of the crime since it is important to see justice being done.[43] This function of the law overlaps with the concept of the moral or socio-pedagogical influence of punishment, which in turn depends on the strength of the message sent to the society by the law and throughout the legal process concerning the consequences of breaking the law, on the one hand, and on the morality of the recipient society, on the other.[44] Indeed, one of the most specific and significant functions of the international criminal tribunals is the socio-pedagogical influence of the punishment on the society involved, as well as on the entire international community; this is the deterrent-preventive influence. Accordingly, the punishment of war criminals should be motivated by its deterrent effect.[45]

---

[43] A. Ashworth, *Principles of Criminal Law*, sixth ed., (New York, N.Y.: Oxford University Press, 2009) 79 [hereinafter Ashworth]; Mitchell, *supra* note 17, at 398.

[44] "A Framework for the Allocation of Prevention Resources with a Specific Application to Insider Trading," (1976) 74:5 Michigan Law Review 982 [herinafter Prevention Resources]; C. Abel & F. Marsh, *Punishment and Restitution: A Restitutionary Approach to Crime and the Criminal* (Westport, Conn.: Greenwood Press, 1984) 70 [herinafter Abel & Marsh]; J. Andenaes, "General Prevention: A Broader View of Deterrence," in R. Gerber & P. McAnany, eds., *Contemporary Punishment: Views, Explanations, and Justifications* (Notre Dame, Ind.: University of Notre Dame Press, 1972) 109 [herinafter Andenaes]; P. Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?," (2001) 95:1 American Journal of International Law 13. Reprinted in R., Falk, et al., eds., *Human Rights: Critical Concepts in Political Science*, 5 vols. (New York, N.Y.: Routledge, 2007) III: 123-159 [herinafter Akhavan]; P. Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," (2005) 99:2 The American Journal of International Law 419 [herinafter the Lord's Resistance Army Case].

[45] A. von Hirsch, "'Neoclassicism,' Proportionality, and the Rationale for Punishment: Thoughts on the Scandinavian Debate," (1983) 29 Crime Delinquency 56 [herinafter Hirsch].

Hence, the failure of the ICTY, for instance, to prosecute and punish adequately gender-based crimes committed in the early 1990s in the former Yugoslavia may be said to have diminished socio-pedagogical influence needed to deter gender-based crimes committed in Bosnia-Herzegovina in the summer of 1995, and in Kosovo in 1998 and 1999, respectively. At the same time, the lack of deterrent influence of the international criminal tribunals, which involved both powerful elites and ordinary people, may also have been a function of a given society's "inverted morality," as Payam Akhavan observes.[46] Certain societies or ethnic groups in the former Yugoslavia and Rwanda considered killing or sexually assaulting members of the victimized groups as a type of heroism and a national duty.[47]

Although the justice delivered by the international criminal tribunals can never provide absolute deterrence of future atrocities, this thesis emphasizes these tribunals'—and particularly the ICC's—pedagogical role in focussing on the

[46] **"**Discussion," (2008) 6 Journal of International Criminal Justice 703 [herinafter Discussion]; P. Akhavan, "Responsibilities: Individual, National and Multilateral," Option Paper, Plenary Panel 2: The Responsibility to Prevent, Stockholm International Forum, 2004 [herinafter Akhavan]; R. Henham, "The Philosophical Foundations of International Sentencing," (2003) 1:1 Journal of International Criminal Justice 78, citing P. Akhavan, "National Perspectives and Reservations," paper presented to the International Conference "From a Culture of Impunity to a Culture of Accountability: International Criminal Tribunals, the International Criminal Court, and Human Rights Protection, University of Utrecht, The Netherlands, November 2001 [herinafter The Philosophical Foundations of International Sentencing]; R. Henham, *Punishment and Process in International Criminal Trials* (Burlington, VT: Ashgate, 2005) 141 [herinafter Henham].

[47] H. Zawati, *The Triumph of Ethnic Hatred and the Failure of International Political Will: Gendered Violence and Genocide in the Former Yugoslavia and Rwanda* (New York, N.Y.: The Edwin Mellen Press, 2010) 142 [hereinafter Zawati].

educative-moralizing function of the punishment.[48] In other words, the law and the legal process should send clear messages and factual information to the general public about the consequences of breaking the law, and strengthen the society's public sense of accountability for human rights violations.[49]

Thus, it is important to communicate to the society the proper degree of condemnation that should be attached to the wrongdoer. If the description of an offence does not precisely reflect the degree and nature of wrongdoing, the society will receive the wrong message, similarly, the lawbreaker could be unfairly stigmatized and ultimately lose faith in the impartiality of the judicial system. A case in point is *R.* v. *Effert*. Ms. Effert, who had been charged with the murder of her new-born baby, was granted a re-trial. Believing that she would not be able to obtain an impartial jury in her home judicial district because of the stigma of post-trial publicity, she asked the court to dispense with the Crown's legislated right to consent to a re-election to trial by judge alone and instead be granted a change of venue. Recalling the aforesaid Supreme Court of Canada decision on *R.* v. *Martineau*, which requires proportionality to be established

---

[48] G. Hawkins, "Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects," (1969) 2 Wisconsin Law review 553. Reprinted in G. Hawkins, "Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects," in S. Grupp, ed., *Theories of Punishment* (Bloomington, Ind.: Indiana University Press, 1971) 163-179 [herinafter Hawkins]; The Philosophical Foundations of International Sentencing, *supra* note 46, at 78.

[49] D. Kahan, "Social Influence, Social Meaning, and Deterrence," (1997) 83:2 Virginia Law Review 383 [herinafter Kahan]; J. Andenaes, "The General Preventive Effects of Punishment," (1966) 114:7 University of Pennsylvania Law Review 950 [herinafter Andenaes]; M. Damaška, "What Is the Point of International Criminal Justice?" (2008) 38:1 Chicago-Kent Law Review 347 [herinafter Damaška]; P. Akhavan, "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism," (2009) 31 Human Rights Quarterly 628 [herinafter Akhavan].

between the stigma and punishment attached to the offender's conviction, and believing that the extensive post-trial publicity was prejudicial to her, the court granted Ms. Effert a change of venue.[50]

In both multiple wrongdoings and separate offences, the principle of fair labelling requires that the law should identify, to a great degree, differences between distinctive forms of lawbreaking. Accordingly, crimes should be separated from one another and labelled in order to reflect the gravity of the offence, as well as the element of moral blameworthiness or culpability represented in the defendant's *mens rea*.[51] It is obvious that gender-based crimes of multiple wrongdoings are different from single wrongdoing crimes. The nature and degree of gravity in raping a woman are different from those involved in forcing a woman to strip off in public or in front of her family members, then raping her and slashing her breasts or even thrusting an object into her private parts.[52] The first wrongdoing could be regarded as a single crime of rape, while

---

[50] Ashworth, *supra* note 43, at 78; *R.* v. *Effert* [2008] A.J. No. 338, 2008 ABQB 200, 443 A.R. 196, at p.3 [hereinafter *R.* v. *Effert*]; *R.* v. *Maciel*, [2007] 219 C.C.C. (3d) 516, 222 O.A.C. 174, 47 C.R. (6th) 319 at paragraph 81 [hereinafter *R.* v. *Maciel*]; Williams, *supra* note 37, at 85.

[51] Mitchell, *supra* note 17, at 394.

[52] For example, the Trial Chamber of the ICTR considered "the interahamwes thrusting a piece of wood into the sexual organs of a woman as she lay dying," an act of rape. This instrumental rape, like other forms of sexual violence, constitutes a method of torture and sexual mutilation. Similarly, women who refused to have sex with rebel combatants in Sierra Leone were mercilessly sexually tortured. Many of them suffered irreparable vaginal tearings and bled to death. Amnesty International reported that a 14-year-old girl was stabbed in the vagina with a knife, while rebels thrust pieces of firebrands into another woman's vagina for refusing to have sex with her rebel captor. See A. Park, "'Other Inhumane Acts': Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone," (2006) 15:3 Social & Legal Studies 324-325 [hereinafter Park]; Akayesu Judgement, *supra* note 6, at paragraph 686; *Sierra Leone, Getting Away with Murder, Mutilation, Rape: New Testimony from Sierra Leone,* Human Rights Watch, July 1999, Vol. 11, No. 3(A) 5 [hereinafter Getting Away with Murder]; *Sierra Leone: Rape and Other Forms of Sexual Violence*

the second is a multiple wrongdoing of several crimes that need to be separated, categorized, and labelled as crimes of forced nudity, gender-based persecution, rape, sexual mutilation, sexual terrorism, and sexual torture. Defining these crimes and recognizing their wrongfulness and severity remove any inconsistency and confusion in labelling and punishing them properly. Neither the defendant nor the community would feel secure if the label attached to the former did not reflect an accurate description of the offence he has committed. There must be proportionality between the stigma and punishment attached to the offence conviction and the moral blameworthiness of the defendant.

Moreover, separating crimes from one another and labelling them in order to reflect their degree of wrongfulness and gravity would help the court to avoid delivering disproportionate sentences. In *Coker* v. *Georgia*, Erlich Anthony Coker—who escaped from prison while serving several sentences for rape, kidnapping, one count of first degree murder, and aggravated assault—broke into the house of Allen and Elnita Carver, raped the woman and robbed her husband. The defendant was convicted of rape, armed robbery, and other offences. The jury sentenced him to death under Georgia statute for rape on the argument that the rape was committed by a person with prior convictions for capital felonies, and that the rape crime was committed in the process of committing armed robbery—another capital felony. The defendant appealed the sentence arguing that it was

---

against Girls and Women. Amnesty International, 28 June 2000, AI Index: AFR 51/35/00, at p.1 [hereinafter other Forms of Sexual Violence].

"cruel and unusual" under the Eighth Amendment of the Constitution. The Supreme Court of Georgia, considering the statistics of how states were refraining from death sentences in rape cases, ruled that the sentence was disproportionately excessive. The court argued that although raping an adult woman is a serious crime, it is not as serious as a murder, which means that the sentence did not reflect the gravity of the offence properly. Accordingly, the sentence was revised.[53]

Nevertheless, fair labelling is a principle, not an absolute injunction, as Andrew Ashworth contends. Although fair labelling requires that the definition of an offence should match the wrongdoing, developments in criminal law may result in the removal or introduction of some distinctions between offences.[54] However, one might ask: what is wrong with using the same label for offences that differ to a great degree in their level of gravity and blameworthiness—for example, prosecuting forced nudity and aggravated rape under the same label of sexual assault? In other words, what prevents us from having one label of gender-based crimes, e.g. "sexual-based crimes," subsumed under crimes against humanity or war crimes, instead of listing them under different labels, namely: rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization? For instance, rape law reform in the Canadian Criminal Code has replaced the offences of "indecent assault" and "rape" with one offence, "sexual

[53] *Coker* v. *Georgia*, 433 U.S. 584; 97 S. Ct. 2861; 53 L. Ed. nd 982; (1977 U.S. LEXIS 146).

[54] Ashworth, *supra* note 23, at 90.

violence." This simply means that differences between types of sexual crimes will be dealt with at the sentencing level, rather than distinguishing these crimes with different labels.

In responding to the above argument, it is crucial to distinguish between rape and other forms of sexual violence utilized in warfare settings and the same sexual offences committed in domestic society in time of peace, as they differ in nature, magnitude, and blameworthiness. Moreover, the Canadian reform of rape law proves to be problematic and seems to have gone wrong for many reasons. First of all, it is not justifiable to use the same label for different crimes which differ so much in their degree of gravity. For example, rape, which may involve attempted or actual penetration, is clearly a more serious offence than the offence of touching the private parts of a woman. Accordingly, sexual violence crimes must be categorized, defined, and labelled with reference to their degree of gravity and culpability. Leaving definitions to judges would increase the potential for abuse and leave judicial powers unrestricted.[55] Second, the abstractness of sexual crimes undermines the proportionality between the stigma and the punishment attached to the crime conviction. Thus, the law needs to be exact in identifying the offence committed by the offender, while the punishment and the stigma should proportionately reflect the gravity of the wrongdoing. For example,

---

[55] Canada, Senate Committee on Legal and Constitutional Affairs, *Bill S-210: An Act to Amend the Criminal Code (Suicide Bombings)*, Submitted by Professor Ed Morgan, April 9, 2008, p. 2 [hereinafter Morgan]; D. Stuart, "Supporting General Principles for Criminal Responsibility in the Model Penal Code with Suggestions for Reconsideration: A Canadian Perspective," (2000-2001) 4 Buffalo Criminal Law Review 21 & 29 [hereinafter Stuart].

if (A) kidnaps a woman and (Z) rapes her, would it be satisfactory to label both culprits indiscriminately as rapists or call their acts simply sexual violence? Given that the criminal law communicates with the society and the convicted person simultaneously, the law must convey an accurate message by exactly defining and categorizing the crime which the offender is convicted of. If the criminal law were not to distinguish the types of gender-based crimes, the conviction would be misleading.[56] Third, the abstractness of gender-based crimes would not reveal the level of blameworthiness of the wrongdoing.[57] Fourth, subsuming gender-based crimes under one label would destroy the notion of comparative justice and make it hard to use precedent decisions when dealing with similar cases.[58] And finally, the abstractness of gender-based crimes would make it difficult to deal with them and to redress and secure a suitable remedy for the victim.[59]

Moreover, this chapter examines relations between the principle of fair labelling and the doctrine of joint criminal enterprise. Since it was introduced in the Tadić Appeals Judgement of 15 July 1999, this doctrine has become the prosecutor's "magic weapon" to indict for collective sexual violence and other crimes within the jurisdiction of the ICTY and other tribunals. Despite the fact

---

[56] Simester & Sullivan, *supra* note 17, at 31.

[57] J. Herring, *Criminal Law: Text, Cases, and Materials* (New York, N.Y.: Oxford University Press, 2008) 281 [hereinafter Herring].

[58] Chalmers & Leverick, *supra* note 37, at 221.

[59] K.-L. Tang, "Rape Law Reform in Canada: The Success and Limits of Legislation," (1998) 42:3 International Journal of Offender Therapy and Comparative Criminology 266 [hereinafter Tang].

that JCE has been regarded as a breakthrough in the ICTY's jurisprudence, it was criticized for broadness, vagueness, and expansiveness. However, the thesis argues that these conceptual problems place the doctrine in serious conflict with major principles of criminal justice, specifically the principle of fair labelling, which requires that proportionality between punishment and the defendant's culpability be well-recognized.

Looking into the codification of gender-based crimes in the statutory laws of the *ad hoc* international criminal tribunals and the Rome Statute of the ICC in the light of the principle of fair labelling, the second part of this chapter reveals that the drafters failed to respond adequately to wartime rape and other forms of sexual violence perpetrated on a large scale in the 1990s and thereafter. Although rape, *per se*, is clearly condemned under the tribunals' statutes and recognized as a crime against humanity and a war crime, no clear-cut definition of this atrocious crime was provided, placing the tribunals in a dilemma. The absence of legal definitions and labelling for rape and other sexual assaults creates a lack of uniformity and consistency on both the prosecutorial and sentencing levels. For example, the terms "forced impregnation," "forced pregnancy," "forced maternity," 'forced abortion," "forced prostitution," "forced marriage," and "sexual slavery," are often used interchangeably, synonymously, and sometimes cumulatively.[60] In accordance with the legal principle *nullum crimen sine lege*,

[60] A. Biehler, "War Crimes against Women," Book Review of *War Crimes against Women: Prosecution in International War Crimes Tribunals*, by K. Askin (2002) 13:4 Criminal Law Forum 507 [hereinafter Biehler]; *Guidelines for Medico-Legal Care for Victims of Sexual Violence* (Geneva: World Health Organization, 2003), p. 6 [hereinafter Legal Care for Victims of

the drafters expressly limit the tribunals' jurisdiction only to trying and punishing crimes recognized by the statutory laws, thereby creating a fundamental conflict with the tribunals' rape prosecutions given the lack of description and labelling. While the Statute of the ICTY, for example, lists rape as a crime against humanity, it fails to list it in Article 2, which specifies grave breaches of the laws of war. In other words, to charge rape as a crime of war, this mislabelling requires the prosecutor to list it as a form of other accepted crimes.

Although the Rome Statute of the ICC includes an impressive list of sexual and gender-based crimes, codifying them as part of the jurisdiction of the ICC, it fails to define these crimes—except "forced pregnancy—among other definitions stated in Article 7 (2)." Likewise, the statute failed to place rape and sexual violence under the category of humiliating and degrading treatment rather than that of grave breaches and serious violations. Another critical point is that in spite of the Akayesu Judgement's historical decision in recognizing rape as an act of genocide, the Statute has excluded rape and other gender-based crimes from Article (6), which incorporates verbatim the definition of genocide found in

---

Sexual Violence]; H. Hallock, "The Violence against Women Act: Civil Rights for Sexual Assault Victims," (1992-1993) 68 Indiana Law Journal 584 [hereinafter Hallock]; K. Askin, *War Crimes against Women:* Prosecution in International War Crimes Tribunals (The Hague: Kluwer Law International 1997) 12 [hereinafter Askin]; L. Saltzman, et al., "National Estimates of Sexual Violence Treated in Emergency Departments," (2007) 49:2 Annals of Emergency Medicine 211 [hereinafter Saltzman]; J. Shargel, "In Defense of the Civil Rights Remedy of the Violence against Women Act," (1997) 106-6 The Yale Law Journal 1851 [hereinafter Shargel]; R. Willis, "The Gun Is Always Pointed: Sexual Violence and Title III of the Violence against Women Act," (1991-1992) Georgia Law Journal 2199 [hereinafter Willis].

Article 2 of the Genocide Convention, Article 4 of the Statute of the ICTY, and Article 2 of the Statute of the ICTR, respectively.

This deliberate ambiguity leaves much room to the ICC judges' discretion, thus creating the risk that they will choose a narrow and regressive understanding of the law. These shortcomings have been reflected in the dilemma of prosecuting gender-based crimes and have led to inconsistent verdicts and punishments—a notion that will be the object of analysis in the following chapter.

Chapter three, before addressing the case law of the international criminal tribunals and examining, in the light of the principle of fair labelling, their shortcomings related to major cases of gender-based crimes, this chapter scrutinizes feminist legal literature and traces its controversial arguments relating to the prosecution of gender-based crimes in these supranational judicial bodies.

Since the news of the first rapes that took place in the early 1990s during the Balkan War, feminists have played a prominent role in calling for the criminalisation of rape and other forms of sexual violence in international legal instruments.[61] In spite of their success in changing the landscape of the international gender justice, however, feminist legal scholars were divided over

[61] For example, see C. Mackinnon, "Genocide's Sexuality," in M. Williams & S. Macedo, eds., *Political Exclusion and Domination* (New York, N.Y.: New York University Press, 2004) 315, reprinted in MacKinnon, C., *Are Women Human?: And Other International Dialogues* (Cambridge, MA: Belknap Press of Harvard University Press, 2006) 209-233; C. Mackinnon, "Rape, Genocide, and Women's Human Rights," in S. French, et al., eds., *Violence against Women: Philosophical Perspectives* (London: Cornell University Press, 1998) 43-56 [hereinafter Mackinnon]; C. McGlynn, "Rape as 'Torture'? Catharine MacKinnon and Questions of Feminist Strategy," (2008) 16: 1 Feminist Legal Studies 72 [hereinafter McGlynn]; E. Jackson, "Catharine MacKinnon and Feminist Jurisprudence: A Critical Appraisal Source," (1992) 19:2 Journal of Law and Society 197 [hereinafter Jackson].

the consideration of wartime rape, its types, significance, and prosecution. While many feminists have argued that wartime rape of mainly Bosnian Muslim women should be recognized as an instrument of genocide to destroy the Bosnian Muslim community, others have argued that it was an ordinary crime although utilized on a large scale. In this connection, Karen Engle distinguished two "camps" of feminists over this issue:[62] those who maintained that wartime rape of Bosnian women should be essentially viewed as genocide, and those who determined that the ICTY should respond equally to all rape cases committed on all sides. Despite the influence of the two differing arguments on the recognition of wartime rape, and their impact on the development of international criminal law and the treatment of sexual-based crimes in the jurisprudence of the ICTY, this thesis argues that both "camps" proved inaccurate in the light of the principle of fair labelling, which requires that offenders be labelled and punished in proportion to their wrongdoing, not their ethnicity or the ethnic lineage of their victims.

Next, this chapter looks at the case law of the international criminal tribunals and examines shortcomings related to major cases of gender-based crimes apparent in the jurisprudence of the ICTY, the ICTR, the SCSL, and the ICC over the past years. It argues that these international judicial bodies have continuously failed to respond adequately to gender-based crimes committed in war-torn areas since the Yugoslav dissolution war in the early 1990s. This

[62] K. Engle "Feminism and its (Dis) Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina," (2005) 99:4 American Journal of International Law 779 [hereinafter Engle].

failure—among other factors, including the lack of a clear prosecutorial strategy, limitations of the tribunals' jurisdictions and mandates—is due to the fact that both legislators and tribunals have failed to use the principle of fair labelling as a legal principle to address such crimes, thus affecting both victims and perpetrators. Furthermore, this chapter demonstrates how the principle of fair labelling is necessary in bringing justice to the victims and in breaking the cycle of impunity for sexual-based crimes.

Although wartime rape and other forms of sexual violence have received unprecedented attention in international criminal law in the past fifteen years, the international criminal tribunals have largely failed to recognize and adequately prosecute different forms of gender-based crimes, sending in the process a three-fold message—to victims, defendants and society—of legal tolerance and impunity for wartime gender-based crimes. In the ICTR, for example, only five men—Akayesu, Bagasora, Gacumbitsi, Muhimana, and Semanza—out of 48 indictees have been found guilty of sexual-related charges. None of them has pleaded guilty to any form of sexual violence offences, and all of them were able to have their sexual violence charges dropped in exchange for guilty pleas on other counts.

The failure to define and label gender-based crimes in the statutory laws of the international criminal tribunals leads to inconsistent verdicts in rape trials and generates confusion among witnesses, defendants, prosecutors and judges. The reliance on judicial discretion to categorize an act of sexual violence would

produce inconsistent guilty verdicts and punishments.[63] Recently, in the *Prosecutor* v. *Jean-Pierre Bemba Gombo*, the Pre-Trial Chamber of the ICC rejected the cumulative charging approach utilized by the Prosecutor and declined to confirm the charge of torture as a crime against humanity and outrages upon dignity as a war crime on a sexual basis. The Chamber concluded that acts of torture and outrages upon personal dignity were "fully subsumed by the count of rape."[64] Moreover, in the *Brima et al.* case, the Trial Chamber of the SCSL found that forced marriage, as an "other inhumane act," must involve conduct not otherwise subsumed by other crimes listed under Article 2 of the Statute of the SCSL. After examining the entirety of the evidence in the case, the Trial Chamber II declared itself—by a majority—not satisfied that the evidence adduced by the prosecution established the elements of a non-sexual crime of "forced marriage" independent of the crime of sexual slavery under Article 2(g) of the Statute of the SCSL.[65] Additionally, the Trial Judges ruled by a majority that the prosecution's

---

[63] Nevertheless, one may argue that the EoC elaborated by the PrepCom eliminate any ambiguity of gender-based crimes incorporated in the Rome Statute. This argument looks unsound for being in conflict with Article 9(1) of the Rome Statute, which states that the EoC were elaborated to "assist" judges and have no conclusiveness or binding legal status as regards the Court. See de Brouwer, *supra* note 20, at 28; G., Werle, *Principles of International Criminal Law* (The Hague, The Netherlands: T.M.C. Asser Press, 2005) 49 [hereinafter Werle]; L. van den Herik, The Condition of the Rwanda Tribunal to the Development of the International Law (Leiden, the Netherlands: Martinus Nijhoff Publishers, 2005) 98 [hereinafter Herik]; The Rome Statute of the ICC, *supra* note 12, at Article 9(1).

[64] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, (The Prosecutor v. Jean-Pierre Bemba Gombo), Decision of 15 June 2009, ICC-01/05-01/08-388, at paragraphs 205, 206, 209 & 312.

[65] Sexual slavery as a form of wartime sexual violence could be one of the most misinterpreted gender crimes. The complexity of this term stems from the many components of the crime. For example, the rape of a group of women by different assailants, individually or collectively, may not amount to the crime of sexual slavery, whereas the multiple rape of a woman seized for this

evidence was completely subsumed by the crime of sexual slavery and that there was no lacuna in the law which would necessitate a separate crime of "forced marriage" as an "other inhumane act." The failure of the women to prove how they were abused and forced to perform "marital" relations and duties against their will and other acts that would go beyond sexual slavery, made the Judges think that it was in the interest of justice to treat forced marriage under the umbrella of sexual slavery. Not listing "forced marriage" explicitly among other gender-based crimes under Article 2 of the Statute of the SCSL, which offends the principle of fair labelling, convinced the Trial Judges not to recognize it as a separate crime against humanity. Accordingly, the judges ruled by a majority that Count 7 was invalid due to duplicity,[66] and dismissed Count 8 for redundancy as the crime of sexual slavery would be dealt with in Count 9. The Trial Chamber concluded, moreover, that the prosecution's evidence in the case did not point to any instances of a women or girl having a false marriage forced upon her in circumstances which did not amount to sexual slavery.[67] The Chamber found that

---

purpose may indeed do so as long as the perpetrators exercise any or all of the powers attached to the right of ownership over the body and sexuality of the victim. See Brima Judgement, *supra* note 33, at paragraphs 703-704; P. Hassan-Morlai, *Evidence in International Criminal Trials: Lessons and Contributions from the Special Court for Sierra Leone* (LL.M., University of East London, 2007) 40 [hereinafter Hassan-Morlai].

[66] Brima Judgement, *supra* note 33, at paragraph 25.

[67] In the author's meeting with Justice Teresa Doherty of the SCSL, during the T. M. C. Asser Institute's conference on "Islam, Politics and Law: Perspectives on International Humanitarian Law between Universalism and Cultural Legitimacy," held in The Hague on Friday, 27 November 2009, she confirmed her dissenting opinion regarding this issue, emphasizing that "the act of forced marriage is of similar gravity and nature to the other enumerated crimes against humanity and that the act causes serious bodily or mental harm. Accordingly, I consider and hold that forced

the evidence advanced by the prosecution as proof of "forced marriage" went to prove elements contained by the crime of sexual slavery.[68]

However, while Trial Chamber II reversed the charge of "forced marriage" on the basis of the above accounts, Trial Chamber I of the same court, in the case of *Sesay, et al.*, found the accused guilty of both sexual slavery and "forced marriage" under Count 7 and Count 8 respectively, and held that the crime of "forced marriage" was not subsumed by the crime of sexual slavery.[69] The defendant was convicted of sexual slavery, a crime against humanity punishable under Article 2(g) of the Statute of the SCSL, for having committed sexual slavery by participating in a JCE, pursuant to Article 6(1) of the Statute of the Court. At the same time, he was convicted of "other inhumane acts," a crime against humanity punishable under Article 2(i) of the Statute, for having committed "forced marriage" by participating in a JCE, pursuant to Article 6(1) of the Statute of the Court.[70] The Chamber went further when it held that sexual slavery and "forced marriage" were committed with the specific intent of terrorising the civilian population of various districts of Sierra Leone.

---

marriage constitutes a crime against humanity." See also Brima Trial Judgement, *supra* note 33, (Partly dissenting opinion of justice Doherty on Count 7-sexual slavery- and Count 8 –'forced marriage'), at p. 594, paragraph 71.

[68] Brima Judgement, *supra* note 33, at paragraphs 520, 713 & 714; K. Glassborow, *Forced Marriage Appeal may Influence the ICC*, Institute for War and Peace Reporting, Africa Reports No. 123 (24 July 2007) 2 [hereinafter Glassborow].

[69] Sesay Judgement, *supra* note 9, at paragraphs 2306-2307.

[70] *Ibid*. at p. 678.

Accordingly, the Chamber found that these crimes constituted acts of terrorism as charged in Count 1 of the Indictment.[71]

Furthermore, in the Civil Defence Force (CDF) case, the Trial Chamber rejected by a majority the Prosecutor's demand to amend the joint indictment to include certain gender-based crimes and consider evidence of gender-based acts as proof of either a crime against humanity of other inhumane acts or the war crime of cruel treatment. This rejection resulted in the failure of the prosecutor to acknowledge the victims' rights to have crimes perpetrated against them categorized as gender-based crimes, once again continuing the cycle of impunity for these crimes and impeding the victims' rights to proper access to justice.[72] In addition, due to the abstractness of gender-based crimes in the ICTY Statute—which infringes the principle of fair labelling—and its failure to classify sexual slavery as a separate crime, the Trial Chamber in the *Prosecutor* v. *Kunarac* charged the defendants with both "rape" and "enslavement" instead of "sexual slavery" as crimes against humanity. It has simply implemented the Slavery Convention's definition of enslavement in the broadest terms, [73] while slavery—

---

[71] *Ibid*. at paragraphs 1355-1356; *Prosecutor* v. *Issa Hassan Sesay, Morris Kallon, Augustine Gbao,* (2006) Corrected Amended Consolidated Indictment, 2 August 2006, SCSL-04-15-PT., See Counts 6-9, paragraphs 54-60 (Sexual Violence, including forced marriage).

[72] *Decision on the Prosecution Request for Leave to Amend the Indictment (Prosecutor* v. *Norman, Fofana & Kondewa)*, Decision of 20 May, SCSL-04-14-PT.

[73] C. Argibay, "Sexual Slavery and the 'Comfort Women' of World War II," (2003) 21:2 Berkeley Journal of International Law 384-385 [hereinafter Argibay]; *Prosecutor* v. *Dragoljub Kunarac, Radomir Kovač and Zoran Vuković,* (2001) Judgement, 22 February 2001, IT-96-23-T and IT-96-23/1-T at paragraph 782 [hereinafter Kunarac Judgement]; Slavery Convention, Concluded on 25 September 1926, A 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253 (Entered into force on 9 March 1927), at Article 1 [hereinafter Slavery Convention].

according to that definition—means forced labour attached to the right of ownership.[74]

Moreover, the chapter provided that the tribunals' commitment to the principles of fundamental justice implied that they had to insure the defendant's rights to a fair trial and sentence. However, fair sentencing implies that a proportion between crime and punishment be established. This function of the law, which is also required by the principle of fair labelling, ensures that the stigma attached to the offender reflects the crime properly. Furthermore, fair sentencing, according to the principle of fair labelling, also requires that the definition and labelling of each crime reflect the element of moral blameworthiness or culpability represented in the defendant's *mens rea*. It stresses that the wording of the conviction should fairly state the defendant's guilt. At the same time, it emphasizes that the offender should be punished in proportion to his *mens rea* and not only to the degree of gravity or seriousness of the offence.

VI. Working Materials

In conducting this study, a variety of primary and secondary legal sources were consulted. The Rome Statute of the ICC, its elements of crimes, rules of procedure and evidence, and case law; the statutes of the *ad hoc* international criminal tribunals established in post-Cold War, particularly the ICTY, the ICTR,

---

[74] K. Askin, "The Kunarac Case of Sexual Slavery: Rape and Enslavement as Crimes against Humanity," in A. Klip & G. Sluiter, eds., *Annotated Leading Cases of International Criminal Tribunals*, Vol. V (Antwerpen, Belgium: Intersentia, 2003) 812 [hereinafter Askin]; McHenry, *supra* note 26, at 1273.

and the SCSL and their jurisprudence, rules of procedure and evidence, and elements of crimes constitute the primary sources of this work. Moreover, this analysis examines a number of relevant international treaties, UN Security Council's resolutions, and the jurisprudence of a number of national courts. At the same time, different secondary sources, including leading legal scholarly analyses focusing on wartime gender-based crimes, conference proceedings, lectures, and dissertations are also analysed.

Finally, by elucidating the main findings of the thesis, the conclusion asserts that the abstractness of gender-based crimes in the statutory laws of the international criminal tribunals offends the principle of fair labelling, leads to inconsistent verdicts and punishments, constitutes a barrier to justice, and furthers the cycle of impunity for sexual-based crimes. It affirms that rape and other forms of sexual violence in war settings should be prosecuted separately as a crime in itself, not as a subsection of war crimes or crimes against humanity. Moreover, it underlines the options for reform within the statutory laws of the international criminal tribunals and the Rome Statute of the ICC in the light of the principle of fair labelling, which would help the tribunals to eliminate any inconsistent prosecution or ruling on these crimes. This issue cannot be addressed without examining and elucidating the finer points of the principle of fair labelling, to which we now turn.

Chapter Two
Fair Labelling and the Codification of Gender-Based Crimes in the Statutory Laws of the International Criminal Tribunals

I. Introduction

This chapter focuses on fair labelling as a legal principle that became a widely accepted tool for reinforcing criminal law over the past three decades,[1] on the one hand, and as a legal framework that guides my work throughout this analysis, on the other. After examining the intellectual development of the principle of fair labelling, elucidating its scope and justifications, and illustrating its applicability to gender-based crimes, this chapter analyses its relation to other criminal law principles and concepts, e.g.: the principle of legality; *mens rea*; proportionality; multiple wrongdoing; the moral or socio-pedagogical influence of punishment, and the doctrine of joint criminal enterprise (JCE).

Moreover, this chapter looks into the landscape of the international gender justice and examines the codification of gender-based crimes embodied in the statutory laws of the international criminal tribunals and the Rome Statute of the ICC in light of the principle of fair labelling. First of all, it examines the lack of an acceptable definition of rape and other gender-based crimes in the above laws and the negative impact of this failing on the competence of the *ad hoc* tribunals;

[1] C. Clarkson, "Context and Culpability in Involuntary Manslaughter: Principle of Instinct?," in A. Ashworth & B. Mitchell, eds., *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000) 141 [hereinafter Clarkson).

secondly, it analyses the different definitions of rape provided by the trial chambers of the ICTR and the ICTY; and, finally, it argues that abstractness, ambiguity and the lack of an acceptable definition of rape and other forms of gender-based crimes in the statutory laws, as well as the incoherent definitions of rape in the case law of the tribunals, constitute an insurmountable obstacle to adequately prosecuting these crimes, as Richard Goldstone has pointed out, and violate the principle of fair labelling, leading to inconsistent prosecutions and convictions in the international criminal tribunals—a problem that will be discussed in detail in the following chapter. The principle of fair labelling emphasizes making distinctions between offences and subdividing and labelling them in order to represent the nature and magnitude of each crime. Inaccurate labels affect defendants, victims, and the public. Accordingly, the principle of fair labelling necessitates sending a deterrent message to the public through the socio-pedagogical influence of punishment and requires ensuring fairness to defendants, so that they be labelled and punished in proportion to their wrongdoing and culpability.

II. Fair Labelling as a Common Legal Principle in Criminal Law

1. Intellectual Development

The principle of representative labelling or fair labelling, as Glanville Williams suggests, was developed for English criminal law in the early 1980s by

Andrew Ashworth, professor of English law in the University of Oxford.[2] It has become widely used and has come to serve as guiding legal principle over the last three decades in spite of the fact that fundamental questions relating to its nature, justification, scope, and applicability to criminal law have never been satisfactorily answered or received a detailed analysis. This section explores the intellectual development of the principle of fair labelling and examines its scope and justification. Moreover, it scrutinizes its applicability to international criminal law, particularly the statutory laws of the international criminal tribunals and the Rome Statute of the ICC governing gender-based crimes in wartime settings.

In his remarkable article on transferred intent entitled "The Elasticity of Mens Rea, 1981,"[3] Andrew Ashworth laid the foundation stone of the principle of "representative labelling," which was modified to "fair labelling" one year later by Glanville Williams in his article "Convictions and Fair Labelling,"[4] responding to Ashworth's aforesaid article. Since then, the term "fair labelling" has come to be more accepted in many legal writings, even by Ashworth himself.[5] In this article, Williams did not elaborate on or contest the fundamental basis of the

---

[2] A. Ashworth, "The Elasticity of *Mens Rea*," in C. Tapper, *Crime, Proof, and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworths, 1981) 56 [hereinafter the Elasticity of Mens Rea]; A. Ashworth, *Principles of Criminal Law*, fifth ed., (New York, N.Y.: Oxford University Press, 2006) 88 [hereinafter Ashworth]. See also other editions of the same book: third edition, p. 90 and sixth edition, p. 78.

[3] The Elasticity of Mens Rea, *supra* note 2, at 56.

[4] G. Williams, "Convictions and Fair Labelling," (1983) 42:1 The Cambridge Law Journal 93 [hereinafter Williams].

[5] Ashworth, *supra* note 2, at 88.

principle of fair labelling as briefly stated by Ashworth;[6] he only slightly disagreed with some of his conclusions on how the principle should be applied to cases involving transferred intent.[7]

Although Ashworth did not discuss the principle in great detail in his paper on the elasticity of *mens rea*, since the focus of the study was indeed transferred intent, he later grouped fair labelling among other principles relating to the conditions of liability in the sixth edition (2009) of his *Principles of Criminal Law.*[8] Besides presenting the main concern and goals of the principle of fair labelling—which he had already stated in his above mentioned paper[9] and in the fifth edition of the same book—he states:[10] "[i]ts concern is to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are represented and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the lawbreaking,"[11] Ashworth tried in the current edition to answer certain fundamental questions, including what

---

[6] Even in his most recent work, the 2009 sixth edition of "Principles of Criminal Law," Ashworth discusses the principle of fair labelling in what is the equivalent of two pages of text, pp. 78-80. See A. Ashworth, *Principles of Criminal Law*, sixth ed., (New York, N.Y.: Oxford University Press, 2009) 78-80 [hereinafter Ashworth].

[7] J. Chalmers & F. Leverick, "Fair Labelling in Criminal Law," (2008) 71:2 Modern Law Review 219 [hereinafter Chalmers & Leverick].

[8] Ashworth, *supra* note 6, at 78-80.

[9] The Elasticity of Mens Rea, *supra* note 2, at 56.

[10] Ashworth, *supra* note 2, at 88.

[11] Ashworth, *supra* note 6, at 78.

aspects of the offence should be reflected in the label of the offence.[12] However, despite the fact that neither Ashworth nor Williams has ever elaborated on the principle of fair labelling in great detail, it has come to be practically and effectively used to justify or criticize different aspects of the English criminal law,[13] particularly crimes against the person, including murder, theft and rape.[14]

Labelling, which literally means to categorize, classify, describe, designate or identify, is significant in any legal process. Even statutory offences should be separated and labelled in a way that would help the prosecutor properly to indict the offender and to ensure that the latter receives a fair notice of possible penalties that might be inflicted on him.[15] Nevertheless, the principle of fair labelling goes further in requiring that offences be categorized and labelled in a way that reflects different degrees of wrongdoing and, accordingly, distinctive levels of

---

[12] *Ibid*. at 79.

[13] Drawing a comparison between English criminal law and the Draft Criminal Code for Scotland—which does not apply the principle of fair labelling—regarding the level of subdivision of offences, James Chalmers and Fiona Leverick found that, for example, Part 1 of the English Sexual Offences Act of 2003 contains 55 substantive offences, while Part 3 of the Draft Criminal Code for Scotland contains only 12 offences. Similarly for crimes of deception, Scots Law has a single offence of fraud, while the English Criminal Laws identifies eight offences of deception under the Theft Acts of 1968 and 1978 respectively. See Chalmers & Leverick, *supra* note 7, at 217-218.

[14] Ashworth, A., "Principles, Pragmatism and the Law: Commission's Recommendations on Homicide Law Reform," (2007) Criminal Law Review 339 [hereinafter Ashworth]; B. Mitchell, "Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling," 64:3 Modern Law Review 412 [hereinafter Mitchell]; C. Clarkson, "Theft and Fair Labelling," (1993) 56 The Modern Law Review 553 [hereinafter Theft and Fair Labelling]; Clarkson, *supra* note 1, at 141-142; Chalmers & Leverick, *supra* note 7, at 220; H. Power, "Towards a Redefinition of the *Mens Rea* of Rape," (2003) 23:3 Oxford Journal of Legal Studies 401 [hereinafter Power]; O. Quick, & C. Wells, "Getting Tough with Defences," (2006) Criminal Law Review 516 [hereinafter Quick & Wells].

[15] Chalmers & Leverick, *supra* note 7, at 222.

punishment consistent with the gravity of the offence. Given these principles, offences should be accurately defined and classified to demonstrate the moral distinctions between them and to rank them with respect to their seriousness.[16] In other words, it seeks to ensure that the definition of an offence would provide society with an accurate moral grasp of the defendant's wrongdoing, and, at the same time, ensure that distinctions between offenders are marked in the offences committed, making it clear that there are significant moral distinctions between offences.

This is the role of the principle of fair labelling: to make distinctions between acts that could be classified under the same offence group, although they differ in their degree of wrongdoing. For example, this would involve distinguishing between a single rape of a woman and a multiple rape of another with the purpose of impregnating her, although both offences lie in the same category of sexual-based crimes.[17] Accordingly, the principle of fair labelling implies that the statutory laws of the international criminal tribunals, as well as the Rome Statute of the ICC, should meaningfully define gender-based crimes, reflecting different levels of wrongdoings through a clear structure for these offences, and label them in a manner that presents distinctive forms of criminality according to the gravity of each crime and recognizes a proportion between the

---

[16] Clarkson, *supra* note 1, at 141-142.

[17] J. Horder, "Rethinking Non-Fatal Offences against the Person," (1994) 14:3 Oxford Journal of Legal Studies 339 [hereinafter Horder]; S., Shute, et al., "Introduction: The Logic of Criminal Law," in S. Shute, et al., eds., *Action and Value in Criminal Law* (New York, N.Y.: Oxford University Press, 1993) 9 [hereinafter Shute].

crime and the sentence.[18] At the same time, defining and categorizing crimes, relying on the principle of fair labelling, would strengthen comparative justice by building a case law of previous legal decisions that would serve as an authoritative rule in dealing with similar cases.

Although Ashworth states that one of the chief concerns of the principle of fair labelling is that the label should correctly represent the nature and magnitude of the offence,[19] Williams maintains that this goes beyond classifying, describing, and differentiating between different forms of wrongdoing; rather, it operates at all levels of the legislative and legal process. It extends to the details stated in the conviction, which should represent the degree of the offender's moral guilt, a key factor in reducing the possibility of misunderstanding.[20] Accordingly, attaching an accurate label to a wrongdoing would help in consistent prosecution and sentencing instead of indicting someone for undefined lawbreaking and leaving everything to the juries' or judges' discretion.[21] In this connection, Williams adds

---

[18] P. Almond, "Understanding the Seriousness of Corporate Crime: Some Lessons for the New 'Corporate Manslaughter' Offence," (2009) 9:2 Criminology and Criminal Justice 149 [hereinafter Almond].

[19] The Elasticity of Mens Rea, *supra* note 2, at 56.

[20] Williams, *supra* note 4, at 85.

[21] It is important that the offender's conduct be defined and categorized in an appropriate way, because convicting a person of a crime should not mean labelling him as a criminal in general, but as one who committed a specific offence. See V. Tadros, "The Distinctiveness of Domestic Abuse: A Freedom-Based Account," in R. Duff & S. Green, eds., *Defining Crimes: Essays on the Special Part of the Criminal Law* (New York, N.Y: Oxford University Press, 2005) 132 [hereinafter Tadros].

that the convicted person may also feel a sense of injustice if the sentence does not fairly represent the wrongdoing.[22]

2. Scope and Justification

In introducing the principle of fair labelling, Ashworth delineates the features of the offence that should be taken into consideration and reflected carefully in the label. These aspects should be taken into consideration by both lawmakers and sentencers. He suggests first of all (a) that the seriousness of the label vary from one offence to another, with some offences entailing a much more serious label than the offender expects, focusing on the result of the wrongdoing more than describing the fault. For example, the offence of manslaughter or causing death (result) by driving while uninsured (fault). He also recommends (b) subdividing and labelling an offence according to the degree of its gravity, which would be appreciated by the criminal justice system, even though it might be rejected by defendants or the public. Accordingly, Ashworth considers the English Law Commission's recommendation that the English laws of homicide be

[22] As the offender is often morally judged by the society according to the label attached to him by the court, the principle of fair labelling requires that the label of the offence should fairly express the wrongdoing of the accused and precisely identify his moral blameworthiness, and that the stigma of conviction should also correspond to the wrongfulness of the act. See D. Robinson, "The Identity Crisis of International Criminal Law," (2008) 21 Leiden Journal of International Law 927 [hereinafter Robinson]; F. Leverick, *Killing in Self-Defence* (New York, N.Y.: Oxford University Press, 2006) 11 [hereinafter Leverick]; Horder, *supra* note 17, at 338-339; *Prosecutor* v. *Miroslav Kvočka et al.,* Appeal Judgement of 28 February 2005, IT-98-30/1-A, at paragraph 92 [hereinafter Kvočka Appeal Judgement]; *R.* v. *Finta*, [1989] 50 c.c.c. (3d) 236 C.J., affd at (1992) 73 c.c.c. (3d) 65 (Ont. C.A.), at p. 132 [hereinafter *R.* v. *Finta*]; *R*. v. *Vaillancourt*, [1987] 2 S. C. R. 63; 1987 S. C. C. 78, at paragraph 53 [hereinafter *R*. v. *Vaillancourt*]; Williams, *supra* note 4, at 85.

classified as murder in the first degree, murder in the second degree, and manslaughter to be a triumph for fair labelling. He furthermore suggests (c) that applying the principle of fair labelling to defences is just as important in terms of indicating why a certain verdict has been reached. Therefore, the English Law Commission's proposal for a narrow definition of the partial defence of provocation was opposed by defenders who believe that such a definition would reflect less well on their capacity. Finally he points out (d) that subdividing crimes and labelling them separately would convey an appropriate message to society regarding the wrongfulness of a certain course of action.[23]

In his justification of the principle of fair labelling, Ashworth briefly[24] provides that the description of and distinction between various kinds of offences are important in ensuring a proportionate response to lawbreaking, so that offenders be labelled and sentenced in proportion to their wrongdoing.[25] The other justification is that subdividing and labelling offences communicates precise patterns of thought to the public, whereas applying broad labels allows too much discretion to judges and those responsible for implementing the law.[26] Indeed, in light of Ashworth's reasoning and subsequent discussions, one can point to a number of socio-juridical functions of offence labelling.

---

[23] Ashworth, *supra* note 6, at 79-80.

[24] In a recent analysis James Chalmers and Fiona Leverick investigated Ashworth's justifications and examined them outside their theoretical frame. See Chalmers & Leverick, *supra* note 7, at 224.

[25] Ashworth, *supra* note 6, at 78.

[26] *Ibid.* at 79.

A. Securing Consistent Prosecutions and Verdicts

As this thesis argues, abstractness, ambiguity and broad labels of offences give too much discretion to judges and to those who are involved in implementing the law, a situation that has led to inconsistent prosecutions, verdicts and punishments. The failure of the legislator to make distinctions between offences with respect to different levels of gravity and degrees of blameworthiness would undermine the judicial system. Although this is a well founded claim, Chalmers and Leverick argue that this is a theoretical rather than a practical assertion, due to the fact that most defendants plead guilty and do not go through a trial process. Chalmers and Leverick's argument is valid insofar as it is concerned with the English criminal law, but less so with international criminal law, which is based on statute, and for which maximum penalties are prescribed for many wrongdoings.[27] Therefore, fair labelling of offences in the statutory laws of the international criminal tribunals is necessary because of the fact that gender-based crimes are abstract, and because the vast majority of defendants plead not guilty before sentencers of the international criminal tribunals in general and for gender-based crimes in particular. The current statutory laws of the international criminal tribunals give too much discretion to trial judges, which in turn resulted in inconsistent prosecutions and sentences.

In light of this discussion, one may ask why we should concern ourselves with distinguishing between gender-based crimes, instead of having a single

[27] Chalmers & Leverick, *supra* note 7, at 225.

offence, if differences in culpability can be taken into account at the stage of sentencing? In response, one might argue that although the relative level of seriousness of a gender-based crime can be taken into account at sentencing, it will not be clear for which crime the offender is being convicted. It is the principle of fair labelling which requires that distinctions between crimes be made, and that the label of the crime must indicate the proportionate wrongfulness of the offence. Moreover, the principle necessitates that differences between wrongdoing and culpability must be identified and described, so as to promote transparency in the criminal justice system.[28] Accordingly, perpetrators will be convicted, sentenced, and stigmatized in proportion to the level of their culpability.

B. Assuring Justice for Defendants and Victims

The principle of fair labelling emphasizes that offenders be labelled and punished in proportion to their degree of wrongdoing. As Ashworth puts it "one of the basic aims of the criminal law is to ensure a proportionate response to lawbreaking,"[29] so that the offender would not feel a sense of injustice, and so that

[28] Ashworth, *supra* note 2, at 88; Chalmers & Leverick, *supra* note 7, at 223; T. Crofts, "Two Degrees of Murder: Homicide Law Reform in England and Western Australia," (2008) 8:2 Oxford University Commonwealth Law Journal 196 [hereinafter Crofts].

[29] Ashworth, *supra* note 6, at 78.

society would receive the right pedagogical message, which fairly represents the severity of the wrongdoing and the suffering of the victim.[30]

Fairly labelling the offender and punishing him in proportion to the offence that he committed ensures fairness to the victim too. In other words, in the case of broad offence labelling or disproportionate labelling and punishment, the victim may suffer unfair stigmatization, inadequate representation of the harm that has been suffered, and even fear to come before the court for redress. Accordingly, the gender-based crimes embodied in the statutes of the international criminal tribunals should be subdivided, separated, defined, and identified with reference to the principle of fair labelling. For example, although most national criminal legislations define rape as the penile penetration of the vagina by force or threat,[31] other domestic codes do not require penetration of the vagina as an element of the crime of rape.[32] Some legislations go even further

---

[30] Chalmers & Leverick, *supra* note 7, at 226; Horder, *supra* note 17, at 351; S. Green, "Looting, Law, and Lawlessness," (2007) 81 Tulane Law Review 1162 [hereinafter Green]; Williams, *supra* note 4, at 85.

[31] C. Hall, "Rape: The Politics of Definition," (1988) 105:1 South African Law Journal 2 [hereinafter Hall]; *California Penal Code*, § 261 (a) (2); *Criminal Code of Korea*, (1985) Chapt. XXXII, Art. 297; L. Langston, "No Penetration-and It's Still Rape," (1998) 26:1 Pepperdine Law Review 2 [hereinafter Langston]; M. Lyon, "No Means No?: Withdrawal of Consent during Intercourse and the Continuing Evolution of the Definition of Rape," (2004) 95:1 The Journal of Criminal Law and Criminology 2 [hereinafter Lyon]; *Maryland Ann Code*, (1957), Art. 27, 463 (9/1); *New York Penal Law*, §130.05 & §130.35; *Penal Code of the Socialist Republic of Bosnia and Herzegovina*, (1991), Chapt. XI, Art. 88 (1); *Swiss Penal Code*, (1999), Art. 190.

[32] For example, the Criminal Code of the Russian Federation and the California Penal Code state that rape is sexual intercourse without determining the type of the sexual act. See *California Penal Code*, § 261; D. West, *Sexual Crimes and Confrontations: A Study of Victims and Offenders* (Aldershot, U.K.: Gouer, 1987) 3; The Criminal Code of the Russian Federation, (1996), Art. 131 (1); S. Katz, *Understanding the Rape Victim: A Synthesis of Research Findings* (New York, N.Y.: John Wiley & Sons, Inc., 1979) 11 [hereinafter Katz].

when they exclude the penetration element, and consider that any act that might satisfy the offender's sexual needs would be enough to find him guilty of rape.[33] Similarly, drawing heavily on national laws, Trial Chamber 1 of the ICTR defined rape in the Akayesu Judgment of 2 September 1998, as: "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[34] This definition is inadequate and falls short of satisfying the requirements of the principle of fair labelling on different grounds that will be discussed in detail at a later point in this chapter.

Convicting a person under this broad definition of rape, when his act does not involve penetration or even any physical contact, will unfairly stigmatize the offender as a "rapist" and the victim as a "victim of rape." By the same token, if the victim was actually raped and the offence label represents a broad concept of sexual violence, which is less than rape, the conviction will not adequately reflect the harm and pain suffered, which explicitly offends the principle of fair labelling. Moreover, and particularly in conservative societies as in Bosnia-Herzegovina, Kosovo, and Rwanda, victims might refrain from speaking out and approaching the tribunals in order to avoid being labelled improperly, in effect adding insult to injury.

C. Socio-Juridical Function of Offence Labelling

---

[33] *Polish Criminal Code*, (1995), Art. 168 (1).

[34] *Prosecutor* v. *Jean-Paul Akayesu,* (1998) Judgement, 2 September 1998, ICTR-96-4-T, at paragraph 598 [hereinafter Akayesu Judgement].

This justification of the importance of the principle of fair labelling—which will be examined from another angle in the following section on fair labelling and the concept of socio-pedagogical influence of the punishment—communicates in a three-fold manner to the following recipients:

(i) Communicating an Appropriate Message to the Defendant

As Simester and Sullivan suggest, the offence label should be clear enough to communicate to the offender the kind of criminal act that he committed and why he is being punished. In this case, the punishment becomes meaningful and a deterrent.[35] Chalmers and Leverick on the other hand argue that this function is not a convincing justification for fair labelling as this message can be delivered to the offender by the sentencing judge. They add that communicating the nature of the wrongdoing to the offender is more important than communicating the name of the offence.[36] Again, this argument is based on the English Sexual Offence Act of 2003, where sexual crimes, for example, are subdivided into 55 offences, and it is not valid in the international criminal law.

(ii) Conveying Educative and Deterrent Information to the Public

Wrongdoings vary according to their nature and degree of culpability. Consequently, they represent different levels of condemnation reflected in the public's mind and in the answer to the question of how a specific offender should be recognized by the society. For this reason, if the offence label does not

[35] A. Simester & G. Sullivan, *Criminal Law: Theory and Doctrine* (Portland, Or.: Hart, 2007) 31 [hereinafter Simester & Sullivan]; Mitchell, *supra* note 14, at 398.

[36] Chalmers & Leverick, *supra* note 7, at 230.

precisely reflect the accurate name and degree of the wrongdoing, the offender will be unfairly stigmatized and regarded by the society. This is the "public communication" or "declaratory" function of the offence label as portrayed by Ashworth and commentators.[37] This function of the offence label justifies the concern of the principle of fair labelling to have offences subdivided, labelled, and categorized according to the degree of wrongdoing.[38]

Since the stigma associated with the offender's conviction represents the seriousness of the wrongdoing, and contains within itself an educative deterrent message influenced by the varying degree of social disapproval of wrongdoings, offences and offenders should be fairly classified and labelled. A practical function of offence labelling is manifested in the social judgment and acceptance of stigmatized individuals as members of the society. For example, unfair labelling of an offender may send a wrong signal to the society that would result in his defamation and exclusion. Employers, for instance, may accept or reject job candidates according to their criminal record. On that account, fair labelling of certain offences means fairness for both offender and society.

(iii) Communication to the Criminal Justice System

An offence's accurate labelling communicates with the criminal justice system in different ways. As this thesis argues, the lack of fair labelling of

---

[37] Ashworth, *supra* note 2, at 89; Chalmers & Leverick, *supra* note 7, at 226; Mitchell, *supra* note 14, at 398; Simester & Sullivan, *supra* note 35, at 30; V. Tadros, "The Homicide Ladder," (2006) 69:4 Modern Law Review 618 [hereinafter Tadros].

[38] Ashworth, *supra* note 6, at 78.

offences results in inconsistent verdicts and may undermine the judicial process. In addition to the above justifications, the accurate labelling of offences assists sentencing judges to make consistent verdicts based on valid precedents. Providing the judicial system with accurate and detailed information about previous wrongdoings retained in offenders' criminal records leads to fairer decisions and judgments. As Chalmers and Leverick put it: "If decisions are to be made about the offender's fate that rely on previous convictions, it is only fair that the information communicated is accurate and sufficiently informative."[39] It is worth mentioning that one of the most serious challenges hindering the international criminal tribunals' adequate prosecution of gender-based crimes has been the lack of a precedent on the subject matter. Neither the Nüremberg nor Tokyo tribunals prosecuted wartime rape or other forms of sexual violence, even though it was explicitly listed in Article II (c) of the Control Council Law No. 10 (CCL10) as a crime against humanity.

Accordingly, it is important—as Mitchell suggests—to record certain crimes as aggravated, even by adding a word or a sentence. Mitchell recommends adding the word "aggravated" to the crime of burglary, if the offender uses a weapon, to be labelled as "aggravated burglary" instead of just "burglary," introducing threatened harm with the possibility of killing as another element of the crime. Similarly, he suggests the label of "aggravated rape" for the offence of rape at the point of a weapon with the aim of distinguishing this crime from the

[39] Chalmers & Leverick, *supra* note 7, at 231.

offence of regular rape and to draw the attention of the court to the possibility of an increased sentence.[40]

Notwithstanding the fact that the above justifications are not fully convincing or insufficiently developed, as Chalmers and Leverick argue, fair labelling is a principle of criminal law that brings fairness to both offenders and victims, and assists sentencing judges in delivering fair and consistent verdicts. Chalmers and Leverick, and other commentators offer opposing arguments stemming from the fact that they examined fair labelling within the context of the English criminal justice system, and certainly not with reference to the statutory laws or jurisprudence of the international criminal tribunals. In making their rulings about an offender, decision makers, whether inside or outside the criminal justice system, as Chalmers and Leverick observe, consider the name of the offence and the information that it communicates. Moreover, fair labelling, as argued above, ensures fairness to the victim too by seeing his suffering reflected accurately in the offender's criminal record.[41] To fairly represent the nature, seriousness, and extent of the lawbreaking, the principle of fair labelling requires practicality, accuracy, and specificity in offence labelling.

3. Applicability to International Criminal Law

Since the establishment of the international criminal tribunals for the former Yugoslavia and Rwanda in the early 1990s, international criminal law has

[40] Chalmers & Leverick, *supra* note 7, at 232; Green, *supra* note 30, at 1164; Mitchell, *supra* note 14, at 406.

[41] Chalmers & Leverick, *supra* note 7, at 238.

demonstrated a high level of compliance with fundamental principles of criminal law, including the principles of personal culpability, legality, and fair labelling. These principles distinguish a liberal system of criminal justice—which adheres to the principles of fundamental justice that respect and protect the rights of individuals in who happen to be subjects to the system—from a despotic system that does not respect the basic fundamental rights of its subjects.[42] This compatibility manifests itself in the acceptance of fair labelling as a principle of criminal law, and will be examined below.

A. Functional Definition of an Offence is Important to the Rule of Law

As mentioned above, the principle of fair labelling aims at the establishment of fairness and the delivery of justice to all parties; the offender, the victim, and the public. To achieve this objective, it requires that the offence label should accurately represent the offender's wrongdoing, ensuring proportionality between the stigma attached to the offender and the wrongfulness of the lawbreaking. Lack of an interconnection between the wrongdoing and the resulting stigma offends the principle of fair labelling. In this respect, fair labelling operates as a monitor of potential injustice in implementing the norms of international criminal law. In many cases, maximizing the protection of the victim's rights may result in punishing and stigmatizing the accused disproportionately.[43]

---

[42] Robinson, *supra* note 22, at 926.

[43] *Ibid.* at 931.

Moreover, international criminal law shows its adherence to the principle of fair labelling by emphasizing the significance of strictly constructed definitions of crimes. However, the lack of an acceptable functional definition for the offence of rape and other forms of gender-based crimes in the statutory laws of the international criminal tribunals leaves too much discretion to judges, opening these crimes to inconsistent interpretations and undermining the international rule of law.[44] In cases of abstractness or ambiguity, definitions shall not be extended by analogy and must be interpreted in favour of the accused. In the Čelebići Judgement of 16 November 1998, Trial Chamber II of the ICTY held that "[t]he rule of strict construction requires that the language of a particular provision shall be construed such that no cases shall be held to fall within it which do not fall both within the responsible meaning of its terms and within the spirit and scope of the enactment."[45] By the same token Article 22(2) of the Rome Statute of the ICC states that "[t]he definition of a crime shall be strictly construed and not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."[46]

B. Fair Labelling is Essential to Criminal Law

---

[44] Canada, Senate Committee on Legal and Constitutional Affairs, *Bill S-210: An Act to Amend the Criminal Code (Suicide Bombings)*, Submitted by Professor Ed Morgan, April 9, 2008, p. 2 [hereinafter Morgan].

[45] *Prosecutor* v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo,* (1998) Judgement, 16 November 1998, IT-96-21, at paragraph 410 [hereinafter Čelebići Judgement].

[46] *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (17 July 1998), 37 I.L.M. 999-1069 (Entered into force on 1 July 2002) [hereinafter the Rome Statute of the ICC].

As indicated earlier, provisions of criminal law designate penalties and simultaneously have a social role in stigmatizing wrongdoings. Thus, the offence label must precisely reflect the nature and magnitude of the lawbreaking. In *R.* v. *Martineau*, the Supreme Court of Canada emphasized this function of labelling by indicating that proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender should be clearly established.[47] As Stuart Green observes, labelling is important for sending the appropriate signal to the public.[48]

Moreover, fair labelling is crucial in assuring that the offence label corresponds accurately with the wrongdoing. For example, while the term genocide symbolizes the ultimate and most heinous crime of mass murder, its definition in the Genocide Convention does not precisely reflect the magnitude of the crime.[49] In other words, one may be convicted of the crime of genocide even when having committed a hate crime of a minor physical nature. In this case, international criminal law may be criticized for incompatibility between the

---

[47] D. Stuart, "Supporting General Principles for Criminal Responsibility in the Penal Code with Suggestions for Reconsideration: A Canadian Perspective," (2000-2001) 4 Buffalo Criminal Law Review 27 [hereinafter Stuart]; *R*. v. *Martineau*, [1990] 2 S.C.R. 633, at p. 3 [hereinafter *R*. v. *Martineau*]; *R*. v. *Vaillancourt*, [1987] 2 S. C. R. 63; 1987 S. C. C. 78, at p. 3 [hereinafter *R*. v. *Vaillancourt*].

[48] Green, *supra* note 30, at 1162.

[49] *Convention on the Prevention and Punishment of the Crime of Genocide,* 9 December 1948, GA Res. 260A (III), 3 UN GAOR at 174, UN Doc. A/810 (1948), 78 U.N.T.S. 277, Articles II [hereinafter Genocide Convention].

offence label and the nature and seriousness of the wrongdoing.[50] Accordingly, fair labelling is important in emphasizing the integral role of criminal law in setting grounds for punishments and their socio-pedagogical influences.

4. Concerns and Theoretical Challenges

Given that fair labelling is relatively new and still subject to examination and criticism, a number of actual and hypothetical opposing arguments may come to light. However, this issue was foreseen from the beginning by Andrew Ashworth who notes that fair labelling is a legal principle, not an absolute injunction. He adds that fair labelling is a flexible principle, so reforms of criminal law may eliminate distinctions between offences or create new crimes, such as in the English Sexual Offences Act of 2003. Accordingly, adopting the principle of fair labelling should not result in the passage of an expansive act of classified and distinct wrongdoings.[51]

Taking the above account into consideration, one possible argument would be to abolish gender-based crimes listed in the Rome Statute of the ICC and replace them with a single broad offence, e.g., "Sexual-based crimes," subsumed under crimes against humanity or war crimes, instead of listing them under different labels, namely: rape, sexual slavery, enforced prostitution, forced

---

[50] Morgan, *supra* note 44, at 2, citing D., Nersessian, "Whoops! I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes," (2006) 30 Fletcher Forum of World Affairs 81.

[51] Ashworth, *supra* note 2, at 90.

pregnancy, and enforced sterilization.[52] A case in point is the 1983 rape law reform in the Canadian Criminal Code, which replaces the offences of "rape," "indecent assault," and "attempted rape" with a three tier offence of "sexual assault" comprised of: sexual assault; sexual assault with a weapon, threats to a third party or causing bodily harm; and aggravated sexual assault.[53] This abstract code simply means that differences between distinctive types of sexual offences would be dealt with at the sentencing level rather than distinguishing these crimes with different labels. In other words, this broadly labelled offence would enable trial judges to reduce sentences at their discretion despite the fact that these crimes vary in their nature, seriousness, and levels of blameworthiness.[54]

However, taking into consideration crucial differences between rape and other forms of sexual violence utilized in warfare settings and those sexual offences committed in the Canadian domestic society in time of peace, this broad labelling would considerably expand judicial discretion at the sentencing stage,

---

[52] The Rome Statute of the ICC, *supra* note 46, at Article 7(1)(g) & Article 8(2)(b)(xxii).

[53] Canadian Criminal Code, R.S.C., 1985, c. C-46, ss. 271-273; D. Chappell, "Law Reform, Social Policy, and Criminal Sexual Violence: Current Canadian Responses," (2006) 528 Annals of the New York Academy of Sciences 382 [hereinafter Chappell]; J. Roberts & R. Gebotya, "Reforming Rape Laws: Effects of Legislative Change in Canada" (1992) 16:5 Law and Human Behavior 556 [hereinafter Roberts & Gebotya]; L. Snider, "Legal Reform and Social Control: The Dangers of Abolishing Rape," (1985) 13:4 International Journal of the Sociology of Law 341 [hereinafter Snider]; R. Berger, et al., "The Dimensions of Rape Reform Legislation," (1988) 22 Law and Society Review 329 [hereinafter Berger]; R. Hinch, "Inconsistencies and Contradictions in Canada's Sexual Assault Law," (1988) 14 Canadian Public Policy 282 [hereinafter Hinch].

[54] Commenting on the harsh debate between George Fletcher and Paul Robinson on the general principles of criminal responsibility set out in the Model Penal Code, Don Stuart asserts that leaving definitions to judges would increase the potential for abuse. See C. Clarkson, *Understanding Criminal Law* (London: Sweet and Maxwell, 2005) 206 [hereinafter Clarkson]; Stuart, *supra* note 47, at 21.

offend the principle of fair labelling, and prove to be problematic for many reasons:

(a) Abolishing the offence of rape or subsuming it under another form of gender-based crimes violates the principles of fundamental justice by decreasing the sexual elements of this heinous crime;

(b) Eliminating the offence may prevent potential offenders from being able to distinguish between different types of sexual violence based on their nature, degree of gravity, and seriousness;

(c) Rape is usually associated with terror, physical and psychological suffering, and an innate feeling of degradation; indeed, no other sexual violence reflects this degree of severity;

(d) Eradicating the offence of rape would send a false message to the public as to the level of socio-cultural rejection of the wrongdoing;[55]

(e) Broad labelling offends the principle of legality. Article (22)(1) of the Rome Statute implies that no one should be held criminally responsible under the court's statute unless the conduct in question constitutes a crime under the jurisdiction of the court, and that the definition of a crime shall be strictly constructed and not be extended by analogy.[56] This means that no one should be held responsible for a crime unless the statutory description of the offence matches the wrong done. Accordingly, the punishment must be proportionate to

[55] Clarkson, *supra* note 54, at 206-207.

[56] The Rome Statute of the ICC, *supra* note 46, at Article 22(1).

the moral blameworthiness of the offence, since in warfare settings, rape and other forms of sexual violence could be performed unintentionally, e.g., when the offender receives orders from high ranking leaders to rape opponent captives to humiliate and break the victims.[57] In this case, the stigma attached to the offender, as well as the penalties, need a *mens rea* reflecting the particular nature of the offence.[58] It is also important to distinguish between the degree of gravity of the offence and the wrongdoing to the victim. Using broad labels such as "gender-based crimes," "sexual assault," or "sexual violence," which justifies the use of the same label for unlawful acts that vary so much in their level of blameworthiness, would send the wrong moral signal to the public[59] because sexual assault or gender-based crime does not tell the society about the form of the offence, which could be rape, sexual torture, or forced impregnation. Hence, rape and other forms of sexual assault must be separated and categorised with reference to their degree of gravity and level of culpability;[60]

---

[57] During the 1990s, Bosnian Muslim fathers were forced by Serb forces to rape their daughters, brothers forced to rape sisters, and Serb warriors forced by their comrades to rape Bosnian Muslim women and girls. There was a deliberate and systematic campaign carried out by Serb forces to destroy the sexuality and the family structure of the Bosnian Muslim people. See *Bosnia-Herzegovina: Mass Rape, Forced Pregnancy, Genocide*, Online: Equality Now: Women's Action 3.1, February 1993 <http://www.equalitynow.org/english/actions/action_0301_en.html> (Accessed on: 22 January 2010); ICTY, Press Release JL/P.I.S./566-e, "Judgement of Trial Chamber II in the Kunarac, Kovac and Vukovic Case," (22 February 2001); R. Gutman, "Rape by Order: Bosnian Women Terrorized by Serbs," *New York Newsday* (23 August 1992) 7 & 39.

[58] Stuart, *supra* note 47, at 27.

[59] J. Herring, *Criminal Law: Text, Cases, and Materials* (New York, N.Y.: Oxford University Press, 2008) 281 [hereinafter Herring]; Morgan, *supra* note 44, at 2.

[60] Stuart, *supra* note 47, at 27.

(f) As Chalmers and Leverick note, the failure of the legislator to subdivide offences and classify them would subvert comparative justice and impede the building of a case law of previous legal decisions that could serve as an authoritative rule in dealing with like cases. Moreover, the ambiguity of the provisions of statutory laws on certain offences would infringe the offender's right to receive a fair notice of possible penalties that he might receive;[61]

(g) The fictive construct of the argument of the Law Reform Commission of Canada (LRCC) for abolishing the offence of rape as both victims and offenders are unfairly stigmatized could be undermined by claming that the wrongdoing—sexual assault—should precisely and adequately reflect the harm and the pain suffered. It is unfair to subsume rape (R) and sexual touching (T) under the broad label of sexual assault (S), because they differ in the degree of gravity and level of blameworthiness. For example, if (A) rapes (B) = [(A) → (B) = (R)] and (Y) sexually touches (Z) = [(Y) → (Z) = (T)], the victims (B) + (Z) and offenders (A) + (Y) are labelled equally and respectively as "victims of sexual assault" and "sexual assault offenders" under the amended Canadian Criminal Code, despite the fact that [(R) ≠ (T)] in the degree of seriousness and the level of culpability. This unfair labelling may result in inconsistent prosecutions and verdicts, and send a wrong moral signal to the parties and society. Accordingly, victims of sexual assaults involving penetration would not be satisfied with the court's decision if the offender is convicted of another crime, e.g., sexual assault,

[61] Chalmers & Leverick, *supra* note 7, at 222.

rather than rape, despite the attached stigma. Abolishing the offence of rape from the Canadian Criminal Code and introducing the neutral offence of sexual assault—besides desexualizing and minimizing the harm of rape—[62]would disparage the victim's experience and increase her feeling of injustice by not assigning adequate moral weight to the pain that she endured, which in turn discourages her from coming forward and speaking out;[63] and

(h) As has already been noted, in responding to a wrongdoing, it is not enough to have justice done but it must be seen to be done. The principles of fundamental justice require accuracy to determine the natures of the offence, as well as the level of culpability. In other words, if someone is convicted of rape, the form of the wrongdoing should be rape and the offender must be labelled a rapist, not a sexual assault offender. If the opposite occurs, the conviction would be misleading to all parties: the victim, the offender, and the society.[64]

Nevertheless, in the past decade or so, the jurisprudence of the international criminal tribunals has dealt with several forms of gender-based crimes, including

---

[62] Cohen, L. & Backhouse, C., "Desexualizing Rape: Dissenting View on the Proposed Rape Amendments," (1980) 2:4 Canadian Woman Studies 99 [hereinafter Cohen & Backhouse]; K.-L. Tang, "Rape Law Reform in Canada: The Success and Limits of Legislation," (1998) 42:3 International Journal of Offender Therapy and Comparative Criminology 264 [hereinafter Tang].

[63] Chalmers & Leverick, *supra* note 7, at 222; Chappell, *supra* note 53, at 382; Law Reform Commission of Canada, *Report on Sexual Offences* (Ottawa: Minister of Supply and Services Canada, 1978) [hereinafter Report on Sexual Offences]; Law Reform Commission of Canada, *Working Paper 22, Criminal Law: Sexual Offences* (Ottawa: Minister of Supply and Services Canada, 1978) [hereinafter Working Paper 22]; Roberts & Gebotya, *supra* note 53, at 556; W. Loh, "What Has Reform of Rape Legislation Wrought? A Truth in Criminal Labelling," (1981) 37:4 Journal of Social Issues 28 [hereinafter Loh].

[64] Simester & Sullivan, *supra* note 35, at 30-31.

rape as a crime against humanity, as an act of genocide, and as a war crime; sexual torture; sexual slavery; and forced marriage. These offences are markedly at variance with rape and other sexual assaults in the national or domestic context for having different elements other than those common elements of peacetime rape and sexual assault, i.e. date rape. In other words, to prosecute rape as a crime against humanity under Article 3 of the ICTR Statute, for instance, it requires the additional element of being part of a widespread or systematic attack against the victim's civilian population on national, political, ethnic, racial, or religious grounds. Similarly, to prosecute rape as an act of genocide, it should be perpetrated with intent to destroy, in whole or in part, the victim's national, ethnic, racial or religious group. However, none of these elements is part of the structure of the elements of "sexual assault" crime embodied in the provisions of the Canadian Criminal Code. As required by the principle of fair labelling and other principles of fundamental justice, it is essential to consider the differences between the above offences, separate all forms of warfare gender-based crimes from one another, and make distinction between these crimes and other forms of domestic sexual assaults, as they differ in nature, magnitude, and blameworthiness. Accordingly, it is invalid to draw an analogy between the provisions of sexual assault articulated in the 1983 amended Canadian Criminal Code—regardless of the criticism that has been levelled at this law for its broadness and abstractness—and gender-based crimes incorporated in the

statutory laws of the international criminal tribunals and the Rome Statute of the ICC.

III. Fair Labelling and other Criminal Law Principles and Concepts

This section examines the connections between the principle of fair labelling and other fundamental principles of criminal law, particularly those relating to the conditions of liability and fair procedures, such as: *nullum crimen sine lege*—the principle of legality; the concept of multiple wrongdoing; the principle of *mens rea*; the principle of proportionality; and the concept of the socio-pedagogical influence of punishment.

1. The Principle of Nullum Crimen Sine Lege

The implications of the maxim *nullum crimen sine lege* are considerably wide-ranging. They can be divided into three distinct sub-principles, namely the principle of non-retroactivity, the principle of maximum certainty in defining offences, and the principle of strict construction of penal statutes.[65] The following discussion—for the purpose of this thesis—focuses on the consistent relationship between these principles and the principle of fair labelling, and reveals their impact on the jurisprudence of the international criminal tribunals.

As a legal principles applicable to legislation and fairness to defendants, fair labelling and *nullum crimen sine lege* necessitate that offences should be well defined in the enacted statutory laws, so no one should be convicted or suffer

[65] Ashworth, *supra* note 6, at 58.

punishment for his conduct unless it has been clearly stated in a statute or regulation that such conduct constitutes a crime and unless fair notice has been provided to the accused.[66]

However, neither fair labelling nor *nullum crimen sine lege* were recognized by the drafters of the statutes of the international criminal tribunals or incorporated in their provisions. Accordingly, these statutes failed to define rape as an individual crime, although it is explicitly listed as a crime against humanity in articles 5, 3, and 2 of the statutes of the ICTY, the ICTR, and the SCSL respectively, as well as a crime against humanity and a war crime in articles 7 and 8 of the Rome Statute of the ICC. In this respect, it is worth noting that the jurisprudence of the tribunals has been significantly more advanced than their statutory laws despite the fact that their jurisdiction has been limited to applying

---

[66] A., Mokhtar, "Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects," (2005) 26:1 Statute Law Review 55 [hereinafter Mokhtar]; Čelebići Judgement, *supra* note 45, at paragraphs 415-418; Robinson, *supra* note 22, at 926; T. Meron, "Reflections on the Prosecution of War Crimes by International Tribunals," (2006) 100 American Journal of International Law 577 [hereinafter Meron].

In the United States, in *Nunley* v. *State of Alaska*, the court of Appeals of Alaska reversed the defendant's conviction because there was no criminal statute obliging him to meet the designated deadline to register as a sex offender on or before 31 January 1996. Moreover, in *Cook* v. *Commonwealth*, the court held that the defendant could not be convicted of attempted second-degree murder because the legislature had not specified a punishment for such an act. Similarly, at Nüremberg, the defence counsel raised the principle of *ex post facto* laws versus *nullum crimen sine lege*, arguing that when the defendants committed their crimes there was no existing law in place considering such acts as punishable crimes. See *Cook* v. *Commonwealth,* 20 Va. App. 510, 458 S.E. 2d 317 (Va. App. 1995) [hereinafter Cook v. Commonwealth]; H., King, Jr., "The Legacy of Nuremberg," (2002) 34 Case Western Reserve Journal of International Law 341 [hereinafter King]; *Nunley* v. *State of Alaska*, 26 P.3rd 1113, 1116 (Alas. App. 2001) [hereinafter Nunley v. State of Alaska]; *Trial of Major War Criminals before the International Military Tribunals*, November 14, 1945-October 1, 1946, 42 vols., (Nüremberg, Germany: [s.n.], 1947-1949) VI: 41 [hereinafter Nüremberg Trials].

existing statutory laws, not legislating or creating new laws.[67] In the case of Erdemović, the defendant who was sentenced to 10 years' imprisonment for having participated in the extermination of approximately 1,200 civilian Bosnian Muslims, he has logged an appeal against his sentencing judgement, claiming that he committed the criminal act under duress. Emphasizing the principle of *nullum crimen sine lege*, the chamber concluded that the defence of duress should not be admitted for one who has been charged with the killing of innocent persons.[68]

Similarly, in the Furundžija case, the Trial Chamber declined to consider the Akayesu definition of rape on the basis of the principle of *nullum crimen sine lege,* although it has endorsed this definition in the Čelebići case. The Trial Chamber's disapproval may have been due to the methodology used in enacting the Akayesu definition.[69] Although the principle of legality is not embodied in the norms of the statutes of the ICTY and the ICTR, the Trial Chamber I—discussing

---

[67] D. Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*: Clarifying the Doctrine," (2005) 15:2 Duke Journal of Comparative & International Law 240 [hereinafter Mitchell]; F. Aolain, "Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War," (1997) 60:3 Albany Law Review 899 [hereinafter Aolain]; J. Falvey, Jr., "Criminal Sexual Conduct as a Violation of International Humanitarian Law," (1997) 12:2 St. John's Journal of Legal Commentary 405 [hereinafter Falvey]; M. Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum crimen sine lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerpen, Belgium: Intersentia, 2002) 248 [hereinafter Boot].

[68] H. Sato, "The Defense of Superior Orders in International Law: Some Implications for the Codification of International Criminal Law," *(*2009) 9 International Criminal Law Review 128-129 [hereinafter Sato]; *Prosecutor* v. *Dražen Erdemović*, (1997) Appeal Judgement, 7 October 1997, IT-96-22-A, at paragraph 10.

[69] A. Cole, "Prosecutor v. Gacumbitsi: The New Definition for Prosecuting Rape under International Law," (2008) 8:1-2 International Criminal Law Review 59 [hereinafter Cole]; Kalosieh, *infra* note 225, at 129; *Prosecutor* v. *Anto Furundžija,* (1998) Judgement, 10 December 1998, IT-95-17/1-T, at paragraphs 165-175 [hereinafter Furundžija Judgement].

the subject-matter jurisdiction of the ICTR in the Akayesu case—recalls the UN Secretary General's report to the president of the Security Council on the establishment of the ICTY, where he maintains that in the application of the principle of *nullum crimen sine lege,* the international criminal tribunal should apply rules of international humanitarian law, which are, beyond any doubt, part of international customary law.[70]

Moreover, in the Vasiljević case, finding that customary law does not provide a clear definition of the offence of "violence to life and person," the Trial Chamber I refused to convict the defendants on that count. To emphasize its decision, the Chamber declared that, to satisfy the principle of *nullum crimen sine lege,* it would not be acceptable by any means for a Trial Chamber to convict an accused person on the basis of a prohibition that taking into account the particularity of customary international law—is either insufficiently precise to determine conduct and distinguish the criminal from the lawful, or is not sufficiently accessible at the relevant time. The Trial Chamber I added that to convict a person with reference to a certain norm, the defendant should be reasonably aware of that norm at the time of his act, and that the norm must be

[70] Akayesu Judgement, *supra* note 34, at 605; J. Nilsson, "The Principle *Nullum crimen sine lege*," in O. Olusanya, ed., *Rethinking International Criminal Law: The Substantive Part* (Groningen: Europa Law Publishing, 2007) 56 [hereinafter Nilsson]; Report of the Secretary-General, *Report on the Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia,* United Nations SCOR, 48th Sess., UN Doc. S/25704, (3 May 1993), para 34 [hereinafter Secretary-General's Report].

sufficiently clear on what act or omission could engage criminal responsibility.[71] This requirement satisfies also the principle of fair labelling and other principles of fundamental justice in ensuring fairness to the defendant.

Recently, in the *Prosecutor* v. *Brima, et al.,* the Trial Chamber of the SCSL found that forced marriage, as an "other inhumane act," must involve conduct not otherwise subsumed by other crimes listed under Article 2 of the Statute of the SCSL. After examining the entirety of the evidence adduced by the Prosecution, the Trial Chamber II ruled by a majority that the Prosecution's evidence was completely subsumed by the crime of sexual slavery and there was no lacuna in the law which would necessitate a separate crime of "forced marriage" as an "other inhumane act." This rejection was due to, *inter alia*, the failure of the drafters of the Statute of the SCSL explicitly to list forced marriage as a distinct gender-based crime under Article 2 of the Statute, as well as to the lack of a strictly constructed definition of this crime, violating both legal principles: fair labelling and *nullum crimen sine lege*.[72]

---

[71] *Looper* v. *Morgan*, Civil Action No. H-92-0294, 29 (1995 U.S. Dist. LEXIS 10241), p.11 [hereinafter Looper v. Morgan]; Model Penal Code § 1.02(1)(c) (1994); *see also* Tex. Penal Code Ann. § 1.02(4) (Vernon 1994) [hereinafter Model Penal Code]; *Prosecutor* v. *Vasiljević,* (2002) Judgement, 29 November 2002, IT-98-32-T, at paragraph 193 [hereinafter Prosecutor v. Vasiljević]; R. Cryer, et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007) 14 [hereinafter Cryer]; R. Slye & B. Van Schaack, *International Criminal Law: Essentials* (New York, N.Y.: Aspen Publishers, 2009) 97-98 [hereinafter Slye & Van Schaack]; S. Ratner, et al., *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (New York, N.Y.: Oxford University Press, 2009) 24 [hereinafter Ratner].

[72] *Prosecutor* v. *Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, (2008) Appeals Judgement, 22 February 2008, SCSL-2004-16-A, at paragraphs 703-704 [hereinafter the Brima Appeals Judgement].

However, M. Cherif Bassiouni provides another viewpoint. From a formal perspective and a practical interpretation of the maxim *nullum crimen sine lege, nulla Poena sine lege,* he maintains that the international criminal courts are not legislative bodies, and that the penalties they have proclaimed—except the ICC—have been *ex post facto*.[73] This exception, as he asserts, is due to the fact that the ICC's jurisdiction was effective as of 1 July 2002, when the Rome Statute of the ICC had entered into force, and the penalties were promulgated by the court after that date. Nevertheless, this thesis harmonizes with Bassiouni's premise, notwithstanding the tribunals' application of rules of international humanitarian law, which are part of customary international law and founded before the establishment of the ICTY and ICTR in 1993 and 1994 respectively, and the claim of the Appeals Chamber of the ICTY that the principle of *nullum crimen sine lege* does not prevent the court from interpreting the element of a particular crime.[74] Despite the age old existence of international humanitarian law prior to the creation of the tribunals, their norms were not sufficiently clear to convicted persons such that they would be aware of acts or omissions that they might be

---

[73] M. C. Bassiouni, "Principles of Legality in International and Comparative Criminal Law," in M. C. Bassiouni, ed., *International Criminal Law: Sources, Subjects, and Contents*, vol. 1 (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008)105 [hereinafter Bassiouni].

[74] G. Mettraux, Book Review of *Genocide, Crimes against Humanity, War Crimes: Nullum crimen sine lege and the Subject Matter Jurisdiction of the International Criminal Court* by M. Boot (2002) 2 International Criminal Law Review 425 [hereinafter Mettraux]; *Prosecutor* v. *Aleksovski,* (2000) Appeal Judgement, 24 March 2000, IT -95-14-A, at paragraphs 126-127 [hereinafter Aleksovski Appeal Judgement]; *Prosecutor* v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo,* (2001) Appeal Judgement, 20 February 2001, IT -96-21-A, at paragraph 173 [hereinafter Čelebići Appeal Judgement].

held responsible for, and this in turn offends the principle of fair labelling and other principles of fundamental justice.

2. The Concept of Multiple Wrongdoing

Gender-based crimes in warfare settings are complicated and usually take the form of multiple wrongdoing. Most of the sexual offences prosecuted in the international criminal tribunals of the former Yugoslavia, Rwanda, and Sierra Leone reveal that many victims were sexually terrorized, publicly humiliated, raped, sexually tortured, enslaved, and forcefully impregnated.[75] This section argues that the current broad labelling of gender-based crimes embodied in the statutory laws of the above tribunals has let to inconsistent prosecutions and verdicts, resulting in the failure of these judicial bodies adequately to address the above grievous offences. The rape offence incorporated in the statutes of the ICTY and the ICTR, for example, was interpreted by trial judges to conflate

[75] Brima Judgement, *supra* note 72; Čelebići Appeal Judgement, *supra* note 74; *Prosecutor* v. *Anto Furundžija,* (2000) Appeal Judgement, 21 July 2000, IT-95-17/1-A (Furundžija Appeal Judgement]; *Prosecutor* v. *Dragoljub Kunarac, Radomir Kovač and Zoran Vuković,* (2002) Appeal Judgement, 12 June 2002, IT-96-23-A and IT-96-23/1-A [hereinafter Kunarac Appeal Judgement]; *Prosecutor* v. *Eliézer Niyitegeka,* (2003) Judgement and Sentence, 16 May 2003, ICTR-96-14-T [hereinafter Niyitegeka Judgement and Sentence]; *Prosecutor* v. *Issa Hassan Sesay*, (2009) Judgement, 26 October 2009, SCSL-04-15-A [hereinafter Sesay Judgement]; *Prosecutor* v. *Jean de Dieu Kamuhanda,* (2004) Judgement, 22 January 2004, ICTR-95-54A-T [hereinafter Kamuhanda Judgement]; *Prosecutor* v. *Jean-Paul Akayesu,* (2001) Appeal Judgement, 1 June 2001, ICTR-96-4-A [hereinafter Akayesu Appeal Judgement]; *Prosecutor* v. *Juvénal Kajelijeli,* (2003) Judgement and Sentence, 1 December 2003, ICTR-98- 44A-T [hereinafter Kajelijeli Judgement and Sentence]; *Prosecutor* v. *Laurent Semanza,* (2003) Judgement and Sentence, 15 May 2003, ICTR-97-20-T [hereinafter Semanza Judgement and Sentence]; *Prosecutor* v. *Mikaeli Muhimana,* (2005) Judgement and Sentence, 28 April 2005, ICTR-95-IB-T [hereinafter Muhimana Judgement and Sentence]; *Prosecutor* v. *Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać,* (2005) Appeal Judgement, 28 February 2005, IT-98-30/1-A [hereinafter Kvočka Appeal Judgement]; *Prosecutor* v. *Sylvestre Gacumbitsi,* (2006) Appeal Judgement, 7 July 2006, ICTR-2001-64-A [hereinafter Gacumbitsi Appeal Judgement]; *Prosecutor* v. *Théoneste Bagosora*, (2008) Judgement and Sentence, 18 December 2008, ICTR-98-41-T [hereinafter Bagosora Judgement and Sentence].

different sexual crimes under the same heading, including sexual offences that do not involve penetration, which in turn violates the principle of fair labelling—a legal principle that requires international criminal law to respect widely felt distinctions between kinds of offences and degrees of wrongdoing.[76]

Accordingly, gender-based crimes in the statutory laws of the tribunals should be separated from one another and labelled in order to reflect the nature and level of gravity of the offence, as well as the element of moral blameworthiness or culpability represented in the defendant's *mens rea*.[77] International criminal law, in light of the principle of fair labelling, should recognise more gender-based crimes of multiple wrongdoing and expand, categorise, and define the existing ones, regardless of the fact that the offender may have engaged in one act, e.g., raping a woman, causing vaginal tearings,[78] and infecting her with sexually transmitted disease,[79] or even more acts such as raping a woman, sexually torturing her, and drafting her into forced prostitution.[80]

---

[76] Ashworth, *supra* note 6, at 78.

[77] Mitchell, *supra* note 14, at 394.

[78] In one horrible story, a Bosnian physician admitted to having euthanized an eight year-old girl by injection to alleviate her suffering. The child had been gang-raped by Serbians who had torn apart her womb, and left her bleeding badly in great pain and so terribly damaged that she could not be repaired. See G. Halsell, "Women's Bodies a Battlefield in War for 'Greater Serbia'," *Washington Report on Middle East Affairs* 11:9 (April 1993) 8 [hereinafter Halsell]; "Prosecuting Rape as Genocide," *New Jersey Law Journal* 141:8 (21 August 1995) 6; United States, The Senate of the United States, 103rd Congress, 1st Session, Senate Resolution 35, by Mr. Lautenberg and other Senators, "Expressing the Sense of the Senate Concerning Systematic Rape in the Conflict in the Former Socialist Federal Republic of Yugoslavia," 26 January 1993.

[79] The *Interahamwe* used HIV/AIDS as a tool of warfare against Tutsi women in a well-organized fashion. The Hutu genocidal government was accused of releasing AIDS patients from hospitals to form battalions of rapists to assault Tutsi women and infect them. In this connection, Radhika Coomaraswamy, the UN special Rapporteur on violence against women, its causes and

Nevertheless, a closer look at gender-based crimes incorporated in the statutory laws of the international criminal tribunals reveals that these laws are

consequences, has reported the following story of "Jeanne": "When the genocide began, Jeanne took her Bible and went to pray at the church with her friend. At the entrance of the church, Jeanne met one of her neighbours with two other men. Her neighbour, whose wife she knew, had AIDS. He told her: "I have AIDS and I want to give it to you.' He then raped her, right in front of the church, even though she was pregnant. The other two men also raped her afterwards. Jeanne survived the genocide, but she has AIDS and is wracked with pain." See A-M. de Brouwer & S. Chu, eds., *The Men who Killed Me: Rwandan Survivors of Sexual Violence* (Toronto, Ont.: D&M Publishers, Forthcoming in April 2009) 31 [hereinafter de Brouwer & Chu]; F. Nduwimana, "Women and Rwanda's Genocide: What Goes Unsaid," *Libertas* 14:2 (2003) 1 & 3 [hereinafter Nduwimana]; J. Ward & M. March, "Sexual Violence against Women and Girls in War and its aftermath: Realities, Responses, and Required Resources," in *Symposium on Sexual Violence in Conflict and Beyond*. Brussels, 21-23 June 2006 [hereinafter Ward]; P. Landesman, "A Woman's Work," *The New York Times* (Magazine Desk), Section 6 (15 September 2002) 114 [hereinafter Landesman]; *Rape and Forced Pregnancy in War and Armed Conflict Situations: Stark Violations of Women's Reproductive and Sexual Self Determination*, Center for Reproductive Law and Policy, Reproductive Freedom News, 30 April 1996, at p. 2 [hereinafter Forced Pregnancy]; UN Commission on Human Rights, *Report of the Mission to Rwanda on the Issue of Violence against Women in Situations of Armed Conflict,* UN Doc. E/CN.4/1998/54/ Add.1 (4 February 1998) 10 [hereinafter Violence against Women].

[80] A. Hoefgen, "There will be no Justice unless Women are Part of the Justice: Rape in Bosnia, the ICTY and Gender Sensitive Prosecution," (1999) 14:2 Wisconsin Women's Law Journal 173 [hereinafter Hoefgen]; *Bosnia and Hercegovina: "A Closed, Dark Place,": Past and Present Human Rights Abuses in Foča*, Human Rights Watch, July 1998, Vol.10, No.6 (D), at p. 20 [hereinafter Human Rights Abuses in Foča]; *Bosnia-Herzegovina: Foča Verdict – Rape and Sexual Enslavement are Crimes against Humanity*, Amnesty International, 22 February 2001, AI Index: EUR 63/004/2001, at p.1 [hereinafter Foča Verdict]; D. Buss, "Prosecuting Mass Rape: Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vuković," (2002) 10:1 Feminist Legal Studies 94 [hereinafter Buss]; G. Rodrigue, "Sexual Violence: Enslavement and Forced Prostitution," in R. Gutman & D. Rieff, eds., *Crimes of War: What the Public Should Know* (New York, N.Y.: W.W. Norton & Company, 1999) 328-329 [hereinafter Rodrigue]; Human Rights Watch, Press Release, "Bosnia: Landmark Verdicts for Rape, Torture, and Sexual Enslavement - Criminal Tribunal Convicts Bosnian Serbs for Crimes against Humanity," (22 February 2001); J. Hagan, Justice in the Balkans: Prosecuting War Crimes in The Hague Tribunal (Chicago, Ill.: University of Chicago Press, 2003) 176 [hereinafter Hagan]; J. McHenry, "Justice for Foča: The International Criminal Tribunal for Yugoslavia's Prosecution of Rape and Enslavement as Crimes against Humanity," (2002) 10:1 Tulsa Journal of Comparative & International Law 184 [hereinafter McHenry]; J. Socolovsky, "3 Bosnians Guilty of Wartime Rape," *Chicago Tribune* (23 February 2001) 1; J. Zoltanski, *The Construction of Rape as a Crime against Humanity: Recognition and Prosecution by the International Criminal Tribunal for the Former Yugoslavia* (Ph.D., Brandeis University, 2006) 35 [hereinafter Zoltanski]; M. Simons, "Bosnian War Trial Focuses on Sex Crimes," *The New York Times* (18 February 2001) A4; N. Erb, "Gender-Based Crimes under the Draft Statute for the Permanent International Criminal Court," (1998) 29 Columbia Human Rights Law Review 420 [hereinafter Erb]; P. Sellers, "Sexual Violence and Peremptory Norms: The Legal Value of Rape," (2002) 34 Case Western Reserve Journal of International Law 296 [hereinafter Sellers].

severely lacking in formal definitions for the above offences, except the crime of forced pregnancy.[81] Moreover, the tribunals' statutory laws are not constructed in such a way to recognise more gender-based crimes of multiple wrongdoing, particularly in the statutes of the ICTY and the ICTR, where these crimes are symbolized and crystallized in the crime of rape, and subsumed under the broad label of crimes against humanity. To satisfy the principle of fair labelling, gender-based crimes should be labelled and defined in a clear way that reflects their degree of moral wrongfulness and relative gravity.[82] Labelling is important for the social function of international criminal law, including effective communication with the masses and explaining to them the rules of acceptable and unacceptable conduct, as well as the consequences that may result from the violation of these rules. However, ensuring a proportionate response to a wrongdoing, as required by the principle of fair labelling, would emphasize the socio-cultural and educative function of the law in rendering justice and recognizing distinctions between different offences and their levels of gravity reflected in the resulting harm and the offender's moral culpability.[83]

It is self-evident that gender-based crimes of single and multiple wrongdoings have a distinctive nature and seriousness. The nature and the degree of gravity of raping a woman are different from forcing a woman to strip off in

---

[81] The Rome Statute of the ICC, *supra* note 46, at Article 7(2)(f).

[82] Mitchell, *supra* note 14, at 399.

[83] *Ibid.* at 399.

public or in front of her family members, raping her, and slashing her breasts or even thrusting an object in her private parts.[84] The first wrongdoing could be regarded as a single crime of rape, while the second is a multiple wrongdoing comprised of several crimes that need to be separated, categorized, and labelled as crimes of forced nudity,[85] gender-based persecution, rape, sexual mutilation, sexual terrorism, and sexual torture. Defining these crimes and reflecting their wrongfulness and severity remove any inconsistency and confusion in labelling and punishing them properly. At the same time, a defendant would not feel secure if the label attached did not reflect an accurate description of the offence he has committed. There must be proportionality between the stigma and punishment attached to the offence conviction and the moral blameworthiness of the defendant.

---

[84] For example, the Trial Chamber of the ICTR considered "the *interahamwes* thrusting a piece of wood into the sexual organs of a woman as she lay dying," an act of rape. This instrumental rape, like other forms of sexual violence, constitutes a method of torture and sexual mutilation. Similarly, women who refused to have sex with rebel combatants in Sierra Leone were mercilessly sexually tortured. Many of them suffered severe vaginal tearings and bled to death. Amnesty International reported that one 14-year-old girl was stabbed in the vagina with a knife, while rebels thrust pieces of firebrands into another woman's vagina for refusing to have sex with her rebel captor. See A. Park, "'Other Inhumane Acts': Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone," (2006) 15:3 Social & Legal Studies 324-325 [hereinafter Park]; Akayesu Judgement, *supra* note 34, at paragraph 686; *Sierra Leone, Getting Away with Murder, Mutilation, Rape: New Testimony from Sierra Leone,* Human Rights Watch, July 1999, Vol. 11, No. 3(A) 5 [hereinafter Getting Away with Murder]; *Sierra Leone: Rape and Other Forms of Sexual Violence against Girls and Women*. Amnesty International, 28 June 2000, AI Index: AFR 51/35/00, at p.1 [hereinafter other Forms of Sexual Violence].

[85] In the *Prosecutor* v. *Akayesu*, "[w]itness KK testified regarding an incident in which the Accused told the *Interahamwe* to undress a young girl named Chantal, whom he knew to be a gymnast, so that she could do gymnastics naked. The Accused told Chantal, who said she was Hutu that she must be a Tutsi because he knew her father to be a Tutsi. As Chantal was forced to march around naked in front of many people, Witness KK testified that the Accused was laughing and happy with this." See Akayesu Judgement, *supra* note 34, at paragraph 429.

Moreover, separating crimes from one another and labelling them in order to reflect their degree of wrongfulness and gravity would help the court to avoid delivering disproportionate sentences. In *Coker* v. *Georgia*, where Erlich Anthony Coker—who escaped from prison while serving several sentences for rape, kidnapping, one count of first degree murder, and aggravated assault—broke into the house of Allen and Elnita Carver, raped the woman and robbed her husband. The defendant was convicted of rape, armed robbery, and other offences. The jury sentenced him to death under the Georgia statute for rape on the basis of the fact that the rape was committed by a person with prior convictions for capital felonies, and because the rape crime was committed in the process of committing armed robbery—another capital felony. The defendant appealed the sentence arguing that this was "cruel and unusual" under the Eight Amendment of the Constitution. The Supreme Court of Georgia, considering the statistics of how states were refraining from death sentences in rape cases, ruled that the sentence was disproportionately excessive. The court argued that although raping an adult woman is a serious crime, it is not as serious as a murder, which means that the sentence did not reflect the gravity of the offence properly. Accordingly, the sentence was revised.[86]

On the basis of the above discussion, the principle of fair labelling would perform a prominent role in international criminal justice procedure. A reform of the definitions of gender-based crimes embodied in the statutory laws of the

[86] *Coker* v. *Georgia*, 433 U.S. 584; 97 S. Ct. 2861; 53 L. Ed. nd 982; (1977 U.S. LEXIS 146).

international criminal tribunals and the Rome Statute of the ICC would enhance the educative function of the law and assist the tribunals in overcoming their shortcomings by adequately prosecuting gender-based crimes and delivering consistent verdicts.

3. The Principle of Mens Rea

The conceptual structure of an offence consists of an objective element—*actus reus*—and a culpability element—*mens rea*. The culpability element is important in that it gives fair warning to the potential offender before he breaks the law. It alerts him to the fact that he is about to violate the rules of law. This element would be absent if offences committed accidentally. Accordingly, persons should be held responsible only for crimes of which they were sufficiently aware of, either by action or omission. The element of *mens rea* is very much associated with the person's capacity to choose among different types of conducts.[87]

However, the principle of fair labelling requires that the definition and labelling of each crime should reflect the element of moral blameworthiness or culpability represented in the defendant's *mens rea*.[88] It stresses that the wording of the conviction should fairly state the defendant's guilt.[89] At the same time, it

---

[87] Ashworth, *supra* note 6, at 75 & 155; P. Robinson, *Structure and Function in Criminal Law* (New York, N.Y.: Oxford University Press, 1997) 5 [hereinafter Robinson].

[88] The Elasticity of Mens Rea, *supra* note 2, at 53.

[89] J. Horder, "Intention in Criminal Law—A Rejoinder," (1995) 58 The Medical Law Review 684 [hereinafter Horder]; Williams, *supra* note 4, at 86.

emphasizes that the offender should be punished in proportion to his *mens rea* and not only to the degree of gravity or seriousness of the offence.[90] In *R.* v. *Martineau*, the Canadian Supreme Court indicated that the principles of fundamental justice require a *mens rea* reflecting the particular nature of the crime.[91] In another case, where the accused was charged with the crime of "attempted murder" for seriously injuring three bystanders, while he was aiming his firearm at another person (T) who was unharmed, the Court of Appeal for Ontario found that labelling the offence committed in relation to persons injured as an "attempted murder" offends the principle of fair labelling and does not accurately reflect the defendant's moral culpability.[92]

In discussing the offender's culpability in terms of gender-based crimes, one may ask: What degree of *mens rea* is required for establishment of the crime of rape? What happens if the defendant has utilized rape or any other form of sexual violence under duress? What would be the situation if the victim had no chance to express her consent? For the purpose of this thesis, the first question seems inappropriate, as it relates to sexual crimes in times of peace rather than in warfare settings. In times of peace, offenders may honestly believe that the other party is consenting to have sexual intercourse, e.g., date rape, while in fact there is

---

[90] Stuart, *supra* note 47, at 27; Williams, *supra* note 4, at 89.

[91] R. v. Martineau, *supra* note 47, at p.3; R. v. Vaillancourt, *supra* note 47, at p.3.

[92] *R*. v. *Gordon*, [2009] 94 O. R. (3d) 1, at. paragraph 26 [hereinafter *R*. v. *Gordon*].

no such consent given.[93] In wartime settings, the matter is different! In the civil wars of the 1990s that erupted in the former Yugoslavia and Rwanda, victims of sexual violence were taken by all warring parties as spoils of war and were drafted—against their will—for all kinds of gender-based violence. Offenders committed these crimes on a large scale as a deliberate policy and integral part of the war. Accordingly, in the case of *Kunarac, et al.*, Trial Chamber I of the ICTY conceived that placing a victim in a state of being unable to resist due to physical or mental incapacity, or inducing her into the act by surprise or misrepresentation, constitutes an element of rape.[94] Moreover, the Trial Chamber provided that, when a victim has no chance for reasoned refusal, sexual penetration constitutes rape, because it is not truly voluntary or consensual on the part of the victim.[95] As a matter of fact, this factor was recognized in the Furundžija case, but never stated in the definition of rape contained in the judgment.[96]

However, as the lack of consent is difficult to prove, and to avoid classical rape trials where certain standards of evidence have traditionally discriminated against women and restricted their access to the criminal justice system, the ICTY

---

[93] Clarkson, *supra* note 54, at 199.

[94] *Prosecutor* v. *Dragoljub Kunarac, Radomir Kovač and Zoran Vuković,* (2001) Judgement, 22 February 2001, IT-96-23-T and IT-96-23/1-T, at paragraph 446 [hereinafter Kunarac Judgement].

[95] *Ibid.* at paragraph 440.

[96] *Ibid.*

established Rule 96 to impose limits on evidence relating to cases of a sexual nature before the tribunal.[97] This rule, cited below in part, provides:

> "In cases of sexual assaults:
>
> (ii) consent shall not be allowed as a defence if the victim:
> (a) has been subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression, or
>
> (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear."[98]

In this connection, the ICTY Prosecutor submitted, in his Pre-Trial Brief 1 (paragraph 128), that "lack of consent is not an element of the offence of rape or any other sexual assault."[99] By the same token, relying on the above jurisdictions and on a number of UN documents, Anne-Marie de Brouwer and many feminists have argued that the "absence of consent" should not be considered an element of the crime of rape in international law.[100] This was due to the fact that the notion of

---

[97] F. Aolain, "Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War," (1997) 60:3 Albany Law Review 892 [hereinafter Aolain]; K. Fitzgerald, "Problems of Prosecution and Adjudication of Rape and other Sexual Assaults under International Law," (1997) 8:4 European Journal of International Law 638 [hereinafter Fitzgerald]; N. Quénivet, *Sexual Offenses in Armed Conflict and International Law* (Ardsley, N.Y.: Transnational Publishers, 2005) 24 [hereinafter Quénivet].

[98] *ICTY: Rules of Procedure and Evidence*, UN Doc. IT/32 (1994), 11 February 1994, reprinted in 33 I.L.M. 484 [hereinafter ICTY Rules]; J. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (Irvington-on-Hudson, N.Y.: Transnational Publishers, Inc., 1998) 311 [hereinafter Jones]; Kunarac Judgement, *supra* note 94, at paragraph 462.

[99] J. Daniel, *No Man's Child: The War Rape Orphans* (M.A., Ludwing Boltzman Institute of Human Rights, University of Vienna, 2003) 8-9 [hereinafter Daniel]; Kunarac Judgement, *supra* note 94, at paragraph 461.

[100] A. Wertheimer, "What is Consent? And is it Important?," (2000) 3 Buffalo Criminal Law Review 558 [hereinafter Wertheimer]; A-M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: the ICC and the Practice of the ICTY and the ICTR* (Antwerpen, Belgium: Intersentia, 2005) 119 [hereinafter de Brouwer]; UN Commission on Human Rights, *Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights*

lack of consent originated in a number of national penal legislations[101] designed to address the crime of rape in peace-time situations: it is therefore not adequate to the task of defining systematic mass wartime rape as a crime against humanity or a war crime. Transferring the elements of the crime of rape as enacted in domestic criminal law into international humanitarian law without taking into consideration the specific differences between these two bodies of law was unrealistic to begin with. Furthermore, while lack of consent could be an element of the crime of rape in peace-time, force, coercion or coercive circumstances are the most integral elements of rape and sexual violence in armed conflicts. In sum, if rape is to be regarded as physically violent misconduct by the perpetrator, then the victim's lack of consent should be considered as an extra factor.[102]

Resolution 1994/45, UN Doc. E/CN.4/1995/42 (22 November 1994), at paragraph 180 [hereinafter Coomaraswamy]; UN Commission on Human Rights, *Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict: Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur,* UN Doc. E/CN.4/Sub.2/1998/13 (22 June 1998) at paragraph 25 [hereinafter McDougall].

[101] Lack of consent, *per se*, constitutes an element of rape and sexual assault under the Canadian Criminal Code. The 1992 amendment of this code has defined consent in section 273.1 as "voluntary agreement of the compliant to engage in the sexual activity in question." Similarly, the Michigan Criminal Sexual Conduct Act provides that Criminal Sexual Conduct is committed when sexual intercourse occurs where the accused uses force or coercion. See *Canadian Criminal Code*, R.S.C. 1985, c. C-46, S. 273.1; Coomaraswamy, *supra* note 100, at paragraph 182; "Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard," (1952) 62:1 The Yale Law Journal 56 [hereinafter Forcible Rape]; H. Shapo, "Recent Statutory Developments in the Definition of Forcible Rape," (1975) 61:7 Virginia Law Review 1513 [hereinafter Shapo]; Mich. Comp. Laws Ann. §750.520b (1) (f) (i)-(V) (1997); P. Kazan, "Sexual Assault and the Problem of Consent," in S. French, et al., eds., *Violence against Women: Philosophical Perspectives* (London: Cornell University Press, 1998) 27 [hereinafter Kazan]; S. Estrich, "Rape," (1986) 95:6 The Yale Law Journal 1105 [hereinafter Estrich].

[102] de Brouwer, *supra* note 100, at 119-120; D. Roberts, "Rape, Violence and Women's Autonomy," (1993) 69 Chicago Kent Law Review 362 [hereinafter Roberts]; J. Falvey, Jr., "Criminal Sexual Conduct as a Violation of International Humanitarian Law," (1997) 12:2 St. John's Journal of Legal Commentary 395-396 [hereinafter Falvey].

As indicated earlier, combatants may engage in rape and other types of sexual violence in warfare under duress and with consent. They might unintentionally perform rape of opponent captives to humiliate them and break the fabric of their society under strict orders and critical conditions. In this case, the *mens rea* of the perpetrator is absent. A similar case in peace-time is when a woman compels a man to have sexual intercourse with her by force or under threat.[103] During the Rwandan genocide, to destroy the Tutsi ethnic minority, the *Interahamwe* ordered Hutu infected militia to rape Tutsi women to infect them with the HIV/AIDS virus by setting up a huge bio-terror rape campaign.[104] In this connection, in the Čelebići judgement, the Trial Chamber II of the ICTY ruled that the act of forcing victims to perform fellatio on one another constitutes a fundamental attack on their dignity, an offence of inhuman and cruel treatment under Articles 2 and 3 of the Statute of the ICTY, and noted that such an act "could constitute rape for which liability could have been found if pleaded in the appropriate manner."[105]

---

[103] Clarkson, *supra* note 54, at 205.

[104] de Brouwer, *supra* note 100, at 57; G. Jansen, "Gender and War: The Effects of Armed Conflict on women's Health and Mental Health," (2006) 21 Affilia 141 [hereinafter Jansen]; M. Cohen, et al., "Women in Rwanda: Another World is Possible," (2005) 294:5 Journal of the American Medical Association 613 [hereinafter Cohen]; M. Lyons, "Hearing the Cry without Answering the Call: Rape, Genocide, and the Rwandan Tribunal," (Decision in Prosecutor v. Akayesu) (2001) 28 Syracuse Journal of International Law and Commerce 111 [hereinafter Lyons]; S. Gruskin, "Negotiating the Relationship of HIV/AIDS to Reproductive Health and Reproductive Rights," (1995) 44:4 American University Law Review 1191 [hereinafter Gruskin].

[105] Čelebići Judgement, *supra* note 45, at paragraphs 1065-1066 & 940. Paragraph 940 was literally echoed in paragraph 962.

Nonetheless, to satisfy the principle of fair labelling, the above discussion reveals that the defendant's *mens rea* is a key element that must be clearly reflected in his conviction. He must be punished in proportion to it and not only to the degree of gravity of the offence.

4. The Principle of Proportionality

The Principle of Proportionality in self-defence refers to the degree of force that is allowed to be used for deterring or responding to an attempted aggression. For example, necessity may require the killing of the attacker as the only way to prevent or escape from a rape assault.[106] Thus, the main task of this principle is to control the degree of force that may be used in conditions of necessity and to assure a proportionate response to the harm committed or threatened.[107]

For the purpose of this thesis, one of the main aims of respecting distinctions between offences, as required by the principle of fair labelling, is proportionality. The objective of the principles of criminal justice is to ensure a proportionate response to lawbreaking. In other words, fairness necessitates that offenders should be labelled and punished in proportion to the degree and seriousness of their wrongdoing.[108]

This principle is clearly featured in *R.* v. *Martineau*, where the Supreme Court of Canada argued that s.7 of the Canadian Charter of Human Rights and

---

[106] Leverick, *supra* note 22, at 148.

[107] Ashworth, *supra* note 6, at 57.

[108] *Ibid*. at 78.

Freedoms rendered certain definitions of murder unconstitutional, because they did not require a culpable intent—i.e., knowing that the inflicted bodily harm is likely to cause death—that would be consistent with the stigma and punishment attached to the crime of murder.[109] The court asserted that in a free and democratic society that values the autonomy and free will of the individual, the stigma and punishment attaching to murder should be reserved for those who choose intentionally to cause death. Moreover, principles of fundamental justice imply that a conviction for murder requires subjective foresight of death, and that proportionality between the stigma and punishment attached to a murder conviction, as well as the moral blameworthiness of the offender, must be established.[110] It is a principal objective of the criminal justice system to see to it that the classification and grading of offences concur with the societal perception of proportionality—a central goal of the principle of fair labelling that will be elucidated in the following section.[111]

5. The Concept of the Socio-Pedagogical Influence of Punishment

Considering criminal law a "communicative enterprise," as Clarkson suggests, requires that an offence's structuring and labelling must be processed in

---

[109] *Charter of Human Rights and Freedoms,* Constitution Act, 1982 (79) Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, (Entered into force on 17 April 1982), at ss.7 and 11(d) [hereinafter the Canadian Charter]; D. Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Toronto, Ont.: Thomson Canada, 2005) 79-81; *R.* v. *Maciel*, [2007] 219 C.C.C. (3d) 516, 222 O.A.C. 174, 47 C.R. (6th) 319 at paragraph 81 [hereinafter *R.* v. *Maciel*].

[110] R. v. Martineau, *supra* note 47, at paragraph 11.

[111] D. Grump & S. Grump, "In Defence of the Felony Murder Doctrine," (1985) 8 Harvard Journal of Law and Public Policy 362 [hereinafter Grump & Grump]; R. v. Martineau, *supra* note 47, at paragraph 89.

a manner that would facilitate communication.[112] An offence's label fulfils a chief communicative function by conveying to different parties—the public, the offender, the victim, and to the actors in the criminal justice system—the way that the wrongdoing was carried out, the offender's degree of guilt, and the punishment that would be inflicted on him as a consequence.[113] Moreover, an offence's label also involves a declaratory function, by representing to the public the degree of condemnation that should be ascribed to the offender and how he should be regarded by society. [114] Furthermore, it is important and appropriate to vindicate society's moral norms. As William Schabas discerns, the declaratory value of criminal law contributes to the struggle against impunity—where society publicly condemns certain conducts—which in turn reaffirms the legal order, preserves the victim's dignity, and addresses her need for social recognition and justice.[115]

Accordingly, drawing moral distinctions between offences is important to accelerating the flow of information to the public. Members of society would like to know in advance which forms of conduct constitute crimes, and, given this

---

[112] Clarkson, *supra* note 1, at 143.

[113] Almond, *supra* note 18, at 149; Crofts, *supra* note 28, at 197; Hawkins, *infra* note 123, at 197.

[114] C. Clarkson, *Understanding Criminal Law* (London: Sweet and Maxwell, 2005) 10 [hereinafter Clarkson]; Chalmers & Leverick, *supra* note 7, at 228.

[115] M. deGuzman, "The Road from Rome: The Developing Law of Crimes against Humanity," (2000) 22:2 Human Rights Quarterly 339 [hereinafter deGuzman]; W. Schabas, "Sentencing by International Tribunals: A Human Rights Approach," (1997) 7:2 Duke Journal of Comparative and International Law 516 [hereinafter Schabas].

situation, what types of crimes they are. Moreover, the principle of fair labelling requires that the offender should be labelled in a precise way for two reasons: the first is that the offender's criminal record would reflect exactly the degree and the type of the wrongdoing that he committed, and the second is that it would transmit to the society an accurate moral picture of the outlawed actions. Accordingly, labels for offences must demonstrate clearly the differences between distinct types of culpable wrongdoing. In other words, it should show the different levels of culpability in which the offence is committed.[116]

As Andrew Ashworth points out, the principle of fair labelling attempts to present to society the nature and degree of the gravity of the crime since it is important to see justice being done.[117] This function of the law overlaps with the concept of the moral or socio-pedagogical influence of punishment, which depends on the type and strength of the message that would be sent to society by the law and throughout the legal process concerning the consequences of breaking the law, on the one hand, and on the morality of the recipient society, on the other.[118] Indeed, one of the most specific and significant functions of international

---

[116] A. Ashworth & B. Mitchell, "Introduction," in A. Ashworth & B. Mitchell, eds., *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000) 8 [hereinafter Ashworth & Mitchell]; A. Simester & G. Sullivan, "On the Nature and Rationale of Property Offences," in R. Duff & S. Green, eds., *Defining Crimes: Essays on the Special Part of the Criminal Law* (New York, N.Y: Oxford University Press, 2005) 186 [hereinafter Simester & Sullivan].

[117] Ashworth, *supra* note 6, at 79; Mitchell, *supra* note 14, at 398.

[118] "A Framework for the Allocation of Prevention Resources with a Specific Application to Insider Trading," (1976) 74:5 Michigan Law Review 982 [herinafter Prevention Resources]; C. Abel & F. Marsh, *Punishment and Restitution: A Restitutionary Approach to Crime and the Criminal* (Westport, Conn.: Greenwood Press, 1984) 70 [herinafter Abel & Marsh]; J. Andenaes, "General Prevention: A Broader View of Deterrence," in R. Gerber & P. McAnany, eds.,

criminal tribunals is the socio-pedagogical influence of the punishment on the society; it is the deterrent-preventive influence. Accordingly, the punishment of war criminals should be motivated by its deterrent effect.[119]

However, the failure of the ICTY, for instance, adequately to prosecute and punish gender-based crimes committed in the early 1990s in the former Yugoslavia has resulted in ineffective socio-pedagogical deterrence of gender-based crimes committed mainly by Serb forces and militias in Bosnia-Herzegovina in the summer of 1995, and in Kosovo in 1998 and 1999 respectively.[120] The negative deterrent influence of the international criminal tribunals, which involved both powerful elites and ordinary people, could also be due to a society's "inverted morality," as Payam Akhavan observes.[121] Certain

---

Contemporary Punishment: Views, Explanations, and Justifications (Notre Dame, Ind.: University of Notre Dame Press, 1972) 109 [herinafter Andenaes]; P. Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?," (2001) 95:1 American Journal of International Law 13. Reprinted in R., Falk, et al., eds., *Human Rights: Critical Concepts in Political Science*, 5 vols. (New York, N.Y.: Routledge, 2007) III: 123-159 [herinafter Akhavan]; P. Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," (2005) 99:2 The American Journal of International Law 419 [herinafter the Lord's Resistance Army Case].

[119] A. von Hirsch, "'Neoclassicism,' Proportionality, and the Rationale for Punishment: Thoughts on the Scandinavian Debate," (1983) 29 Crime Delinquency 56 [herinafter Hirsch].

[120] D. Tolbert, "The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings," (2002) 26:2 The Fletcher Forum of World Affairs 9 [hereinafter Tolbert].

[121] **"**Discussion," (2008) 6 Journal of International Criminal Justice 703 [herinafter Discussion]; P. Akhavan, "Responsibilities: Individual, National and Multilateral," Option Paper, Plenary Panel 2: The Responsibility to Prevent, Stockholm International Forum, 2004 [herinafter Akhavan]; R. Henham, "The Philosophical Foundations of International Sentencing," (2003) 1:1 Journal of International Criminal Justice 78, citing P. Akhavan, "National Perspectives and Reservations," paper presented to the International Conference "From a Culture of Impunity to a Culture of Accountability: International Criminal Tribunals, the International Criminal Court, and Human Rights Protection, University of Utrecht, The Netherlands, November 2001 [herinafter

societies—ethnic groups—in former Yugoslavia and Rwanda considered killing or sexually assaulting members of the victimized groups to be a type of heroism and a national duty.[122]

Although justice in international criminal tribunals could not provide absolute deterrence of future atrocities, this thesis emphasizes the tribunals'—and particularly the ICC's—pedagogical role in focussing on the educative-moralizing function of the punishment.[123] In other words, the tribunals' statutory laws and legal proceedings should send clear messages and factual information to the public, as well as to the international community, about the consequences of breaking the law, and strengthen the society's public sense of accountability for human rights violations.[124]

The Philosophical Foundations of International Sentencing]; R. Henham, *Punishment and Process in International Criminal Trials* (Burlington, VT: Ashgate, 2005) 141 [herinafter Henham].

[122] H. Zawati, *The Triumph of Ethnic Hatred and the Failure of International Political Will: Gendered Violence and Genocide in the Former Yugoslavia and Rwanda* (New York, N.Y.: The Edwin Mellen Press, 2010) 142 [hereinafter Zawati].

[123] G. Hawkins, "Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects," (1969) 2 Wisconsin Law review 553. Reprinted in G. Hawkins, "Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects," in S. Grupp, ed., *Theories of Punishment* (Bloomington, Ind.: Indiana University Press, 1971) 163-179 [herinafter Hawkins]; The Philosophical Foundations of International Sentencing, *supra* note 121, at 78.

[124] D. Kahan, "Social Influence, Social Meaning, and Deterrence," (1997) 83:2 Virginia Law Review 383 [herinafter Kahan]; J. Andenaes, "The General Preventive Effects of Punishment," (1966) 114:7 University of Pennsylvania Law Review 950 [herinafter Andenaes]; M. Damaška, "What Is the Point of International Criminal Justice?" (2008) 38:1 Chicago-Kent Law Review 347 [herinafter Damaška]; P. Akhavan, "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism," (2009) 31 Human Rights Quarterly 628 [herinafter Akhavan].

Thus, it is crucial to communicate to society the proper degree of condemnation that should be attached to the wrongdoer. If the label of an offence does not precisely reflect the nature and degree of the wrongdoing, the society will receive a misleading message, and accordingly, the lawbreaker could be unfairly stigmatized and finally lose faith in having an impartial jury try his case locally. In *R.* v. *Effert*, Ms. Effert, who was charged with the murder of her newborn baby, was granted a re-trial. Believing that she would not be able to obtain an impartial jury in her home judicial district because of the stigma of post-trial publicity, she asked the court to dispense with the Crown's legislated right to consent to a re-election to trial by judge alone or to be granted a change of venue. Recalling the aforesaid Supreme Court of Canada decision on *R.* v. *Martineau*, which requires proportionality to be established between the stigma and punishment attached to the offender's conviction, and believing that the extensive post-trial publicity was prejudicial to her, the court granted Ms. Effert a change of venue.[125]

One can only conclude by emphasizing the significant socio-communicative role of criminal law and proceedings, conveyed—to both local society and the international community—in the label of the offence, including the offence name and description, the offender's moral culpability, and the punishment to be inflicted on the convicted person as a response to the

[125] Ashworth, *supra* note 6, at 78; *R.* v. *Effert* [2008] A.J. No. 338, 2008 ABQB 200, 443 A.R. 196, at p.3 [hereinafter *R.* v. *Effert*]; R. v. Maciel, *supra* note 109, at paragraph 81; Williams, *supra* note 4, at 85.

wrongdoing. Accordingly, the label of the offence, for the sake of fairness, must accurately reflect the nature and degree of seriousness of the condemned act, simply because the symbolic and declaratory function of the offence label determines the degree of societal condemnation that should be imputed to the offender.[126] Moreover, the offence label affects the socio-pedagogical and deterrent-preventive influence of punishment on society; a task that the international criminal tribunals failed to fulfil.

6. The Doctrine of Joint Criminal Enterprise

This section examines joint criminal enterprise (JCE), as a newly emerged liability doctrine, with reference to the principle of fair labelling. JCE, which has been playing a significant role in the prosecution of collective gender-based crimes and other offences in the tribunals during the last decade, is neither a crime that has been incorporated in the provisions of the statutory laws of the tribunals nor a crime lying within the jurisdiction of the tribunals.[127] It is a mode of liability and criminal responsibility that corresponds to the doctrine of conspiracy in domestic criminal law.[128] Although the doctrine of JCE has been criticized for

---

[126] Chalmers & Leverick, *supra* note 7, at 227; Mitchell, *supra* note 14, at 398; Simester & Sullivan, *supra* note 35, at 30.

[127] B. Lyons, "Tortured Law/Tortured "Justice" – Joint Criminal Enterprise in the Case of Aloys Simba," Online: ICTR Legacy from the Defence Perspective (October 2009) <http://www.ictrlegacydefenseperspective.org/papers/Beth_Lyons_Joint_Criminal_Enterprise_in_the_Case_of_Aloys_Simba.pdf> (Accessed on: 21May 2010), at p.1 [hereinafter Lyons]; N. Piacente, "Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy," (2004) 2 Journal of International Criminal Justice 446 [hereinafter Piacente].

[128] G. Fletcher & J. Ohlin, "Reclaiming Fundamental Principles of Criminal Law in the Darfur Case," (2005) 3 Journal of International Criminal Justice 544 [hereinafter Fletcher & Ohlin]; G.

broadness and violation of basic principles of legality—which will be discussed later in this section—Catharine MacKinnon regards it as a breakthrough in the ICTY's jurisprudence that would be equivalent to the Akayesu achievement.[129] Indeed, since it was introduced in the Tadić Appeals Judgement,[130] this doctrine has become the Prosecutor's "magic weapon"[131] or "darling notion"[132] to indict for collective sexual violence[133] and other crimes within the jurisdiction of the Tribunal.[134]

Guliyeva, "The Concept of Joint Criminal Enterprise and ICC Jurisdiction," (2008-2009) 5:1 Eyes on the ICC 51 [hereinafter Guliyeva]; J. Dermod, "AFRC Appeal: Joint Criminal Enterprise," Online: Transnational Law Blog (27 March 2008) <http://transnationallawblog.typepad.com/transnational_law_blog/sierra_leone/> (Accessed on: 21 May 2010), p.1 [hereinafter Dermod].

[129] C. MacKinnon, "The ICTR's Legacy on Sexual Violence: The Recognition of Rape as an Act of Genocide-*Prosecutor* v. *Akayesu*," in Guest Lecture Series of the Office of the Prosecutor, the ICC, The Hague, 27 October 2008. Reprinted in (2008) 14:2 New English Journal of International Comparative Law 107 [hereinafter MacKinnon].

[130] *Prosecutor* v. *Dušku Tadić,* (1999) Appeals Judgement, 15 July 1999, IT-94-1-A, paragraphs 189 & 197 [hereinafter Tadić Appeals Judgement].

[131] K. Ambos, "Joint Criminal Enterprise and Command Responsibility," (2007) 5: 1 Journal of International Criminal Justice 159 [hereinafter Ambos]; W. Schabas, "Mens Rea and the International Criminal Tribunal for the Former Yugoslavia," (2003) 37:4 New England Law Review 1032 [hereinafter Schabas].

[132] A. Cassese, "The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise," (2007) 5 Journal of International Criminal Justice 110 [hereinafter Cassese].

[133] P. Sellers, "Individual(s') Liability for Collective Sexual Violence," in K. Knop, ed., *Gender and Human Rights* (New York, N.Y.: Oxford University Press, 2004) 155 [hereinafter Sellers].

[134] Furundžija Appeal Judgement, *supra* note 75, at paragraphs 118-119; Kvočka Appeal Judgement, *supra* note 22, at paragraphs 326; *Prosecutor* v. *Radislav Krstić*, (2001) Judgement, 2 August 2001; 40 I.L.M.134, IT-98-33-T, at paragraph 605 [hereinafter Krstić Judgement]; Tadić Appeals Judgement, *supra* note 130, at paragraph 220.

The JCE doctrine, which the Appeals Chamber of the ICTY has also referred to using several terms interchangeably[135]—as a common criminal plan,[136] a common criminal purpose,[137] a common design or purpose,[138] a common criminal design,[139] a common purpose,[140] a common design,[141] and a common concentrated design[142]—is a judicially created doctrine introduced in the Tadić Appeals Judgement.[143] In developing JCE, the Appeals Chamber of the ICTY relied heavily on the post-WWII jurisprudence of British, Italian, and United States courts and military tribunals,[144] claiming that it is implicitly included in the language of Article 7(1) of the Statute,[145] which describes five forms of criminal

---

[135] A. Bogdan, "Individual Criminal Responsibility in the Execution of a Joint Criminal Enterprise in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia," (2006) 6 International Criminal Law Review 80 [hereinafter Bogdan].

[136] Tadić Appeals Judgement, *supra* note 130, at paragraph 185.

[137] *Ibid.* at paragraph 187.

[138] *Ibid.* at paragraph 188.

[139] *Ibid.* at paragraphs 191 & 193.

[140] *Ibid.* at paragraphs 193, 195, 204 & 225.

[141] *Ibid.* at paragraphs 196 & 202-204.

[142] *Ibid.* at paragraph 203.

[143] *Ibid.* at paragraph 185.

[144] J. Widell, "Joint Criminal Enterprise in the International Criminal Tribunal for Yugoslavia," Online: Serbianna (16 September 2005) <http://www.serbianna.com/columns/widell/003.shtml> (Accessed on: 21 May 2010), p. 5 [hereinafter Widell]; Piacente, *supra* note 127, at 447.

[145] A. Danner & J. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law," (2005) 93:75 California Law Review 103 [hereinafter Danner & Martinez]; C. Farhang, "Point of No Return: Joint Criminal Enterprise in Brđanin," (2010) 23 Leiden Journal of International Law 140 [hereinafter Farhang]; K. Askin, "Reflections on Some of the Most Significant Achievements of the ICTY," (2003) 37:4

responsibility that can be established only when a person "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute."[146] A closer look at this provision reveals that it contains two types of liability: a direct type, which involves committing or planning a crime, no matter whether carried out individually or with the help or others, and an indirect form, which includes instigating, ordering, or aiding and abetting the commission of a crime by others.[147]

As most of those who participate in JCE are high-ranking militants or political leaders, involved with others in an enterprise to execute a common criminal plan,[148] the doctrine helps the prosecution to address co-perpetrated crimes, particularly when the perpetrators' *mens rea* of committing certain crimes is hard to establish.[149] Nevertheless, in contrast to the ICTY's jurisprudence, the Trial Chamber III of the ICTR, in the Gacumbitsi case, rejected allegations

---

New England Law Review 911 [hereinafter Askin]; R. Barrett & L. Little, "Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals," (2003) 88: I Minnesota Law Review 37 [hereinafter Barrett & Little].

[146] The ICTY Statute, *infra* note 207, at Articles 2 & 5.

[147] Danner & Martinez, *supra* note 145, at 102.

[148] Piacente, *supra* note 127, at 446.

[149] C. Del Ponte, "Investigation and Prosecution of Large-scale Crimes at the International Level: The Experience of the ICTY," (2006) 4:2 Journal of International Criminal Justice 547 [hereinafter Del Ponte]; W. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge, N.Y.: Cambridge University Press, 2006) 112-113 & 309 [hereinafter Schabas].

against the accused on the JCE basis,[150] where the Prosecutor brought charges against the defendant, including conspiring with others, of participating in the planning, preparation or implementation of a common plan aimed at the extermination of the Tutsi social group.[151] In another case, *Prosecutor* v. *Karemera, et al.*, the same Trial Chamber denied[152] the Prosecutor's request, of 29 August 2003, for leave to file an amended indictment. The Prosecutor sought to add charges, namely that the accused were part of a joint criminal enterprise to destroy the Tutsi ethnic group, the natural and foreseeable consequences of which was the commission of crimes within the jurisdiction of the Tribunal. The Prosecutor provided that the amended indictment, based on evidence without reasonable doubt that was not available at the time of the original indictment, would bring new charges and enhance specificity. The Appeals Chamber reversed the Trial Chamber's decision and remitted the matter to the latter for consideration if the amended indictment is in compliance with Rule 50 of the Tribunal's rules of procedure and evidence.[153] Moreover, in the *Brima, et al.* trial judgement, Trial Chamber II of the SCSL did not "consider JCE as a mode of

---

[150] Gacumbitsi Judgment, *infra* note 199, at paragraph 289.

[151] *Prosecutor* v. *Sylvestre Gacumbitsi,* (2001) Indictment, 20 June 2001, ICTR-2001-64-I, at paragraph 25 [hereinafter Gacumbitsi Indictment].

[152] *The Prosecutor* v. *Édouard Karemera, et al.,* (2003) Decision Denying Leave to File an Amended Indictment, 8 October 2003, ICTR-98-44-I [hereinafter Karemera Decision].

[153] *The Prosecutor* v. *Édouard Karemera, et al.,* (2003) Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision OF 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, ICTR-98-44-AR73, at paragraphs 3 & 32, cited in Schabas, *supra* note 149, at 311.

criminal responsibility" on the grounds that the Prosecutor had defectively pleaded it.[154]

The legal foundation of JCE as a doctrine of liability is based on three pillars: the post-WWII jurisprudence of domestic courts and military tribunals established to try German Nazis and Italian Fascists; recent international criminal instruments; and the jurisprudence of the ICTY. In laying down the foundation of the doctrine in the Tadić appeals decision, the Appeals Chamber relied heavily on the case law of British and US military tribunals set up in occupied Germany to try German Nazis, particularly the Essen Lynching—also known as Essen West—where two German servicemen and five civilians were convicted of war crimes for killing three British prisoners of war,[155] and on the jurisprudence of the Italian Supreme Court trying Italian Fascists.[156] Besides Article 7(1) of the Statute of the

---

[154] C. Rose, "Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-Based Crimes," Online: SelectedWorks <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=cecily_rose> (Accessed on: 21 May 2010), p.16 [hereinafter Rose]; *Prosecutor* v. *Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, (2007) Trial Judgement, 20 June 2007, SCSL-2004-16-T, at paragraph 67 [hereinafter Brima Trial Judgement]; Z. Hinson, "An Examining of Joint Criminal Enterprise in the Special Court's Decision of the AFRC Trial," Online: Centre for Accountability and the Rule of Law (CARL-SL) (28 July 2007) <http://www.carlsl.org/home/index.php?option=com_content &view=article&id=90:by-zoilahinson&catid=4:articles&Itemid=23> (Accessed on: 21 May 2010), p.1 [hereinafter Hinson].

[155] A. Cassese, "Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine: Before The Pre-Trial Chamber Extraordinary Chambers in the Courts of Cambodia. Case File No.: 001/18-07-2007-ECCC/OCIJ (PTC 02)," (2009) 20 Criminal Law Forum 311 [hereinafter Cassese]; United Nations War Crimes Commission, "The Essen Lynching Case, Trial of Erich Heyer and Six Others, British Military Court for the Trial of War Criminals," in Law Reports of Trials of War Criminals (1947) at p.88, cited in Barrett & Little, *supra* note 145, at 110.

[156] J. Pjani, "Joint Criminal Enterprise," Online: Odsjek Krivicne Odbrane BIH (OKO) (2010) <http://www.okobih.ba/files/docs/Jasmina_Pjanic_ENG_i_BHS.pdf> (Accessed on: 21 May 2010), at p.2 [hereinafter Pjani].

ICTY, the doctrine of JCE could be found in the language of Article 2(3)(c) of the International Convention for the Suppression of Terrorist Bombing (ICSTB),[157] and in Article 25(3)(d) of the Rome Statute of the ICC.[158] The third legal foundation of JCE is the jurisprudence of the tribunals, particularly the case law of the ICTY, where the Tribunal delivered the hallmark decision of Tadić and spelled out—for the first time in the legal history of international criminal law—the elements and types of JCE as a model of criminal liability.[159]

Although the Statute of the ICTY does not provide a clear definition of JCE doctrine, showing explicitly the *actus reus* and *mens rea* of the doctrine, the 1999 Tribunal's Appeals Chamber decision in the Tadić case specified three distinctive forms of collective responsibility sharing the same *actus reus*,[160] which includes the following elements: "(a) a plurality of persons, organized in a military, political or administrative structure; (b) the existence of a common plan, design or purpose that amounts to or involves the commission of a crime provided for in the Statute; and (c) participation of the accused in the common design involving the

---

[157] International Convention for the Suppression of Terrorist Bombing, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998), entered into force May 23, 2001, at Article 2(3)(c) [hereinafter Convention for the Suppression of Terrorist Bombing].

[158] The Rome Statute of the ICC, *supra* note 46, at Article 25(3)(d).

[159] Cassese, *supra* note 132, at 110.

[160] K., Gustafson, "The Requirement of an 'Express Agreement' for Joint Criminal Enterprise Liability A Critique of Brđanin," (2007) 5 Journal of International Criminal Justice 136 [hereinafter Gustafson]; Pjani, *supra* note 156, at 6; S. Powles, "Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity," (2004) 2 Journal of International Criminal Justice 608 [hereinafter Powles]; V. Haan, "Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia," (2005) 5 International Criminal Law Review 169 [hereinafter Haan].

preparation of one of the crimes provided for in the Statute."[161] Nevertheless, in contrast to the *actus reus*, which is the same in each of the three identified categories of JCE, the Appeals Chamber contends that the *mens rea* element differs according to the category of the JCE "common design"[162] under consideration. However, the Appeals Chamber articulated three forms of JCE in Tadić decision, which have been developed in subsequent cases,[163] as follows: basic (JCE I),[164] systematic (JCE II),[165] and extended (JCE III).[166]

In JCE I, which is a more widespread category of liability,[167] all participants in JCE share the same criminal intention and act according to a common plan or design. Under this category, all members of a JCE must enter into an agreement to carry out a certain crime. In other words, to indict for gender-based crimes under this category, the Prosecutor must prove that there was a common design to rape the victim, for instance, and that the accused have

---

[161] Tadić Appeals Judgement, *supra* note 130, at paragraph 227.

[162] A. O'Rourke, "Joint Criminal Enterprise and Brđanin: Misguided Overcorrection," (2006) 47:1 Harvard International Law Journal 312 [hereinafter O'Rourke]; Powles, *supra* note 160, at 608; W. Jordash & P. Van Tuyl, "Failure to Carry the Burden of Proof How Joint Criminal Enterprise Lost its Way at the Special Court for Sierra Leone," (2010) Journal of International Criminal Justice 4 [hereinafter Jordash, & Van Tuyl].

[163] Guliyeva, *supra* note 128, at 52; Jordash, & Van Tuyl, *supra* note 162, at 4; *Prosecutor* v. *Milan Milutinović*, *et al.,* (2003) Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise*,* ICTY Appeals Chamber, 21 May 2003, IT-99-37-AR72, at para. 23, cited in Danner & Martinez, *supra* note 145, at 105.

[164] Tadić Appeals Judgement, *supra* note 130, at paragraphs 196 & 228.

[165] *Ibid.* at paragraph 202.

[166] *Ibid.*at paragraph 204.

[167] Cassese, *supra* note 132, at 111.

voluntarily participated at least in one aspect of the common design, i.e., holding or undressing the victim, even he did not personally and effectively rape her.[168]

Under JCE II, which is a variant of the first category and may be referred to as the system of ill-treatment, e.g., concentration camps,[169] the accused must have personal knowledge of the system of ill-treatment, as well as the intent to further this system.[170] Thus, this form of liability, as Antonio Cassese observes, relates to performing a task within a criminal plan that is carried out in an institutional framework.[171] Accordingly, to convict a person under this category, the prosecutor needs to prove the adherence of this person to the system of repression rather than proving a formal or informal agreement among the participants to implement it.[172]

JCE III is the extended and most wide-ranging category of liability, which involves criminal acts that fall outside the common plan.[173] In this category, all

---

[168] C. Gibson, "Testing the Legitimacy of the Joint Criminal Enterprise Doctrine in the ICTY: A Comparison of Individual Liability for Group Conduct in International and Domestic Law," (2008) 18 Duke Journal of Comparative & International Law 526 [hereinafter Gibson]; Danner & Martinez, *supra* note 145, at 105; Tadić Appeals Judgement, *supra* note 130, at paragraph 196.

[169] Tadić Appeals Judgement, *supra* note 130, at paragraph 202.

[170] J. Easterday, "Obscuring Joint Criminal Enterprise Liability: The Conviction of Augustine Gbao by the Special Court of Sierra Leone," (2009) 3 Berkeley Journal of International Law Publicist 38 [hereinafter 38]; Kvočka Appeal Judgement, *supra* note 22, at paragraph 82; Tadić Appeals Judgement, *supra* note 130, at paragraph 228.

[171] Cassese, *supra* note 132, at 112.

[172] Haffajee, *infra* note 225, at 213; *Prosecutor* v. *Kmojelac,* (2003) Appeals Judgement, 17 September 2003, IT-97-25-A, at paragraph 96 [hereinafter Kmojelac Appeals Judgement], cited in Danner & Martinez, *supra* note 145, at 105.

[173] Danner & Martinez, *supra* note 145, at 105; Guliyeva, *supra* note 128, at 53.

participants agree to pursue one course of conduct,[174] which is the main purpose of the common criminal plan, but they do not share the intent of some of other participants in a JCE.[175] An example of this would be wartime gang-rape, where a group of concentration camp guards design a common plan to rape some women prisoners. If a member of the gang shoots one or more of these women who, for instance, resisted rape, he would be held responsible for both rape and murder, together with other members of the common enterprise. This is because, although killing was not explicitly identified as part of the common plan, it was natural and foreseeable that such a crime might be perpetrated by members of a JCE in such circumstances.

Nevertheless, the above analysis coincides with the observations of Jens Ohlin[176] that war crimes, genocide, and crimes against humanity—contrary to domestic crimes—usually take the form of collective criminality, committed by groups of individuals, including militants, politicians, administrators, etc., so it would be too difficult, as Antonio Cassese maintains, to determine the role played by each member of a joint criminal enterprise[177] involving the nature and magnitude of the committed crime, as well as the intentionality, which is important to determine the moral blameworthiness of the offender. Moreover, an

---

[174] Tadić Appeals Judgement, *supra* note 130, at paragraph 204.

[175] Cassese, *supra* note 132, at 113; Haffajee, *infra* note 225, at 213.

[176] J. Ohlin, "Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise," (2007) 5 Journal of International Criminal Justice 73 [hereinafter Ohlin].

[177] Cassese, *supra* note 132, at 110.

examination of JCE reveals that it is chiefly unspecific, vague, and expansive. These conceptual problems put the doctrine in serious conflict with major principles of fundamental justice, particularly the principle of fair labelling, which requires that proportionality between punishment and the defendant's culpability be well-recognized. Furthermore, JCE offends against the principle of legality, which stresses that no one should be punished retroactively.[178]

In addition, the doctrine of JCE encompasses a number of conceptual problems that led to controversy in legal jurisprudence and led to disapproval among defendants' counsellors, legal scholars, and even judges.[179] As further discussion of these problems, this section concludes by scrutinizing the doctrine's major conceptual problems including the problems of intentionality, foreseeability, equal culpability, and inconsistency with the principle of legality.

Specifically speaking, criticism has been levelled against the second and third forms of JCE for extending the individual criminal accountability to exceed the actual perpetrator to other members of the common plan.[180] In contrast to

---

[178] Fletcher & Ohlin, *supra* note 128, at 548; J. Laughland, "Conspiracy, Joint Criminal Enterprise and Command Responsibility in International Criminal Law," Online: ICTR Legacy from the Defence Perspective (2009) <http://www.heritagetpirdefense.org/papers/John_laughland_Conspiracy_joint_criminal_enterprise_and_command_responsibility.pdf> (Accessed on: 21 May 2010), at p.1 [hereinafter Laughland].

[179] In his dissenting opinion to the Simić judgement, Judge Lindholm provides: "I dissociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally… The concept or "doctrine" has caused confusion and a waste of time, and is in my opinion of no benefit to the work of the Tribunal or the development of international criminal law." See *Prosecutor* v. *Blagoje Simić, et al.,* (2003) Judgement, Dissenting Opinion of Judge Per-Johan Lindholm, 17 October 2003, IT-95-9-T, at paragraphs pp. 314 & 316, cited in E. Van Sliedregt, "Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide," (2006) Journal of International Criminal Justice 4 [hereinafter Van Sliedregt].

[180] Van Sliedregt, *supra* note 179, at 5.

Article 25(3)(d) of the Rome Statute of the ICC, which states that any contribution to the commission of a crime by a group of persons acting with a common purpose shall be intentional,[181] the Appeals Chamber provides that a member of a JCE could be held liable for crimes committed by other members of the common plan even if he had no intention of committing such a crime.[182] In other words, all members of a JCE could be held responsible for criminal acts carried out by any of the co-perpetrators,[183] regardless of the fact that these acts were not part of the criminal plan agreed upon or whether they were intentionally participating in their commission.[184] Moreover, under this form of the doctrine—JCE III—liability could be extended to persons who might be convicted for criminal acts that did not exist but were considered as a foreseeable and natural consequence of the JCE in question. In this connection, Radovan Karadžić, pursuant to Rule 72(A)(i) of the ICTY's rules of procedure and evidence, petitioned Trial Chamber III of the Tribunal to dismiss the JCE III allegations in each count of the Third Amended Indictment, claiming that the Tribunal had no jurisdiction to prosecute him for unintended acts that "might" have been committed or were a "possible" consequence of the intended plan.[185]

---

[181] The Rome Statute of the ICC, *supra* note 46, at Article 25(3)(d).

[182] Tadić Appeals Judgement, *supra* note 130, at paragraph 204.

[183] Ohlin, *supra* note 176, at 81.

[184] Schabas, *supra* note 131, at 1031.

[185] *Prosecutor* v. *Radovan Karadžić,* (2009) Preliminary Motion to Dismiss Joint Criminal Enterprise III – Foreseability, 16 March 2009, ICTY-IT -95-05/18-PT, [hereinafter Karadžić Preliminary Motion].

As already pointed out herein, JCE III is also in conflict with the principle of fair labelling as it might operate to punish a person who did not "cause a prohibited harm,"[186] but was found guilty of being a member of a criminal enterprise. In this respect, the Supreme Court of Canada provided in R. v. Martineau that:

> In a free and democratic society that values the autonomy and free will of the individual, the stigma and punishment attached to murder should be reserved for those who choose intentionally to cause death or who choose to inflict bodily harm knowing that it is likely to cause death. Requiring subjective foresight of death in the context of murder maintains proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender.[187]

Accordingly, it is unfair to suggest that all members of a JCE are equally culpable[188]—another shortcoming of the doctrine—and consequently, prosecutors should limit condemnation to the highest offenders who substantively contribute to a JCE. Hence, as the principles of fundamental justice imply, individuals participating in a common plan should be punished with reference to their culpability and the degree of gravity of their wrongdoing.[189] It would be unfair to condemn equally all participants in a JCE and hold that they are equally culpable for the criminal act(s) committed by some members of the criminal enterprise. On that basis, JCE contradicts the principle of culpability, which implies personal

---

[186] Ashworth, *supra* note 2, at 161.

[187] *R*. v. *Martineau*, *supra* note 47, at p. 635.

[188] Ohlin, *supra* note 176, at 77.

[189] Danner & Martinez, *supra* note 145, at 151; Haffajee, *infra* note 225, at 220.

contribution to the common purpose.[190] Even the Trial Chamber in the Brđanin case, as Harmen van der wilt and Gunel Guliyeva observe,[191] concluded that the notion of JCE can lead to unwarranted extension of collective responsibility,[192] leading the chamber to reject JCE as an applicable mode of responsibility.[193]

Finally, as was mentioned at the very beginning of this section, JCE is a judicially created doctrine that has never been explicitly mentioned in the Statute of the ICTY, hence it was criticized for infringing the principle of *nullum crimen sine lege*. In this respect, the defence in *Prosecutor* v. *Dragoljub Ojdanić* argued that holding General Ojdanić liable for crimes under the doctrine of JCE III violated the principle of legality and accordingly the defence filed a preliminary motion with Trial Chamber III of the ICTY to dismiss charges under this doctrine listed in the Third Amended Indictment.[194] The Trial Chamber rejected the defence argument, concluding that this form of criminal liability does exist in the Statute of the ICTY and that the subjective and objective elements are found in customary international law and based on general international criminal law,

---

[190] Ambos, *supra* note 131, at 173.

[191] Guliyeva, *supra* note 128, at 63; H. van der Wilt, "Joint Criminal Enterprise Possibilities and Limitations," (2007) 5:1 Journal of International Criminal Justice 92 [hereinafter van der Wilt].

[192] Van der Wilt, *supra* note 191, at 92, cited in Guliyeva, *supra* note 128, at 63.

[193] *Prosecutor* v. *Radoslav Brđanin*, (2004) Judgement, 1 September 2004, IT-99-36-T, at paragraph 354 [hereinafter Brđanin Judgement].

[194] *Prosecutor* v. *Dragoljub Ojdanić,* (2002) Preliminary Motion to Dismiss Joint Criminal Enterprise for Lack of Jurisdiction, 29 November 2002, IT-99-37-PT.

national legislation and case law arising out of WWII prosecutions.[195] The defence appealed the decision contending that the Third Amended Indictment encompasses conduct that ended on 20 June 1999, that's one month before the Tadić appeals decision was handed down, and that it had accordingly been applied retroactively in the present case. Furthermore, it was argued, relying on obscure provisions and inconsistent national jurisprudence to impose liability on General Ojdanić for the foreseeable acts of others offends the principle of legality and general principles of criminal law.[196] Moreover, the inconsistency of the doctrine of JCE with the principle of legality was simultaneously raised in the Trial Chamber II of the ICTY in the Stakić trial. The chamber concluded that JCE "cannot be viewed as membership of an organization," that it consists in a new crime not articulated in the Statute, and accordingly offends the principle of *nullem crimen sine lege*.[197]

IV. Fair Labelling and the Codification of Gender-Based Crimes in the Statutory Laws of the International Criminal Tribunals

The aim of this section is neither to identify loopholes in the statutory laws of the international criminal tribunals and the ICC[198] nor to recount the legislative

---

[195] *Prosecutor* v. *Dragoljub Ojdanić,* (2003) Motion Challenging Jurisdiction-Joint Criminal Enterprise*,* ICTY Appeals Chamber, 28 February 2003, IT-99-37-AR72, at paragraph 5.

[196] *Ibid.* at paragraphs 67-70.

[197] *Prosecutor* v. *Milomir Stakić*, Judgement, 31 July 2003, IT-97-24-T, at paragraph 433 [hereinafter Stakić].

[198] No doubt that loopholes in the construction of the Rome Statute of the ICC constitute actual barriers to its efficiency. These loopholes include, but are not limited to, the issues of complementarity and admissibility. In this case, a country which is involved with the investigation

history of the above instruments. Its main concern is to examine the norms of these treaties and explore the failure of the drafters to enact distinct gender-based crimes and categorize, describe, and label them in a manner that represents fairly the nature and degree of gravity of each offence, rather than subsuming them under crimes against humanity or war crimes. This failure has placed the tribunals on the horns of a dilemma[199]—as will be thoroughly discussed in the following chapter—and has led to inconsistent prosecutions and convictions for wartime

---

may deal with the case before it reaches the ICC, which would limit the Court's effectiveness and minimise its jurisdiction. Another loophole is the UN Security Council's involvement to delay the investigation of crimes for a period of twelve months, renewable for an unlimited period of time. This simply means that the Security Council can efficiently obstruct any investigations of crimes committed by its members or their allies. A third loophole in the Statute is the opt out provision for States Parties with respect to war crimes under the ICC's jurisdiction for up to seven years. Finally, the Court's obligation to obtain the cooperation of requested states for the waiver of immunity and consent to surrender. Accordingly, the United States had concluded several bilateral Article 98(2) Agreements with different states—both actual and potential States Parties to the Rome Statute—to protect its military service troop, as well as its officials and diplomats, from being surrendered by these states to the ICC. See B. Keatts, "The International Criminal Court: Far from Perfect," (2000) 20:1 New York Law School Journal of International and Comparative Law 145-146 [hereinafter Keatts]; J. Pichon, The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court," (2008) 8 International Criminal Law Review 193 [hereinafter Pichon]; M. Marler, "The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute," (1999) 49:3 Duke Law Journal 833 [hereinafter Marler]; The Rome Statute of the ICC, *supra* note 46, at Articles 2, 16, 17, & 98.

[199] Despite the statutes' fine-sounding norms, however, none of them has provided an explicit definition of rape or another form of sexual violence. Consequently, the Trial Chambers of the ICTY and ICTR—before developing their own different definitions of rape—had turned to classical definitions in national laws, which were inadequate to prosecute this grievous crime and, therefore, inappropriate to address the needs of the victims. In the ICTR, for example, only five men—Akayesu, Bagasora, Gacumbitsi, Muhimana, and Semanza—out of 48 indictees have been found guilty of sexual related charges. None of them has pleaded guilty to any form of sexual violence offences, and all of them were able to have their sexual violence charges dropped in exchange for guilty pleas on other counts. See Akayesu Judgement, *supra* note 34, at paragraph 598; Furundžija Judgement, *supra* note 69, at paragraphs 165-175; *Prosecutor* v. *Alfred Musema,* (2000) Judgement and Sentence, 27 January 2000, ICTR-96-13- T, at paragraphs 220 & 226 [hereinafter Musema Judgement]; *Prosecutor* v. *Sylvestre Gacumbitsi,* (2004) Judgement, 17 June 2004, ICTR-2001-64-T , at paragraphs 226-228 [hereinafter Gacumbitsi Judgement].

rape and other forms of sexual violence committed in the former Yugoslavia,[200] Rwanda,[201] and Sierra Leone[202] during the 1990s.

Before proceeding further, it may be worthwhile emphasizing—as was already noted at the outset of this chapter—that the principle of fair labelling stresses clear distinctions between all types of offences, so that they may be

---

[200] Due to the abstractness of gender-based crimes in the ICTY Statute and to the failure of the drafters to categorize sexual slavery as a separate crime—which violates the principle of fair labelling—the Trial Chamber in the *Prosecutor* v. *Kunarac, et al.,* charged the defendants with both "rape" and "enslavement" instead of "sexual slavery" as crimes against humanity. It has simply implemented the Slavery Convention's definition of enslavement in the broadest terms. See C. Argibay, "Sexual Slavery and the 'Comfort Women' of World War II," (2003) 21:2 Berkeley Journal of International Law 384-385 [hereinafter Argibay]; Kunarac Judgement, *supra* note 94, at paragraph 782; Slavery Convention, Concluded on 25 September 1926, A 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253 (Entered into force on 9 March 1927), at Article 1 [hereinafter Slavery Convention].

[201] Even the first indictment of Akayesu of 1996 did not include any rape charges, though rape was widespread in the Taba Commune where Akayesu served as mayor during the 1994 Rwandan genocide. In June 1997, under pressure from feminist groups and legal scholars, the prosecutor amended the indictment to include rape as a crime of sexual violence. Nonetheless, even after convicting Akayesu with sexual violence as a crime of genocide in September 1998, there were only two indictments, which were changed to include rape and sexual violence. See A. Brunet & I. Helal, "Monitoring the Prosecution of Gender-Related Crimes in Rwanda: A Brief Field Report," (1998) 4:4 Journal of Peace Psychology 394 [hereinafter Brunet and Helal]; Akayesu Judgement, *supra* note 34, at paragraph 598; Furundžija Judgement, *supra* note 69, at paragraphs 165-175; *Decision on the Prosecutor's Request for Leave to Amend the Indictment (Prosecutor* v. *Alfred Musema)*, Decision of 18 November 1998, ICTR-98-40-T; *Prosecutor* v. *Pauline Nyiramasuhuko & Shalom Ntahobali*, Amended Indictment of 11 August 1999, ICTR-97-21-I; S. Wood, "A Woman Scorned for the 'Least Condemned' War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda," (2004) 13:2 Columbia Journal of Gender and Law 302 [hereinafter Wood]; *Shattered Lives: Sexual Violence during the Rwandan Genocide and Its Aftermath* (New York, N.Y.: Human Rights Watch, 1996) 93 [hereinafter Shattered Lives].

[202] The SCSL—like other preceding *ad hoc* international criminal tribunals—has fallen short of adequately prosecuting gender-based crimes due to, *inter alia*, the abstractness of gender-based crimes in its statutory laws, procedural problems, lack of a clear prosecutorial strategy, and limitations on the Court's jurisdictions and mandates. Accordingly, Trial Chamber II of the SCSL did not consider the possibility of recognizing "forced marriage" as a distinct crime, preferring to characterize it as a form of sexual slavery as listed in Article 7(1)(g) of the Rome Statute. This lack of competence has weakened the international criminal legal system and is reflected in the inability of international criminal judicial bodies to adequately prosecute and penalize this offence. See Brima Judgement, *supra* note 72, at paragraph 573.

classified, defined, and labelled in order to reflect fairly the nature and degree of seriousness of the crime. This would ensure a proportionate response to wrongdoing, and assess the law's pedagogical function.[203] Similarly, the principle of *nullum crimen sine lege*, embodied in Article 22 of the Rome Statute of the ICC, accentuates the importance of having crimes defined, strictly construed, and not extended by analogy.[204]

Thus, for an effective prosecution of gender-based crimes under the statutory laws of the international criminal tribunals and the ICC, these crimes should be separated and not subsumed under other crimes, clearly defined at least as in the crime of genocide, and independently labelled. These crimes should be situated within the jurisdiction of the international criminal tribunals and the ICC, whether they are committed in time of peace or during armed conflict, by non-state actors or as part of a state policy, and perpetrated by targeting individuals or systematic ally applied to an entire civilian group.[205]

1. The Lack of an Acceptable Definition

Although rape was listed as a crime against humanity in the CCL10[206]—though no prosecution of rape took place under this law—and in the statutory

---

[203] Ashworth, *supra* note 6, at 78.

[204] The Rome Statute of the ICC, *supra* note 46, at Article 22(2).

[205] *The International Criminal Court: Making the Right Choices - Part I: Defining the Crimes and Permissible Defences and Initiating a Prosecution*, Amnesty International, January 1997, AI-Index: IOR 40/01/97, at p. 25 [hereinafter Making the Right Choices].

[206] Article II(1)(C) defines crimes against humanity as "Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or

laws of the *ad hoc* international criminal tribunals, as well as in the Rome Statute of the ICC,[207] and despite being implicitly referred to in a number of international humanitarian law conventions,[208] surprisingly, none of these treaties ever defined

---

other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic law of the country where perpetrated. See *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946) [hereinafter Control Council No. 10]; M. Jarvis, *Sexual Violence and Armed Conflict: United Nations Response* (New York, N.Y.: UN Division for the Advancement of Women, 1998) 4 [hereinafter Jarvis].

[207] Article 5 of the ICTY Statute states that "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; and (i) other inhumane acts." This article is echoed in Article 3 of the ICTR Statute. See A. Callamard, et al., *Investigating Women's Rights Violations in Armed Conflicts* (Montreal, Quebec: Rights & Democracy, Amnesty International, 2001) 119 [hereinafter Callamard]; The Rome Statute of the ICC, *supra* note 46, at Article 7; S. Sarai, *The Rape of the Balkan Women: An Argument for the Full Recognition of Wartime Rape as a War Crime* (M.A., Queen's University at Kingston, 2000) 28 [hereinafter Sarai]; *Statute of the International Criminal Tribunal for the Former Yugoslavia,* United Nations SCOR, 48th Sess., 3175. Annex, at 40, UN Doc. S/25704, 3 May 1993. (As Amended on 19 May 2003 by Security Council's Resolution 1481) [hereinafter the ICTY Statute]; *Statute of the International Criminal Tribunal for Rwanda*, UN Security Council's Resolution S/RES/955 (1994) Annex, Adopted in the Security Council's 3454th meeting on 8 November 1994. [hereinafter the ICTR Statute]; W. Fenrick, "Should Crimes against Humanity Replace War Crimes?," (1999) 37:3 Columbia Journal of Transnational Law 775 [hereinafter Fenrick].

[208] Namely, Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), which reads, in part: "Women shall be specially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault"; Article 76(1) of Protocol I Additional to the Geneva Conventions states "women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault"; and Article 4(2)(e) of Protocol II Additional to the Geneva Conventions classifies "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault." Although these articles have implicitly prohibited rape during armed conflict, they treated it as an attack on woman's honour and social values rather than a direct physical crime against the victim, the matter that excludes women as subjects of international law. See A. Callamard, *Documenting Human Rights Violations by State Agents* (Montreal, Quebec: Rights & Democracy, and Amnesty International,1999) 7 [hereinafter Callamard]; D. Buss, "Women at the Borders: Rape and Nationalism in International Law," (1998) 4:2 Feminist Legal Studies 187 [hereinafter Buss]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva IV), Opened for signature 12 August 1949, 6 U.S.T. 3516, T.I.A.S. No.3365, 75 U.N.T.S. 287 (Entered into force on 21 October 1950) [hereinafter Geneva IV]; J. Gardam, "The Law of Armed Conflict:

it, leaving rape and other gender-based crimes without an internationally accepted definition at the time of the establishment of the *ad hoc* tribunals in the early1990s.[209]

A Gendered Regime?", in D. Dallmeyer, ed., *Reconceiving Reality: Women and International Law* (Washington, D.C.: The American Society of International Law, 1993) 178-179 [hereinafter Gardam]; Mitchell, *supra* note 67, at 237-239; P. Sellers, "Rape under International Law," in B. Cooper, ed., *War Crimes: The Legacy of Nüremberg* (New York, N.Y.: TV Books, 1999) 163 [hereinafter Sellers]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, (Protocol I), Opened for signature on 12 December 1977, 1125 U.N.T.S. 3 (Entered into force on 7 December 1978) [hereinafter Additional Protocol I]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, (Protocol II), Opened for signature on 12 December 1977, 1125 U.N.T.S. 609 (Entered into force on 7 December 1978) [hereinafter Additional Protocol II]; R. Boed, "Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda," (2002) 13 Criminal Law Forum 305 [hereinafter Boed].

[209] Neither legal scholars nor feminists nor worldwide national legislators have endorsed an agreed-upon definition of rape or of other sex crimes. M. Cherif Bassiouni defines rape as "non-consensual vaginal penetration by a penis, or other body parts, or foreign object." On her part, Kelly D. Askin provides a gender-neutral definition by observing rape as "sexual penetration of the victim's vagina, anus, or mouth by body part or object." On the national level, for example, rape is also defined in different ways by several U.S. and European legislators. During the past few decades no consensus has been reached by the legal community on a standard definition of rape. This variation was due to the gender of both the victim and the perpetrator, the amount of force and threat used, the relationship between the victim and the assailant, the consent, and the sexual organs involved. See Akayesu Judgement, *supra* note 34, at 596; B. Britton, "Rape," in S. Ruzek, et al., eds., *Women's Health: Complexities and Differences* (Columbus, Ohio: Ohio State University Press, 1997) 492 [hereinafter Britton]; C. Muehlenhard, et al., "Is Rape Sex or Violence? Conceptual Issues and Implications," in D. Buss & N. Malamuth, eds., *Sex, Power, Conflict: Evolutionary and Feminist Perspectives* (New York, N.Y.: Oxford University Press, 1996) 124 [hereinafter Muehlenhard]; J. Bridgeman & S. Millns, *Feminist Perspectives on Law: Law's Engagement with the Female Body* (London: Seet & Maxwell, 1998) 393 [hereinafter Bridgeman]; J. Gardam, "The Legal Protection of Women in Times of Armed Conflict," (Annie Macdonald Langstaff Workshop, Institute of Comparative Law, Faculty of Law, McGill University, 12 November 1997). [Unpublished]; J. Temkin, *Rape and the Legal Process* (New York, N.Y.: Oxford University Press, 2002) 55 [hereinafter Temkin]; K. Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (The Hague, The Netherlands: Martinus Nijhoff Publishers, 1997) 11 & 380-382 [hereinafter Askin]; Karagiannakis, *infra* note 227, at 481; M. C. Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson, N.Y.: Transnational Publishers, Inc., 1996) 555 [hereinafter Bassiouni]; R. Goldstone & E. Dehon, "Engendering Accountability: Gender Crimes under International Criminal Law," (2003) 19 New England Journal on Public Policy 127 [hereinafter Goldstone]; UN Security Council, *Annex IX,*

The ambiguity and abstractness of the statutory laws of the ICTY and ICTR may be due to the urgent circumstances that preceded and accompanied the establishment of both tribunals. As a result of dreadful atrocities, including systematic mass rape and other forms of sexual violence, committed during and in the aftermath of the tragic dissolution of the Federal Republic of Yugoslavia (FRY), and mass killings in Rwanda in the early 1990s, and in response to recommendations made by various United Nations commissions of experts,[210] the UN Security Council passed Resolutions 827 and 955 to establish the ICTY and the ICTR respectively under Chapter VII of the United Nations Charter,[211] regardless of the fact that no provision in the Charter entitled the Security Council to set up such tribunals—a critical issue raised in the Tadić trial, the first case brought before the ICTY.[212]

Rape and Sexual Assault, UN SCOR, UN Doc. S/1994/674/Annex IX (28 December 1994) 7 [hereinafter Annex IX].

[210] UN Security Council, *Final Report of the Commission of Experts Established Pursuant to Security Resolution 780 (1992)*, UN Doc. S/1994/674 (27 May 1994); UN Security Council, *The Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, UN Doc. S/1994/1405 (9 December 1994).

[211] UN Security Council's Resolution 808 (1993), Deciding that an International Tribunal shall be Established for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (22 February 1993), UN Doc. S/RES/808 (1993) [hereinafter UN Security Council Res. 808]; UN Security Council's Resolution 827 (1993), *Approving the UN Secretary-General's Report, Deciding to Establish the Tribunal, and Specifying Implementing Tasks* (25 May 1993), UN Doc. S/RES/827 (1993); 32 I.L.M. 1203-1205 (1993) [hereinafter UN Security Council Res. 827]; UN Security Council's Resolution 955 (1994), *Adopting the Statute of the International Criminal Tribunal for Rwanda* (8 November 1994), UN Doc. S/RES/955 (1994), 33 I.L.M. 1598-1613 (1994) [hereinafter UN Security Council Res. 955].

[212] Decision on the Defence Motion (Prosecutor v. Duško Tadić also Known as "Dule,") Decision of 10 August 1995, 35 I.L.M. 32, IT-94-1-AR72, at 48; Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Prosecutor v. Duško Tadić also Known as "Dule,") Decision of 2 October 1995, 35 I.L.M. 32, IT-94-1-AR72, at 48 [hereinafter Tadić Defence

Both statutes were drafted by the UN Department of Legal Affairs in a relatively short period of time and without going through the traditional procedure of enacting international treaties—involving in-depth debates and reviews—due to the urgency of the situation in both countries.[213] The rapid establishment of both judicial bodies resulted in ambiguity in the norms of their statutes and was manifested in technical shortcomings in the texts, particularly the absence of categorizing, defining, and distinguishing between gender-based crimes in a way that reflected the nature and magnitude of the lawbreaking. This deficiency gave sentencers an absolute power to interpret and adopt interpretations of the tribunals' statutory laws.

Similarly, neither the 1994 International Law Commission's (ILC) Draft Statute for an International Criminal Court, nor the 1998 Draft Statute and Draft Final Act—introduced during the last Preparatory Committee (PrepCom) meeting in Zutphen, the Netherlands in January 1998, and submitted for consideration by the Diplomatic Conference held in Rome between June 15 and July 17, 1998—contains definitions for crimes listed within the jurisdiction of the prospective

---

Motion for Interlocutory Appeal]; Decision on the Defence Motion on Jurisdiction, Trial Chamber (Prosecutor v. Joseph Kanyabashi), Decision of 18 June 1997, ICTR-96-15-T; Encyclopedia of Genocide and Crimes against Humanity, "International Criminal Tribunal for the former Yugoslavia," by P. Akhavan & M. Johnson, at 558 [hereinafter Akhavan & Johnson]; V. Morris & M. Scharf, The International Criminal Tribunal for Rwanda (Irvington-on- Hudson, N.Y.: Transnational Publishers, 1998) I: 91 [hereinafter Morris & Scharf].

[213] P. Tavernier, "The Experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda," (1997) 321 International Review of the Red Cross 607-608 [hereinafter Tavernier].

court.[214] As Leila Sadat has indicated, defining crimes within the Court's jurisdiction was one of the greatest challenges that the drafters encountered in Rome.[215] The Diplomatic Conference convened in strained circumstances, leaving several substantial issues argued over in the PrepCom meetings during the two years preceding the Conference, including a sophisticated text of the proposed statute containing 116 articles with approximately 1,400 words in brackets, essentially undetermined.[216]

The failure of the ILC to define crimes listed in the consecutive drafts of the Court's statute was due to the fact that the Draft Code and the Court Statute had historically proceeded as separate tasks, and due to the ILC's concerns that defining crimes might render the statute politically disagreeable, a problem that obstructed the establishment of an international criminal court since the woes of

---

[214] M. C. Bassiouni, "Observations Concerning the 1997-98 Preparatory Committee's Work," (1997) 25:2 Denver Journal of International Law and Policy 398 [hereinafter Bassiouni]; *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol.1, UN GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22; *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol.2, UN GAOR, 51st Sess., Supp. No. 22 A, UN Doc. A/51/22; *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Draft Statute and Draft Final Act, 14 April 1998, UN Doc. A/Conf.183/2/Add.1 [hereinafter Draft Statute and Draft Final].

[215] L. Wexler, "A First Look at the 1998 Rome Statute for a Permanent International Criminal Court: Jurisdiction, Definition of Crimes, Structure and Referrals to the Court," in M. C. Bassiouni, ed., *International Criminal Law: Enforcement*, vol. 3 (Ardsley, N.Y.: Transnational Publishers, 1999) 659 [hereinafter Wexler]; W. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2007) 17 [hereinafter Schabas].

[216] Boot, *supra* note 67, at 32; K. Askin, "Crimes within the Jurisdiction of the International Criminal Court," (1999) 10:1 Criminal Law Forum 33 [hereinafter Askin]; P. Hwang, "Defining Crimes against Humanity in the Rome Statute of the International Criminal Court," (1998) 22:2 Fordham International Law Journal 494 [hereinafter Hwang]; P. Kirsch, & J. Holmes, "The Rome Conference on an International Criminal Court: The Negotiating Process," (1999) 93 The American Journal of International Law 3 [hereinafter Kirsch & Holmes]; Wexler, *supra* note 215, at 655.

WWI.[217] Thus the drafters' work was faced with different impediments, including the states' varying interpretations and political agendas, the ambitious projects of NGO's, the lack of legal principles shaping the drafting process, particularly the principle of fair labelling, and the absence of legal technical expertise in the delegations of many participating states.[218]

2. Clash of Definitions and the Tribunals' Case Law

Indeed, as Richard Goldstone and Estelle Dehon point out, the absence of an accepted definition of rape in international law was a tangible challenge facing the ICTY and the ICTR in prosecuting gender-based crimes.[219] The systematic mass rape of Bosnian and Rwandan women between 1991 and 1995 challenged and developed the case law of these bodies, allowing them to contribute to the development of international humanitarian and human rights law, particularly on

---

[217] B. Moshan, "Women, War and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes against Humanity," (1998) 22 Fordham International Law Journal 173 [hereinafter Moshan]; D. Robinson, "Defining 'Crimes against Humanity' at the Rome Conference," (1999) 93:1 American Journal of International Law 43 [hereinafter Robinson]; D. Robinson & H. von Hebel, "War Crimes in Internal Conflicts: Article 8 of the ICC Statute," (1999) 2 Yearbook of International Humanitarian Law 197 [hereinafter Robinson & von Hebel]; G. Danilenko, "The Statute of the International Criminal Court and Third States," (2000) 21:3 Michigan Journal of International Law 484 [hereinafter Danilenko]; G. Dawson, "Defining Substantive Crimes within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression?," (2000) 19:3 New York Law School Journal of International and Comparative Law 424 [hereinafter Dawson]; Wexler, *supra* note 215, at 659.

[218] Boot, *supra* note 67, at 352; L. Wexler, "First Committee Report on Jurisdiction, Definition of Crimes and Complementary," in M. C. Bassiouni, ed., *The International Criminal Court: Observations and Issues* before the 1997-1998 Preparatory Committee and Administrative and Financial Implications (Chicago, Ill.: International Human Rights Law Institute, DePaul University, 1997) 167. Reprented in Wexler, L., "Committee Report on Jurisdiction, Definition of Crimes, and Complementarity," (1997) 25 Denver Journal of International Law and Policy 221 [hereinafter Wexler]; Wexler, *supra* note 215, at 660.

[219] Goldstone and Dehon, *supra* note 209, at 127.

gender-based crimes. This development has been reflected clearly in the Rome Statute of the ICC,[220] and in the SCSL Statute.[221]

ICTY and ICTR case law features a number of rape cases, three of which alone permitted three distinct definitions of rape based on the elements of the crime.[222] Drawing heavily on national laws, since no comprehensive definition of rape existed in international law,[223] Trial Chamber I of the ICTR defined rape in the Akayesu Judgement of 2 September 1998[224] as: "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."

---

[220] The ICC Statute broadened the concept of rape to cover other sexual assaults as crimes against humanity and war crimes. Article 7(1)(g) states that "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity," are crimes against humanity. Moreover Article 8(2)(b)(xxii) considered "committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7(2)(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva conventions," to be war crimes. See The Rome Statute of the ICC, *supra* note 46, Article 7(1)(g) and Article 8(2)(b)(xxii).

[221] Similarly, Article 2(g) of the Statute of the Special Court for Sierra Leone provides that "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence," as crimes against humanity. See *Statute of the Special Court for Sierra Leone*, UN Doc. S/2002/246, appendix II, 2178 U.N.T.S. 138. (06/03/2002) [hereinafter The Sierra Leone Statute]; T. Hansen-Young, "Defining Rape: A Means to Achieve Justice in the Special Court for Sierra Leone," (2005) 6 Chicago Journal of International Law 483 [hereinafter Hansen-Young].

[222] In chronological order, these cases are: *Akayesu* (1998); *Furundžija* (1998); and *Kunarac, et al.,* (2001). See de Brouwer, *supra* note100, at 105.

[223] A. Whyte, *Placing Blame or Finding Peace: A Qualitative Analysis of the Legal Response to Rape as a War Crime in the Former Yugoslavia* (M.A., University of Manitoba , 2005) 110-111[hereinafter Whyte]; Akayesu Judgement, *supra* note 34, at paragraph 686.

[224] Jean-Paul Akayesu, the Mayor of Taba Commune in Gitarama during the 1994 Rwandan genocide, has made history. He was the first defendant to appear before the ICTR and to be charged with rape as a crime against humanity in connection with Articles 3(g) of the ICTR Statute, Article 4(e) of the Protocol II Additional to the Geneva Conventions echoed in Article 4(e) of the ICTR Statute, and Article 3 common to the 1949 Geneva Conventions. See Additional Protocol II, *supra* note 208, at Article 4(e); Geneva IV, *supra* note 208, at Article 3; The ICTR Statute, *supra* note 207, at Article 3(g); P. Sellers, "The Cultural Value of Sexual Violence," (1999) 93 American Society of International Law, Proceedings of the Annual Meeting 312 [hereinafter Sellers].

At the same time, the Tribunal defined sexual violence, including rape, as "any act of [a] sexual nature which is committed on a person under circumstances which are coercive."[225]

While this landmark definition of rape has restricted the elements of the crime to (a) a physical invasion (penetration) of a sexual nature, (b) committed on a person (male or female), and (c) under circumstances which are coercive (against the victim's will or without her or his consent),[226] the Tribunal conceded that "sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[227] Simultaneously, the Tribunal noted that "rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual." For example, the Tribunal considered "the *interahamwe*s thrusting a piece of wood into the sexual organs of a woman as she lay dying," an

---

[225] A. Kalosieh, "Consent to Genocide?: The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foča," (2003) 24:2 Women's Rights Law Reporter 130 [hereinafter Kalosieh]; Akayesu Judgement, *supra* note 34, at paragraph 598; C. MacKinnon, "Defining Rape Internationally: A Comment on *Akayesu*," (2006) 44 Columbia Journal of International Law 944 [hereinafter MacKinnon]; J. van-der-Vyver, "Prosecution and Punishment of the Crime of Genocide," (1999) 23:2 Fordham International Law Journal 311 [hereinafter van-der-Vyver]; R. Haffajee, "Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory," (2006) 29 Harvard Journal of Law & Gender 206 [hereinafter Haffajee].

[226] In the Muhimana Judgement, the Trial Chamber III of the ICTR ruled that "coercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape." See Muhimana Judgement, *supra* note 75, at paragraph 546.

[227] The Tribunal considered the incident described by Witness KK in which Akayesu ordered the *Interahamwe* to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, an act of sexual violence. See Akayesu Judgement, *supra* note 34, at paragraph 688; M. Karagiannakis, "The Definition of Rape and its Characterization as an Act of Genocide: A Review of the Jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia," (1999) 12 Leiden Journal of International Law 479 [hereinafter Karagiannakis].

act of rape.[228] This instrumental rape, like other forms of sexual violence, constitutes a method of torture and sexual mutilation.[229]

However, this broad definition of rape, as established in the Akayesu Judgement, was the first conceptual definition that refrained from specifying sexual organs and that did not require penetration or the lack of consent as essential elements of the crime of rape articulated in classical definitions. In contrast to the prosecution's and the defence's attempts to elicit an explicit description of rape in physical terms, the Tribunal ruled that "rape is a form of aggression and the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts," thereby establishing a more acceptable definition that would protect the victims, particularly in cases of mass violence, and recognize cultural diversity on the concept of rape as a violation of the victim's personal dignity. Later on, the same Trial Chamber arrived at the

---

[228] In this connection, in the Čelebići Judgement, the Trial Chamber II of the ICTY indicated that vaginal or anal penetration by the penis under coercive circumstances constituted rape. Moreover, the Chamber ruled that the act of forcing victims to perform fellatio on one another constituted a fundamental attack on their human dignity as an offence of inhuman and cruel treatment under Articles 2 and 3 of the ICTY Statute, and noted that such an act "could constitute rape for which liability could have been found if pleaded in the appropriate manner." See Akayesu Judgement, *supra* note 34, at paragraph 686; Čelebići Judgement, *supra* note 45, at paragraphs 1065-1066 & 940. Paragraph 940 was literally echoed in paragraph 962; S. Sivakumaran, "Sexual Violence against Men in Armed Conflict," (2007) 18:2 The European Journal of International Law 263-264 [hereinafter Sivakumaran].

[229] In his report submitted to the UN Commission on Human Rights on the issue of torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur Nigel Rodley stated that he received abundant information regarding the practice of rape and sexual abuse as a weapon to punish, intimidate and humiliate victims, who were mostly women. He added that rape and other forms of sexual abuse were apparently associated with other methods of torture. See D. Taylor, "Congo Rape Testimonies: Aged One to 90, the Victims of Hidden War against Women," *The Guardian* (5 December 2008) 17 [hereinafter Taylor]; UN Commission on Human Rights, *Report of Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment,* UN Doc. E/CN.4/1994/31, (6 January 1994), at paragraphs 431-432.

same decision in the Musema Judgement when it asserted that "the essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion."[230] It must be emphasized that the above definition has been reflected in a number of ICTR and ICTY judgments of war crime suspects charged with rape as a crime against humanity between 1998 and 2005.[231] The Trial Chambers at both Tribunals had no difficulty adopting and endorsing the definition of rape and sexual violence articulated in the Akayesu Judgement, or agreeing with its conclusion.[232]

The Tribunals' case law led to a new definition of rape enacted in the Furundžija Judgement by Trial Chamber II of the ICTY. Noting that no definition of rape existed in international law, and relying on Article 5 of the ICTY Statute, Article 27 of the Geneva Convention IV, Article 76(1) of the Additional Protocol I, and Article 4(2)(e) of the Additional Protocol II,[233] the Chamber concluded that

---

[230] Akayesu Judgement, *supra* note 34, at paragraph 687; de Brouwer, *supra* note 100, at 107 & 109; Musema Judgement, *supra* note 199, at paragraph 226.

[231] Namely, Čelebići Judgement, *supra* note 45, at paragraphs 478-479; Muhimana Judgement and Sentence, *supra* note 75, at paragraphs 535-551; Musema Judgement and Sentence, *supra* note 199, at paragraphs 220 & 226; Niyitegeka Judgement and Sentence, *supra* note 75, at paragraph 456.

[232] Čelebići Judgement, *supra* note 45, at paragraphs 478-479; Musema Judgement, *supra* note 199, at paragraphs 20-27; Muhimana Judgement, *supra* note 75, at paragraph 535.

[233] A. de Busschere, "The Human Treatment of Women in Times of Armed Conflict: Equality and the Law of Humanity," (1987) 26:1-3 Revue de droit penal militaire et de droite de la guerre 595 [hereinafter de Busschere]; Additional Protocol I, *supra* note 208, at Article 76(1); Additional Protocol II, *supra* note 208, at Article 4(2)(e); C. Cissé, "The End of a Culture of Impunity in Rwanda? Prosecution of Genocide and War Crimes before Rwandan Courts and the International Criminal Tribunal for Rwanda," (1998) 1 Yearbook of International Humanitarian Law 172 [hereinafter Cissé]; C. Cleiren & M. Tijssen, "Rape and other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues," (1994) 5:2-

rape "is a forcible act of the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object."[234] In this definition, the Chamber limited the elements of the crime of rape to:

> "(i) the sexual penetration, however slight:
> (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator;
> or
> (b) of the mouth of the victim by the penis of the perpetrator;
> (ii) by coercion of force or threat of force against the victim or a third person."[235]

From what has been said, it becomes clear that the ICTY Trial Chamber definition of rape in the Furundžija Judgement distinguished between the actual rape resulting in the sexual penetration of the vagina or anus of the victim by the penis of the perpetrator, on the one hand, and other sexual assaults falling short of actual penetration, on the other. This was in spite of the fact that the latter constitutes serious abuse of a sexual nature upon the physical and moral integrity

---

3 Criminal Law Forum 471-506. Reprinted in (1996) Nemesis Essays 483 [hereinafter Cleiren]; C. Meindersma, "The Prosecution of Rape and other Forms of Sexual Assault before the International Tribunal for the Former Yugoslavia," (1996) Nemesis Essays 146 [hereinafter Meindersma]; C. Nier, "The Yugoslavian Civil War: An Analysis of the Applicability of the Laws of War Governing Non-International Armed Conflicts in the Modern World," (1992) 10:2 Dickinson Journal of International Law 314-315 [hereinafter Nier]; Furundžija Judgement, *supra* note 69, at paragraph 175; Geneva IV, *supra* note 208, at Article 27; K. Askin, "Women's Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC," in D. Shelton, ed., *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsley, N.Y.: Transnational Publishers, Inc., 2000) 55 [hereinafter Askin]; P. Sellers, "Emerging Jurisprudence on Crimes of Sexual Violence," (1998) 13 American University International Law Review 1523 [hereinafter Sellers]; T. Meron, *War Crimes Law Comes of Age: Essays* (New York, N.Y.: Oxford University Press, 1998) 204 [hereinafter Meron].

[234] Furundžija Judgement, *supra* note 69, at paragraph 174; K. Askin, "The International War Crimes Trial of Anto Furundžija: Major Progress toward Ending the Cycle of Impunity for Rape Crimes," (1999) 12 Leiden Journal of International Law 947 [hereinafter Askin].

[235] Furundžija Judgement, *supra* note 69, at paragraph 185.

of the victim by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity.[236] Furthermore, the Furundžija definition was in sharp contrast to the Akayesu definition of rape. While Trial Chamber I of the ICTR explicitly rejected a mechanical definition of rape as proposed by the prosecution and found in many national laws, the Furundžija conceptual definition stated the body parts in minute detail. Based on the above discussion, one might conclude that the Furundžija definition is more accurate and the Akayesu broader; in any event, this has qualified the first as the most acceptable definition of the crime of rape in international law at the present time and for the foreseeable future.[237]

Although Trial Chamber II of the ICTY established in the Furundžija Judgement what could be considered the most detailed and accurate legal definition of rape in international law, Trial Chamber I of the ICTY partially overlooked it and enacted another definition in the following judgement against Kunarac, Kovač, and Kuković,[238] which reads:

> "… the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator: or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be

[236] *Ibid.* at paragraph 186.

[237] Akayesu Judgement, *supra* note 34, at paragraph 687; de Brouwer, *supra* note 100, at 114-115; K. Askin, Kunarac Judgment," (2001) 8:3 Human Rights Brief 22 [hereinafter Askin].

[238] de Brouwer, *supra* note 100, at 116; M. Walsh, "Gendering International Justice: Progress and Pitfalls at International Criminal Tribunals," in D. Pankhurst, ed., *Gendered Peace: Women's Struggles for Post-War Justice and Reconciliation* (New York, N.Y.: Routledge, 2008) 41 [hereinafter Walsh].

> consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the, intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."[239]

A comparison of the above-stated definitions reveals that the Trial Chamber in the Kunarac, Kovač, and Vuković Judgement had literally adopted the first part of the Furundžija definition of rape, stating clearly the mechanical description of the sexual organs and objects involved in the act of rape, and substituting the second part, i.e., "(ii) by coercion or force or threat of force against the victim or third person,"[240] with the phrase "… without the consent of the victim." Notwithstanding the fitness of the Furundžija definition to the circumstances of the case, the Kunarac, Kovač, and Vuković judges felt that it was limited, too restrictive and did not adequately address the requirements of international law. Moreover, they perceived that the Furundžija definition made "coercion, force or threat of force against the victim or a third person" a condition for considering the relevant act of sexual penetration a crime of rape. On the other hand, the definition "did not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim."[241]

After a considerable and comprehensive verification of the world's major national criminal codes on the definition of the crime of rape, which specified the nature of the sexual acts and the circumstances that rendered those acts criminal,

---

[239] Kunarac Judgement, *supra* note 94, at paragraph 460.

[240] Furundžija Judgement, *supra* note 69, at paragraph 185.

[241] Kunarac Judgement, *supra* note 94, at paragraph 438.

the Trial Chamber identified a large range of different factors that allowed it to classify the relevant sexual acts into three broad categories, each constituting the crime of rape:[242]

> "(i) the sexual activity is accompanied by force or threat of force to the victim or a third party ;[243]
>
> (ii) the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal;[244] or
>
> (iii) the sexual activity occurs without the consent of the victim."[245]

In addition to element (i) "force or threat of force to the victim or a third party," the Trial Chamber introduced two new elements in categories (ii) and (iii). In category (ii), the judges conceived that putting the victim in a state of being unable to resist because of physical or mental incapacity, or inducing her into the act by surprise or misrepresentation, constituted an element of the crime of rape.[246] Similarly, in category (iii) the Trial Chamber considered the absence of consent, including any situation where the victim has no chance for reasoned

---

[242] *Ibid,* at paragraph 442.

[243] *Ibid.* at paragraphs 443-445, where the Trial Chamber cites the criminal codes of Austria; Bosnia-Herzegovina; China; Germany; Korea; Maryland (U.S.); Massachusetts (U.S.); New York (U.S.); Norway; and Sierra Leone.

[244] *Ibid.* at paragraphs 447-451, referring to the penal codes of Argentina; California (U.S.); Costa Rica; Denmark; Estonia; France; Finland; Italy; Japan; The Philippines; Portugal; Switzerland; and Uruguay.

[245] *Ibid.* at paragraphs 453-456, stating that this category is established in the penal codes of Australia; Bangladesh; Belgium; Canada; England; India; New Zealand; Nicaragua; South Africa; and Zambia.

[246] Kunarac Judgement, *supra* note 94, at paragraph 446.

refusal, as another key element of the crime.[247] As a matter of fact, this factor was recognized in the Furundžija case, but never stated in the definition of rape contained in the judgment.[248]

However, as already discussed above, the lack of consent is difficult to prove, particularly in sexual offences committed in wartime settings. To avoid classical rape trials, where certain standards of evidence have traditionally discriminated against women and obstructed their access to judicial bodies, the ICTY established Rule 96 to impose limits on evidence relating to cases of sexual nature before the Tribunal.[249] This rule provides:

> "In cases of sexual assaults:
> (i) no corroboration of the victim's testimony shall be required;
>
> (ii) consent shall not be allowed as a defence if the victim:
> (a) has been subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression, or
>
> (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
>
> (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;

---

[247] de Brouwer, *supra* note 100, at 117.

[248] Furundžija Judgement, *supra* note 69, at paragraph 80; Kunarac Judgement, *supra* note 94 at paragraph 440.

[249] F. Aolain, "Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War," (1997) 60:3 Albany Law Review 892 [hereinafter Aolain]; K. Fitzgerald, "Problems of Prosecution and Adjudication of Rape and other Sexual Assaults under International Law," (1997) 8:4 European Journal of International Law 638 [hereinafter Fitzgerald].

(iv) prior sexual conduct of the victim shall not be admitted into evidence."[250]

There is no doubt that the Preparatory Committee for the International Criminal Court was influenced by ICTY and ICTR case law. This was reflected in the Elements of Crimes (EoC) prepared to help the court in its interpretation and application of Articles 6 (genocide), 7 (crimes against humanity), and 8 (war crimes) as stated in article 9 of the ICC Statute, and in keeping with the PrepCom mandate.[251] As wartime rape in the former Yugoslavia and Rwanda fits the crime of genocide as well as crimes against humanity and war crimes under the ICC Statute, the PrepCom provided three sets of EoC on the definition of rape: one according to Article 7(1)(g), crimes against humanity; another according to Article 8(2)(b)(xxii), war crimes associated with an international armed conflict;

---

[250] *ICTY: Rules of Procedure and Evidence*, UN Doc. IT/32 (1994), 11 February 1994, reprinted in 33 I.L.M. 484 [hereinafter ICTY Rules]; J. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (Irvington-on-Hudson, N.Y.: Transnational Publishers, Inc., 1998) 311 [hereinafter Jones]; Kunarac Judgement, *supra* note 94, at paragraph 462.

[251] The PrepCom was established by the Rome Conference of Plenipotentiaries on the Establishment of an International Criminal Court, and mandated by the conference to prepare proposals for the practical operation of the ICC, including: draft texts of Rules of Procedure and Evidence; Elements of Crimes, a relationship agreement; financial regulations and rules; an agreement on privileges and immunities of the court; a budget for the first financial year; the rules of procedure of the Assembly of State Parties; and proposals on a provision on aggression. On 30 June 2000, the PrepCom adopted finalized draft texts of the Rules of Procedure and Evidence (PCNICC/2000/1/Add.1) and Elements of Crimes (PCNICC/2000/1/ Add.2). See de Brouwer, *supra* note 100, at 130; J. Lee, et al., *Annotated Rome Statute of the International Criminal Court* (Vancouver, B.C.: International Center for Criminal Law Reform & Criminal Justice Policy, 2002) 4 [hereinafter Lee]; V. Oosterveld, "Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court" (2005) 12(1) *New England Journal of International and Comparative Law* 124 [hereinafter Oosterveld].

and a third according to Article 8(2)(e)(vi), war crimes associated with an armed conflict of an international character.[252]

The ICC's Common Elements of Crimes on the definition of rape were characterized, in its Finalized Draft Text, as follows:[253]

> "1. The perpetrator invaded (15) the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
>
> 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. (16)
>
> (15) The consent of "invasion" is intended to be broad enough to be gender-neutral.
>
> (16) It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 7(1) (g) -3, 5 and 6. "

Judging by the above elements, and in light of the definitions of the crime of rape provided in judgements rendered by the ICTY and the ICTR Trial Chambers prior to the establishment of the PrepCom, they look relatively similar to the definition stated in the Furundžija Judgement.[254] Although these elements

---

[252] *Finalized Draft Text of the Elements of Crimes,* UN Doc. PCNICC/2000/1/Add.2, (2 November 2000), at pp. 12, 34, and 43 [hereinafter Finalized Draft]; P. Akhavan "Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes against Humanity and Genocide," (2000) 94 American Society of International Law Proceedings 284 [hereinafter Akhavan]; P. Spees, "Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power," (2003) 28 Signs: Journal of Women in Culture and Society 1241[hereinafter Spees].

[253] Finalized Draft, *supra* note 252, at p. 12.

[254] Furundžija Judgement, *supra* note 69, at paragraph 174.

concentrate on the mechanical description of the rape process, they do not explicitly specify the names of the sexual organs involved in the criminal act of rape, rendering them more acceptable in the international criminal justice system.[255]

3. Codification of Gender-Based Crimes and the Principle of Fair Libelling

A closer look at the above discussion reveals that none of the *ad hoc* tribunals or ICC statutory laws has provided any definition for rape or other gender-based crimes. The ICTY and the ICTR statutes list rape under crimes

---

[255] These elements reflect the concept of gender neutrality articulated in the definitions of rape in the above Judgements. In spite of the fact that most of the wartime rape victims were women, investigations brought to light that men were also raped in ethnic conflicts and mass violence in the former Yugoslavia and Rwanda, and recently in American prisons in occupied Iraq. These assaults were committed either by men against men or women against men. In a personal interview with the author, on 6 June 1998, Dr. S. Lang, Office of the President of the Republic of Croatia, revealed that thousands of Croatian captive men were sexually assaulted in detention camps by Serbian militia men and women. This information was confirmed by a Croatian eyewitness soldier. In testimony to the Medical Center for Human Rights, he claimed that he was forced by Serbian soldiers to watch the castration of a Croatian man by a female *Četnik*. Furthermore, Pauline Nyiramasuhuko was indicted by the ICTR Prosecutor for ordering Hutu militia men and gendarmes to rape and sexually assault Tutsi women and girls. In the same fashion, during the late nineties' civil war in Sierra Leone, female abductees were subjected to virginity checks and manually raped by female rebels prior to their deflowering by male rebels. Moreover, female rebels forced men to have sexual intercourse at gunpoint. In the January 1999 invasion of Freetown, a female rebel forced a male civilian to have sex. Recently, Lynndie Rana England, a U.S. Army reservist, was sentenced to three years confinement on 27 September 2005, by a U.S. Military Court Martial at Fort Hood's Williams Judicial Centre. She was charged with violations of the Uniform Code of Military Justice, particularly, inflicting sexual, physical and psychological abuse on Iraqi prisoners of war at Baghdad's central confinement facility at Abu Ghraib. See de Brouwer, *supra* note 100, at 133; C. Sperling, "Special Feature: Women as Perpetrators of Crime: Mother of Atrocities: Pauline Nyiramasuhuko's Role in the Rwandan Genocide," (2006) 33 Fordham Urban Law Journal 653-654 [hereinafter Sperling]; L. Sjoberg, Gender, *Justice, and the Wars in Iraq: A Feminist Reformulation of Just War Theory* (Lanham, MD: Lexington Books, 2006) 144 [hereinafter Sjoberg]; *Lynndie Rana England*, Online: Wikipedia Encyclopedia <http://en.wikipedia.org/wiki/lynndie_england> (Accessed on: 5 June 2008); P. Oosterhoff, et al., "Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret," (2004) 12:24 Reproductive Health Matters 74-75 [hereinafter Oosterhoff]; *Prosecutor* v. *Pauline Nyiramasuhuko & Shalom Ntahobali*, Amended Indictment of 11 August 1999, ICTR-97-21-I, at paragraph 6.53 [hereinafter Nyiramasuhuko Indictment]; "*We'll Kill You if You Cry,": Sexual Violence in the Sierra Leone Conflict,* Human Rights Watch, January 2003, Vol. 15, No. 1 (A) [hereinafter We'll Kill You].

against humanity, while the Rome Statute of the ICC subsumes rape and other forms of sexual violence under both crimes against humanity and war crimes. The Statute of the SCSL echoes the same list of gender-based crimes, except enforced sterilization, under crimes against humanity. Hence, although the above statutes are considered the first international criminal laws to recognize gender-based crimes as crimes against humanity and war crimes, the drafters utterly failed to provide an explicit definition of these crimes, except for the Rome Statute's controversial definition of the crime of forced pregnancy, which focuses on the consequences of making one or more women forcibly pregnant "affecting the ethnic composition of her population"[256] while ignoring their physical and psychological suffering. On the other hand, despite the fact that the Trial Chamber I of the ICTR in Akayesu case has succeeded in taking a "key step toward filling the gender crimes lacuna in international law"[257] by providing the first definition of rape by an international criminal judicial body, Trial Chambers I and II of the ICTY have overlooked the ICTR's definition of rape in the Akayesu decision and provided two distinct definitions in two different consecutive cases. Nonetheless, the ambiguity and abstractness of the statutory laws of the *ad hoc* tribunals and the ICC, as well as the incompatible definitions of rape provided by the ICTR and

[256] K. Boon, "Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent," (2001) 32:3 Columbia Human Rights Law Review 659 [hereinafter Boon];The Rome Statute of the ICC, *supra* note 46, at Article 7(2)(f).

[257] Goldstone and Dehon, *supra* note 209, at 127.

the ICTY, have led to inconsistent prosecutions and convictions and violate the principle of fair labelling and other principles of criminal justice.

Moreover, providing varied definitions for one gender-based crime, i.e., rape, and leaving the interpretation of other sexual crimes to the trial chambers, infringe the principle of fair labelling, which insists on making distinctions between crimes by categorizing, defining, and labelling them to represent fairly the nature of each gender-based crime and determining its degree of seriousness. This is to ensure proportionality between the stigma and punishment attached to each sexual offence.[258] Although rape was a common sexual crime in warfare in the former Yugoslavia and Rwanda, there were other serious sexual crimes that have been ignored in the statutory laws of the tribunals, placing the tribunals in a dilemma: for example, because the ICTY Statute failed to recognize sexual slavery as a distinct crime under crimes against humanity, Trial Chamber I of the ICTY in Foča case charged the defendants with both crimes, rape and enslavement, by implementing the 1926 Slavery Convention's definition of enslavement in the broadest terms.[259] Furthermore, due to the failure of the drafters of the SCSL to list forced marriage as a distinct crime among crimes against humanity, Trial Chamber II of the SCSL in the *Brima, et al.* case dismissed charges of forced marriage considering it mislabelling of the crime of sexual slavery, despite the fact that the SCSL was the first international criminal

[258] Robinson, *supra* note 22, at 926; Stuart, *supra* note 47, at 27; *R.* v. *Martineau*, *supra* note 47, at p. 3.

[259] Argibay, *supra* note 200, at 384; Kunarac Judgement, *supra* note 94, at paragraph 782; Slavery Convention, *supra* note 200, at Article 1.

judicial body to prosecute sexual slavery and forced marriage as such.[260] In this case the court considered forced marriage a form of sexual slavery, then dismissed changes of sexual slavery and subsumed both acts under the war crimes charge of outrage upon personal dignity.[261] As Valerie Oosterveld observes, subsuming forced marriage under sexual slavery diminishes and misjudges women's suffering and raises the question of the future conceptualization of such multifaceted gender-based crimes—[262]a topic that will be the object of analysis in a separate research project.

Examining the tribunals' different definitions of rape in light of the principle of fair labelling, one may find them broad and ambiguous, for example, the Akayesu Judgement's definition of rape as "physical invasion of a sexual nature."[263] This definition presents a huge umbrella that may cover several sexual offences that need to be separated, defined and labelled in a manner that represents the nature of each crime and the degree of its seriousness. Moreover, in the Furundžija case, Trial Chamber II of the ICTY made another wide-ranging

---

[260] *Decision on the Prosecution Request for Leave to Amend the Indictment (Prosecutor* v. *Alex Tamba Brima, et al.)*, Decision of 6 May 2004, SCSL-2004-16-PT. [hereinafter AFRC Indictment Amendment]; *Decision on the Prosecution Request for Leave to Amend the Indictment (Prosecutor* v. *Issa Sesay, et al.)*, Decision of 6 May 2004, SCSL-2004-15-PT. [hereinafter RUF Indictment Amendment].

[261] Brima Judgement, *supra* note 72, at paragraph 176-177.

[262] B. Nowrojee, "Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims," (2005) 18 Harvard Human Rights Journal 102 [hereinafter Nowrojee]; V. Oosterveld, "The Special Court for Sierra Leone, Child Soldiers and Forced Marriage: Providing Clarity or Confusion?" (2007) 45 Canadian Yearbook of International Law 154 [hereinafter Oosterveld]; V. Oosterveld, "The Special Court for Sierra Leone's Consideration of Gender-Based Violence: Contributing to Transitional Justice?" (2009) 10:1 Human Rights Review 75 [hereinafter Consideration of Gender-Based Violence].

[263] Akayesu Judgement, *supra* note 34, at 598.

definition of rape in considering forcible oral sex as a form of rape.[264] Similarly, in the Musema case, Trial Chamber I of the ICTR refrained from the Furundžija mechanical definition and preferred to consider the definition of rape provided in Akayesu, asserting that the essence of rape is not in the description of body parts or objects involved, but in the aggression of a sexual nature under coercive conditions.[265] Furthermore, in *Kunarac, et al*., Trial Chamber II of the ICTY adopted another definition of rape by considering the first part of Furundžija's definition of rape and substituting the second part "by coercion or force or threat of force against the victim or third person" with the phrase "without the consent of the victim."[266] This definition, focusing on the consent of the victim, failed to prosecute rape as a form of sexual slavery. Instead, the perpetrators were convicted of rape and enslavement in the traditional senses of the terms.[267]

However, the lack of a clear definition of rape and other gender-based crimes in the statutory laws of the tribunals, has resulted in treating them as secondary crimes for several years following the establishment of the tribunals. For example, despite the fact that rape was common in the Taba Commune where Akayesu served as a mayor during the 1994 Rwandan genocide, his first

---

[264] Furundžija Judgement, *supra* note 69, at paragraph 184.

[265] Musema Judgement, *supra* note 199, at paragraph 226.

[266] Kunarac Judgement, *supra* note 94, at paragraph 185.

[267] *Ibid*. at paragraph 782.

indictment from 1996 did not include any rape charges.[268] Moreover, in a recent judgment, the SCSL was silent on gender-based crimes committed by members of the Civil Defence Forces (CDF), including rape, sexual slavery and forced marriage. This was due to judicial decisions made throughout the trial which excluded evidence of these crimes.[269]

Another critical issue in this respect is subsuming rape under crimes against humanity. This simply means that for this crime to be prosecuted, it should be committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds," which would leave thousands of gender-based crimes in occupied cities and suburbs outside the jurisdiction of the tribunals. However, these deficiencies have been reflected in the dilemma of prosecuting gender-based crimes, and have led to inconsistent verdicts and punishments, thereby posing barriers to justice and furthering the cycle of impunity for sexual-based crimes.

Although Richard Goldstone[270] and other commentators, including the author,[271] have viewed rape definitions when handed down by tribunals as a

---

[268] Oosterveld, *supra* note 251, at 126.

[269] Consideration of Gender-Based Violence, *supra* note 262, at 75.

[270] Goldstone and Dehon, *supra* note 209, at 128.

[271] H. Zawati, "De Bosnie-Herzégovine au Rwanda, le Kosovo et la Tchétchénie: déclaration de la guerre sur le corps des femmes," dans *Atelier: le viol au masculin et au féminin: sévices sexuelles en conditions de violence.* Réseau d'intervention auprés des personnes ayant subi la violence organisée (RIVO), Montréal, Québec, 27 octobre 2000); H. Zawati, Old Weapon, New Crimes: Wartime Rape of Kosovar Women as a Crime against Humanity," (Institute of Islamic Studies Lecture Series, McGill University, 15 March 2000).

victory in the fight against gender-based crimes and impunity, these definitions violate the principle of fair labelling on several grounds: first, these definitions constitute *ex-post facto* laws, violating also the principle of *nullum crimen sine lege*, which insists on the existence of a law at the time of commission of a crime, and that the definition of the crime be strictly construed and not extended by analogy. Both principles of legality and the principle of fair labelling require that offences should be well defined in the statutory laws, since no one should be punished for conduct unless it has been clearly stated in a statute or regulation that such conduct constitutes a crime, and so long as prior fair notice has been provided to the offender;[272] second, these definitions are broad enough, particularly in the Akayesu definition "physical invasion of a sexual nature," to eliminate distinctions between different types of sexual violence. Accordingly, the tribunals laid down several definitions in different cases to represent the nature of the sexual offence in question and to reflect the defendant's *mens rea* in inflicting physical and psychological pain of a sexual nature on the victim in a coercive condition, amounting to rape in the act of genocide in the Akayesu case,[273] oral sex—fellatio—in Delalić,[274] torture and outrages upon personal dignity in Furundžija,[275] and enslavement—sexual slavery—in Kunarac, et al.;[276] and

---

[272] Karagiannakis, *supra* note 227, at 483; The Rome Statute of the ICC, *supra* note 46, at Article 22(1).

[273] Akayesu Judgement, *supra* note 34, at paragraphs 731-734.

[274] Čelebići Judgement, *supra* note 45, at paragraph 1066.

[275] Furundžija Judgement, *supra* note 69, at paragraph 163 & 183.

finally, the broad definition of rape results in unfair labelling of the offender. Accordingly, it prevents ensuring a proportionate response to the offence, and undermines the law's educative and declaratory function. Indeed, sending a misleading message to the public tends to subvert the socio-pedagogical influence of the punishment applied, which in turn offends the principle of fair labelling.

V. Concluding Remarks

This chapter revealed that the drafters of the statutory laws of the *ad hoc* international criminal tribunals and the Rome Statute of the ICC have failed to respond adequately to wartime rape and other forms of sexual violence perpetrated in the 1990s and thereafter. Although rape, *per se*, is clearly condemned under the tribunals' statutes and recognized as a crime against humanity and a war crime, no clear-cut definition of this atrocious crime was provided, putting the tribunals in a dilemma. The absence of legal definitions and labelling for rape and other sexual assaults creates a lack of uniformity and consistency on both the prosecutorial and sentencing levels. For example, the terms "forced impregnation," "forced pregnancy," "forced maternity," 'forced abortion," "forced prostitution," "forced marriage," and "sexual slavery," are often used interchangeably, synonymously, and sometimes cumulatively.[277]

---

[276] Kunarac Judgement, *supra* note 94, at paragraphs 883 & 886.

[277] A. Biehler, "War Crimes against Women," Book Review of *War Crimes against Women: Prosecution in International War Crimes Tribunals*, by K. Askin (2002) 13:4 Criminal Law Forum 507 [hereinafter Biehler]; *Guidelines for Medico-Legal Care for Victims of Sexual*

Furthermore, in accordance with the principle of legality, the drafters have expressly limited the tribunals' jurisdiction only to try and punish crimes recognized by the statutory laws, creating a fundamental conflict with the tribunals' rape prosecutions due to the lack of description and labelling. While the Statute of the ICTY, for example, lists rape as a crime against humanity, it fails to list it in Article 2, which specifies grave breaches of the laws of war. In other words, to charge rape as a crime of war, the prosecutor has to list it as a form of other accepted crimes.

Although the Rome Statute of the ICC includes an impressive list of sexual and gender-based crimes, codifying them as part of the jurisdiction of the ICC, it failed to define these crimes among other definitions stated in Article 7 (2) except "forced pregnancy." Likewise, the statute failed to place rape and sexual violence under the category of humiliating and degrading treatment rather than that of grave breaches and serious violations. Another critical point is that, in spite of the Akayesu Judgement's historical decision in recognizing rape as an act of genocide, the drafters of the statute have excluded rape and other gender-based crimes from Article (6), which incorporates verbatim the definition of genocide

---

Violence (Geneva: World Health Organization, 2003), p. 6 [hereinafter Legal Care for Victims of Sexual Violence]; H. Hallock, "The Violence against Women Act: Civil Rights for Sexual Assault Victims," (1992-1993) 68 Indiana Law Journal 584 [hereinafter Hallock]; K. Askin, *War Crimes against Women:* Prosecution in International War Crimes Tribunals (The Hague: Kluwer Law International 1997) 12 [hereinafter Askin]; L. Saltzman, et al., "National Estimates of Sexual Violence Treated in Emergency Departments," (2007) 49:2 Annals of Emergency Medicine 211 [hereinafter Saltzman]; J. Shargel, "In Defense of the Civil Rights Remedy of the Violence against Women Act," (1997) 106-6 The Yale Law Journal 1851 [hereinafter Shargel]; R. Willis, "The Gun Is Always Pointed: Sexual Violence and Title III of the Violence against Women Act," (1991-1992) Georgia Law Journal 2199 [hereinafter Willis].

found in Article 2 of the Genocide Convention, Article 4 of the Statute of the ICTY, and Article 2 of the Statute of the ICTR respectively.

However, subdividing, labelling, and making distinctions between different kinds of offences and degrees of lawbreaking, as suggested by the principle of fair labelling, are essential in emphasizing two main principles of criminal law: proportionality and the socio-pedagogical influence of punishment. The principles of fundamental justice require ensuring a proportionate response to different offences, which implies labelling and punishing offenders in proportion to their law breaking, and which reinforces social and criminal justice system standards. Moreover, labelling assists the criminal law's educative function by ensuring a more direct relationship with the common patterns of thought in the society.[278]

Based on the above discussion, and in light of the principle of fair labelling, gender-based crimes incorporated in the provisions of the statutory laws of the international criminal tribunals should, firstly, be defined with sufficient specificity to capture what is morally significant about them, and, secondly, these crimes must be structured in a way that would reflect their nature and degree of seriousness—two requirements that the drafters of the tribunals' statutes failed to meet. The broad gender-based offence label, comprising everything from forced nudity and rape to sexual slavery and forced impregnation, runs the risk of allowing too much discretionary power to investigators and sentencers—a

[278] Ashworth, *supra* note 2, at 88-89.

situation that may result in inconsistent prosecutions and verdicts. This is a timely topic that will be discussed in detail in the following chapter.

Finally, while the international community and States Parties are preparing for the first "Review Conference on the Rome Statute,"[279] this chapter calls for the reconceptualization of gender-based crimes in the statutory laws of the international criminal tribunals, particularly the Rome Statute of the ICC, in light of the principle of fair labelling.

[279] Article 123 of the Rome Statute of the ICC calls for a 'Review Conference' to be held seven years after the entry of the Statute into force. This conference will be held in Kampala, Uganda, between 31 May and 11 June 2010. See R. Clark, "Possible Amendments for the First ICC Review Conference in 2009," (2007) 4 New Zealand Yearbook of International Law 103 [hereinafter Clark].

Chapter Three
Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes in the International Criminal Tribunals

I. Introduction

As already pointed out in the previous chapter, following Richard Goldstone and Estelle Dehon, the absence of an accepted definition of rape in international law was a tangible challenge facing the ICTY and the ICTR in prosecuting gender-based crimes.[1] Nevertheless, before addressing this issue by looking into the case law of the international criminal tribunals and examining shortcomings related to major cases of this type in the light of the principle of fair labelling, this chapter reviews feminists' legal writing and traces their controversial arguments regarding the prosecution of gender-based crimes in the above tribunals, as well as their role in surfacing these crimes in modern international criminal law.[2] Notwithstanding their success in changing the

[1] R. Goldstone & E. Dehon, "Engendering Accountability: Gender Crimes under International Criminal Law," (2003) 19 New England Journal on Public Policy 127 [hereinafter Goldstone & Dehon].

[2] C. Mackinnon, "Genocide's Sexuality," in M. Williams & S. Macedo, eds., *Political Exclusion and Domination* (New York, N.Y.: New York University Press, 2004) 315, reprinted in C. MacKinnon, *Are Women Human?: And Other International Dialogues* (Cambridge, MA: Belknap Press of Harvard University Press, 2006) 209-233 [hereinafter Genocide's Sexuality]; C. Mackinnon, "Rape, Genocide, and Women's Human Rights," in S. French, et al., eds., *Violence against Women: Philosophical Perspectives* (London: Cornell University Press, 1998) 43, previously printed in "Rape, Genocide, and Women's Human Rights," (1994) 17 Harvard Women's Law Journal 5-16; and in A. Stiglmayer, ed., *Mass Rape: The War against Women in Bosnia-Herzegovina* (Lincoln: University of Nebraska Press, 1994) 183-196 [hereinafter Mackinnon]; C. McGlynn, "Rape as 'Torture'? Catharine MacKinnon and Questions of Feminist Strategy," (2008) 16: 1 Feminist Legal Studies 72 [hereinafter McGlynn]; E. Jackson, "Catharine

landscape of the international gender justice, feminist legal scholars were and remain divided over the nature of wartime rape, its significance, and prosecution. The present chapter examines these different viewpoints in the light of the principle of fair labelling, emphasizing that defendants must be convicted in proportion to the culpability represented in their *mens rea*, as well as to the nature and degree of the wrongdoing, the *actus reus*, rather than their ethnicity or the ethnic lineage of their victims.

Moreover, this chapter turns to the case law of the international criminal tribunals and the ICC, and examines the impact of abstractness and ambiguity of gender-based crimes, embodied in the statutory laws of these international criminal judicial bodies, on the prosecution and conviction of such crimes. Indeed, leaving rape and other forms of gender-based crimes open to more than one interpretation under the broad label of crimes against humanity and war crimes is incompatible with the general principles of criminal law for several reasons: First, these crimes must be distinguished from one another, classified, and defined according to the principle of fair labelling; second, they must be prosecuted in their own right due to the lack of established precedents in the case law of post-WWII tribunals—the IMT and the IMTFE—a problem encountered

---

MacKinnon and Feminist Jurisprudence: A Critical Appraisal Source," (1992) 19:2 Journal of Law and Society 197 [hereinafter Jackson].

by the ICTY and ICTR in prosecuting gender-based crimes,[3] and must receive special consideration due to their distinctness from other wartime crimes, and their invisibility in both customary and conventional humanitarian and human rights law for many years;[4] and finally, as Kelly Askin argues, subsuming gender-based crimes under other crimes simply means that they must be prosecuted as part of the latter, which requires additional elements to be added. In other words, to prosecute rape as a crime against humanity, it must be systematic and perpetrated on a large scale against a civilian population, which means that isolated gender-based crimes committed against individuals, as well as those sexual assaults committed against prisoners of war fall outside of the tribunals' jurisdiction.[5]

Furthermore, in view of the principle of fair labelling, this chapter explores how the abstractness of gender-based crimes rendered international criminal tribunals unable to respond adequately to these crimes, thus offending the rights of both victims and defendants and sending a wrong moral signal to the public.[6]

---

[3] A. Phelps, "Gender-Based War Crimes: Incidence and Effectiveness of International Criminal Prosecution," (2006) 12 William and Mary Journal of Women and the Law 501 [hereinafter Phelps].

[4] *Ibid.* at 502.

[5] K. Askin, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status," (1999) 93 The American Journal of International Law 109 [hereinafter Askin].

[6] Canada, Senate Committee on Legal and Constitutional Affairs, *Bill S-210: An Act to Amend the Criminal Code (Suicide Bombings)*, Submitted by Professor Ed Morgan, April 9, 2008, p. 2 [hereinafter Morgan]; J. Herring, *Criminal Law: Text, Cases, and Materials* (New York, N.Y.: Oxford University Press, 2008) 281 [hereinafter Herring].

II. Prosecution of Gender-Based Crimes and the Feminist Legal Literature

There is no doubt that the adoption of rape and other forms of gender-based crimes on a massive scale as an integral part of ethnic armed conflicts during the 1990s—leaving thousands of physically and psychologically devastated women—surfaced these crimes and brought them into the international legal arena.[7] As early as the first reports of the systematic mass rape of mainly Bosnian Muslim women in the summer of 1992,[8] feminist legal scholars, individually or collectively through women's human rights institutions, played a significant role in calling for the criminalization of gender-based crimes in international legal instruments. However, this section focuses on two central issues: firstly, it critically examines the historical invisibility of gender-based crimes—whether in international humanitarian and human rights instruments or in

---

[7] C. Lindsey, "Women and War: An Overview," (2000) 839 International Review of the Red Cross 565 [hereinafter Lindsey]; *Conflict in the Former Yugoslavia: An Encyclopedia*, 1st ed., "Rape," by J. Allcock, at 233; L. Gilbert, "Rights, Refugee Women and Reproductive Health," (1995) 44:4 American University Law Review 1224; R. Coomaraswamy & L. Kois, "Violence against Women", in K. Askin & D. Koenig, eds., *Women's International Human Rights Law*, vol.1 (Ardsley, N.Y.: Transnational Publishers, Inc., 1999) 215 [hereinafter Coomaraswamy]; UN High Commissioner for Refugees, *Sexual Violence against Refugees: Guidelines on Prevention and Response* (Geneva: UNHCR Publications, 1995) 7 [hereinafter refugees]; V. Nikolić-Ristanović, "Definitions of Violence in War and the Experience of Women: The Subject of Research," in V. Nikolić-Ristanović, ed., *Women, Violence and War: Wartime Victimization of Refugees in the Balkans* (Budapest: Central European University Press, 2000) 21 [hereinafter Nikolić-Ristanović]; V. Nikolić-Ristanović, "Refugee Women in Serbia - Invisible Victims of War in the Former Yugoslavia," (2003) 73 Feminist Review 109 [hereinafter Invisible Victims].

[8] A. Stiglmayer, "The War in the Former Yugoslavia," in A. Stiglmayer, ed., *Mass Rape: The War against Women in Bosnia-Herzegovina* (Lincoln, Neb.: University of Nebraska Press, 1994) 14 [hereinafter Stiglmayer]; J. Kuzmanović, "Legacies of Invisibility: Past Silence, Present Violence against Women in the Former Yugoslavia," in J. Peters & A. Wolper, eds., *Women's Rights Human Rights: International Feminist Perspectives* (New York, N.Y.: Routledge, 1995) 57 [hereinafter Kuzmanović]; R. Gutman, "Serbs Rape of Muslim Women in Bosnia Seen as Tactic of War," *Houston Chronicle* (23 August 1992) A1 [hereinafter Gutman].

the jurisprudence of international criminal tribunals—and the role of feminists in surfacing these crimes and bringing them to the world's attention. And secondly, it analyses feminists' different views and divisions over the recognition and prosecution of wartime rape and other gender-based crimes in international criminal tribunals and their statutory law, and it concludes by examining their divergence over the recognition of these crimes with respect to the principle of fair labelling.

1. Surfacing Gender-Based Crimes in the International Criminal Justice System

Throughout the history of warfare, gender-based crimes were, and still are,[9] the least condemned wartime crimes. Before the codification of the ICTY and the ICTR statutes, wartime rape and other forms of sexual violence were invisible in international humanitarian law instruments and criminal codes, considered as either an inevitable unfortunate by-product of war or a necessary reward for male combatants in the field.[10] Although wartime rape has been prohibited by national and international regulations on armed conflict for hundreds of years, the prosecution of gender-based crimes in international military and criminal

---

[9] In the cases before the ICTR, for example, only five men out of 48 indictees have been found guilty of sexual related charges. None of them has pleaded guilty to any form of gender-based crimes, and all of them were able to have their sexual violence charges dropped in exchange for guilty pleas on other crimes.

[10] Copelon, *infra* note 28, at 220; Eaton, *infra* note 28, at 883; *Shattered Lives: Sexual Violence during the Rwandan Genocide and Its Aftermath* (New York, N.Y.: Human Rights Watch, 1996), at p. 27 [hereinafter Shattered Lives]; UN Commission on Human Rights, *Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45*, UN Doc. E/CN.4/1995/42 (22 November 1994), at paragraph 180 [hereinafter Coomaraswamy]; Wood, *infra* note 28, at 281.

tribunals is a new legal phenomenon. Historically speaking, rape began to be prohibited in national military codes as early as the fourteenth and fifteenth centuries. The Ordinances of War promulgated by Richard II (1385) outlawed women's rape and subjected convicted persons to capital punishment by hanging. Similarly, Henry V drew on the laws of Richard II, particularly the provisions denouncing women's rape; his Ordinances of War (July 1419) also declared the crime a capital offence.[11] Nonetheless, the first documented international criminal prosecution of a gender-based crime can be traced back to 1474, when Sir Peter van Hagenbach stood trial in Breisach, Germany, before 27 judges of the Holy Roman Empire. He was convicted of war crimes, including rape committed by troops under his command, and sentenced to death. Kelly Askin maintains that Sir Hagenbach was convicted because he did not actually declare war, not because involvement in rape constituted a prohibited crime. Had he done so, the rapes would have been considered permissible.[12] Later on, in the sixteenth and seventeenth centuries, Alberico Gentili and Hugo Grotius emphasized that wartime rape—like peacetime sexual violence—is unlawful and must be punished

---

[11] Askin, *infra* note 28, at 299; Copelon, *infra* note 28, at 220; Healey, *infra* note 28, at 330; *The Lieber Code*, U.S. Department of Army, General Orders No. 100 (April 1863), reprinted in *The Law of War*, vol. 1 (New York, N.Y.: Random House, 1972) 158-186), Articles 44 & 47 [hereinafter the Lieber Code]; T. Meron, "Rape as a Crime under International Humanitarian Law," (1993) 87:3 The American Journal of International Law 425 [hereinafter Meron]; T. Meron, *Henry's Wars and Shakespeare's Laws* (New York, N.Y.: Oxford University Press, 2002) 143-144 [hereinafter Shakespeare's Laws].

[12] A-M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: the ICC and the Practice of the ICTY and the ICTR* (Antwerpen, Belgium: Intersentia, 2005) 4 [hereinafter de Brouwer]; Askin, *infra* note 21, at 5; Askin, *infra* note 28, at 299; Luping, *infra* note 28, at 436.

even when employed against combatant women.[13] In 1863, the Lieber Code, which was enacted during the American Civil War, also outlawed wartime rape. Articles 44 and 47 of this code prohibited rape under the penalty of death.[14]

However, while the laws and customs of war on land embodied in Article 46 of the 1907 Hague Convention IV and Article 3(c) common to the 1949 four Geneva Conventions could be broadly interpreted implicitly to prohibit wartime rape as an offence against "family honour,"[15] "outrage upon personal dignity," and "humiliating and degrading treatment,"[16] Article 27 of the Geneva Convention IV, Article 76(1) of the Additional Protocol I, and Article 4(2)(e) of the Additional Protocol II explicitly call for the protection of women "especially

---

[13] A. Gentili, *De iure belli libri tres* (Oxford: The Clarendon Press, 1933) 258-259. This Work is available through Heine online, as follows: vol. I consists of a photographic reproduction of the edition of 1612 & vol. II includes a translation of the edition of 1612 / by John C. Rolfe. [hereinafter Gentili]; H. Grotius, *De jure belli ac pacis libri tres* [The Law of War and Peace] (Amstelodami: Apud Viduam Abrahami Asomeren, 1701) 656 [hereinafter Grotius].

[14] Articles 44 and 47 of the Lieber Code read respectively: "All wanton violence committed against persons in the invaded country…all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death…" "[c]rimes punishable by all penal codes, such as arson, murder … and rape…are not only punishable as at home, but in all cases in which death is not inflicted the severer punishment shall be preferred." See Lieber Code, *supra* note 11, at Articles 44 and 47.

[15] *The Hague Convention IV Respecting the Laws and Customs of War on Land, and its Annex,* 18 October 1907, 36 Stat. 2277, 1 Bevans 631. (Entered into force on 26 January 1910), Article 46 [hereinafter The Hague Convention IV].

[16] *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I), Opened* for signature 12 August 1949, 6 U.S.T. 3114, T.I.A.S. No.3362, 75 U.N.T.S. 31 (Entered into force on 21 October 1950), at Article 3(C); *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II),* 75 U.N.T.S. 85 (Entered into force on 21 October 1950), at Article 3(C); *Convention Relative to the Treatment of Prisoners of War (Geneva III), Opened* for signature 12 August 1949, 6 U.S.T. 3316, T.I.A.S. No.3364, 75 U.N.T.S. 135 (Entered into force on 21 October 1950), at Article 3(C); *Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV),* Opened for signature 12 August 1949, 6 U.S.T. 3516, T.I.A.S. No.3365, 75 U.N.T.S. 287 (Entered into force on 21 October 1950), at Article 3(C).

against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[17]

Nevertheless, a closer look at the above provisions would reveal that the scope of the 1949 Geneva Conventions is terribly limited with respect to wartime rape and sexual violence. Despite the prevalence of these heinous crimes during WWI and WWII, not to mention numerous other armed conflicts, legislators have failed to list such crimes among the offences that should be prosecuted as war crimes or legally amount to grave breaches of the Geneva Conventions. These crimes have been explicitly excluded from grave breaches under the Geneva Conventions, embodied in Article 147 of Geneva IV.[18]

Moreover, although Article 76 of Additional Protocol I of 1977, expanded "protection" to all women who are affected by war, it has largely failed to refer adequately to wartime rape as a grave breach of armed conflict.[19] Even when

---

[17] Additional Protocol I, *infra* note 19, at Article 76(1); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, (Protocol II), Opened for signature on 12 December 1977, 1125 U.N.T.S. 609 (Entered into force on 7 December 1978), at Article 4(2)(e) [hereinafter Additional Protocol II].

[18] C. Niarchos, "Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia," (1995) 17:4 Human Rights Quarterly 673 [hereinafter Niarchos]; Geneva IV, *supra* note 16, at Article 147; R. Copelon, "Surfacing Gender: Reconceptualizing Crimes against Women in Time of War," in A. Stiglmayer, ed., *Mass Rape: The War against Women in Bosnia-Herzegovina* (Lincoln, Neb.: University of Nebraska Press, 1994) 197. Reprinted in (1994) 5:2 Hastings Women's Law Journal 243-266 & in L. Lorentzen & J. Turpin, eds., *The Women and War Reader* (New York, N.Y.: New York University Press, 1998) 63-79 & in N. Dombrowski, ed., *Women and War in the Twentieth Century: Enlisted with or without Consent* (New York, N.Y.: Garland Publishing, Inc., 1999) 332-359 [hereinafter Copelon].

[19] A. Levy, "International Prosecution of Rape in Warfare: Non-discriminatory Recognition and Enforcement," (1994) 4 University of California at Los Angeles Women's Law Journal 273 [hereinafter Levy]; D. Marder, "Once again, Rape becomes a Weapon of War," *The Atlanta Journal - Constitution* (17 February 1993) A 11[hereinafter Marder]; I. Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963) 51 [hereinafter Brownlie]; J.

Article 27 of Geneva IV prohibits any attack on women's honour, particularly rape, forced prostitution or indecent assault, it focuses on social values, not on women's physical and psychological pain and self integrity. This article, while failing to prohibit wartime rape as a crime, merely presents women as defenceless and needing to be protected. It emphasizes the idea that women are the property of men rather than potential victims of one of the most degrading crimes that can be inflicted on a human being.[20] Furthermore, when Article 76(2) of the Additional Protocol I states that "pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority," it provides different types of protection based on the civil status of women. While giving the utmost attention to child-bearing women, it leaves other women, particularly young girls, vulnerable to rape and other forms of sexual assault, or at best pays them less attention.[21] Moreover, the 1974 Declaration on the Protection of

---

Gardam, "Gender and Non-Combatant Immunity," (1993) 3 Transnational Law Contemporary Problems 360-361 [hereinafter Gardam]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, Opened for signature on 12 December 1977, 1125 U.N.T.S. 76 (Entered into force on 7 December 1978) [hereinafter Additional Protocol I]; S. Splittgerber, "The Need for Greater Regional Protection for the Human Rights of Women: The Cases of Rape in Bosnia and Guatemala," (1996) 15:1 Wisconsin International Law Journal 195 [hereinafter Splittgerber]; T. Taylor, *The Anatomy of the Nüremberg Trials: A Personal Memoir* (New York, N.Y.: Knopf, 1992)165 [hereinafter Taylor].

[20] *Prosecutor* v. *Jean-Paul Akayesu,* (1998) Judgement, 2 September 1998, ICTR-96-4-T, at paragraph 731 [hereinafter Akayesu Judgement].

[21] Additional Protocol I, *supra* note 19, at 76; C. Kennedy-Pipe & P. Stanley, "Rape in War: Lessons of the Balkan Conflicts in the 1990s," (2000) 47:3-4 International Journal of Human Rights 72 [hereinafter Kennedy-Pipe & Stanley]; K. Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (The Hague, The Netherlands: Martinus Nijhoff Publishers, 1997) 257 [hereinafter Askin]; P. Kuo, "Prosecuting Crimes of Sexual

Women and Children in Emergency and Armed Conflict excluded gender-based crimes from its provisions. It confined itself to exhorting states engaged in armed conflict to "…spare women and children from the ravages of war…" and considered criminal "[a]ll forms of repression and cruel and inhuman treatment of women and children…].[22]

Nonetheless, despite the fact that sexual violence was utilized on a large scale during World War II, when thousands of women and girls were forced into concentration camps and brothels for rape and sexual slavery, the drafters of the statutory laws of the International Military Tribunal (IMT)[23] and the International Military Tribunal for the Far East (IMTFE)[24] conspicuously failed to list rape as a war crime or a crime against humanity.[25] Likewise, the Trial Judges at both

---

Violence in an International Tribunal," (2002) 34 Case Western Reserve Journal of International Law 335-336 [hereinafter Kuo].

[22] *Declaration on the Protection of Women and Children in Emergency and Armed Conflict,* (1974), GA Res. 3318 (XXIX), 29 UN GAOP Supp. (No.31) at 146, UN Doc. A/9631 (1974) at Articles 4 & 5.

[23] *Charter of the International Military Tribunal (IMT), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement)*, 8 August 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280.

[24] *Charter of the International Military Tribunal of the Far East (IMTFE),* 19 January 1946, 26 Apri1, 1946, T .I.A.S. No.1589, 4 Bevans 20.

[25] M. Cherif Bassiouni argues that rape was implicitly included in the statutes of the IMT and the IMTEF as a crime against humanity under the leadings "inhuman acts" and "ill treatment." However, Bassiouni's interpretation infringes both fair labelling and the *nullum crimen sine lege* principles, which require that a crime shall be explicitly classified and labelled, while its definition must be strictly constructed and not be extended by analogy. See A. Ashworth, *Principles of Criminal Law*, fifth ed., (New York, N.Y.: Oxford University Press, 2006) 88 [hereinafter Ashworth]; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (London: Kluwer Law International, 1999) 125 [hereinafter Bassiouni]; *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (17 July 1998), 37 I.L.M. 999-1069 (Entered into force on 1 July 2002), at Article 22 [hereinafter the Rome Statute of the ICC].

tribunals largely ignored rape and other forms of sexual violence, although incidences of the latter were broadly documented during the war and despite the fact that the trial records include evidence of horrific sexual violence as means of torture, involving different types of gender-based crimes, mainly rape, sexual mutilation, forced nudity, and forced abortion.[26] Even in the trials of minor war criminals, held by the Allied forces under Control Council Law No.10 (CCL10),[27] rape and other sexual-based crimes were treated at a minimal level, although this treaty explicitly recognized rape as a crime against humanity. By the same token, although sexual violence was documented and prosecuted, the IMTFE judges failed to deal with it as a separate crime. Instead, it was seen as a secondary offence and subsumed under charges of command responsibility for other atrocities in Nanking.[28] General Matsui, the Japanese Commander-in-Chief for

---

[26] *Trial of Major War Criminals before the International Military Tribunals*, November 14, 1945-October 1, 1946 (Nuremberg, Germany: [s.n.], 1947-1949) VI: 170 & VII: 494.

[27] *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946) at Article II(1)(c) [hereinafter CCL10].

[28] C. Schiessl, "An Element of Genocide: Rape, Total War, and International Law in the Twentieth Century," (2002) 4:2 Journal of Genocide Research 205 [hereinafter Schiessl]; D. Luping, "Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 439-440 [hereinafter Luping]; J. McHenry, "The Prosecution of Rape under International Law: Justice that is Long Overdue," (2002) 35:4 Vanderbilt Journal of Transnational Law 1277 [hereinafter McHenry]; K. Askin, "Prosecuting Wartime Rape and other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles," (2003) 21:2 Berkeley Journal of International Law 301 [hereinafter Askin]; K. Nahapetian, "Selective Justice: Prosecuting Rape in the International Criminal Tribunals for the Former Yugoslavia and Rwanda," (1999) 14 Berkeley Women's Law Journal 127 [hereinafter Nahapetian]; Kuo, *supra* note 21, at 307; R. Copelon, "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law," (2000) 46 McGill Law Journal 221 [hereinafter Copelon]; R. Goldstone, "Prosecuting Rape as a War Crime," (2002) 34 Case Western Reserve Journal of International Law 279 [hereinafter Goldstone]; S. Eaton, "Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime," (2004) 35:4 Georgetown Journal of International Law 884

central China, was prosecuted in the IMTFE for doing nothing to stop the rape of Chinese women and girls in Nanking—the comfort women—in 1937. The Tribunal held him responsible for his failure to control his subordinates. He was found guilty of Count 55 charging him with rape.[29] A closer look at the trial proceedings reveals that gender-based crimes were treated at both tribunals as less important offences and the victims considered as second-class casualties of war. Indeed, the marginalization of gender-based crimes here and elsewhere may be attributed to the fact that rape has been accepted throughout the history of armed conflicts as a natural consequence of war and a form of collateral damage affecting women, rather than a condemnable war crime.[30]

The establishment of the ICTY and ICTR in 1993 and 1994 respectively has improved the international criminal justice system by facilitating the investigation, prosecution, adjudication, and punishment of wartime rape to a great extent. The statutes of both tribunals explicitly recognize rape as a crime against humanity for the first time in the history of humanitarian law.[31] Moreover,

---

[hereinafter Eaton]; S. Healey, "Prosecuting Rape under the Statute of the War Crimes Tribunals for the Former Yugoslavia," (1995) 21:2 Brook Journal of International Law 330 [hereinafter Healey]; S. Wood, "A Woman Scorned for the 'Least Condemned' War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda," (2004) 13:2 Columbia Journal of Gender and Law 282 [hereinafter Wood]; T. Meron, "Reflections on the Prosecution of War Crimes by International Tribunals," (2006) 100 American Journal of International Law 567 [hereinafter Meron].

[29] *The International Military Tribunal for the Far East*, The Tokyo Judgment 29 April 1946 - 12 November 1948, at 453-454 (B.V. A. Roling & C. F. Ruter, eds., 1977).

[30] S. Russell-Brown, "Rape as an Act of Genocide," (2003) 21 Berkeley Journal of International Law 351 [hereinafter Russell-Brown].

the decade following the establishment of these judicial bodies has witnessed remarkable developments in the international criminal justice system:[32] the adoption and entrance into force of the Rome Statute of the ICC, the establishment of the SCSL, the setting up of the Special Panels for Serious Crime Panels in East Timor (SPSC), and the inauguration of the Extraordinary Chambers of the Courts of Cambodia (ECCC).

Influenced by the basic laws and jurisprudence developed in the ICTY and ICTR, the statutory laws of the above international criminal judicial bodies explicitly mandate the prosecution and punishment of wartime gender-based crimes, as follows:

- Section Five of the SPSC, incorporating crimes against humanity, lists rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity under subsection 5(1)(g).[33] Similarly, Section Six of the same treaty defines rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence as constituting

---

[31] While Article 5(g) of the Statute of the ICTY and Article 3(g) of the Statute of the ICTR list rape as a crime against humanity, Article 4 of the latter lists rape, enforced prostitution and indecent assault of any kind as a serious violation of Article 3 common to the 1949 Geneva Conventions and of their 1977 Additional Protocol II.

[32] V. Oosterveld, "Prosecution of Gender-Based Crimes in International law," in D. Mazurana, et al., eds., *Gender, Conflict, and Peacekeeping* (Lanham, MD: Rowman & Littlefield, 2005) 68 [hereinafter Oosterveld].

[33] *Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, 6 June 2000, UN Doc. UNTAET/REG/2000/15, at Section 5(1)(g) [hereinafter the Special Panels for Serious Crime Panels in East Timor].

a grave breach of the Geneva Conventions, and serious violations of Article 3 common to the four Geneva Conventions under subsections 6(1)(b)(xxii) and 6(1)(e)(vi) relating to war crimes;[34]

- Article 2 (g) of the Statute of the SCSL lists rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence as a crime against humanity, and Article 3(e) lists outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault as serious violations of Article 3 common to the 1949 Geneva Conventions and their 1977 Additional Protocol II;[35]
- Article 5 of the Statute of the ECCC lists rape within crimes against humanity;[36] and
- Article 7(1)(g) of the Rome Statute of the ICC lists rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity as a crime against humanity.[37] Article 8(2)(b)(xxii) lists rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of

---

[34] *Ibid*. Section 6(1)(b)(xxii) & 6(1)(e)(vi).

[35] Additional Protocol II, *supra* note 17, Article 3.

[36] *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, 27 October 2004 (NS/RKM/1004/006) [hereinafter Extraordinary Chambers in the Courts of Cambodia].

[37] The Rome Statute of the ICC, *supra* note 25, at Article 7(1)(g).

> sexual violence as serious violations of the laws and customs applicable in international armed conflict.[38] And Article 8(e)(vi) lists rape, sexual slavery, enforced prostitution, forced pregnancy (as defined in Article 7, paragraph 2(f)), enforced sterilization or any other form of sexual violence as constituting a serious violation of article 3 common to the four 1949 Geneva Conventions.[39]

However, notwithstanding the above fine-sounding norms and their achievement of several groundbreaking decisions, these bodies all fell short of adequately prosecuting gender-based crimes due to, *inter alia*, ambiguity in its statutory laws, procedural problems, lack of a clear prosecutorial strategy, and limitations on their jurisdictions and mandates. These shortcomings will be addressed, in the light of the principle of fair labelling, in the following sections.

Nevertheless, many of these achievements—as Richard Goldstone, the first Chief Prosecutor of the ICTY and the ICTR, explains it—would not have been possible without efforts made by worldwide women's human rights organizations and feminist lawyers.[40] Indeed, feminist legal scholars played a prominent role is surfacing gender-based crimes and developing the international criminal justice system in the last two decades, whether by calling for gender justice and improving the performance of the above tribunals to prosecute and punish gender-

---

[38] *Ibid*. at Article 8(2)(b)(xxii).

[39] *Ibid.* at Article 8(e)(vi).

[40] Goldstone, *supra* note 28, at 281.

based crimes, or by pressuring the drafters of the Rome Statute of the ICC, before or during the 1998 Diplomatic Conference, to incorporate gender-based crimes in the provisions of the statute.

In fact, since the first news of mass rape camps in Bosnia-Herzegovina in the early 1990s, feminist theorists and legal scholars have increased the world's awareness and understanding of the function of rape, as a weapon of war, as a tool of ethnic cleansing, as an act of genocide, and as a means of destroying the culture and the infrastructure of an opponent's society. Catherine Mackinnon, a leading feminist legal scholar and a founder of feminist radical theory, argues that wartime rape is a form of genocide, and requires the international community's military intervention. To protect women during armed conflict and to deter rape crimes, she suggests that the UN Security Council pass resolutions under Chapter VII of the United Nations Charter to combat violence against women as a threat to international peace and security.[41] Yet, while many feminist scholars regard wartime rape as a tool of devastation and destruction, others call for considering this crime within its social and cultural context.[42] These arguments and other feminist legal views and differences over the recognition and prosecution of wartime rape by international criminal judicial bodies will be examined in the next section.

---

[41] C. MacKinnon, "Women's September 11th: Rethinking the International Law of Conflict," (2006) 47:1 Harvard International Law Journal 29 [hereinafter Mackinnon].

[42] J. Hubbard, *Breaking the Silence: Women's Narratives of Sexual Violence during the 1994 Rwandan Genocide* (M.Sc., Virginia Polytechnic Institute and State University, 2007) 42 [hereinafter Hubbard].

2. Genocidal Rape v. Rape as a Crime against Humanity: A Feminist Debate

This section focuses not so much on women's advocacy for the rights of wartime rape victims as it does on feminist legal scholars' different positions on the question of wartime rape in the territory of former Yugoslavia since the early 1990s. It examines feminists' divergent views, explores their impact on the development of international criminal law, and inquires into the future role that they may play to improve the re-conceptualization of wartime rape and other gender-based crimes, whether those embodied in the Rome Statute of the ICC or in any future treaty to prosecute and punish gender-based crimes in a wartime context.

As early as the release of the first news of systematic mass rape in Bosnia-Herzegovina, different feminist legal scholars called for diplomatic, legal, and humanitarian intervention to stop the war, protect victims,[43] and bring perpetrators to justice, advancing arguments that fall into two different "camps," as defined by Karen Engle,[44] or better still, what I call "movements": due to the fact that they are more than "camps" and less than schools, still active even though less intensely, and spearheaded by two prominent feminist legal scholars, polarizing many other feminists and activists. These movements have been divided over the consideration, importance, and ways of recognizing wartime rape in former

---

[43] K. Engle, "'Calling in the Troops': The Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Intervention," (2007) 20 Harvard Human Rights Journal 219 [hereinafter Engle].

[44] K. Engle, "Feminism and its (Dis) Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina," (2005) 99:4 American Journal of International Law 779 [hereinafter Engle].

Yugoslavia, particularly, whether the rape of Bosnian Muslim women should be recognized as a form of genocide—genocidal rape.[45]

The first "movement," led by Catharine MacKinnon, argues that the rape of Bosnian Muslim women by Serb forces, regular and irregulars, should be understood within the context of genocide and that it was carried out with the intention of destroying the victims' religious group—the Bosnian Muslim community. The second "movement," steered by Rhonda Copelon, contends that Bosnian Muslim women's rape should be regarded as habitual wrongdoing, even when employed on a large scale, emphasizing that the international criminal justice system should deal with rape on all sides on an equal footing. Although this diversity began to shrink as soon as the UN Department of Legal Affairs proceeded to enact the basic laws of the ICTY, disagreements between the two movements continued, but at a lower tone.[46]

The first "movement" seems to be an extension of the feminist radical school, also led by MacKinnon, which sees everyday rape as a sex-based oppression by the male (the oppressor) over the female (the oppressed), and maintains that by raping Bosnian Muslim women, Serbs are dominating them as well as their social group on the basis of both sex and ethnicity.[47] The second

---

[45] Engle, *supra* note 44, at 779; P. Bos, "Feminists Interpreting the Politics of Wartime Rape: Berlin, 1945; Yugoslavia, 1992–1993," (2006) 31:4 Signs: Journal of Women in Culture and Society 1013 [hereinafter Bos]; Russell-Brown, *supra* note 30, at 363.

[46] Engle, *supra* note 44, at 779.

[47] Jackson, *supra* note 2, at 203; M. Leiboff & M. Thomas, *Legal Theories: Context and Practices* (Pyrmont, NSW: Lawbook Co., 2009) 422 [hereinafter Leiboff & Thomas].

"movement," on the other hand, can be linked to the liberal feminist school,[48] which struggles to ensure equal rights with men, and views the rape of women as a form of domination in a patriarchal society. Thus, rape, whether in peacetime or in war, is considered a violation of women's rights because the victims are women, not because of their religious or ethnic affiliation—women qua women.[49] In other words, rape and other gender-based crimes are mainly carried out against women due to the degraded status of women in the society. They are targeted for rape, not because they belong to the enemy, "but because rape embodies male domination and female subordination."[50] Accordingly, Rhonda Copelon does not see any difference between rape in war and rape in peacetime. She maintains that the acceptance of the notion of Bosnian Muslim Women's genocidal rape would undermine how we recognize women's fate in warfare. She argues that if wartime rape in the Balkan conflict has to be considered genocidal, then it should be because it affects women everywhere, having been inflicted on them because of their gender, not because of their ethnic or religious lineage. They are targeted because of their sexual and reproductive power.[51] In her words: "[i]n terms of its impact on the women affected, there is no difference between genocidal rape and

---

[48] Leiboff & Thomas, *supra* note 47, at 418.

[49] Engle, *supra* note 44, at 779, citing H. Charlesworth, "Feminist Methods in International Law," (1999) 93:2 The American Journal of International Law 387 [hereinafter Charlesworth].

[50] R. Copelon, "Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law," (1994) 5:2 Hastings Women's Law Journal 263 [hereinafter Copelon]. For more citations, see footnote 18.

[51] *Ibid.* at 262.

the most common form of rape in war. Women were used as a way of keeping soldiers going, as reward to them. Why is that not a crime against humanity based upon gender?"[52]

On the contrary, Catharine MacKinnon vehemently indorses the idea that wartime rape of Bosnian Muslim women by Serbs was implemented as an instrument of genocide, distinguishing it from both everyday rape and other rape carried out in the Balkan fragmentation war. She accuses feminists who refuse to consider the rape of Bosnian Muslim women as a form of genocide of being involved in a cover-up campaign. In a recent article, referring to the events of September 11th and the international community's response to terrorism, she suggests that the UN Security Council pass a resolution under Chapter VII of the UN Charter authorizing the waging of war against those involved in wartime rape as a threat to peace and security.[53] However, while MacKinnon restricts the label of genocidal rape to the rape of Bosnian Muslim and Croatian Catholic women, and never calls for the prosecution of the rape of Serbian women by Croatian and Bosnian Muslim forces, Copelon offers a broader concept of the Balkan mass rapes to include rapes on all sides irrespective of ethnicity, race, and religion—to be recognized as a crime against humanity. She adds that the association of the

---

[52] C. Copelon, "Women and War Crimes," (1995) 69:1-2 St-John's Law Review 67 [hereinafter Copelon]; D. De Vito, et al., "Rape Characterised as Genocide" (2009) 6:10 SUR - International Journal on Human Rights 38 [hereinafter De Vito]; L. Sharlach, "Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda," (2000) 22:1 New Political Science 93 [hereinafter Sharlach].

[53] MacKinnon, *supra* note 41, at 29.

rape of women on the basis of their ethnic relationship to the enemy constitutes another attack on the basis of gender by completely denying their subjectivity, and constitutes a failure to acknowledge the sexual persecution that these women endured.[54]

To this end, the first "movement" views wartime rape as an instrument of genocide that implicates both gender and ethnic lineage or religious affiliation. It is a genocidal act that involves an attack on the victim's existence and ethnicity. On the other hand, the second "movement" asserts that wartime rape is a crime against gender. It marginalizes the victim's national or religious identity and focuses on her sex.[55]

Categorizing wartime rape in the former Yugoslavia only as genocidal or sexist in nature is problematic. Seeing rape as genocidal through MacKinnon's glasses would minimize the fact that women on all sides were raped, focusing as she does only on one side—Bosnian Muslim women as victims and Serbian forces as perpetrators.[56] And claiming that the wartime rape of Bosnian Muslim

---

[54] Copelon, *supra* note 50, at 263.

[55] G. Soonarane, *Rape: An Act of Genocide or a Crime against Gender?* (LL.M., University of Toronto, 2006) 7 [hereinafter Soonarane].

[56] In fact, this is not an accurate claim. Croatian forces employed the same pattern of rape as a tool of ethnic cleansing against Serbian women in the Croatian region of Western Slavonia. Serbian civilians from the Posavina region were besieged and driven out by members of the *Hrvatsko Vijeće Obrane* (HVO) and the *Hrvatske Odrambene Snage* (HOS). This huge exodus of Serbs was accompanied by a large-scale campaign of raping Serbian women, burning their homes and destroying their cultural and religious institutions. See A. Stiglmayer, "The Rapes in Bosnia-Herzegovina," in A. Stiglmayer, ed., *Mass Rape: The War against Women in Bosnia-Herzegovina* (Lincoln, Neb.: University of Nebraska Press, 1994) 140; *Crimes against Serbian Civilians.* Produced and Directed by Bosnian Serbs' Television. Running Time 00:57:00. SAT, 1993. *(Videocassette)*; D. Djokić, "Memorandum on War Crimes and Crimes of Genocide Committed against the Serbian People in the Area of the Former Commune of Odžak by Ustashi-

women was only sexist in nature distorts the evidence that these women were targeted because of their religious identity in a huge campaign of ethnic cleansing.[57] However, while MacKinnon maintains that "[a]ctual genocides testify to the contrary. Extermination destroys peoples, but peoples are also destroyed by certain acts short of killing: sexual atrocities,"[58] Rhonda Copelon asserts that rape and genocide are separate atrocities. The association of rape with genocide to emphasize "the heinousness of the rape of Muslim women" is dangerous.[59] Stressing that the rape of Bosnian women was carried out against them because of their sex—not because of their ethnicity or religious affiliation—Copelon expresses her concern that the description of "the horror of "genocidal" rape as 'unparalleled' is factually dubious and risks rendering rape invisible once again."[60]

Fundamentalist Paramilitary Formations and Members of the National Guard of the Republic of Croatia, Samac, 21 May 1993," A Letter to the Secretary-General from Dragomir Djokić, the Chargé d'affaires of the Permanent Mission of Yugoslavia to the United Nations (6 August 1993), UN Doc. A/48/299-S/26261; *Raping Serbian Women.* Produced and Directed by Tanja Peternek-Aleksić. Running Time 00:55:00. SAT, 1993. *(Videocassette)*; UN Commission on Human Rights, *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki*, UN Doc. E/CN.4/1993/50 (10 February 1993) 16 [hereinafter Mazowiecki]; V. Nikolić-Ristanović, "Seksualno nasilje," [Sexual Violence] in V. Nikolić-Ristanović, et al., eds., *Žene, Nasilje i Rat* [Women, Violence and War] (Beograd: Institut Za Kriminološka i Sociološka Istraživanja, 1995) 36. (Serbo-Croatian); *Zločin i Progonstvo* [Crime and Expulsion]. Produced by Serbian TV. Directed by Zoran Preradovič. Running Time 00:30:00. Serbian TV, 1995. *(Videocassette).* Serbo-Croatian.

[57] Genocide's Sexuality, *supra* note 2, at 334.

[58] *Ibid.* at 313.

[59] Copelon, *supra* note 50, at 246; J. Halley, "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law," (2008) 30 Michigan Journal of International Law 100 [hereinafter Halley].

[60] Buss, *infra* note 221, at 149; Copelon, *supra* note 50, at 246.

Apart from the two feminist movements' conflicting arguments, rape crimes, whether committed against individuals or groups, against women or men, must be regarded as an act of genocide if they fit the scope of the Genocide Convention. This is not because such acts were perpetrated during genocidal campaigns, but due to the intent of the perpetrators and their purpose in committing these acts, i.e., to destroy, in whole or in part, the victims and their national, religious, ethnic, or racial groups. Indeed, the testimonies of wartime rape survivors from the Yugoslavian and Rwandan genocides indicate that such crimes were perpetrated with the aim of eradicating Tutsi, Bosnian Muslim, Croatian Catholic, and Kosovar Albanian ethnic and religious groups, based on explicit statements by perpetrators. The genocidal intent can be seen even more clearly in the fact that many Tutsi and Bosnian Muslim women died during the gang-rape process, while others were executed after being raped.[61]

In fact, the rape of women of the same social group by men of another group can be construed as a severe attack on the foundations of the victims'

[61] Although the genocidal rape of Bosnian and Croatian women was synchronous with the genocidal rape of Tutsi women, and both rape campaigns were committed against particular women due to their ethnic or religious affiliation with intent to destroy, in whole or in part, their ethnic groups, they followed different methods. While the mass rape of Bosnian women was committed with the aim of impregnating these women, making them bear the children of the enemy, the *Četniks*, and consequently, preventing them from giving birth within their own ethnic groups, the rape of Tutsi women was perpetrated with the intent of killing these women whether by infecting them with HIV/AIDS, (a slow death) or by machetes after being raped and sexually mutilated (a quicker death). See A. Rall, "The Rwandan Genocide Mercilessly Put to Death Millions of Innocent Women and Children," *Off Our Backs* 26:3 (1996) 18 [hereinafter Rall]; P. Triay-Kone, "Rwanda: le viol comme arme de guerre," *Jeune Afrique Économie* (3 avril 1995) 34; Russell-Brown, *supra* note 30, at 355-356; Shattered Lives, *supra* note 10, at 35.

society.[62] To determine whether wartime rape crimes committed during the Yugoslav and Rwandan ethnic conflicts were acts of genocide, one should refer to Article II of the Genocide Convention,[63] which provides that:

> Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious groups, as such:[64]
>
> (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;
> (e) Forcibly transferring children of the group to another group.[65]

---

[62] Akayesu Judgement, *supra* note 20, at paragraph 521; J. Gardam & M. Jarvis, *Women, Armed Conflict and International Law* (The Hague, The Netherlands: Kluwer Law International, 2001) 190 [hereinafter Gardam and Jarvis]; Mackinnon, *supra* note 2, at 16; *Prosecutor* v. *Radislav Krstić*, (2001) 40 I.L.M.134, IT-98-33-T, at 525 [hereinafter Krstić Judgement]; N. Quénivet, *Sexual Offenses in Armed Conflict and International Law* (Ardsley, N.Y.: Transnational Publishers, 2005) 165 [hereinafter Quénivet].

[63] A. Wing & S. Merchan, "Rape, Ethnicity and Culture: Spirit Injury from Bosnia to Black America," (1993) 25:1 Columbia Human Rights Law Review 1 [hereinafter Wing]; J. Webb, "Genocide Treaty-Ethnic Cleansing-Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia," (1993) 23:2 Georgia Journal of International and Comparative Law 392 [hereinafter Webb].

[64] The term *intent* was first used and explained in a negative way when the minister of defence of the government of Paraguay, in answering charges of genocide against the Aché Indians, replied that there was no intention to destroy them. See J. Falvey, Jr., "Criminal Sexual Conduct as a Violation of International Humanitarian Law," (1997) 12:2 St. John's Journal of Legal Commentary 406 [hereinafter Falvey]; L. Kuper, "Genocide and Mass Killings: Illusion and Reality," in B. Ramcharan, ed., *The Right to Life in International Law* (Dordrecht, the Netherlands: Martinus Nijhoff Publishers, 1985) 115 [hereinafter Kuper].

[65] *Convention on the Prevention and Punishment of the Crime of Genocide,* 9 December 1948, GA Res. 260A (III), 3 UN GAOR at 174, UN Doc. A/810 (1948), 78 U.N.T.S. 277 [hereinafter Genocide Convention].

The systematic mass rapes of Bosnian, Croatian, Kosovar, and Tutsi women fit the above definition because they were committed in order to cause serious physical and mental harm to these women with reference to their ethnicities, as well as to destroy their cultures. A closer look at the above article, taking Bosnian Muslim women as an example, reveals that section (a) is applicable to these women victims, thousands of whom were killed after being raped.[66] Section (b) is pertinent since many of these women suffered serious physical and mental harm as a result of rape. Section (c) is applicable too in that many of them were killed and mutilated after being raped. Section (d) of this Article prohibits imposing measures intended to prevent births within the group, and so forcing Bosnian Muslim women to carry non-Muslim babies as a result of systematic mass rape prevented them from carrying Muslim babies (since the ethnicity of a Muslim baby is determined by the ethnicity of his father). Section (e) of the same convention is also pertinent, as thousands of Muslim women were forcibly impregnated in order to make them give birth to Serbian children, thereby increasing the members of a non-Muslim at the expense of a Muslim group.[67] In this respect, Catharine MacKinnon provides: "It is rape for reproduction as ethnic

[66] Levy, *Supra* note 19, at 277; C. Chinkin, "Rape and Sexual Abuse of Women in International Law," (1994) 5:3 European Journal of International Law 333 [hereinafter Chinkin]; D. Aydelott, "Mass Rape during War: Prosecuting Bosnian Rapists under International Law," (1993) 7:2 Emory International Law Review 614 [hereinafter Aydelott]; E. Kohn, "Rape as a Weapon of War: Women's Human Rights during the Dissolution of Yugoslavia," (1994) 24:1-3 Golden Gate University Law Review 219 [hereinafter Kohn].

[67] Aydelott, *supra* note 66, at 614; Levy, *Supra* note 19, at 278.

liquidation: Croatian and Muslim Women are raped to help make a Serbian state by making Serbian babies." [68]

However, recognizing the rape of Bosnian Muslim women as a form of genocide should not obscure the gender component in this crime as Copelon claims. In fact, genocidal rapes in Bosnia-Herzegovina and Rwanda proved the opposite by capturing the attention of the international community and by focusing on the suffering of the victimized women, particularly those who were forcibly impregnated and obliged to give birth in hospitals, on the sides of roads, and in the woods. Although many gender-based crimes were brought before the ICTY—approximately twenty percent of the cases include charges of rape or other forms of sexual violence—fitting the definition of genocide, surprisingly, none of them has been prosecuted or convicted as such.[69]

Despite the fact that Bosnian women were assaulted because of their gender, they were also attacked because of being members of the targeted group--Bosnian Muslims. If Serb forces were targeting them just for their sexuality, as Copelon asserts, then the perpetrators would have been expected to attack any women in the region, including Serbian women who used to live with Bosnian Muslims in a mixed society for many years before the dissolution of Yugoslavia.

---

[68] C. MacKinnon, "Crimes of War, Crimes of Peace," in S. Shute & S. Hurley, eds., *On Human Rights: The Oxford Amnesty Lectures, 1993* (New York, N.Y.: Basic Books, 1993) 90, reprinted in (1993) 4 UCLA Women's Law Journal 59-76, and in E. Richter-Lyonette, ed*., In the Aftermath of Rape: Women's Rights, War Crimes and Genocide* (Givrins, Switzerland: The Coordination of Women's Advocacy, 1998) 13-32. [hereinafter MacKinnon].

[69] Russell-Brown, *supra* note 30, at 363.

However, a victim is a victim and rape is rape, whether utilized as a form of genocide or as an everyday wartime rape, against women or against men.[70] Of course, it would not be acceptable to label all rapes in any conflict as genocidal: only the elements of each crime can determine whether it is genocidal or not. This includes the *mens rea* of the perpetrator, and the nature and degree of seriousness of the crime. Accordingly, MacKinnon's intersectionality between ethnicity and gender is not broad enough to label all rapes of Muslim and Croatian women in Bosnia-Herzegovina as genocidal.

However, the above debate leads to a critical question: are women in war gender beings whose nationality, race, ethnicity, and religion are secondary to their sexuality? If the answer is yes, then the warfare sexual violence against them must qualify as a crime against gender—a concept that Rhonda Copelon debated for many years. Nonetheless, the jurisprudence of the international criminal

---

[70] Different reports from the battlefield in Croatia and Bosnia-Herzegovina claimed that male captives were also subjected to systematic brutal rape and sexual assaults during armed conflict. It has been estimated that more than 4,000 Croatian men were sexually abused by Serb militants. Ruling on the first case before the ICTY, the Prosecutor charged Dušku Tadić with sexual violence against male prisoners at the Omarska concentration camp. In this connection, in a lecture given on 3 October 2001 at Case Western Reserve University Scholl of Law, Richard Goldstone provides: "It is significant that judges [at the ICTY and the ICTR] referred to "he" as well as "she" because one of the horrible phenomena to come out of these wars is that of rape of men by men. See Goldstone, *supra* note 28, at 278. See also E. Carlson, "Sexual Assault on Men in War," (1997) 349:9045 The Lancet 129 [hereinafter Carlson]; H. Zawati, "Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime against Humanity," (2007) 17:1 Torture Journal 27 [hereinafter Zawati]; K. King & M. Greening, "Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia," (2007) 88:5 Social Science Quarterly 1056 [hereinafter King and Greening]; *Prosecutor* v. *Dušku Tadić also Known as "Dule" & Goran Borovinca*, Indictment of 13 February 1995, 34 I.L.M.1028, IT-94-1-I, at paragraph 2.6. [hereinafter Tadić Indictment]; R. Dobson, "Sexual Torture of Men in Wartime Croatia was Common," (2004) 328 British Medical Jouma1 1280 [hereinafter Dobson]; S. Fuchs, "Male Sexual Assault: Issues of Arousal and Consent," (2004) 51 Cleveland State Law Review 117 [hereinafter Fuchs].

tribunals testifies to the contrary. As Gail Soonarane observes, the Akayesu judgement, for instance, provides that the sexuality of Tutsi women was secondary to their ethnicity. They were deliberately selected for death by rape because of their ethnic identity.[71]

In the end, one may conclude by saying that both movements have had a positive and negative impact on the recognition of wartime rape and other forms of gender-based crimes committed in former Yugoslavia, Rwanda, and other war-torn places. Both movements worked hard to surface gender-based crimes and make them visible. As a result of feminist legal scholar's debates and pressure made on the international community, as well as their calls for diplomatic, legal, and humanitarian intervention to protect victims and bring perpetrators to justice,[72] wartime rape has been prosecuted as a crime against humanity for the first time in the history of international criminal law. It has been explicitly listed as a crime against humanity in the statutory laws of the ICTY and the ICTR, and as a crime against humanity and a crime of war in the Rome Statute of the ICC.

Moreover, the two movements played a significant role in the development of international criminal law and made a major difference in the way that gender-based crimes are understood and treated in international criminal tribunals. As a consequence of the pressure made by these movements, as well as by other legal scholars and activists, Richard Goldstone appointed Patricia Sellers, an

---

[71] Akayesu Judgement, *supra* note 20, at paragraph 730; Soonarane, *supra* note 55, at 57.

[72] Engle, *supra* note 43, at 219.

outstanding American lawyer, as the legal advisor to the Office of the Prosecutor for gender crimes.[73] This was followed by the appointment of Peggy Kuo, Nancy Paterson, and Brenda Hollis as prosecutors, who made significant contributions in pushing gender-based cases forward.[74]

Despite the deep tensions between the two movements on the notion of whether the rape of Bosnian women by Serb forces should be considered a form of genocide, they utterly failed to convince the ICTY to prosecute this crime, even though thousands of Bosnian Muslim and Croatian Catholic women have given birth to the perpetrators' children, a crime that could be prosecuted under Article IV(2)(d) and (e) of the Statute of the ICTY. Instead, the tribunal delivered symbolic gender justice, presented in the three famous cases known as Čelebići, Furundžija, and Foča, where the defendants in the first case were Bosnian Croatians and Bosnian Muslims and the victims Serbs, the defendant in the second Bosnian Croatian and the victims Bosnian Muslims, and the defendants in the third Bosnian Serbs and the victims Bosnian Muslims. It was symbolic justice for judging ethnic symbols!! However, while the ICTY has succeeded in delivering these symbolic judgements, the ICTR has failed to prosecute and convict any member of the Rwandese Patriotic Army (RPA) for gender-based

---

[73] When Richard Goldstone arrived in The Hague in the middle of August 1994, he was amazed at the gender bias that prevailed in the Office of the Prosecutor. There were no senior female investigators to deal with gender-sensitive issues. He added: "I became convinced that if we didn't have an appropriate gender policy in the Office of the Prosecutor, we would have little chance of getting it right outside of the office." See Goldstone, *supra* note 28, at 281.

[74] Kuo, *supra* note 21, at 311.

crimes allegedly committed during and after the1994 Rwanda genocide in Rwanda and in Eastern Democratic Republic of Congo (DRC) against the Hutu population and refugees.[75]

Nevertheless, feminist movements, legal scholars, and advocates still have a long way ahead to achieve justice for gender-based crimes victims. A further step should be taken towards the amendment of the statutory laws of the international criminal tribunals, as well as of the Rome Statute of the ICC, to incorporate gender-based crimes in these statutes under a separate Article "gender-based crimes," not to be subsumed under crimes against humanity or war crimes. These crimes, as required by the principle of fair labelling, should be classified, defined and labelled in a way that represents the nature and the magnitude of each crime.[76] Feminist legal scholars may forge a separate treaty of gender-based crimes and call upon the UN Security Council to adopt it under Chapter VII of the UN Charter. In 2008, the Security Council passed Resolution 1820, noting that

---

[75] Although the RPA high command has never denied that their soldiers committed war crimes or crimes against humanity in Rwanda between April and December 1994, the ICTR has constantly failed to prosecute any Tutsi war crime suspect as the post-1994 Rwandan genocide Tutsi government has refused to cooperate or to surrender any of the suspects to the tribunal. Moreover, the tribunal has failed to investigate alleged human rights atrocities and the mass killings of approximately 200,000 Hutu refugees in DRC between December 1996 and May 1997. See M. Dorsey, "Violence and Power-Building in post Genocide Rwanda," in R. Doom & J. Gorus, eds., *Politics of Identity and Economics of Conflict in the Great Lakes Region* (Brussels: VUB University Press, 2000) 343 [hereinafter Dorsey]; N. Eltringham, *Accounting for Horror: Post-Genocide Debates in Rwanda* (London: Pluto Press, 2004) 101-102 [hereinafter Eltringham]; *Rwanda: Reports of Killings and Abductions by the Rwandese Patriotic Army, April-August 1994*, Amnesty International, October 1994, AI-Index: AFR. 47/16/94, at p. 2; Y. Beigbeder, *Judging Criminal Leaders: The Slow Erosion of Impunity* (New York, N.Y.: Martinus Nijhoff Publishers, 2002) 150 [hereinafter Beigbeder].

[76] A. Ashworth, *Principles of Criminal Law*, sixth ed., (New York, N.Y.: Oxford University Press, 2009) 78 [hereinafter Ashworth].

rape and other forms of sexual violence can constitute war crimes, crimes against humanity, and acts of genocide.[77] By doing so, feminists will participate in changing the landscape of international gender justice.

III. The Dilemma of Prosecuting Gender-Based Crimes in the International Criminal Tribunals

The last two decades have witnessed incredible developments in the international criminal justice system through the enactment of a number of international law treaties and the establishment of several international criminal judicial bodies, particularly the ICC. Notwithstanding these remarkable accomplishments, however, gender-based crimes are still equivocally treated in international criminal law and inadequately addressed in the jurisprudence of the international criminal tribunals. This inadequacy—which includes, among other failings, the lack of a clear prosecutorial strategy and limitations on the tribunals' jurisdiction—is due to the abstractness and ambiguity of the statutory laws of these judicial bodies, which in turn offends the principle of fair labelling and its requirement that offences should be classified, defined, and properly labelled.

This section contends that the current broad labelling of gender-based crimes embodied in the statutory laws of the above tribunals has led to inconsistent prosecutions and verdicts, resulting in the failure of these judicial

[77] UN Security Council's Resolution 1820 (2008), *Noting that Rape and other Forms of Sexual Violence can Constitute a War Crime, a Crime against Humanity, or a Constitutive Act with Respect to Genocide* (31 March 2008) UN Doc. S/RES/1820 (2008).

bodies to adequately address grievous offences.[78] The rape offence, incorporated in the statutes of the ICTY and the ICTR, for example, was interpreted by the trial judges to conflate different sexual crimes under the same heading, including sexual offences that do not involve penetration, which in turn violates the principle of fair labelling—an imperative legal principle that requires the international criminal law to respect widely felt distinctions between kinds of offences and degrees of wrongdoing.[79] Accordingly, gender-based crimes in the statutory laws of the tribunals have to be separated from one another and labelled in order to reflect the nature and level of gravity of the offence, as well as the element of moral blameworthiness or culpability represented in the defendant's *mens rea*.[80]

Defining these crimes and reflecting their wrongfulness and severity would remove any inconsistency and confusion in labelling and punishing them properly. In fact, neither the victim nor the defendant would feel that justice has been fulfilled if the label attached to his crime did not reflect an accurate

---

[78] Although more than twenty percent of cases brought before the ICTY until now have included charges of rape or other forms of sexual violence, the tribunal delivered only three symbolic judgements on gender-based crimes. Similarly in the ICTR, only five men out of forty-eight indictees have been found guilty of sexual assault-related charges. Moreover, the ICTY failed to prosecute rape as a crime of genocide in spite of the fact that thousands of women, mainly Bosnian Muslims, were systematically raped and forcibly impregnated. Furthermore, both the ICTY and the ICTR have consistently failed to prosecute sexual military slavery and force marriage as a separate war crime or as crimes against humanity. By the same token, the Trial Chamber of the SCSL failed to convict defendants for the crime of forced marriage as an "other human act" under Article 2(i) of the Statute of the SCSL.

[79] Ashworth, *supra* note 76, at 78.

[80] B. Mitchell, "Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling," 64:3 Modern Law Review 412 [hereinafter Mitchell].

description of the offence committed. There must be proportionality between the stigma and punishment attached to the offence and the moral blameworthiness of the defendant. Defining offences facilitates the judicial process at the prosecution and litigation stages, improves the tribunals' gender sensitive justice, and provides society with an accurate moral grasp of the defendant's wrongdoing, while at the same time ensuring that distinctions between offenders are marked in the offences committed and that there are significant moral distinctions between offences.

This section will therefore examine the case law of the international criminal tribunals and the ICC in the light of the principle of fair labelling, and explore shortcomings related to gender-based crimes considered within the jurisdiction of these judicial bodies.

1. Abstractness and Ambiguity: Tangible Challenges

One of the major challenges facing the international criminal tribunals and the ICC is the abstractness and vagueness of the gender-based crimes in their statutory laws.[81] In the Akayesu case, for example, Trial Chamber I of the ICTR acknowledged the lack of an accepted definition of the crime of rape in international law, which put the tribunal in a dilemma. Despite the fact that the ICTR is not a legislative body, the judges—who are granted vast authority to adopt rules for the purpose of proceedings before the tribunal—[82]ruled that "the

---

[81] Goldstone & Dehon, *supra* note 1, at 127.

[82] *Statute of the International Criminal Tribunal for Rwanda*, UN Security Council's Resolution S/RES/955 (1994) Annex, Adopted in the Security Council's 3454th meeting on 8 November 1994, Article 14 [hereinafter the ICTR Statute].

Chamber must define rape."[83] This is an *ex post facto* law, as M. Cherif Bassiouni argues,[84] that violates both the principle of *nullum crimen sine lege*, which implies that no one should be held criminally responsible for an act unless it constitutes a crime at the time it takes place, and the principle of fair labelling, which necessitates that fair notice should have been provided to the defendant, so he knows that his conduct constitutes a crime before he carried it out. Ambiguity and broad labels of offences violate also the principle of maximum certainty or fair warning—in the sense that vagueness will mislead both defendant and society as to the extent and consequence of the crime.[85] This problem, at the same time, gives too much discretion to judges in interpreting and applying the law, resulting in different definitions—discussed in the previous chapter—for the crime of rape, leading to inconsistent prosecutions and convictions. Ambivalent definitions of the same crime by the same tribunal leaves the crime open to inconsistent interpretations and leads to an undermining of the rule of the law, as well as the judicial system as a whole.[86]

---

[83] Akayesu Judgement, *supra* note 20, at paragraph 596.

[84] Discussing the maxim *nullum crimen sine lege, nulla poena sine lege,* M. C. Bassiouni maintains that the international criminal courts are not legislative bodies, and that the penalties they have proclaimed—except the Rome Statute of the ICC, which includes *nullum crimen sine lege* provisions— have been *ex post facto*. See M. C. Bassiouni, "Principles of Legality in International and Comparative Criminal Law," in M. C. Bassiouni, ed., *International Criminal Law: Sources, Subjects, and Contents*, vol. 1 (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008)105 [hereinafter Bassiouni].

[85] Ashworth, *supra* note 76, at 63-64; *Kolender* v. *Lawson* (1983) 103 S. Ct. 1855; 461 U.S. 352; 75 L. Ed. 2d 903; 1983 U.S. LEXIS 159; 51 U.S.L.W. 4532, at p. 15.

[86] C. Eboe-Osuji, "Rape as Genocide: Some Questions Arising," (2007) 9:2 Journal of Genocide Research 252 [hereinafter Eboe-Osuji]; Morgan, *supra* note 6, at 2.

In addition, the unrestricted discretion granted to judges in interpreting ambiguous laws threatens their objectivity, because in case of ambiguity, as Aharun Barak and Jared Wessel observe, judges often make interpretations with reference to their own values.[87] Accordingly, to limit judicial discretion in the ICC, States Parties to the Rome Statute created textual restriction.[88] In contrast to the ICTY and the ICTR Statutes, which entrust to judges the task of elaborating and adopting substantive rules,[89] the delegations to the Rome Conference authorized a Preparatory Commission (PrepCom) to draft Elements of Crimes [EoC] for the crime of genocide, crimes against humanity, and war crimes listed in Articles 6, 7, and 8 of the Rome Statute of the ICC, [90] and to draw up Rules of Procedure and Evidence, stated to enter into force upon adoption by two-thirds majority of the members of the Assembly of States Parties.[91] These tools would help judges to fill gaps arising from ambiguity in the Rome Statute, although some delegates to the Preparatory Commission argued that any problem arising

---

[87] J. Wessel, "Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing," (2006) 44:2 The Columbia Journal of Transnational Law 385 [hereinafter Wessel], citing A. Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy," (2002) 116 Harvard Law Review 57-58.

[88] *Ibid.* at p. 384.

[89] The identical Articles 15 and 14 of the ICTY and the ICTR, respectively, provide: "The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters." See The ICTR Statute, *supra* note 82, at Article 14; *Statute of the International Criminal Tribunal for the Former Yugoslavia,* United Nations SCOR, 48th Sess., 3175. Annex, at 40, UN Doc. S/25704, 3 May 1993. (As Amended on 19 May 2003 by Security Council's Resolution 1481), at Article 15 [hereinafter the ICTY Statute].

[90] The Rome Statute of the ICC, *supra* note 25, at Article 9(1).

[91] *Ibid.* at Article 51(1).

from the ambiguity of the provisions of the statutory laws should be addressed by judges of the Court.[92]

Nevertheless, one may argue that the EoC elaborated by the PrepCom eliminate any vagueness of the provisions of Articles 6, 7, and 8 of the Rome Statute and, accordingly, fill the lacuna of crime definition. Despite the broad scope of the EoC, which includes the *actus reus* and *mens rea* of the aforementioned crimes, this argument looks unsound for at least two reasons: firstly, it is in conflict with Article 9(1) of the Rome Statute, which states that "Elements of Crimes shall assist the court in the interpretation and application of Articles 6, 7, and 8." This provision means, without any reasonable doubt, that the EoC were elaborated to "assist" judges of the court, not "bind" them in their interpretation and application of the laws within the jurisdiction of the ICC, thereby giving them considerable discretion. And secondly, indictments prepared by prosecutors and decisions taken by judges are based on the articles of the Statute, not on the Elements, which have no conclusiveness or binding legal status as regards the Court.[93]

However, the idea of formulating the EoC was an American initiative. During the 1996 discussions in the Preparatory Committee on the Establishment

---

[92] W. Lietzau, "Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court," (1999) 32 Cornell International Law Journal 481 [hereinafter Lietzau]; Wessel, *supra* note 87, at 386.

[93] de Brouwer, *supra* note 12, at 28; G. Werle, *Principles of International Criminal Law* (The Hague, The Netherlands: T.M.C. Asser Press, 2005) 49 [hereinafter Werle]; L. van den Herik, The Condition of the Rwanda Tribunal to the Development of the International Law (Leiden, the Netherlands: Martinus Nijhoff Publishers, 2005) 98 [hereinafter Herik].

of the ICC, the United States suggested that creating the EoC would be useful in ridding the statutory laws of vagueness and helping the Court to interpret and apply the articles of the Statute. This idea, which received a chilly welcome from other members of the Committee, resurfaced in the Committee's meeting,[94] held a few months before the Rome Conference, when the US delegation presented a proposal including draft Elements of Crimes to become binding on judges. The project did not receive approval by the members of the Committee until a compromise was reached during the Rome Conference in the course of discussing Article 9 of the Rome Statute. The delegations then authorised a Preparatory Commission to work out the EoC before 30 June 2000.[95] Examining the wording of Article 9(1) of the Rome Statute, one finds the word "assist," which looks as if it served to strike a balance between States Parties calling for annexing the Elements to the Rome Statute and giving them binding force, and the majority who considered such works as redundant and unnecessary,[96] if not a "complex

---

[94] D. Scheffer, "The United States and the International Criminal Court," (1999) 93:1 The American Journal of International Law 17 [hereinafter Scheffer]; *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol.1, UN GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22, at paragraph 56 [hereinafter Report of the Preparatory Committee].

[95] *Finalized Draft Text of the Elements of Crimes,* Part II, PrepCom on ICC, 2 November 2000, UN Doc. PCNICC/2000/1/Add.2. (6 July 2000) [hereinafter Elements of Crimes]; H. von Hebel, & M Kelt, "Some Comments on the Elements of Crimes for the Crimes of the ICC Statute," (2000) 3 Yearbook of International Humanitarian Law 273-274 [hereinafter Hebel & Kelt].

[96] D. Pfirter, "The Position of Switzerland with Respect to the ICC Statute and in Particular the Elements of Crimes," (1999) 32 Cornell International Law Journal 502 [hereinafter Pfirter]; M. Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerpen, Belgium: Intersentia, 2002) 248 [hereinafter Boot].

and time-consuming task."[97] However, the document entitled "Finalized draft text of the Elements of Crimes" does not explicitly state anywhere that these Elements are subordinate to the Rome Statute or binding on the Court.[98]

In contrast to the above argument, some commentators argue that the EoC, as well as Article 22 of the Rome Statute, constitute restrictions on judicial discretion, impose significant limits on the Court's progress, and jeopardize the potential for judicial policy-making.[99] David Hunt, a former judge of the ICTY, has expressed his concern that the drafters of the Rome Statute, by considering the EoC and basing based them upon the body of the law, have prevented the ICC's judges from making worthwhile contributions to international criminal law, and have imposed on them a more mechanical and narrow function. He adds that States Parties imposed such restrictions on the powers of the judge in order to control the proceedings.[100] Similarly, Antonio Cassese, a former president of the ICTY, maintains that the Rome Statute of the ICC demonstrates a certain mistrust in the judges.[101]

---

[97] K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (New York, N.Y.: Cambridge University Press, 2002) 8 [hereinafter Dörmann]; Report of the Preparatory Committee, *supra* note 94, at paragraph 56.

[98] Boot, *supra* note 96, at 36; Elements of Crimes, *supra* note 95.

[99] Wessel, *supra* note 87, at 410.

[100] D. Hunt, "International Criminal Court-High Hopes, Creative Ambiguity and an Unfortunate Mistrust in International Judges," (2004) 2 Journal of International Criminal Justice 61 [hereinafter Hunt].

[101] A. Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections," (1999) 10 European Journal of International Law 163 [hereinafter Cassese].

Nevertheless, another ambiguity that extends judicial discretion is the major inconsistency between Articles 9 and 21 of the Rome Statute. While Article 9 provides that the Elements of Crimes "shall assist" the Court in the interpretation and application of Articles 6, 7, and 8 of the Statute, Article 21 of the same Statute places the EoC in the first category of laws that the Court "shall apply," including the Statute of the Court and the Rules of Procedure and Evidence.[102] However, although Article 9 imposes no obligation on the side of the judges to apply the EoC and Article 21 contains imperative provisions that judges must apply these Elements, Article 9(1) appears to be the *lex specialis* with regard to Article 21(1)(a), the *lex generalis*. This means that in certain cases, the law governing a specific matter—Elements of Crimes—overrides a law that governs general matters—applicable laws by the Court.[103]

To this end, the ambiguity and vagueness of gender-based crimes, embodied in the provisions of the statutory laws of the international criminal tribunals and the ICC, could be resolved by providing explicit definitions for these crimes in the light of the principle of fair labelling, which requires that offences be separated from one another, classified, defined, and labelled. A definition should reflect the different levels of wrongdoing, its nature and the degree of seriousness.

2. Initial Failure to Recognize and Prosecute Gender-Based Crimes

[102] The Rome Statute of the ICC, *supra* note 25, at Article 9(1) & 21(1)(a).

[103] Dörmann, *supra* note 97, at 8.

As has already been noted, Richard Goldstone was amazed at the gender bias that prevailed in the office of the Prosecutor when he assumed the position of Chief Prosecutor at the ICTY and ICTR in August and November 1994 respectively.[104] This bias has been developed in the absence of an affective gender policy to investigate rape and other gender-based crimes, and has culminated in the tribunals' initial failure to adequately recognize and prosecute these crimes. As a matter of fact, since the establishment of the ICTR, for instance, rape and other gender-based crimes have never been investigated or prosecuted consistently within a framework of a definite prosecution strategy. This is due to the fact that rape was overlooked during the first four years succeeding the creation of the Tribunal, which dealt with it as a "lesser" crime and the victims as secondary casualties; the repeated mistakes of unqualified investigators; the lack of expertise and political will on the part of the Office of the Prosecutor, particularly amongst those who were leading the investigations; and the deputy prosecutor's unfounded contention that Rwandan women would not come forward to complain.[105]

Accordingly, rape was not among charges listed in the first series of indictments at the ICTR, including that of Akayesu who was the first accused to appear before the Tribunal.[106] Indeed, many cases proceeded without rape charges

---

[104] Goldstone, *supra* note 28, at 281.

[105] Shattered Lives, *supra* note 10, at 94-95.

[106] Copelon, *supra* note 28, at 224-225.

although the Prosecutor had strong evidence, e.g., the Cyangugu case, where both prosecutors and judges prevented rape victims from seeking justice at the ICTR, as Binaifer Nowrojee provides.[107] Other rape prosecutions lacked evidence beyond reasonable doubt, so the Prosecutor was compelled to withdraw these charges, while rape charges were also dropped because of negligence of the Office of the Prosecutor, e.g., missing the deadline to appeal the rape acquittals in Kajelijeli case. Finally many rape charges were not originally incorporated in several indictments, but were added at a later time under enormous pressure made by feminist legal scholars and human rights activists.[108]

The chief example remains the 1996 Akayesu indictment. Despite the fact that rape and other forms of sexual violence spread throughout Rwanda during the 1994 genocide, particularly in the Taba Commune where Akayesu served as mayor, the latter's first indictment contained no rape charges.[109] However, on the basis of the staggering information revealed by different human rights organizations, particularly Human Rights Watch's famous report "Shattered Lives" on the horrific rape crimes committed against Tutsi women, the Tribunal received an Amicus Brief and several appeals submitted by activists from human rights organizations, feminist legal scholars, and worldwide international human

[107] B. Nowrojee, "Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?, Occasional Paper 10 (Geneva: United Nations Research Institute for Social development, 2005) 10 [hereinafter Nowrojee].

[108] *Ibid.* at 8.

[109] Askin, *supra* note 5, at 105; K. Askin, "Gender Crimes Jurisprudence in the ICTR: Positive Developments," (2005) 3 Journal of International Criminal Justice 1008 [hereinafter Askin]; Peterson, *infra* note 129 at 516.

rights lawyers, including the author.[110] The *Amici* petitioned the Trial Chamber to exercise its authority under the Tribunal's Statute and Rules of Procedure and Evidence to call upon the Prosecutor to amend the indictment against Jean-Paul Akayesu to include charges of rape and other forms of sexual violence as crimes within the jurisdiction of the Tribunal; to decide upon the method of fortifying the record on such charges, whether by calling witnesses pursuant to Rule 98 or through calling upon the Prosecutor to consider supplementing investigations and evidence in the case; and to investigate the issue of not including charges of rape and other forms of sexual assaults in the issued indictments despite conclusive reports documenting widespread rape and other gender-based crimes during the Rwandan genocide.[111] The failure of the Office of the Prosecutor to investigate wartime rape, which should be prosecuted under Article 2(2)(b), (c), and (d), Article 3(f), (g), and (h), and Article 4(a), (c), (h), and (i) of the Statute of the ICTR, constitutes a disappointing precedent that discourages women witnesses

---

[110] de Brouwer, *supra* note 12, at 44; Copelon, *supra* note 28, at 225; G. Borchett, "Sexual Violence against Women in War and Armed Conflict," in A. Barnes, ed., *The Handbook of Women, Psychology, and the Law* (San Francisco, Calif.: Jossey-Bass, 2005) 306 [hereinafter Borchett]; Human Rights Watch, Press Release, "Rwanda Tribunal to Rule on Akayesu Case," (1 September 1998); *International Criminal Tribunal for Rwanda: Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and other Sexual Violence within the Competence of the Tribunal in Akayesu,* ICTR-96-4-1, 27 May 1997 (Montreal, Quebec: Rights & Democracy, 1998), at paragraph 1 [hereinafter Amicus Brief Respecting Amendment of the Indictment of Akayesu]; Shattered Lives, *supra* note 10, at 95.

[111] Amicus Brief Respecting Amendment of the Indictment of Akayesu, *supra* note 110, at paragraph I(3).

from participating in further investigations, and rape victims from speaking out and approaching the Tribunal or any other judicial body.[112]

Consequently, on 17 June 1997, Chief Prosecutor Louise Arbour amended the indictment to include allegations of sexual violence and charges of rape and other sexual crimes against the accused under Article 3(g), Article 3(i), and Article 4(e) of the ICTR Statute. The amendment was motivated by spontaneous testimony of sexual violence by Witness J and Witness H during the course of the trial, as well as by subsequent investigation of the prosecution in addition to the above-mentioned women's groups' and NGOs' pressure on the Prosecution.[113]

Moreover, in Cyangugu Prefecture, as in other Rwandan districts, it soon became evident that rape, sexual slavery, and sexual mutilation were committed on a large scale—as an integral part of the 1994 Rwandan genocide—against Tutsi women, as well as against Hutu women associated with or sympathizing with the Tutsi group. Despite conclusive evidence provided, during the trial of André Ntagerura and others,[114] by two Prosecution witnesses who testified that

---

[112] *Ibid.* at paragraphs 12(4) & (40).

[113] "A Landmark Ruling on Rape," *New York Times* (24 February 2001) A12; A. Lyth, The Development of the Legal Protection against Sexual Violence in Armed Conflicts: Advantages and Disadvantages. Online: Kvinna till Kvinna Foundation (December 2001) <http://www.iktk.se/publikationer/rapporter/pdf/development.pdf> (Accessed on: 12 December 2007); Akayesu Judgement, *supra* note 20, at paragraphs 416-417 & 500-501 & 731; B. Stephens, "Humanitarian Law and Gender Violence: An End to Centuries of Neglect?," (1999) 3 Hofstra Law and Policy Symposium 105 [hereinafter Stephens]; L. Sharlach, "State Rape: Sexual Violence as Genocide," in K. Worcester, et al., eds., *Violence and Politics: Globalization's Paradox* (New York, N.Y.: Routledge, 2002)108-109 [hereinafter Sharlach]; P. Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (S.J.D., Harvard University, 2002) 401 [hereinafter Akhavan]; Wood, *supra* note 28, at 277 & 302.

[114] *Prosecutor* v. *André Ntagerura, Emmanuel Bagambiki & Samuel Imanishimwe,* Judgement and Sentence, 25 February 2004, ICTR-99-46-T [hereinafter Ntagerura].

rape and other forms of sexual assaults were prevalent during the Cyangugu massacres in April 1994, the Prosecutor failed to include these egregious crimes in the indictment against the accused. In her testimony on 25 October 2000, Witness LBI, a Tutsi woman, told the Trial Judges that she was sexually enslaved and raped for several days.[115] Similarly, Witness LAM, also a Tutsi woman, testified on 2 November 2000 that rape and other gender-based crimes were committed during the April genocide by Hutu men. She added that Tutsi women were taken by *Interahamwe* and repeatedly raped. A woman or a girl who resisted or "display[ed] arrogance" was thrown alive into a latrine to breathe her last.[116] On 14 February 2001, the Trial Chamber decided that the Prosecutor could not bring evidence on rape because it was a crime not charged in the indictment.[117]

Accordingly, the Coalition for Women's Human Rights in Armed Conflict Situation submitted on 1 March 2001 an Amicus Curiae Brief requesting the Trial Chamber III of the ICTR to call upon the Prosecutor in the above case to review

---

[115] *Amicus Curiae Brief Respecting the Need to include Sexual Violence Charges in the Indictment*, The Prosecutor v. Samuel Imanishimwe, Emmanuel Bagambiki, André Ntagerura, Case No.: ICTR-99-46 T, The Coalition for Women's Human Rights in Armed Conflict Situations, March 1st, 2001, paragraph 5(ii) [hereinafter Amicus Brief Respecting Amendment of the Indictment of Ntagerura]; S. Balthazar, "Gender Crimes and the International Criminal Tribunals," (2006) 10:1 Gonzaga Journal of International Law 47 [hereinafter Balthazar].

[116] Amicus Brief Respecting Amendment of the Indictment of Ntagerura, *supra* note 115, at paragraph 5(iv); Decision on the Application to File Amicus Curiae Brief according to Rule 74 of the Rules of Procedure and Evidence Filed on Behalf of the NGO Coalition for Women's Human Rights in Conflict Situations, (Prosecutor v. André Ntagerura, Emmanuel Bagambiki & Samuel Imanishimwe), Decision of 24 May 2001, ICTR-99-46-T, paragraph 3.

[117] Amicus Brief Respecting Amendment of the Indictment of Ntagerura, *supra* note 115, at paragraph 2.

the facts and evidence and to grant leave to the Prosecutor to amend the indictment and prosecute sexual violence thus: as genocide under Article 2(a), (b), and (d); as a crime against humanity under Article 3(c), (f), (g), and (i); and as a grave breach of common Article 3 of the Geneva Conventions under Article 4(a) and (e) of the Statute of the ICTR.[118] The *Amici* argued that the failure of the Prosecutor to include rape charges in the indictment against the defendants constituted a grave injustice against the victims, violated the principle of non-discrimination which requires that gender-based crimes be investigated and prosecuted with the same seriousness of other crimes within the Tribunal's jurisdiction,[119] and sent a message to the victims that these crimes, despite their seriousness and gravity, do not warrant the attention of the Tribunal.[120]

By the same token, the April 2000 amended indictment[121] of Radovan Karadžic did not explicitly include rape among the other charges laid against the accused. The indictment referred to rape under the broad term of "sexual violence" under Counts 1-6 "genocide, complicity in genocide, extermination, murder, and wilful killings,"[122] and under Count 7 "persecutions."[123] The

---

[118] *Ibid.* at paragraph 1.

[119] *Ibid.* at paragraph 3(iii).

[120] *Ibid.* at paragraph 42.

[121] *Prosecutor* v. *Radovan Karadžić*, Amended Indictment of 31 May 2000, IT-95-5-1. [hereinafter Karadžić Amended Indictment].

[122] *Ibid.* at paragraph 17(b).

[123] *Ibid.* at paragraph 34(c) and (d).

indictment, which prosecuted sexual violence against Bosnian Muslims, Bosnian Croats, and non-Serb populations as an act of genocide, torture, and persecution, mainly focused on the sufferings of victims in detention camps or other facilities and ignored thousands of individual cases of rape committed at home and at checkpoints in outlying villages and towns. On the other hand, the indictment subsumed rape under the broad label of sexual violence, thus offending against the principle of fair labelling, which requires that crimes be separated from one another, classified, defined and labelled. Accordingly, in the aftermath of the arrest of Radovan Karadžic, a number of feminist legal scholars and other women's human rights activists drew the attention of the ICTY's Prosecutor to the fact that "[w]hile sexualized violence was undoubtedly part of the persecution inflicted upon the Bosnian Muslims as a group, it is not acceptable simply to include these distinct gender crimes in the omnibus persecution crime as in the current indictment; they [the distinct gender-based crimes] merit distinct charges embodying the jurisprudence of the Tribunal."[124] However, prosecuting rape in this ambiguous way, in addition to furthering the closing strategy of the tribunal, risked a partial or superficial treatment of these serious crimes, thereby undermining gender justice, relegating wartime rape once again to the margins of

[124] R. Copelon, "Amendment of the Karadzic indictment respecting rape and sexualized violence," A Letter to Serge Brammertz, Chief Prosecutor of the International Criminal Tribunal for Former Yugoslavia from Rhonda Copelon, International Women's Human Rights Law Clinic, and others (23 August 2008) [hereinafter Letter to Serge Brammertz].

international criminal law, and subverting international criminal law's capacity to develop a deterrent to such heinous crimes.[125]

From what has been said, there were a number of shortcomings that curtailed the tribunals' capacity to respond adequately to gender-based crimes committed during the Rwandan genocide and the Yugoslav conflict. First, despite the pervasiveness of rape and other sexual violence, the tribunals failed utterly to prosecute these crimes from the beginning of their work, which in turn damaged their credibility to deliver fair, effective, and timely justice.[126] The Prosecutor's initial failure to adequately and professionally investigate massive and systematic rape and sexual violence that occurred in the Rwandan genocide, at least until enormous external pressure made by human rights activists and feminist legal scholars on the ICTR to amend Akayesu's indictment, reduced the victims' confidence in the Tribunal's ability to deliver justice and adequately address their needs. This is part of what keeps wartime rape invisible and an unavoidable collateral damage of war. Second, the tribunals failed to deal with gender sensitive matters whether at the investigation or at the trial stage. The lack of professional female investigators made many rape survivors refrain from coming forward to talk or complain, affecting as a result adversely the Tribunals' ability to fulfil their mandate, prosecute gender-based crimes, and bring justice to victims. Provocative questions either by poorly trained investigators at the pre-

[125] *Ibid.*

[126] Wood, *supra* note 28, at 299.

trial stage or by defence counsel in the trial process—particularly if the witnesses received psychological counselling before trial—simply re-traumatized them and resulted in inconsistent testimonies.

This failure has occurred in spite of the fact that the ICTR has a Witness Protection Unit, established purposely to handle witnesses' issues during the prosecutorial process. For example, in winter 2003, a defence lawyer and his assistant visited, without prior notice, a secret place where protected witnesses were located. Because they belonged to the same community, witnesses were afraid that their identities had been compromised, filling them with apprehension. In another case before the ICTY during the Foča trial, the defence lawyer asked the witness, after she testified that she had not been selected to be raped one night by the prison guards, whether she was jealous of the women who had been chosen to be raped.[127]

Moreover, witnesses were reluctant to testify, as many other witnesses had been killed or forced to leave their homes after testifying once their identities had been revealed infiltrated to the defendants' relatives or militant groups. In *Prosecutor* v. *Tadić*, which was expected to be a historic trial that would prosecute rape as a war crime for the first time in an international criminal judicial body, rape charges were dropped for lack of evidence, as witness "F" was

---

[127] *International Criminal Tribunal for Rwanda: Witness Support and Protection,* Online: War Crimes Research Office, Washington College of Law, 7 June 2003, <http://www.wcl.american.edu/warcrimes/2003ictr_protection.cfm> (Accessed on: 19 April 2008); *Prosecutor* v. *Dragoljub Kunarac, Radomir Kovač and Zoran Vuković,* (2001) Judgement, 22 February 2001, IT-96-23-T and IT-96-23/1-T. [hereinafter Kunarac Judgement]; Shattered Lives, *supra* note 10, at 96; Wood, *supra* note 28, at 311.

terrified and refused to testify without full protection, and Witness "L's" testimony was discredited at cross-examination. Accordingly, the Prosecutor was forced to withdraw rape charges included in Counts 2 throughout 4. At the same time, many witnesses and sexually abused victims with uncertain refugee status in neighbouring Western countries were unwilling to come forward to testify, as they feared being forcibly returned to Bosnia-Herzegovina after testifying before the Tribunal—a situation that would make many of them vulnerable to consequential risks.[128] Notwithstanding the Prosecutor's withdrawal of rape charges, some commentators argue that "the Tadić case was not a complete failure for gender-related criminal prosecution because it proved that it is legally possible to charge war criminals with rape under international law."[129]

Finally, the other shortcoming that has impeded the tribunals' ability to adequately respond to gender-based crimes is the delays in prosecuting and

---

[128] Copelon, *supra* note 28, at 230; E. Stover, "Witnesses and the Promise of Justice in The Hague," in E. Stover & H. Weinstein, eds., *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (New York, N.Y.: Cambridge University Press, 2004) 110 [hereinafter Stover]; Eaton, *supra* note 28, at 894; J. Campanaro, "Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes," (2001) 89: 8 Georgetown Law Journal 2576 [hereinafter Campanaro]; P. Wald, "Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal," (2002) 5 Yale Human Rights and Development Law Journal 219 [hereinafter Dealing with Witnesses]; P. Wald, "The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court," (2001) 5 Washington University Journal of Law & Policy 109 [hereinafter Wald]; *Rape is a War Crime: How to Support the Survivors, Lessons from Bosnia-Strategies for Kosovo*, International Centre for Migration Policy Development, Report, 1999, at p. 77 [hereinafter How to Support the Survivors].

[129] L. Peterson, "Shared Dilemmas: Justice for Rape Victims under International Law and Protection for Rape Victims Seeking Asylum," (2008) 31 Hastings International and Comparative Law Review 513 [hereinafter Peterson]; R. Lehr-Lehnardt, "One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court," (2002) 16 Brigham Young University Journal of Public Law 362 [hereinafter Lehr-Lehnardt].

judging the perpetrators. For example, despite the landmark decision of Akayesu, the ICTR took four years to prosecute and convict him. Similarly, it took the Tribunal approximately one decade to prosecute and convict Nyiramasuhuko.[130] These delays violate the principle of fair labelling, which preserves the defendant's right to efficient and timely justice, and send a message to rape survivors that justice is still out of reach. In light of the above accounts, one should not be surprised that ninety percent of the ICTR judgements, for instance, do not contain rape convictions, or that the number of rape acquittals is double the number of rape convictions.[131] This issue will be discussed in the following section.

3. The "Least Condemned Crimes": Inconsistent Prosecutions and Inadequate Convictions

Despite tremendous progress made during the last two decades by international criminal tribunals on gender-based crimes, many feminist legal scholars and commentators have considered these developments as inadequate if

---

[130] Pauline Nyiramasuhuko was born in 1946, in Ndora Commune, Butare Prefecture, Rwanda. She was Minister for Women's Development and Welfare in the government of Juvenal Habyarimana and subsequently held the same position in the interim government of Theodore Sindikubwabo. Nyiramasuhuko was arrested in Kenya in the month of July 1997 as a result of a Warrant of Arrest issued by the Tribunal on 29 May 1997. The prosecutor of the International Criminal Tribunal for Rwanda filed an indictment on 26 May 1997 accusing her of genocide, crimes against humanity and serious violations of Article 3 common to the Geneva conventions, all offences committed in violation of article 2, 3 and 4 respectively of the Statute of the Tribunal. The indictment was confirmed by Judge Yakov Ostrovsky on 29 May 1997. The initial appearance of Pauline Nyiramasuhuko did not take place until 3 September 1997when she was brought before Trial Chamber I of the International Criminal Tribunal for Rwanda. She pleaded not guilty to all Charges. Since that time, her case is still in process.

[131] Nowrojee, *supra* note 107, at 8.

not a "complete" failure.[132] This thesis argues that this inadequacy is due to—besides other deficiencies, particularly the lack of a clear gender-based prosecutorial strategy and limitations on the tribunals' jurisdictions and mandates—the abstractness and ambiguity of gender-based crimes in the statutory laws and jurisprudence of these tribunals, resulting from the constant failure of the drafters of these laws to recognize the principle of fair labelling.[133]

Although wartime rape and other forms of gender-based crimes were utilized systematically on a large scale by drafting thousands of women and girls in the territory of former Yugoslavia, Rwanda, and Sierra Leone for systematic mass rape and various sexual assaults, the ICTY, the ICTR, and the SCSL delivered only symbolic gender justice by judging a few wartime rape perpetrators or those who were responsible for using sexual violence as an integral part of the war. However, this section will look into the case law of the

[132] See generally, B. Stephens, "Humanitarian Law and Gender Violence: An End to Centuries of Neglect?," (1999) 3 Hofstra Law and Policy Symposium 87-109; C. Coan, "Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia," (2000) 26:1 North Carolina Journal of International Law and Commercial Regulation 183-237; Eaton, *supra* note 28, at 873-919; G. Carlton, "Equalized Tragedy: Prosecuting Rape in The Bosnian Conflict under the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia," (1997) 6:1 Journal of International Law and Practice 92-109; K. Askin, "Prosecuting Wartime Rape and other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles," (2003) 21:2 Berkeley Journal of International Law 288-349; R. Copelon, "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law," (2000) 46 McGill Law Journal 217-240; R. Copelon, "Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law," (1994) 5:2 Hastings Women's Law Journal 243-266.

[133] On the national level, the lack of definition of the crime of rape in the Rwandan Penal Code has led to inconsistent verdicts in genocide judgements involving rape and contributed to confusion among prosecutors and judges. Although the Rwandan Penal Code prohibits rape and other forms of sexual violence, it fails, like the statutory laws of international criminal tribunals, to define these prohibited offences. See *Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda,* Human Rights Watch, September 2004, Vol.16, No. 10(A), at p. 32 [hereinafter Barriers to Justice for Rape Victims].

tribunals and the ICC, examine a number of cases that included sexual violence, and explore how these crimes were ill-prosecuted, and how many of them were acquitted due to lack of evidence beyond reasonable doubt or withdrawn on plea bargaining agreements between defendants and the prosecution.

A. Ambiguity and the Lack of Prosecutions' Political Will: The Road to Rape Acquittals

As argued earlier, the absence of a clear-cut definition of rape and other gender-based crimes in the statutory laws was not resolved by the numerous broad and narrow definitions of rape provided by the trial chambers of the ICTR and the ICTY judgements of Akayesu, Furundžija, and Kunarac, where some of these definitions made it difficult for the prosecution to acquire rape convictions in the tribunals. The Trial Chamber II definition of rape, emphasizing as it did the *actus reus* of the crime, complicated the prosecution's task of obtaining evidence beyond reasonable doubt for procuring convictions of rape in sexual violence trials.[134] Accordingly, in the Semanza case, Trial Chamber III of the ICTR asserted that the *mens rea* of rape, as a crime against humanity, means the intent to sexually penetrate the victim with the knowledge that the victim does not consent to this act.[135] Based on that, the Trial Chamber found the accused guilty for only an isolated rape incident despite the fact that he regularly and directly

---

[134] Kunarac Judgement, *supra* note 127, at paragraph 437; *Prosecutor* v. *Dragoljub Kunarac, Radomir Kovač and Zoran Vuković,* (2002) Appeals Judgement, 12 June 2002, IT-96-23-A and IT-96-23/1-A, at paragraphs 127-128 [hereinafter Kunarac Appeals Judgement].

[135] *Prosecutor* v. *Laurent Semanza,* (2003) Judgement and Sentence, 15 May 2003, ICTR-97-20-T. at paragraph 346 [hereinafter Semanza Judgement].

ordered his subordinates to utilize rape,[136] thus demolishing the possibility of bringing more rape crimes before the Tribunal.

The Prosecutor's failure to provide evidence of rape beyond reasonable doubt resulted in the renunciation of rape charges in several cases. As a matter of fact, since the Akayesu decision, the Trial Chambers of the ICTR required a high burden of proof from the prosecution whether in individual or command responsibility cases.[137] However, looking into the case law of the ICTR, one finds that approximately thirty percent of the charges brought before the Tribunal included rape and other forms of sexual violence: and that of these one third of the accused were found guilty and two thirds acquitted due to the failure of the prosecutor to provide evidence beyond reasonable doubt. For example, Trial Chamber I of the ICTR convicted Musema of the rape of a Tutsi woman and gave him a life sentence pursuant to Article 3(g) of the Statute of the Tribunal;[138] nevertheless, the Appeals Chamber reversed the conviction for lack of evidence beyond reasonable doubt[139] as the Prosecutor had failed to prove that the accused

---

[136] *Ibid.* at paragraph 478.

[137] R. Haffajee, "Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory," (2006) 29 Harvard Journal of Law and Gender 209 [hereinafter Haffajee].

[138] This is on the basis of Article 6(1), which states "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime." See The ICTR Statute, *supra* note 82, at Article 6(1).

[139] *Alfred Musema* v. *The Prosecutor,* (2001) Appeals Judgement, 16 November 2001, ICTR-96-13-A, at paragraphs 172-194 [hereinafter Musema Appeals Judgement]; *The Prosecutor* v. *Alfred Musema,* (2000) Judgement and Sentence, 27 January 2000, ICTR-96-13-A, at paragraphs 193-194 [hereinafter Musema Judgement].

had the knowledge that his subordinates had committed rape or that he had failed to take reasonable measures to prevent or punish the perpetrators.[140] Moreover, in the Juvenal Kajelijeli case, the accused was acquitted of rape due to lack of credibility and inconsistency in the testimony on the part of the key witness.[141]

However, there were other acquittals for rape in the ICTR due either to the fact that the prosecution failed to meet the required burden of proof or to the fact that the Prosecutor withdrew rape and sexual violence counts from the original indictments. An example of the first category is the acquittal of rape charges brought against Niyitegeka,[142] Muvunyi,[143] and Kamuhanda.[144] Amazingly, none of these acquittals had ever been appealed by the Prosecutor. Examples for the second category include the Prosecutor's withdrawal of rape charges in the indictments of Ndindabahizi,[145] Nzabirinda,[146] Serushago,[147] and Bisengimana.[148]

---

[140] Musema Judgement, *supra* note 139, at paragraph 968.

[141] *Prosecutor* v. *Juvénal Kajelijeli*, (2003) Judgement and Sentence, 1 December 2003, ICTR-98-44A-T, at paragraphs 908-925 [hereinafter Kajelijeli Judgement].

[142] *Prosecutor* v. Eliézer Niyitegeka, (2003), Judgement and Sentence, 16 May 2003, ICTR-96-14-T., at paragraph 458 [hereinafter Niyitegeka Judgement].

[143] A. Brunet, "Letter to Prosecutor Hassan Jallow," A Letter to Hassan Jallow, the Prosecutor of the International Criminal Tribunal for Rwanda from Ariane Brunet, Women's Rights Coordinator at Rights & Democracy, Montreal, Canada, (8 February 2005) [hereinafter Letter to Prosecutor Hassan Jallow]; Peterson, *supra* note 129 at 517; *Prosecutor* v. *Tharcisse Muvunyi*, (2006), Judgement and Sentence, 12 September 2006, ICTR-2000-55A-T., at paragraph 526 [hereinafter Muvunyi Judgement]; "Rwanda: ICTR Honeymoon Threatens to End over Rape Charges," *Hirondelle News Agency*, Arusha, February 11th, 2005.

[144] *Prosecutor* v. *Kamuhanda*, (2004) Judgement, 22 January 2004, -95-54A-T., at paragraph 427 [hereinafter Kamuhanda Judgement].

[145] A. Milne, "Prosecuting Cases of Gender Violence in The International Criminal Tribunal for Rwanda," (2005) 11 Buffalo Human Rights Law Review 122 [hereinafter Milne]; *Prosecutor* v. *Emmanuel Ndindabahizi*, (2004) Judgment and Sentence, 15 July 2004, ICTR 2001-71-I., at paragraph 13 [hereinafter Ndindabahizi Judgement].

To date, only a few defendants have been found guilty of rape, including Akayesu,[149] Gacumbitsi,[150] Semanza,[151] and Muhimana.[152] Thus, approximately ninety percent of the ICTR's judgements are free of rape charges, while rape acquittals are double the rape convictions in number.[153]

Unlike the SCSL,[154] the tribunals have lacked a prosecution plan to track down those responsible for the rape of thousands of mainly Bosnian and Tutsi women and girls. In fact, gender-based crimes have never consistently formed part of a well-defined prosecution strategy to investigate and bring sufficient evidence of rape and other sexual assaults into the trial chambers of the

---

[146] *Prosecutor* v. *Joseph Nzabirinda*, (2007) Sentencing Judgment, 23 February 2007, ICTR 2001-77-T., at paragraphs 3, 4, and 44 [hereinafter Nzabirinda Sentencing Judgement].

[147] *Prosecutor* v. *Omar Serushago*, (1999) Judgment and Sentence, 5 February1999, ICTR 98-39-S., at paragraph 4 [hereinafter Serushago Judgement and Sentence].

[148] *Prosecutor* v. *Paul Bisengimana*, (2006) Judgment and Sentence, 13 April 2006, ICTR 00-60-T., at paragraphs 7 and 12 [hereinafter Bisengimana Judgement].

[149] Akayesu Judgement, *supra* note 20, at paragraphs 694-695.

[150] *Prosecutor* v. *Sylvestre Gacumbitsi*, (2004) Judgment, 17 June 2004, ICTR 2001-64-T., at paragraph 292 [hereinafter Gacumbitsi Judgement].

[151] Semanza Judgement, *supra* note 135, at paragraph 588.

[152] *Prosecutor* v. *Mikaeli Muhimana*, (2005) Judgment and Sentence, 28 April 2005, ICTR-95-1B-T., at paragraph 534 [hereinafter Muhimana Judgement].

[153] Nowrojee, *supra* note 107, at 3.

[154] Despite the lack of human resources and other shortages in his office, David Crane, the Prosecutor at the SCSL, has committed himself to a prosecution strategy that has consistently incorporated gender-based crimes and is reflected in hiring competent female investigators, who compromise twenty percent of investigators, while the ICTR, for instance, never dedicated more than one to two percent of its approximately one-hundred investigators to this issue. See Nowrojee, *supra* note 107, at 11.

tribunals.[155] Consequently, the tribunals are doomed to repeat their mistakes, such as in 1995 when the ICTY's prosecutor was forced to withdraw rape charges from the indictment of Tadić, the first ever case in the history of international criminal law that featured charges of rape as a war crime, because the Tribunal failed to provide adequate security to the key witness in this case. In another instance ten years later, the ICTR's prosecutor was obliged to withdraw rape charges against Tharcisse Muvenyi, because the prosecution witness declined to testify and changed residence without leaving a valid contact information.[156]

Although gender-based crimes were never fully or consistently integrated into the tribunals' investigative and prosecution strategy, the prosecutorial policies of these bodies reveal different levels of interest and political will to investigate and prosecute gender-based crimes. Despite Justice Richard Goldstone's—the first Chief Prosecutor of the ICTY and the ICTR—commitment to investigate and prosecute rape and other sexual assaults perpetrated in the early 1990s in the former Yugoslavia and Rwanda, he was faced with several obstacles that impeded his ambitious plans, including: his short period in office, 1994-1996; a lack of human and financial resources; and a lack of political will on the part of the international community to arrest high-ranking war leaders who encouraged the use of rape and other sexual violence as an integral tool of war. Accordingly, Justice Goldstone never clearly set forth an effective prosecution plan to

---

[155] *Ibid.* at p. 8.

[156] Letter to Prosecutor Hassan Jallow, *supra* note 143.

investigate and include charges in the indictments. Thus, the possibility of bringing charges of rape and sexual violence during his tenure was limited. For this reason, most early indictments did not include rape charges, although rape and sexual violence were common in the Yugoslav and Rwandan conflicts.[157] Nevertheless, gender-based crimes received more attention at both tribunals during the time of Justice Louise Arbour, who assumed the office of the Chief Prosecutor for three years. In her tenure, she amended the Akayesu indictment and added rape charges to several new indictments after undertaking further investigations and receiving enormous pressure from many feminist legal scholars and activists, calling upon the prosecutor to bring more charges of rape and other sexual violence within the jurisdiction of the Tribunals. Despite the landmark developments in the tribunals' jurisprudence under Arbour's tenure, including the substantive achievement of providing the first definition of rape in international criminal law, and convicting persons of rape as an act of genocide, a crime against humanity and torture, rape charges have since added impetuously without adequate evidence and drafted in a similar language to the indictments, so that many of these charges were acquitted at the appeals stage at a later time.

Justice Arbour was succeeded by Carla Del Ponte in September 1999. Despite the new prosecutor's plan to add more indictments and arrests, rape and sexual violence charges were diminished in number and quality—some of them

[157] Nowrojee, *supra* note 107, at 9.

by withdrawal for lack of evidence beyond reasonable doubt[158] or dropped as a part of plea bargaining to speed up the trials.[159] This decline was due to the lack of commitment to adequately develop the evidence in cases that previously included rape charges and were brought to the tribunal during the tenure of Justice Arbour. However, during Del Ponte's last year in the office, no rape charges were included in any new indictments.[160] Most notable was the aforementioned Cyangugu case when Del Ponte ignored rape victims' testimonies during the trial and refused to add rape charges to the indictments of the accused.[161]

Moreover, the current prosecutor, Hassan Jallow, has continued the legacy of Del Ponte. He started his tenure with the failure to appeal rape acquittals in the Kajelijeli case when his office negligently missed the deadline to appeal these acquittals. During his tenure, several rape charges were dropped due to lack of conclusive evidence or in exchange for guilty pleas.[162]

---

[158] Kajelijeli Judgement, *supra* note 141, at paragraphs 908-925; Musema Judgement, *supra* note 139, at paragraphs 193-194; Niyitegeka Judgement, *supra* note 142, at paragraph 458.

[159] *Prosecutor* v. *Hassan Ngeze, et al.,* (2003) Judgment, 3 December 2003, ICTR-99-52-T., at paragraphs 520 and 522 [hereinafter Ngeze Judgement].

[160] Nowrojee, *supra* note 107, at 10.

[161] B. Van Schaack, "Engendering Genocide: The Akayesu Case before the International Criminal Tribunal for Rwanda," Online: Santa Clara University - School of Law, Legal Studies Research Paper No. 08-55 (2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154259> (Accessed on: 20 October 2009), p. 25 [hereinafter Van Schaack].

[162] Bisengimana Judgement, *supra* note 148, at paragraph 228; C. MacKinnon, "The ICTR's Legacy on Sexual Violence: The Recognition of Rape as an Act of Genocide-*Prosecutor* v. *Akayesu*," in Guest Lecture Series of the Office of the Prosecutor, the ICC, The Hague, 27 October 2008, p. 104 [hereinafter MacKinnon]; Nowrojee, *supra* note 107, at 3; Nzabirinda Sentencing Judgement, *supra* note 146, at paragraphs 41 and 42; P. Sellers, "Gender Strategy is not a Luxury for International Courts," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 317 [hereinafter Sellers]; *Prosecutor* v. *Juvénal Rugambarara*, (2007) Sentencing

B. Broad Definitions and Un-Specificity of Gender-Based Crimes: Barriers to Justice

Yet, the lack of a statutory definition of rape in international criminal law instruments has put the international criminal tribunals in a dilemma. It leads to misinterpretations of the law and inconsistent convictions for rape in the tribunals. For example, in the Muhimana case, Trial Chamber III of the ICTR interpreted the Kunarac and Akayesu definitions of rape as compatible,[163] despite essential differences between them.[164] The Trial Chamber took a further step to re-adopt the Akayesu model, holding that the Kunarac concept of rape contained the Akayesu measures. Accordingly, the Chamber found the accused guilty of rape as a crime against humanity because he had individually committed rape as part of a systematic and massive campaign against the Tutsi ethnic group, and did not consider the act of disembowelment of Pascasie Mukaremera by cutting her with a machete from her breasts to her genitals,[165] as a crime of rape, although the Trial Chamber I of the same tribunal conceded in the Akayesu case that "sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[166]

Judgement, 16 November 2007, ICTR-00-59-T., at paragraphs 2 and 3 [hereinafter Rugambarara Sentencing Judgement]; Serushago Judgement and Sentence, *supra* note 147, at paragraph 4.

[163] Haffajee, *supra* note 137, at paragraph 211.

[164] Muhimana Judgement, *supra* note 152, at paragraph 548.

[165] *Ibid.* at paragraph 536.

[166] The Tribunal considered the incident described by Witness KK in which Akayesu ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard

Simultaneously, the Tribunal noted that "rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual." For example, the Tribunal considered "the interahamwes thrusting a piece of wood into the sexual organs of a woman as she lay dying," an act of rape.[167] This instrumental rape, like other forms of sexual violence, constitutes a method of torture and sexual mutilation.[168] The above two controversial decisions by the same tribunal demonstrate inconsistency in convicting and sentencing, which necessitates the articulation of a clear cut

---

of the bureau communal, in front of a crowd, an act of sexual violence. See Akayesu Judgement, *supra* note 20, at paragraph 688; M. Karagiannakis, "The Definition of Rape and its Characterization as an Act of Genocide: A Review of the Jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia," (1999) 12 Leiden Journal of International Law 479 [hereinafter Karagiannakis].

[167] In this connection, in the Čelebići Judgement, the Trial Chamber II of the ICTY indicated that vaginal or anal penetration by the penis under coercive circumstances constituted rape. Moreover, the Chamber ruled that the act of forcing victims to perform fellatio on one another constituted a fundamental attack on their human dignity as an offence of inhuman and cruel treatment under Articles 2 and 3 of the ICTY Statute, and noted that such an act "could constitute rape for which liability could have been found if pleaded in the appropriate manner." See Akayesu Judgement, *supra* note 20, at paragraph 686; *Prosecutor* v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo,* (1998) Judgement, 16 November 1998, IT-96-21, at paragraphs 1065-1066 & 940. Paragraph 940 was literally echoed in paragraph 962 [hereinafter Čelebići Judgement]; S. Sivakumaran, "Sexual Violence against Men in Armed Conflict," (2007) 18:2 The European Journal of International Law 263-264 [hereinafter Sivakumaran].

[168] In his report submitted to the UN Commission on Human Rights on the issue of torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur Nigel Rodley stated that he received abundant information regarding the practice of rape and sexual abuse as a weapon to punish, intimidate and humiliate victims, who were mostly women. He added that rape and other forms of sexual abuse were apparently associated with other methods of torture. See D. Taylor, "Congo Rape Testimonies: Aged One to 90, the Victims of Hidden War against Women," *The Guardian* (5 December 2008) 17 [hereinafter Taylor]; UN Commission on Human Rights, *Report of Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment,* UN Doc. E/CN.4/1994/31, (6 January 1994), at paragraphs 431-432 [hereinafter Degrading Treatment].

definition of the crime of rape in the statutory laws of the tribunals as required by the principle of fair labelling.

Moreover, while Trial Chamber II of the ICTY held that one of the substantial features of the *actus reus* of the crime of rape is the use of "coercion or force or threat of force against the victim or a third person,"[169] focusing on the victim's consent, the Trial Chamber III of the ICTR ruled in the Muhimana judgement—being influenced by Akayesu definition of rape—that "coercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape."[170] Similarly, in determining the elements of rape as a crime against humanity and war crime, the ICC Elements of Crimes incorporate the Akayesu elements of rape as a physical invasion of a sexual nature in coercive circumstances, including the principle that the victim's consent is not an element of the crime of rape, instead making reference to the coercive circumstances where rape takes place.[171]

Indeed, the tribunals' jurisdiction witnessed a persistent tension regarding elements of the rape crime, particularly the elements of "non-consent of the victim" and how it could be interpreted.[172] However, the Akayesu landmark

---

[169] Kunarac Judgement, *supra* note 127, at paragraph 437.

[170] Muhimana Judgement, *supra* note 152, at paragraph 546.

[171] A. Cole, "Prosecutor v. Gacumbitsi: The New Definition for Prosecuting Rape under International Law," (2008) 8:1-2 International Criminal Law Review 80 [hereinafter Cole].

[172] P. Sellers, "The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation," Online: The OHCHR Women's Human Rights and Gender Unit (WRGU) – Conceptual Framework and Main Priorities (2006) <http://www2.ohchr.org/

definition of rape has restricted the elements of the crime to (a) a physical invasion (penetration) of a sexual nature; (b) committed on a person (male or female), (c) under circumstances which are coercive (against the victim's will or her/his consent).[173] Accordingly, the Trial Chamber, in contrast to elements of domestic rape crimes, refrained from requiring the elements of the victim's consent, where the victim must relate her or his non-consent to the perpetrator regarding the physical invasion of the sexual nature. Having conclusive evidence that rape was committed in Taba commune in "circumstances which are coercive," the Akayesu rape crime elements were not challenged on appeal.[174]

Similarly in the Furundžija judgement, the Trial Chamber comprehends that "any form of captivity vitiated consent."[175] Moreover, in the *Prosecutor* v. *Kunarac*, *et. al.*, the Appeals Chamber adopted Furundžija's mechanical definition of rape, which some commentators refer to as the Furundžija/Kunarac definition. Although the appeals judges were keenly aware that circumstances of detention in centres could amount to "circumstances that were so coercive as to negate any possibility of consent,"[176] they required the prosecutor to provide

---

english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf> (Accessed on: 18 March 2010), p. 18 [hereinafter Sellers].

[173] Akayesu Judgement, *supra* note 20, at paragraph 598.

[174] Sellers, *supra* note 172, at 20.

[175] *Prosecutor* v. *Anto Furundžija,* (1998) Judgement, 10 December 1998, IT-95-17/1-T, at paragraph 271 [hereinafter Furundžija Judgement].

[176] Kunarac Judgement, *supra* note 127, at paragraph 132.

evidence beyond reasonable doubt that the victim did not consent to rape or sexual violence.[177] Later on, in *Prosecutor* v. *Gaucumbitsi*, the Appeals Chamber of the ICTR, basing itself on the doctrine of *stare decisis,* considered the elements of rape set forth in Kunarac. Accordingly, the Appeals Chamber asked the prosecutor to provide evidence beyond reasonable doubt that the victim had not consented to rape, although the judges knew that rape took place in circumstances where the sexual autonomy of the victim was completely absent.[178]

However, the ambiguity of the statutory laws of the tribunals on gender-based crimes and the inconsistent definitions of rape provided in their case law created several complications. Besides the prosecutorial and adjudication obstacles discussed above, inconsistencies in the definition of rape created a number of human rights concerns, as Patricia Sellers observes,[179] including the victim's right to equal access to justice. Based on judges' discretion, in some cases, the victim's consent to rape was obviated in coercive circumstances, while in other cases rape victims were asked to prove the non-consent element and the perpetrator's awareness of the lack of consent.

Nonetheless, the un-specificity of gender-based crimes in the statutory laws of the tribunals has affected their capacity to prosecute these crimes as such. In

---

[177] A. Obote-Odora, "Rape and Sexual Violence in International Law: ICTR Contribution," (2005) 12 New England Journal of International and Comparative Law 152 [hereinafter Obote-Odora]; Sellers, *supra* note 172, at 21.

[178] Sellers, *supra* note 172, at 23.

[179] *Ibid.* at p. 27.

Prosecutor v. *Kunarac, et al.*, known as the Foča case, Trial Chamber II of the ICTY failed to convict those who were accused of genocidal rape and sexual slavery. Instead, it convicted them of enslavement as a crime against humanity under Article 5(c) of the Statute of the ICTY; torture as a crime against humanity and as a violation of the laws or customs of war under Article 5(f) and Article 3 of the Statute of the Tribunal respectively; rape as a crime against humanity and as a violation of the laws or customs of war under Article 5(g) and Article 3 of the Statute; and outrages upon personal dignity as a violation of the laws or customs of war under the same Article 3 of the Statute of the ICTY.

Despite the fact that the Trial Chamber had extensive evidence beyond reasonable doubt that victims were targeted because they were Muslims of Bosnian origin and with the intent to forcibly impregnate them so as to make them give birth to Serb children,[180] it failed to convict the accused of rape as an act of genocide. Moreover, the Trial Chamber charged the accused with both "rape" and "enslavement" instead of "sexual slavery" as a crime against humanity. It simply implemented the Slavery Convention's definition of slavery in the broadest terms. Article 1(1) of the Slavery Convention provides: "[s]lavery is the status or

[180] The Trial Chamber noted how the Dragoljub Kunarac knew that the women he targeted were Muslim; accordingly, he seized some of them for himself, while he gave others to his men to be raped. It was reported that the accused Kunarac, while raping victim FWS-183, told the latter that she should enjoy being "f…d by a Serb". After she was raped by one of the accused's men, Kunarac laughed at her, and told her that she would carry a Serb baby whose father she would never know. See K. Askin, "The Kunarac Case of Sexual Slavery: Rape and Enslavement as Crimes against Humanity," in A. Klip & G. Sluiter, eds., *Annotated Leading Cases of International Criminal Tribunals*, Vol. V (Antwerpen, Belgium: Intersentia, 2003) 811 [hereinafter Askin]; Kunarac Judgement, *supra* note 127, at paragraph 582-583; Soonarane, *supra* note 55, at 38.

condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[181] In other words, the Trial Chamber expanded this definition to include sexual slavery as a crime against humanity, while slavery—according to the above definition—means forced labour attached to the right of ownership.[182]

However, although the victims were subjected to forced labour, including cleaning, cooking, and washing the perpetrators' clothes, the perpetrators ought to have been convicted of sexual slavery, not enslavement. This is because the main purpose of seizing the victims was to gang-rape them with the intent of impregnation and forcing them to give birth to children belonging to another ethnic group—a crime that could also have been prosecuted as a crime of genocide under Article 3(b), (d), and (e) of the Statute of the ICTY. The failure of the Trial Chamber to convict the accused of genocidal rape and sexual slavery as such was due to the ambiguity and abstractness of the statute of the ICTY on gender-based crimes and the failure to incorporate rape as an act of genocide under Article 4 or as sexual slavery within crimes against humanity under Article 5 of the Statute. Moreover, these shortcomings reveal that the prosecution

[181] Slavery Convention, Concluded on 25 September 1926, A 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253 (Entered into force on 9 March 1927), at Article 1 [hereinafter Slavery Convention].

[182] Askin, *supra* note 180, at 812; McHenry, *supra* note 28, at 1273.

intentionally dealt with rape and other gender-based crimes as the "least condemned crimes."[183]

Similarly, the Trial Chamber charged the accused with torture for crimes involving sexual violence. Deciding on the applicable law, the Trial Chamber convicted the accused of both torture and rape under Articles 3 and 5 respectively, instead of "sexual torture," an offence that is not embodied in the Statute of the ICTY. The Chamber convicted the accused cumulatively of more than one offence for the same conduct.[184] This issue points to another failure of the drafters of the Statute, i.e., that of not defining several gender-based crimes and labelling them in a way that corresponds to the nature and magnitude of the offence. To convict a person cumulatively of rape and torture under the same conduct, rape must be utilized by a state official with the intent of extracting information. Accordingly, any sexual torture employed by a non-state official with no such intent would not satisfy the elements of the crime of torture in its traditional broad meaning.[185]

---

[183] Haffajee, *supra* note 137, at paragraph 204; Shattered Lives, *supra* note 10, at 37; UN Commission on Human Rights, *Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45*, UN Doc. E/CN.4/1995/42 (22 November 1994), at p. 64 [hereinafter Coomaraswamy]; Wood, *supra* note 28, at 281.

[184] Kunarac Judgement, *supra* note 127, at paragraph 711.

[185] Askin, *supra* note 180, at 810 and 818; *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,* GA Res. 39/46, 39 UN GAOR, Supp. (No.51) at 197, UN Doc. A/39/51 (1984), reprinted in 23 International Le Aterials 1027 (1984), *Substantive changes noted in* 24 I.L.M. 535 (1985) (Entered into force on 26 June1987), at Article 1 [hereinafter Convention against Torture].

Despite the importance of the Kunarac judgement, both the prosecution and trial judges failed to make reference to sexual slavery and sexual torture, both of them terms that accurately reflect the offences of rape and enslavement, and rape and torture respectively.[186] Nevertheless, the lack of clear-cut definitions of gender-based crimes in the statutory laws of the tribunals continue to apply in the absence of the principle of fair labelling, which necessitates that crimes should be separated, classified, defined, and labelled. Given the current situation, some gender crimes are often used interchangeably or synonymously.[187]

Furthermore, the lack of definition of rape and other gender-based crimes favours the marginalization of these crimes at the prosecutorial stage and gives rise to confusion among prosecutors, the defence, and the trial judges at the SCSL. A case in point is *Prosecutor* v. *Moinina Fofana and Allieu Kondewa*, known as the Civil Defence Force (CDF) case,[188] where the initial indictments against these individuals included no allegations of sexual violence in contrast to

---

[186] Askin, *supra* note 180, at 817.

[187] A. Biehler, "War Crimes against Women," (2002) 13 Criminal Law Forum 507 [hereinafter Biehler]; D. Bergoffen, "From Genocide to Justice: Women's Bodies as a Legal Writing Pads," (2006) 32:1 Feminist Studies 22 [hereinafter Bergoffen]; K. Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (The Hague, The Netherlands: Martinus Nijhoff Publishers, 1997) 12 [hereinafter Askin]; L. Arcel, "Deliberate Sexual Torture of Women in War: The Case of Bosnia-Herzegovina," in A. Shalev, et al., eds., *International Handbook of Human Response to Trauma* (Dordrecht, The Netherlands: Kluwer Academic Publishers, 2000) 182 [hereinafter Arcel]; M. C. Bassiouni & M. McCormick, *Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia*, Occasional Paper No.1 (Chicago, Ill.: International Human Rights Law Institute, DePaul University, 1996) 3 [hereinafter Bassiouni & McCormick]; W. Schabas, "Definitional Traps' and Misleading Titles," (2009) 4:2 Genocide Studies and Prevention 178 [hereinafter Schabas].

[188] *Prosecutor* v. *Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa*, (2004) Indictment, 5 February 2004, SCSL-03-14-PT. [hereinafter Fofana Indictment].

two parallel indictments against other individuals tried in cases known as the Armed Forces Revolutionary Council (AFRC)[189] and Revolutionary United Front (RUF) cases,[190] which did include sexual charges. The dilemma erupted during the CDF judicial processing stage when the prosecutor sought leave to amend the above three indictments, those already containing sexual charges and the CDF case which did not, by adding "one more and new count of forced marriage"[191] as a crime against humanity. The Prosecutor argued that the additional charge of forced marriage to the AFRC and the RUF cases, which already included sexual violence charges, was based on the same facts already embodied in the initial indictments, and, accordingly, should not require more investigation on the part of the defence.

Contrary to the Prosecutor's expectations, the defence challenged his application arguing that forced marriage is not defined as a crime against humanity in the Statute of the SCSL, so that adding this count to the indictments

---

[189] *Prosecutor* v. *Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, (2005) Further Amended Consolidated Indictment, 18 February 2005, SCSL-2004-16-PT., See Counts 6-9, paragraphs 51-64 (Sexual Violence, including forced marriage). [hereinafter Brima Further Amended Consolidated Indictment].

[190] *Prosecutor* v. *Issa Hassan Sesay, Morris Kallon, Augustine Gbao* (2006) Corrected Amended Consolidated Indictment, 2 August 2006, SCSL-04-15-PT., See Counts 6-9, paragraphs 54-60 (Sexual Violence, including forced marriage). [hereinafter Sesay Corrected Amended Consolidated Indictment].

[191] *Prosecutor* v. *Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, (2004) Decision on Prosecution Application for Leave to File an Interlocutory Appeal against Decision on Motion for Concurrent Fearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT, 1 June 2004, [hereinafter Decision on Prosecution Application for Leave].

would violate the principle of legality.[192] Debating the Prosecutor's demand and the defence's argument, the Trial Chamber allowed by a majority the Prosecutor's application to amend the above indictments and add the new count of forced marriage, holding that this crime was relevant to other offences listed in the indictments.[193] However, considering the right of the accused to be tried without undue delay, which is incorporated in Article 17(4)(c) of the Statute of the SCSL, the Trial Chamber by a majority rejected the Prosecutor's application to amend the indictments in the CDF case. The judges held that adding a new set of charges based on new facts would delay the rights of the accused to be tried without undue delay.[194]

Despite the fact that the trial judges allowed the amendment of the AFRC case, *Prosecutor* v. *Brima, et al.,* to add the crime of forced marriage as a separate crime against humanity under Article 2(i) "[o]ther inhumane acts,"[195] they ruled by a majority that they were not satisfied with the evidence adduced by the

---

[192] *Prosecutor* v. *Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, (2004) Decision on Prosecution Request for Leave to Amend the Indictment, 6 May 2004, SCSL-2004-16-PT., paragraph 12 [hereinafter Decision on Prosecution Request].

[193] A. Park, "'Other Inhumane Acts': Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone," (2006) 15:3 Social & Legal Studies 328 [hereinafter Park]; T. Doherty, "Developments in the Prosecution of Gender-Based Crimes - the Special Court for Sierra Leone Experience," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 330 [hereinafter Doherty].

[194] *Prosecutor* v. *Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa*, (2004) Decision on Prosecuting Request for Leave to Amend the Indictment, 20 May 2004, SCSL-03-14-PT., [hereinafter Decision on Prosecuting Request for Leave]; V. Oosterveld, "Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 3 [hereinafter Oosterveld].

[195] Decision on Prosecution Request, *supra* note 192, at paragraph 6.

prosecution on the alleged crime of forced marriage as an independent crime of the offence of sexual slavery under Article 2(g) of the Statute of the SCSL. The trial judges acquitted the accused of the crime of forced marriage, arguing that this crime is subsumed by the crime of sexual slavery and that there was no lacuna in the law which would necessitate a separate crime of forced marriage as an "other inhumane act."[196]

Accordingly, they ruled that Count 7 was invalid due to duplicity, and dismissed Count 8 for redundancy as the crime of sexual slavery would be dealt with in Count 9.[197] The Trial Chamber concluded, moreover, that the Prosecution's evidence in the case did not point to any instances of a woman or girl having a false marriage forced upon her in circumstances which did not amount to sexual slavery.[198] However, Justice Doherty dissented from the majority view, arguing that the evidence provided by the Prosecution showed that women and girls who were labelled 'bush wives" or rebel wives" had been forced into conjugal status, protected from rape by other rebels, given food when available, and attributed a status corresponding to their "husband's" status among

---

[196] *Prosecutor* v. *Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, (2007) Trial Judgement, 20 June 2007, SCSL-2004-16-T., at paragraphs 703-704 [hereinafter Brima Trial Judgement].

[197] *Ibid.* at paragraph 25.

[198] Brima Trial Judgement, *supra* note 196, (Partly dissenting opinion of justice Doherty on Count 7-sexual slavery- and Count 8 –'forced marriage'), at p. 594, paragraph 71; V. Oosterveld, "The Special Court for Sierra Leone's Consideration of Gender-Based Violence: Contributing to Transitional Justice?" (2009) 10:1 Human Rights Review 84-89 [hereinafter Oosterveld].

rebel men.[199] She added that forced marriage, in contrast to rape or other forms of sexual violence, did not necessitate physical violence. Moreover, the status of forced marriage, unlike sexual slavery, aimed at imposing a "forced conjugal association rather than exercise mere ownership over civilian women and girls."[200]

Examining the majority and minority opinions, as well as the prosecution's evidence, the Appeals Chamber noted that the Trial Chamber might have been mislead by the way that the Prosecution classified forced marriage as "other inhumane acts" among other gender-based crimes, Counts 6-9, under the main heading "sexual violence."[201] Furthermore, it held that the category "other inhumane acts" is articulated to include crimes of comparable gravity to the listed crimes against humanity.[202] However, the Appeals Chamber's view of forced marriage was quite different from that of the Trial Chamber. Based on the prosecutor's evidence, the Appeals Chamber provided that:

> … no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery. While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with

---

[199] Doherty, *supra* note 193, at 332.

[200] *Prosecutor* v. *Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, (2008) Appeals Judgement, 22 February 2008, SCSL-2004-16-A., at paragraph 193 [hereinafter Brima Appeals Judgement].

[201] *Ibid.* at paragraph 181.

[202] *Ibid.* at paragraph 183.

> him, into a forced conjugal association with a another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the "husband" and "wife," which could lead to disciplinary consequences for breach of this exclusive arrangement. These distinctions imply that forced marriage is not predominantly a sexual crime. The Trial Chamber, therefore, erred in holding that the evidence of forced marriage is subsumed in the elements of sexual slavery.[203]

Despite the further step taken by the Appeals Chamber in clarifying the crime of forced marriage and rejecting the Trial Chamber's understanding that the category of "other inhumane acts" must be restricted to non- sexual crimes,[204] it failed to provide a clear-cut definition of forced marriage to be adopted in other cases.

Nonetheless, the above conflicting opinions indicate that gender-based crimes embodied in the statutory laws of the tribunals should be separated from one another, classified, defined and labelled as required by the principle of fair labelling. Because forced marriage, which contains sexual and non-sexual features, is not explicitly listed among crimes against humanity within the Statute of the SCSL, the Prosecutor charged it as a crime of an "other inhumane act," creating a crime that lacked definition.[205] However, although the Trial Chamber stated, in its approval of the prosecution request for leave to amend the

---

[203] *Ibid.* at paragraph 195.

[204] *Ibid.* at paragraphs 185-186.

[205] Sellers, *supra* note 162, at 320; V. Oosterveld, "The Special Court for Sierra Leone, Child Soldiers and Forced Marriage: Providing Clarity or Confusion?" (2007) 45 Canadian Yearbook of International Law 152 [hereinafter Oosterveld].

indictment, that "[f]orced marriage is in fact what we would like to classify as a 'kindred offence' to those that exist in the indictment in view of the commonality of the ingredients needed to prove offences of this nature," it dismissed this count, declaring it "completely subsumed" by the offence of sexual slavery despite[206] differences between both offences—i.e., an act of complete mislabelling.[207] Moreover, as the majority of trial judges had also dismissed the charge of sexual slavery for duplicity, they subsumed both offences—forced marriage and sexual slavery—under the war crimes charge of outrage upon personal dignity.[208] Moreover, the ambiguity of the Statute of the SCSL on gender-based crimes leaves too much room to the trial judges—to render dissenting opinions and violates the principle of fair labelling. In the absence of clear definitions for various gender-based crimes in the Statute, one may claim that categorizing sexual assaults under the category "other inhumane acts" which includes crimes without a sexual aspect, is not accurate as there is a long list of gender-based crimes of a sexual nature not yet listed under Article 3(g) of the statute. Furthermore, this notion is inconsistent with the jurisprudence of the

---

[206] Brima Trial Judgement, *supra* note 196, at paragraph 713.

[207] Oosterveld, *supra* note 198, at 86.

[208] Brima Appeals Judgement, *supra* note 200, at paragraph 202; Oosterveld, *supra* note 194, at 415; Sellers, *supra* note 172, at 24; V. Oosterveld, "Gender-Based Crimes against Humanity," In *Crimes against Humanity Initiative: April Experts' Meeting*. A Conference Sponsored by Washington University Law Whitney R. Harris World Law Institute, April 12-15, 2009, at p. 20 [hereinafter Oosterveld].

ICTY and the ICTR, which considered, for instance, forced nudity as a sexual-based crime under the same category of "other inhumane acts."[209]

However, the Trial Chamber's rejection of the Prosecutor's request to add sexual violence charges, including the crime of forced marriage, to the indictments of the accused in the CDF case—as has already been noted—meant that the CDF trial did not include evidence of sexual crimes, including forced marriage, although such crimes were common in the CDF-held territories. This is another indication, as Valerie Oosterveld points out, that the international criminal tribunals did not adequately address gender-based crimes which can still be misunderstood, misinterpreted, and mischaracterized.[210]

In addition to the ambiguity of the provisions of the statute of the SCSL, lack of definitions of gender-based crimes, and the absence of "Elements of Crimes," there are a number of statutory shortcomings that would thwart adequate prosecution of wartime rape and other sexual violence including: (a) the exclusion of persecution on gender grounds—unlike Article 7(1)(h) of the Rome Statute of the ICC—[211]from acts that constitute crimes against humanity under Article 2(h)

---

[209] Akayesu Judgement, *supra* note 20, at paragraph 697; *Prosecutor* v. *Jean-Paul Akayesu,* (1996) Amended Indictment, ICTR-96-4-I., at Paragraph 10A [hereinafter Akayesu Amended Indictment]; Furundžija Judgement, *supra* note 175, at paragraph 82.

[210] Oosterveld, *supra* note 198, at 96; Oosterveld, *supra* note 205, at 159; V. Oosterveld & Marlowe, A., "Prosecutor v. Brima et al., Prosecutor v. Fofana and Kondewa, Special Court for Sierra Leone," (2007) 101(4) American Journal of International Law 856 [hereinafter Oosterveld & Marlowe].

[211] The Rome Statute of the ICC, *supra* note 25, at Article 7(1)(h).

of the Statute,[212] which include persecution on political, racial, ethnic or religious grounds; (b) the incorporation of rape and other indecent assaults in Article 3(e) of the Statute,[213] which covers outrages upon personal dignity such as humiliation and degrading treatment diminishing the victim's physical and psychological endurance;[214] (c) the failure of the Statute of the SCSL, as in the case of the statutory laws of other international criminal tribunals, to prosecute gender-based crimes in their own right, not under the umbrella of crimes against humanity or war crimes; and finally (d) the influence of other tribunals' practice of providing symbolic justice to victims by prosecuting only those "who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leone law committed in the territory of Sierra Leone since 30 November 1996," as provided in Article 1(1) under the competence of the court.[215]

Indeed, the ambiguity of gender-based crimes and subsuming them under other crimes required additional elements and created confusion between the Prosecutor and the trial judges. In *Prosecutor* v. *Jean Pierre Bemba Gombo*, a recent case before the ICC, the accused was charged with the offences of murder,

---

[212] *Ibid.* at Article 2(h).

[213] *Ibid.* at Article 3(e).

[214] Damgaard, C., "The Special Court for Sierra Leone: Challenging the Tradition of Impunity for Gender-based Crimes?," (2004) 73 Nordic Journal of International Law 495 [hereinafter Damgaard].

[215] *Statute of the Special Court for Sierra Leone*, UN Doc. S/2002/246, appendix II, 2178 U.N.T.S. 138. (06/03/2002), at Article 1(1) [hereinafter Statute of the Special Court for Sierra Leone].

Article 7(1)(a); rape, Article 7(1)(g); torture, Article 7(1)(f) as crimes against humanity falling within the jurisdiction of the court under the Rome Statute. He was also charged with murder, Article 8(2)(i); rape, Article 8(2)(e)(vi); torture, Article 8(2)(c)(i); outrages upon personal dignity, Article 8(2)(c)(ii); and pillaging, Article 8(2)(e)(v) of the Rome Statute—constituting war crimes within the jurisdiction of the Court. On 15 June 2009, Pre-Trial Chamber II of the ICC issued its "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo," rejecting the cumulative charging approach for the Prosecutor[216] and declined to confirm Count 3 of torture as a crime against humanity and the war crime of outrages upon personal dignity on that basis. The Chamber concluded that "the evidence presented reflects the same conduct which underlies the count of rape," and considered that the acts of torture and outrages upon personal dignity were fully subsumed by the count of rape.[217] Following that decision, a number of women's human rights experts and human rights advocates sought leave to submit observations as *Amicus Curiae* on 31 July 2009[218] and 28 August 2009

[216] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, (The Prosecutor v. Jean-Pierre Bemba Gombo), Decision of 15 June 2009, ICC-01/05-01/08-388, at paragraph 190 [hereinafter Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute].

[217] *Ibid.* at paragraph 205.

[218] Women's Initiatives for Gender Justice, *Amicus Curiae Observations of the Women's Initiatives for Gender Justice Pursuant to Rule 103 of the ICC Rules of Procedure and Evidence*, in the case of The *Prosecutor* v. *Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-466, 31 July 2009.

respectively.[219] Both documents argued that the issue of the cumulative charge is "a widely accepted and established practice in international and national courts" and does not offend the right of the accused for a fair trial.[220]

C. Plea Bargaining Agreements: Gender-Based Crimes as the "Least Condemned Crimes"

Despite the fact that gender-based crimes have received unprecedented attention in international criminal law in the past fifteen years, the international criminal tribunals have largely failed to recognize and prosecute these crimes on an equal footing with other serious crimes. Many of these crimes were acquitted or withdrawn from the Court during plea bargaining or charge exchange. Indeed, plea bargaining has been a staple commodity of the international criminal law.[221] Despite the fact that the ICTY and the ICTR initially determined that plea bargaining is incompatible with their unique purposes and functions,[222] guilty pleas, as a result of plea bargains, have become an acceptable practice used by the

---

[219] Women's Initiatives for Gender Justice, *Amicus Curiae Observations of the Women's Initiatives for Gender Justice Pursuant to Rule 103 of the ICC Rules of Procedure and Evidence*, in the case of The *Prosecutor* v. *Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-466, 28 August 2009. (Submitted by Rhonda Copelon, Director, International Women's Human Rights Law Clinic, City University of New York School of Law, USA, and Others, on the negotiating history and applicability of key provisions of the Rome Statute and elements of crimes as well as developments in international law which compel the cumulative charging of rape and torture).

[220] *Ibid.* at paragraph 11.

[221] B. Van Schaack, "Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 396 [hereinafter Van Schaack]; D. Buss, "Rethinking 'Rape as a Weapon of War'," (2009) 17:2 Feminist Legal Studies 151 [hereinafter Buss].

[222] M. Scharf, "Trading Justice for Efficiency: Plea Bargaining and International Tribunals," (2004) 2:4 Journal of International Criminal Justice 1071 [hereinafter Scharf].

trial chambers of these tribunals to mitigate circumstances and facilitate reconciliation in the former Yugoslavia and Rwanda, expedite their caseloads and consequently save the tribunal's time and resources. It has also recently served as a response to the considerable pressure applied by the UN Security Council and donor states to speed up their work and close their doors by the end of 2010.[223] Although plea bargaining is a highly controversial judicial process[224] that may result in dropping severe changes[225] and damaging to the credibility of the judicial system, [226] both tribunals were, and still are, involved in a huge plea bargaining campaign—at the ICTY alone, 12 out of 20 defendants pleaded guilty of certain crimes in plea bargain between 2001 and 2003—including offences categorized as crimes of genocide, crimes against humanity, and war crimes. During the last decade, however, dropping rape and other gender-based charges in the course of

[223] R. Henham & M. Drumbl, "Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia," (2005) 16:1 Criminal Law Forum 49 [hereinafter Henham & Drumbl]; S. Williams, ICTY Referrals to National Jurisdictions: A Fair Trial or a Fair Price? (2006) 17 Criminal Law Forum178 [hereinafter Williams]; UN Security Council's Resolution 1503 (2003), *Calling on the ICTY and the ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategies)* (28 August 2003), UN Doc. No. S/RES/1503 (2003).

[224] J. Clark, "Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation," (2009) 20:2 European Journal of International Law 416 [hereinafter Clark].

[225] In a statement by Judge Antonio Cassese, the former president of the ICTY, made at a Briefing to Members of Diplomatic Missions on 11 February 1994, he maintained that plea bargaining is unfitting in the case of defendants charged with the most horrifying crimes. See Scharf, *supra* note 222, at 1075, citing V. Morris & M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, vol. 2 (Irvington-on- Hudson, N.Y.: Transnational Publishers, 1995) 649.

[226] R. Henham, "The Ethics of Plea Bargaining in International Criminal Trials," (2005) 26:3 Liverpool Law Review 217 [hereinafter Henham].

pleading guilty of other crimes, e.g., murder, became common in judicial proceedings, mainly in the ICTR.[227]

In the ICTR, the prosecution has concluded several plea agreements with the accused in which the latter agreed to plead guilty of certain charges while the prosecution pledged to drop other charges against the defendant. In *Prosecutor* v. *Paul Bisengimana*, the defendant, who held the office of Bourgmestre of Gikoro Commune, Kigali-Rural Prefecture during the Rwandan genocide, was found guilty of genocide (Count 1) pursuant to Article 2(3)(a) of the Statute of the ICTR, and another eleven counts, including: complicity in genocide (Count 2); conspiracy to commit genocide (Count 3); direct and public incitation to commit genocide (Count 4); crimes against humanity (Count 5); Crimes against humanity-extermination (Count 6); crimes against humanity-torture (Count 7); crimes against humanity-rape (Count 8); crimes against humanity-other inhumane acts (Count 9); and Geneva conventions violations (Counts 10, 11, and 12).[228] Following the Plea Agreement between the defendant and the Office of the Prosecutor, and during his second further appearance on 7 December 2005, the accused pleaded guilty to the counts of murder and extermination as crimes against humanity. Accordingly, Trial Chamber II granted the prosecution motion

---

[227] C. MacKinnon, "The ICTR's Legacy on Sexual Violence: The Recognition of Rape as an Act of Genocide-*Prosecutor* v. *Akayesu*," in Guest Lecture Series of the Office of the Prosecutor, the ICC, The Hague, 27 October 2008, at p. 104, reprinted in (2008) 14:2 New English Journal of International Comparative Law 101-110 [hereinafter MacKinnon].

[228] *Prosecutor* v. *Paul Bisengimana*, (2006) Indictment, 19 July 2000, ICTR 00-60-I. [hereinafter Bisengimana Indictment].

for withdrawal and dismissal of the counts to which the accused had pleaded not guilty, including genocide, complicity in genocide, and rape as a crime against humanity.[229]

Moreover, in *Prosecutor* v. *Nzabirinda*, the defendant was charged with genocide and crimes against humanity for extermination and rape—offences stipulated in Articles 2 and 3 of the Statute of the Tribunal.[230] On 20 November 2006, the prosecution requested the withdrawal of the charges of genocide (Count 1), complicity in genocide (Count 2), extermination as a crime against humanity (Count 3), and rape as a crime against humanity (Count 4).[231] The prosecution further submitted that, pursuant to Article 9 of the Statute, the Trial Chamber should rule that the *non bis in idem* principle applies to counts withdrawn even though no trial on the merits had been held thereon.[232] On 8 December 2006, the Chamber granted the motion and accepted the withdrawal of the previous indictment and the filling of a new indictment with one count of murder, as a crime against humanity.[233]

In another case before the Trial Chamber I, the Prosecutor charged Omar Serushago, one of the five leaders of the *Interahamwe* in Gisenyi, with rape as a

---

[229] *Prosecutor* v. *Paul Bisengimana*, (2006) Judgment and Sentence, 13 April 2006, ICTR 00-60-T., at paragraphs 12 and 231 [hereinafter Bisengimana Judgment and Sentence].

[230] *Prosecutor* v. *Joseph Nzabirinda*, (2001) Indictment, 6 December 2001, ICTR 2001-77-I [hereinafter Nzabirinda Indictment].

[231] Nzabirinda Sentencing Judgement, *supra* note 146, at paragraph 41.

[232] *Ibid.* at paragraph 44.

[233] *Ibid.* at paragraph 4.

crime against humanity under Count 5 for his responsibility for rape as a widespread or systematic attack against a civilian population on political, ethnic or racial grounds—a crime punishable under Article 3(g) of the Statute of the Tribunal.[234] On 14 December 1998, during his initial appearance before the Trial Chamber I of the ICTR, the accused pleaded guilty to all counts except the charge of rape as a crime against humanity. The prosecutor requested that the Trial Chamber grant her leave to withdraw rape charges, and this was authorized.[235]

Nevertheless, in another case before the same Trial Chamber, the Prosecutor charged Juvénal Rugambarara, the Bourgmestre of Bicumbi Commune, Kigali-Rural Prefecture, with nine counts, including: genocide (Count 1); complicity in genocide (Count 2); conspiracy to commit genocide (Count 3); direct and public incitement to commit genocide (Count 4); torture and rape as a crime against humanity (Count 6 and Count 7); and serious violations of common Article 3 of the Geneva Conventions and Additional Protocol II pursuant to Article 4(a) and 4(e) of the Statute of the Tribunal (Count 8 and Count 9).[236] The Prosecutor filed a motion with the Chamber on 12 June 2007, requesting the amendment of the indictment. On 28 June 2007, the Chamber accepted the withdrawal of the previous counts, including Count 7 (rape as a crime against

---

[234] Milne, *supra* note 145, at 125; Peterson, *supra* note 129 at 517; *Prosecutor* v. *Omar Serushago*, (1998) Indictment, 8 October1998, ICTR 98-39-I [hereinafter Serushago Indictment].

[235] Serushago Judgement and Sentence, *supra* note 147, at paragraph 4.

[236] *Prosecutor* v. *Juvénal Rugambarara*, (2007) A Decision on the Prosecution Motion to Amend the Indictment, 28 June 2007, ICTR-00-59-I., at paragraph 2 [hereinafter Rugambarara Decision on the Prosecution Motion to Amend the Indictment].

humanity) and charged him with one count (extermination as a crime against humanity) pursuant to Article 3(b) of the Statute.[237]

However, examining plea agreements between defendants and the Prosecution, in general, one notices that a plea bargain often takes place when the defendant agrees to plead guilty to a lesser offence in return for the prosecution's agreement to drop or withdraw a more serious charge. Looking into the above ICTR plea agreements, amazingly, one finds that all the defendants agreed to plead guilty to many serious offences, e.g., murder, in return for dropping charges of rape or other forms of sexual violence—crimes that have been invisible for hundreds of years in international law. In this respect, one wonders if defendants agree to plead guilty to serious crimes in return for dropping rape charge because both perpetrators and victims belong to the same conservative society that still views rape as one of the most disgraceful offences that can be inflicted on a human being, fearing the stigma of being labelled as rapists? This phenomenon is strong proof of the social role of labelling crimes and emphasizes that the label must reflect exactly the nature and magnitude of the wrongdoing—a function required by the principle of fair labelling. The acquittal of rape charges on plea agreements sends a two-fold message to both victims and perpetrators: despite great developments in international criminal justice in the past 15 years, justice is still far from obtainable, while gender-based crimes still remain secondary crimes.

[237] Rugambarara Sentencing Judgement, *supra* note 162, at paragraphs 2 and 3.

At the same time, it assures perpetrators that rape and sexual violence offences can be dropped or withdrawn on plea agreements, even after sentencing.

4. Fair Labelling: The Missing Legal Principle

The above analysis reveals that the statutory laws and jurisprudence of the international criminal tribunals and the ICC had violated the principle of fair labelling and other legal principles in several cases and on different occasions. Having touched upon some of these violations throughout the previous chapters, this section will examine violations of certain other principles and concepts, particularly the offender's right to fair warning or maximum certainty, the right to be tried without undue delay, and the right to fair sentencing. These rights will be scrutinized with reference to the principle of fair labelling.

However, the interest of the principle of fair labelling, as Williams maintains, goes beyond categorizing, defining, and differentiating between different forms of wrongdoings to operate on all levels of the legislative and legal process. It insists that the offence's label should present the degree of the offender's moral guilt, which would reduce the possibility of misunderstanding and would help in consistent prosecution and sentencing, rather than leaving everything to the judges' discretion.[238] Moreover, as Simester and Sullivan suggest, the label of the offence must be clear enough to communicate to the offender the kind of crime that he committed and why he is being punished.

[238] G. Williams, "Convictions and Fair Labelling," (1983) 42:1 The Cambridge Law Journal 85 [hereinafter Williams].

Indeed,[239] as Williams added, if the sentence does not fairly represent the wrongdoing, the offender could complain of unfairness.[240]

As the offender is often judged by the society according to the label attached to him by the court, the principle of fair labelling requires that the label of the offence should fairly express the wrongdoing of the offender and precisely identify the extent of his moral blameworthiness. In short, the stigma of the conviction should correspond to the wrongfulness of the act.[241] Broad labels or labelling an offence in a way that does not accord with the society's understanding of the real meaning of the offence would also offend the principle of fair warning or maximum certainty and mislead individuals with regard to the nature and scope of the offence,[242] leading quite possibly to the complications of retroactivity, as Ashworth asserts.[243] However, if the label does not represent the

---

[239] A. Simester & G. Sullivan, *Criminal Law: Theory and Doctrine* (Portland, Or.: Hart, 2007) 31 [hereinafter Simester & Sullivan].

[240] Williams, *supra* note 238, at 85.

[241] D. Robinson, "The Identity Crisis of International Criminal Law," (2008) 21 Leiden Journal of International Law 927 [hereinafter Robinson]; F. Leverick, *Killing in Self-Defence* (New York, N.Y.: Oxford University Press, 2006) 11 [hereinafter Leverick]; *Prosecutor* v. *Miroslav Kvočka et al.,* Appeal Judgement, 28 February 2005, IT-98-30/1-A, at paragraph 92 [hereinafter Kvočka Appeal Judgement].

[242] A. Steel, "Money for Nothing, Cheques for Free? The Meaning of 'Financial Advantage' in Fraud Offences," (2007) 31 Melbourne University Law Review 227 [hereinafter Steel].

[243] Ashworth, *supra* note 76, at 64.

accurate name of the offence and reflect the offender's degree of culpability, the latter will be unfairly stigmatized by the society.[244]

A. The Right to Fair Warning or Maximum Certainty

In this respect, the principle of fair warning or maximum certainty overlaps with the principle of fair labelling. Both principles require that the defendant should only be charged with a crime that is explicitly defined in the law. Accordingly, charging a person for conduct that is not explicitly defined in the statutory laws of the tribunals as criminal would violate both principles, because they insist that individuals must know that a certain conduct may subject them to criminal prosecution at the time of breaking the law.[245] In this sense, the fair warning principle implies that the potential offender's *mens rea*—the culpability element—is necessary to protect him against the severe adverse consequences attached to lawbreaking.[246] A case in point is the *prosecutor* v. *Brima, et al.* When the Prosecutor sought leave to amend the indictment by adding a new charge of forced marriage, the defence challenged the Prosecutor's application asserting that the crime in question is not defined in the Statute of the SCSL as a crime against

---

[244] C. Clarkson, "Context and Culpability in Involuntary Manslaughter: Principle of Instinct?," in A. Ashworth & B. Mitchell, eds., *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000) 143 [hereinafter Clarkson).

[245] D. Amann & M. Sellers, "The United States of America and the International Criminal Court," (2002) 50 American Journal of Comparative Law 400 [hereinafter Amann & Sellers].

[246] A. Zemach, "Fairness and Moral Judgments in International Criminal Law: The Settlement Provision in the Rome Statute," (2002-2003) 41 Columbia Journal of Transnational Law 910 [hereinafter Zemach].

humanity, so that bringing such a charge violates the principle of legality.[247] In fact, the Prosecutor and the defence failed to recognize both the principles of fair labelling and fair warning. The Prosecutor overlooked the principle of fair labelling, which insists that a crime must exist and be explicitly defined and labelled in the Statute, while the defence ignored the accused's right to fair warning or maximum certainty despite the fact that this right overlaps with the principle of legality, which prohibits applying laws retroactively. However, charging individuals for acts which are not explicitly prohibited under the statute of the court would force the law to function against the principles of fundamental justice.

B. The Right to be Tried without Undue Delay

Nevertheless, a tribunal's competence depends on its capacity to deliver justice in a timely, efficient, and impartial way.[248] Although the statutory laws of the tribunals provide for the defendant's right to be tried without undue delay,[249] these judicial bodies were slow in processing cases, which adversely affected their capacity to deliver timely and deterrent justice. Despite the fact that this is mainly a procedural problem, it in turn offends against the principle of representative

[247] Decision on Prosecution Request, *supra* note 192, at paragraph 12.

[248] Wood, *supra* note 28, at 313.

[249] The ICTY Statute, *supra* note 89, at Article 21(4)(c); The ICTR Statute, *supra* note 82, at Article 20 (4)(c); Statute of the Special Court for Sierra Leone, *supra* note 215, at Article 17(4)(c).

labelling—fair labelling—which also attempts to make it clear to society that justice is being done to both victims and perpetrators.[250]

As noted, the excessive delays in the proceedings of cases were largely procedural. These included: the Prosecutor's several amendments of indictments at various stages in the proceedings,[251] such as the Akayesu indictment at the ICTR,[252] where the prosecutor successfully added sexual charges to the indictment in the midst of the trial, and other indictments at the AFRC[253] and the RUF[254] at the SCSL, where the Prosecutor tried to add the crime of forced marriage as a crime against humanity;[255] repeated adjournments in the course of the trial by judges;[256] excessive cross-examinations of witnesses;[257] the

---

[250] Ashworth, *supra* note 76, at 79.

[251] The International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Adopted on 11 February 1994, last Amendment on 28 February 2008, UN Doc. IT/32/Rev. 41, reprinted in 33 I.L.M. 484, at Rule 50; The International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Adopted on 29 June 1995, last Amendment on 14 March 2008, at Rule 50; Special Court for Sierra Leone, Rules of Procedure and Evidence, Adopted on 7 March 2003, last Amendment on 27 May 2008, at Rule 50.

[252] Akayesu Amended Indictment, *supra* note 209, at paragraph 10A; Akayesu Judgement, *supra* note 20, at paragraph 697.

[253] Brima Further Amended Consolidated Indictment, *supra* note 189, at Counts 6-9, paragraphs 51-64.

[254] Sesay Corrected Amended Consolidated Indictment, *supra* note 190, at Counts 6-9, paragraphs 54-60.

[255] Moreover, at the conclusion of the Dragan Nikolić preliminary hearing, the ICTY Trial Chamber judges invited amendments to add charges of rape and genocide to the accused's indictment. See *Prosecutor* v. *Dragan Nikolić,* Review of Indictment Pursuant to Rule 61. Case No. IT-94-2-S, 20 October 1995.

[256] For example, the trial of Nyiramasuhuko was adjourned five times by the presiding judges, for several months each time. And as a result of drastic changes in the Tribunal's trial chambers, the case was adjourned indefinitely in the summer of 2003. See *Prosecutor* v. *Nyiramasuhuko,* (2003) Decision on the Matter of Proceeding under Rule 15 *bis* (D), 15 July 2003, ICTR-97-42-T.,

complexity of the case;[258] and sometimes the unavailability of witnesses due to a lack of the state cooperation with the Tribunal.[259]

Indeed, excessive delays in the proceedings of the tribunals and the endemic violation of the right of the accused to be tried without undue delay were of frequent occurrence in the tribunals' chambers. Of course, these delays give the impression that the tribunals are not serious about prosecuting gender-based crimes, and suggest to the victims and society that perpetrators will not be held responsible.[260]

---

paragraph 34; *Prosecutor* v. *Théoneste Bagosora, et al.,* (2002) Decision on the Defence Motion for Release, 12 July 2002, ICTR-98-41-T, at paragraph 4.

[257] Nowrojee, *supra* note 107, at 23.

[258] One of the five factors that have been considered by the ICTR Appeals Chamber in deciding if there has been a violation of the right of the accused to be tried without undue delay is the complexity of the case, including "the number of charges, the number of the accused persons, the number of witnesses, the volume of evidence, and the complexity of facts and law. See *Prosecutor* v. *Mugiraneza,* (2004) Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, 27 February 2004, ICTR-99-50-AR73.

[259] When the Prosecutor failed to prosecute Jean-Bosco Barayagwiza—a former official in the Ministry of Foreign Affairs and one of the suspects most notorious for committing genocide and crimes against humanity during the Rwandan genocide—after being held for many years in custody without trial, the appeals Chamber decided to release him, noting that the prosecution's failure to prosecute him had violated the right of all individuals, including the accused, and put the integrity of the Tribunal at stake. In response, the Rwandan government labelled the Prosecutor incompetent and suspended cooperation with the Tribunal, including not allowing witnesses to travel from Rwanda to Arusha to testify. See A. Wisotsky, "A Legal Resource for the International Human Rights Community," (2001) 8:3 Human Rights Brief 20 [hereinafter Wisotsky]; *International Criminal Tribunals for Rwanda: Trials and Tribulations*, Amnesty International, April 1998, AI-Index: IOR 40/03/98, at p.29 [hereinafter Trials and Tribulations]; *Jean-Bosco Barayagwiza* v. *The Prosecutor,* Appeals Chamber Decision, 3 November 1999, ICTR-97-19, at paragraphs 106 & 112.

[260] Another example is the Rwamakuba case. By 3 June 2005, the length of delay in this case had reached nine years and nine and a half months since the arrest of the accused on 2 August 1995. See *Prosecutor* v. *André Rwamakuba*, (2005) Decision on Defence Motion for Stay of

C. The Right to Fair Sentencing

Moreover, the ICC and the tribunals' commitment to the principles of legality and fundamental justice implies that they must insure the defendant's rights to fair trial and sentence[261] and make sure that no innocent is convicted[262] and that no excessive punishment has been inflicted. However, fair sentencing implies that a proportion between crime and punishment be established.[263] This function of the law, which is also required by the principle of fair labelling, would ensure that the stigma attached to the offender reflects the crime properly.[264] Unfair prejudice to defendants would imperil the integrity of the judicial process.[265]

Furthermore, fair sentencing, according to the principle of fair labelling, also requires that the definition and labelling of each crime reflect the element of

---

Proceedings: Article 20 of the Statute, 3 June 2005, ICTR-98-44C-PT, at paragraph 10; Wood, *supra* note 28, at 315.

[261] G. Fletcher & J. Ohlin, "Reclaiming Fundamental Principles of Criminal Law in the Darfur Case," (2005) 3 Journal of International Criminal Justice 540-541 [hereinafter Fletcher & J. Ohlin].

[262] T. Murphy & N. Whitty, "What is a Fair Trial? Rape Prosecutions, Disclosure and the Human Rights Act," (2000) 8 Feminist Legal Studies 153 [hereinafter Murphy & Whitty].

[263] P. Almond, "Understanding the Seriousness of Corporate Crime: Some Lessons for the New 'Corporate Manslaughter' Offence," (2009) 9:2 Criminology and Criminal Justice 149 [hereinafter Almond].

[264] Ashworth, *supra* note 25, at 88; J. Chalmers & F. Leverick, "Fair Labelling in Criminal Law," (2008) 71:2 Modern Law Review 227 [hereinafter Chalmers & Leverick]; Simester & Sullivan, *supra* note 239, at 30-31; Williams, *supra* note 238, at 93.

[265] K. Andrew, "Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR," (2001-2002) 12:1 Indiana International and Comparative Law Review 69 [hereinafter Andrew].

moral blameworthiness or culpability represented in the defendant's *mens rea*.[266] It stresses that the wording of the conviction should fairly state the defendant's guilt.[267] At the same time, it emphasizes that the offender should be punished in proportion to his *mens rea* and not only to the degree of gravity or seriousness of the offence.[268] In the aforementioned case of *R.* v. *Martineau*, the Canadian Supreme Court indicated that the principles of fundamental justice require a *mens rea* reflecting the particular nature of the crime.[269] Moreover, fair sentencing requires that offences be defined in the statutory laws at the time of the commission of the crime. In this connection, James McHenry argued that *Kunarac, et al.* were convicted of rape retroactively. For him, this meant that they had been unfairly sentenced, as the rape offence was not explicitly defined in any international law instruments when the Yugoslav armed conflict first broke out in the early 1990s— the time of the commission of the crime.[270] Hence, "defendants

---

[266] A. Ashworth, "The Elasticity of *Mens Rea*," in C. Tapper, *Crime, Proof, and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworths, 1981) 53 [hereinafter the Elasticity of Mens Rea].

[267] J. Horder, "Intention in Criminal Law—A Rejoinder," (1995) 58 The Medical Law Review 684 [hereinafter Horder]; Williams, *supra* note 238, at 86.

[268] D. Stuart, "Supporting General Principles for Criminal Responsibility in the Model Penal Code with Suggestions for Reconsideration: A Canadian Perspective," (2000-2001) 4 Buffalo Criminal Law Review 27 [hereinafter Stuart]; Williams, *supra* note 238, at 89.

[269] *R.* v. *Martineau*, [1990] 2 S.C.R. 633, at p. 3 [hereinafter *R.* v. *Martineau*]; *R.* v. *Vaillancourt*, [1987] 2 S. C. R. 63; 1987 S. C. C. 78, at p. 3 [hereinafter *R.* v. *Vaillancourt*].

[270] J. McHenry, "Justice for Foča: The International Criminal Tribunal for Yugoslavia's Prosecution of Rape and Enslavement as Crimes against Humanity," (2002) 10:1 Tulsa Journal of Comparative & International Law 184 [hereinafter McHenry].

may be convicted of an *ex-post facto* crime, which thereby violated a sense of due process and fairness."[271]

Furthermore, separating crimes from one another and labelling them in order to reflect their degree of wrongfulness and gravity would help the court to avoid delivering disproportionate sentences. In *Coker* v. *Georgia*, a case mentioned earlier, the defendant was convicted of rape, armed robbery, and other offences. The jury sentenced him to death under the Georgia statute for rape on the argument that the rape was committed by a person with prior convictions for capital felonies, and that the rape crime was committed in the process of committing armed robbery—another capital felony. The defendant appealed the sentence arguing that it was "cruel and unusual" under the Eighth Amendment of the Constitution. The Supreme Court of Georgia, considering the statistics of how states were refraining from death sentences in rape cases, ruled that the sentence was disproportionately excessive. Accordingly, the sentence was revised.[272]

Examining the tribunals' jurisprudence, therefore, one finds that fair sentencing is indispensable to the objective of these judicial bodies, which is ultimately to advance peace and reconciliation in the former Yugoslavia, Rwanda, and Sierra Leone, as well as to end impunity for the perpetrators of warfare

---

[271] *Ibid.* at p. 212.

[272] *Coker* v. *Georgia*, 433 U.S. 584; 97 S. Ct. 2861; 53 L. Ed. nd 982; (1977 U.S. LEXIS 146).

offences.[273] While several sentences delivered by the tribunals reflect the traditional justification for the punishment of various crimes, including retribution, deterrence, isolation from society, and rehabilitation, several of the judgements reveal that deterrence and retribution were often the main objectives of the tribunals.[274] As one example, fairness requires holding separate sentencing hearings after defendants have been found guilty. This common law procedure was however abandoned by the ICTY and the ICTR in 1998 when the tribunals' judges modified the rules of procedure and evidence to be compatible with the civil law method, which allows handing down a judgement during the trial process—not in a separate sentencing hearing—allowing prosecutors to bring further evidence that might affect the sentence.

The contradiction between the two procedures is clearly shown in the ICTY's Tadić and Krstić cases. In the Tadić case, the trial judges rejected "evidence relevant only to sentencing before rendering a verdict,"[275] ruling that witness testimony pertinent to the guilt or the innocence of the accused should not be allowed if it's purpose was simply to provide evidence for sentencing.[276] By

---

[273] A. Keller, "Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR," (2001-2002) 12:1 Indiana International and Comparative Law Review 54 [hereinafter Keller].

[274] G. Fletcher, *Rethinking Criminal Law* (New York, N.Y.: Oxford University Press, 2000) 409-418 [hereinafter Fletcher]; *Prosecutor* v. *Kupreškić,* (2000) Judgement, 14 January 2000, IT-95-16-T, at paragraph 848 [hereinafter Kupreškić Judgement], cited in Keller, *supra* note 273, at 57.

[275] Keller, *supra* note 273, at 67.

[276] Transcript of Tadić Trial, 3 May 1996, at paragraph 981, cited in Keller, *supra* note 273, at 67.

contrast, Trial Chamber I allowed the prosecutor's witness in the Krstić case to testify after he was found guilty and before trial judges had decided on an appropriate sentence for him. When DD, a Bosnian Muslim woman, testified emotionally before the trial judges, alleging that her young boy had been taken by General Krstić military groups, two out of three judges showed sympathy to her by saying "we understand and feel your pain … and the whole world is on your side,"[277] and "[your testimony] will help us in making our decision."[278] This process however ran counter to the principle of fair sentencing, as judges explicitly renounced their neutrality. However, according to Andrew Keller, one may argue that applying the civil law approach by the Tribunals should not "adversely affect" fair sentencing, as many national courts around the world are using the system.[279] Nonetheless, this argument could be challenged on the argument that although both the *ad hoc* tribunals and domestic courts apply the same system, the seriousness, nature, and degree of gravity of the crimes presented before the two distinct judicial bodies are unique and require different procedures.

Moreover, in the case of *Prosecutor* v. *Blaškić*, another case in the ICTY, the trial judges sentenced the accused to 45 years of imprisonment, the harshest

---

[277] Transcript I of Krstić Trial, 3 May 1996, at paragraph 5763, cited in Keller, *supra* note 273, at 71.

[278] *Ibid.* at paragraph 5768.

[279] Keller, *supra* note 273, at 70.

punishment imposed on a defendant by the Tribunal at that time.[280] Comparing Blaškić's sentence with that handed down to his superior, Dario Kordić, who—five years later—was convicted of the same crimes and sentenced to only 25 years of imprisonment,[281] one may argue that General Blaškić was unfairly sentenced for several reasons. This includes the influence of the Trial Chamber in aiming at deterrence rather than other factors, i.e., the gravity of the crime. For this reason it failed to apply adequately certain aggravating and mitigating circumstances in deciding on an appropriate sentence for the defendant.[282] However, on 29 July 2004, the Appeals Chamber reversed several findings of the Trial Chamber, including the Blaškić's responsibility for crimes in Ahmići and Grbavica. Accordingly, it overturned his sentence of 45 years, which was imposed by the Trial Chamber on 3 March 2000, and reduced it to nine years with credit for time served from 1 April 1996.[283] Pursuant to Rules 124 and 125 of the Tribunal's Rules of Procedure and Evidence, as well as to Article 7 of the Tribunal's Statute,

---

[280] *Prosecutor* v. *Blaškić,* (2000) Judgement, 3 March 2000, IT-95-14-T, at page 270 [hereinafter Blaškić Judgement].

[281] *Prosecutor* v. *Blaškić,* (2000) Judgement, 3 March 2000, IT-95-14-T, at page 270 [hereinafter Blaškić Judgement].

[282] S. Dana, "Revisiting the Blaskić Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY," (2004) 4 International Criminal Law Review 347 [hereinafter Dana Judgement].

[283] *Prosecutor* v. *Blaškić,* (2004) Appeals Judgement, 29 July 2004, IT-95-14-A, at p. 258 [hereinafter Blaškić Appeals Judgement].

Blaškić was released on 2 August 2004 after being granted early release by Judge Theodor Meron, the Tribunal's President.[284]

IV. Concluding Remarks

Over the last fifteen years or so, wartime rape crimes were invisible in the statutory laws and jurisprudence of international criminal judicial bodies.[285] Before the establishment of the ICTY and the ICTR in 1993 and 1994, respectively, rape and other gender-based crimes were viewed as the collateral damage of war and never considered to be as serious as other warfare crimes, regardless of the prevalence and magnitude of these offences and their impact on the victims and their societies. Yet, despite the pitfalls and jurisprudential shortcomings of these laws, which offered only symbolic gender justice, the tribunals did manage to lay down a number of groundbreaking judgments that captured the world's attention and set the foundation for a new international criminal justice system. This system would call for the prosecution and conviction of rape and other forms of sexual violence as a crime of genocide; torture, enslavement, sexual slavery as a crime against humanity; and war crime as an outrage upon personal dignity in violation of Article three common to the Geneva

---

[284] *Prosecutor* v. *Tihomir Blaškić*, Order of the President of the Application for the Early Release of Tihomir Blaškić, 29 July 2004, IT-95-14-A, at paragraphs 1 & 10.

[285] Despite the fact that the Nuremberg records include evidence beyond reasonable doubt that sexual torture, forced sterilisation, forced abortion and forced prostitution were utilized on a large scale during WWII, the Charter of the Tribunal and the jurisprudence did not criminalize or prosecute these crimes. See Askin, *supra* note 21, at 97; N. Pillay, "The Rule of International Humanitarian Jurisprudence in Redressing Crimes of Sexual Violence," in Vohrah. L., et al., eds., *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (New York, N.Y.: Kluwer Law International, 2003) 687 [hereinafter Pillay].

Conventions and Additional Protocol II. These historical decisions could not have been achieved without the efforts made by feminist legal scholars and human rights activists before and after the setting up of these international criminal judicial bodies as a direct response to systematic mass rape crimes that shocked the conscience of the world during the ethnic conflicts of the early 1990s in the former Yugoslavia and Rwanda.

Nevertheless, due to the abstractness and ambiguity of the tribunals' statutory laws on gender-based crimes, the tribunals failed to respond adequately to these atrocities and bring perpetrators to justice. The lack of a clear cut definition of the crime of rape and other gender-based crimes, and the absence of an effective prosecutorial strategy to track down perpetrators and secure evidence beyond reasonable doubt resulted in several rape acquittals, placing the tribunals in a sharp dilemma.

To improve the tribunals' strategy of providing adequate justice to gender-based crime victims, the tribunals need to recognize the principle of fair labelling and implement it in their statutory laws and jurisprudence. The principle of fair labelling, which insists on recognizing distinctions between crimes and on classifying, defining, and labelling them according to their nature and seriousness, preserves the defendant's right to be judged without undue delay and according to his/her culpability, not only to the degree of the gravity of the offence. Moreover, the principle of fair labelling requires that a proportionality must be established between the lawbreaking, the stigma, and the punishment. The principle of fair

labelling is important in order to secure consistent convictions, ensure fair sentencing, present the right degree of condemnation, and convey an accurate socio-pedagogical signal to society through the influence of the punishment.

Furthermore, the ambiguity of gender-based crimes in the statutory laws of the tribunals, in particular, and in other international law instruments, as well as the fact that these crimes were subsumed under crimes against humanity or war crimes, augmented the marginalization of these crimes by dealing with them as secondary offences. This policy has been clearly reflected in the prosecution's failure to conduct successful gender-based crimes investigations.[286] As Beth Van Schaack argues, shoddy prosecutorial work, including poor investigations and sloppy testimonies, had resulted in several rape charge withdrawals and perpetrator acquittals.[287] In the ICTR, for example, a few defendants have been found guilty of rape or other forms of sexual violence, including—in chronological order—the cases of Akayesu,[288] Semanza,[289] Gacumbitsi,[290] and Muhimana,[291] while more than fifty percent of the Tribunal's indictments—

---

[286] The initial failure of the Office of the Prosecutor to recognize gender sensitive requirements by appointing male investigators was another barrier that prevented rape victims from coming forward and testifying. See Nowrojee, *supra* note 107, at 12.

[287] B. Van Schaack, "Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 397 [hereinafter Van Schaack].

[288] *Prosecutor* v. *Jean-Paul Akayesu,* (2001) Appeals Judgement, 1 June 2001, ICTR-96-4-A., at paragraphs 694-696 [hereinafter Akayesu Appeals Judgement].

[289] Semanza Judgement, *supra* note 135, at paragraph 588.

[290] Gacumbitsi Judgement, *supra* note 150, at paragraph 333.

[291] Muhimana Judgement, *supra* note 152, at paragraphs 534-563.

including charges of rape or other gender-based crimes—have resulted in acquittal. The ill-prepared evidence and inconsistent testimony of the key witness in the Kajelijeli case, for instance, culminated in the acquittal of the accused of rape charges.[292] These inconsistencies, as Judge Arlette Ramaroson has argued, did not arise from a lack of credibility but from an inept investigation.[293]

Moreover, the Prosecutor's failure to provide evidence beyond reasonable doubt resulted also in more acquittals of rape and other forms of sexual violence charges, involving the cases of Niyitegeka,[294] Muvunyi,[295] Kamuhanda,[296] and Mpambara.[297] Astoundingly, while failing to appeal the above acquittals, the prosecutor withdrew rape and other sexual violence counts from the Ndindabahizi indictment before the trial even took place.[298] Finally, this chapter has examined— in the light of the principle of fair labelling—the defendant's right to fair warning or maximum certainty, the right to be tried without undue delay, and the right to fair sentencing. The tribunal's failure to recognize adequately these

---

[292] Kajelijeli Judgement, *supra* note 141, at paragraphs 924.

[293] *Juvénal Kajelijeli* v. *The Prosecutor,* (2005) Appeals Judgement, 23 May 2005, ICTR-98-44A-A, at paragraphs 26-28 and 36 [hereinafter Kajelijeli Appeals Judgement].

[294] Niyitegeka Judgement, *supra* note 142, at paragraph 458.

[295] Muvunyi Judgement and Sentence, *supra* note 143, at paragraph 526.

[296] Kamuhanda Judgement, *supra* note 144, at paragraph 713.

[297] *Prosecutor* v. *Jean Mpambara*, (2006) Judgement, 11 September 2006, ICTR-01-65-T, at paragraph 175 [hereinafter Mpambara Judgement].
.

[298] Ndindabahizi Judgement and Sentence, *supra* note 145, at paragraphs 9 and 13.

rights points to its deficiencies in prosecuting gender-based crimes and holding the perpetrators of wartime rape and other forms of sexual violence justly accountable.

Chapter Four
Conclusion

I. Introduction

The last fifteen years have witnessed a profound change in the treatment of gender-based crimes in international criminal law. Rape and other forms of sexual violence were incorporated in the statutory laws of the *ad hoc* international criminal tribunals and the Rome Statute of the ICC. Since the establishment of the ICTY and the ICTR in the early 1990s, tribunals broke new ground and made a number of landmark decisions by prosecuting and convicting perpetrators for warfare rape and other forms of sexual violence as crimes against humanity, war crimes, acts of terrorism, and acts of genocide. Yet, despite the tremendous legal achievements and progress in the international criminal gender justice, many legal scholars and commentators have asserted that these international judicial bodies have continuously failed to respond adequately to gender-based crimes committed during the 1990s' armed conflicts in the former Yugoslavia, Rwanda, and Sierra Leone. Although some of these criticisms have served as catalysts to actuate the tribunals' performance, they lacked a coherent conceptual framework within which the importance of prosecuting crimes of sexual violence can be judged.

Unlike other legal works, this thesis deemed that the principle of fair labelling provides the most compelling argument in favour of the reconceptualization and prosecution of various wartime gender-based crimes. Accordingly, this thesis has argued that the abstractness, ambiguity, and lack of accurate definition and labelling of gender-based crimes in the statutory laws of

the international criminal tribunals and courts violated the principle of fair labelling and led to inconsistent prosecution of these crimes. On that basis, this thesis has dealt with gender-based crimes as a case study and with fair labelling as a legal principle and theoretical framework.

II. Summary and Main Findings

To accomplish this objective with the detail and comprehensiveness that it warrants, this analysis was structured into four coherently incorporated chapters. The introductory chapter began by identifying the central legal argument of this thesis and outlined the theoretical legal framework that guided my investigation and analysis of the dilemma of prosecuting gender-based crimes in the *ad hoc* tribunals and the ICC. Moreover, this chapter pinpointed the importance of conducting this inquiry by elucidating why an analysis of the failure of the international criminal judicial bodies to adequately prosecute gender-based crimes in the light of the principle of fair labelling is of critical importance. Furthermore, it provided a brief historical overview of the development of the prosecution of gender-based crimes under customary and conventional international criminal law, as well as under the statutes of the *ad hoc* tribunals established post-WWII.

Regardless of the fact that rape has been prohibited by national and international regulations on armed conflict for many years, the prosecution of gender-based crimes in international military and criminal tribunals is a new legal phenomenon. Although sexual violence was utilized on a large scale during WWII, the drafters of the statutes of the IMT and IMTFE failed to list rape as a

war crime or a crime against humanity. Similarly, the trial judges at both tribunals largely ignored rape and other forms of sexual violence, although the trial records included evidence of horrific sexual violence. Moreover, the IMTFE judges failed to deal with rape as a separate crime and subsumed it under charges of command responsibility for other atrocious crimes.

In the early 1990s, as a response to atrocities committed against civilians in the Yugoslav dissolution war and the Rwandan genocide, the UN Security Council established the ICTY and the ICTR to prosecute and punish those responsible for serious violations of international humanitarian law that took place during the conflicts. Both tribunals were founded under Chapter VII of the UN Charter, which constitutes a binding obligation on the international community to carry out the decisions taken by these tribunals in enforcing the law. However, despite the constant failure of these international criminal judicial bodies to prosecute adequately rape and other gender-based crimes—due largely to the abstractness and ambiguity of the statutory laws of the tribunals—which resulted in inconsistent verdicts and punishments, they made tremendous progress in gender justice and were the first international criminal tribunals to recognize and prosecute rape as a war crime, a crime against humanity, and an act of genocide.

With the turn of the millennium, the ICC and the SCSL statutes entered into force. Regardless of the criticism levelled at the SCSL, the Court delivered groundbreaking decisions on the immunity of a head of state and the conscription of children in armed conflict and made notable progress in the prosecution of

gender-based crimes, particularly sexual slavery, forced marriage, and rape as an act of terrorism. Moreover, the Rome Statute of the ICC was the first international treaty of an international criminal judicial body to explicitly recognize a wide range of gender-based crimes, while the ICC itself was the first international criminal court to exercise its jurisdiction over persons for the most serious crimes, including sexual offences. Due to legal deficiencies in the statutory laws of the Court, and the abstractness and ambiguity of gender-related norms, *inter alia*, the Court was not able to investigate and prosecute gender-based crimes other than those committed in the Central African Republic, the Democratic Republic of Congo, Uganda, and the Sudan. Finally, this chapter discussed the structure and subsequent chapters of this inquiry and looked thoroughly at the working materials that were used in its construction.

Chapter two concentrated on fair labelling as a criminal law principle and a legal framework that guided my work. It paid special attention to the intellectual development of the principle of fair labelling, elucidated its scope and justification, and illustrated its applicability to gender-based crimes. Moreover, this chapter also analysed the principle's relation to other criminal law principles, concepts, and doctrines, particularly *nullum crimen sine lege*; *mens rea*, proportionality; multiple wrongdoing; the moral or socio-pedagogical influence of punishment; and the doctrine of joint criminal enterprise (JCE). Furthermore, it looked into international criminal law instruments and examined the codification of gender-based crimes as crimes against humanity and war crimes under the

statutory laws of the international criminal tribunals and courts and in the light of the principle of fair labelling.

Discussing its intellectual development, scope and justification, and applicability to international criminal law, this chapter indicated that the principle of fair labelling requires that the criminal law should meaningfully identify the crime through a strict and well-constructed definition. Moreover, it stipulates that an offence must be labelled with reference to its true nature and magnitude, and that a proportion between crime and punishment should be established. This is another task for the law, besides setting grounds for the punishment of wrongdoings, i.e., to ensure that the stigma and punishment attached to the offender reflect the crime property. In contrast to JCE III, this principle necessitates that convicted persons should be labelled according to the role that each of them played in the common enterprise, while the label must reflect the offender's culpability. This chapter cited a case in point, *R.* v. *Martineau*, where the Canadian Supreme Court indicated that the principles of fundamental justice required a *mens rea* reflecting the particular nature of the crime, and proportionality between the stigma and punishment attached to, in this case a murder conviction, and the moral blameworthiness of the offender. This means that offences should be accurately defined and classified to demonstrate the moral distinctions between them and to rank them with respect to their magnitude. In this respect, the principle seeks to ensure that the definition of an offence should provide society with an accurate moral grasp of the defendant's wrongdoing, and

ensure that distinctions between offenders are marked in the offence committed, noting that there are significant moral distinctions between offences.

On that basis, the principle of fair labelling implies that the statutory laws of the international criminal tribunals and the Rome Statute of the ICC should meaningfully define gender-based crimes, reflecting different levels of wrongdoing through a clear structure for these offences, and label them in a manner that presents distinctive forms of criminality according to the gravity of each crime and recognizes a proportion between the crime and the sentence. However, as Glanville Williams maintains, the concerns of the principle of fair labelling go beyond classifying, describing, and separating crimes from one another to operate at the levels of the legislative and legal process. It extends to the details stated in the conviction, which should represent the degree of the offender's moral guilt, a key factor in reducing the possibility of misunderstanding. Attaching an accurate label to an offence would help the actors in the criminal justice system to secure consistent prosecution and judgement. Moreover, fairly representing the offence would also reduce the judge's discretion and convey an appropriate message to society regarding the wrongfulness of a certain course of action. Furthermore, it would ensure a proportionate response to lawbreaking, so that the offender be labelled and sentenced in proportion to his wrongdoing.

In this connection, the chapter has examined relations between the principle of fair labelling and other fundamental principles of criminal law, particularly

those relating to the conditions of liability and fair procedures. As legal principles applicable to legislation and fairness to defendants, fair labelling and *nullum crimen sine lege* necessitate that offences should be well defined in the enacted statutory laws, so that no one should be convicted or suffer punishment for his conduct unless it has been clearly stated in a statute or regulation that such conduct constitutes a crime and unless fair notice has been provided to the accused. It is worth mentioning that neither fair labelling nor *nullum crimen sine lege* were recognized by the drafters of the statutes of the international criminal tribunals or incorporated in their provisions. Consequently, these statutes failed to define rape as an individual crime in itself, not subsumed under crimes against humanity or war crimes. However, the jurisprudence of the tribunals has been significantly more advanced when compared to their statutory laws, although it has been limited to applying existing laws and not legislating or creating new ones. For example, in the Vasiljević case, Trial Chamber I of the ICTY refused to convict the defendants on the count of "violence to life and person," concluding that international customary law does not provide a clear definition of the offence.

As most of the sexual offences prosecuted in the international criminal tribunals took the form of multiple wrongdoing, the chapter argued that the current broad labelling of gender-based crimes embodied in the statutory laws of these judicial bodies has let to inconsistent prosecutions and verdicts. Accordingly, in the light of the principle of fair labelling, statutory laws of the tribunals should recognize more gender-based crimes of multiple wrongdoing,

expand categories, and define the existing ones. Gender-based crimes should be classified and labelled to reflect the nature and level of gravity of the offence, as well as the element of moral blameworthiness or culpability represented in the defendant's *mens rea*. In fact the tribunals' statutory laws are not constructed in such a way as to recognize more gender-based crimes of multiple wrongdoing, particularly in the statutes of the ICTY and the ICTR, where these crimes are symbolized and crystallized in the crime of rape, and articulated as subsections of crimes against humanity and war crimes.

Moreover, the chapter advised that the principle of fair labelling requires that the definition and labelling of each crime should reflect the element of moral blameworthiness or culpability represented in the defendant's *mens rea*. It emphasized that the wording of the conviction should fairly represent the defendant's guilt. At the same time, it stressed that the perpetrator should be punished in relation to his *mens rea* and the nature and degree of gravity of the crime.

On the other hand, the chapter discussed the relation between the principle of fair labelling and the principle of proportionality, arguing that one of the main aims of respecting distinctions between offences—as required by the principle of fair labelling—is proportionality. Indeed, one of the primary objectives of criminal justice is to ensure a proportionate response to law breaking. In other words, fairness necessitates that offenders be labelled and punished in proportion to the degree and seriousness of their wrongdoing. Meanwhile, the chapter

examined the concept of the socio-pedagogical influence of punishment with reference to the principle of fair labelling. Considering criminal law a "communicative enterprise," the principle of fair labelling requires that an offence's label should involve a declaratory function, by representing to the public the degree of condemnation that should be ascribed to the offender and how he should be regarded by the society. This is in conformity with the aim of the principle of fair labelling, as Andrew Ashworth pointed out, to present to society the nature and degree of the gravity of the crime since it is important to see justice being done. This function of the law overlaps with the concept of the moral or socio-pedagogical influence of punishment, which depends on the type and strength of the message sent to society by the law and throughout the process concerning the consequences of breaking the law, as well as on the morality of the recipient society. As a matter of fact, the deterrent preventive influence of the punishment on the society is one of the chief functions of international criminal tribunals. Although these judicial bodies could not achieve absolute deterrence of future atrocities, the thesis has emphasized the tribunals' pedagogical role in focussing on the educative-moralizing function of the punishment.

Furthermore, the chapter inquired into relations between the principle of fair labelling and the doctrine of JCE, particularly JCE III. Despite the fact that JCE has been criticized for broadness and violation of basic principles of legality, it was regarded as a breakthrough in the ICTY's jurisprudence. Since it was introduced in the Tadić Appeals Judgement of 15 July 1999, this doctrine has

become the prosecutor's "magic weapon" to indict for collective sexual violence and other crimes within the jurisdiction of the ICTY and other tribunals. Indeed, JCE helped the prosecution to address co-perpetrated crimes, particularly when the perpetrators' *mens rea* in committing certain crimes was hard to establish.

Despite the fact that the provisions of the Statute of the ICTY does not provide a clear definition of JCE, stating clearly the *actus reus* and *mens rea* of the doctrine, the Tadić decision specified three distinctive forms of collective responsibility sharing the same *actus reus*, including the following elements: a plurality of persons, organized in a military, political or administrative structure; the existence of a common plan involving the commission of a crime within the jurisdiction of the Tribunal; and participation of the accused in the common plan involving the preparation of one of the crimes provided for in the Statute. However, based on the *mens rea* of the accused, the Appeals Chamber articulated three forms of JCE in Tadić decision, as follows: basic, systematic, and extended. In the basic form (JCE I), a more widespread category of liability, all participants share the same criminal intention and act according to a common plan. Under the second form (JCE II), which may be referred to as the system of ill-treatment, the accused must have had personal knowledge of and an intent to further the plan. The third form (JCE III) is the extended and most wide-spread category of liability, which involves criminal acts that fall outside the common plan. In this form of liability, all participants agree to pursue one course of conduct, which is

the main purpose of the common criminal plan, but they do not share the intent of some of the other participants in a JCE.

Nevertheless, an examination of this doctrine reveals that it is chiefly unspecific, vague, and expansive. These conceptual problems place the doctrine in serious conflict with major principles of criminal justice, specifically the principle of fair labelling, which requires that proportionality between punishment and the defendant's culpability be well-recognized. Moreover, JCE offends against the principle of legality, which stresses that no one should be punished retroactively. Specifically speaking, criticism has been levelled against the second and third forms of JCE for extending individual criminal accountability to apply not only to the actual perpetrator but to other members of the common plan. In fact, the Appeals Chamber of the ICTY provided that a member of a JCE could be held liable for crimes committed by other members of the common plan even if he had no intention of committing such a crime. In other words, all members of a JCE could be held responsible for criminal acts carried out by any of the co-perpetrators, regardless of the fact that these acts were not part of the criminal plan agreed upon or whether they were intentionally participating in their commission. Moreover, under this form of the doctrine—JCE III—liability could be extended to persons who might be convicted for criminal acts that did not exist but were considered as a foreseeable and natural consequence of the JCE in question. It might operate to punish a person who did not "cause a prohibited harm" but was found guilty of being a member of a criminal enterprise. In this

connection, Radovan Karadžić recently petitioned Trial Chamber III of the ICTY to dismiss the JCE III allegations in each count of his Third Amended Indictment, claiming that the Tribunal had no jurisdiction to prosecute him for unintended acts that "might" have been committed or were a "possible" consequence of the intended plan. Whatever the soundness of the above accounts, it would be unfair to condemn equally all participants in a JCE and hold that they are equally culpable for the criminal act(s) committed by some members of the criminal enterprise.

Finally, this chapter examined gender-based crimes as embodied in the provisions of the statutory laws of the tribunals and courts with reference to the principle of fair labelling. It argued that drafters of these laws have largely failed to enact distinct gender-based crimes and to categorize, define, and label them in a manner that represents fairly the nature and degree of gravity of each offence, rather than subsume them under crimes against humanity or war crimes. The ambiguity and abstractness of the statutory laws on gender-based crimes have put the tribunals in a dilemma. As Richard Goldstone and Estelle Dehon point out, the absence of an acceptable definition of rape in international law constituted a real challenge to the tribunals in prosecuting gender-based crimes, which in turn developed the case law of these judicial bodies by delivering a number of ground breaking decisions that included varying broad definitions of rape even within the same tribunal.

However, providing different definitions for one crime, i.e., rape, and leaving the interpretation of other sexual crimes to the trial chambers, infringe the principle of fair labelling, which insists on making distinctions between crimes by categorizing, defining, and labelling them to represent fairly the nature of each gender-based crime, determining thereby its degree of seriousness. This is to ensure proportionality between the stigma and punishment attached to each sexual offence. Regardless of the fact that rape was a common sexual crime during armed conflicts in the former Yugoslavia and Rwanda, there were other serious gender-based crimes that have been ignored in the statutory laws of the tribunals. For example, since the Statute of the ICTY failed to recognise sexual slavery as a distinct crime under crimes against humanity, Trial Chamber I of the ICTY in Foča case charged the defendants with both crimes, rape and enslavement, by implementing the 1926 Slavery Convention's definition of enslavement in the broadest terms. Similarly, due to the failure of the drafters of the Statute of the SCSL to specify the crime of forced marriage within crimes against humanity, Trial Chamber II of the SCSL in the *Brima, et al*. case dismissed charges of forced marriage, considering it a mislabelling of the crime of sexual slavery, despite the fact that Chamber I of the same court had condemned forced marriage in the *Sesay, et al*. case as an act of terrorism. Indeed, as Valerie Oosterveld observes, subsuming forced marriage under the crime of sexual slavery diminishes and misjudges women's suffering and raises the question of the future reconceptnalization of such multifaceted gender-based crimes. Nonetheless, the

lack of a clear definition of rape and other gender-based crimes in the statutory laws of the tribunals resulted in their being treated as secondary crimes for several years following the establishment of the tribunals. For example, despite the fact that rape was common in the Taba Commune where Akayesu served as a mayor during the 1994 Rwandan genocide, his first indictment from 1996 did not include any rape charges. Moreover, subsuming rape under crime against humanity adds a new element that it should be committed "as part of a widespread attack against civilian population, committed on political, national, ethnic, racial or religious grounds."

In sum, notwithstanding the legal scholars' consideration of rape definitions handed down by tribunals as a victory in the fight against gender-based crimes and impunity, these definitions violate the principle of fair labelling on several grounds. First, these definitions constitute *ex-post facto* laws, violating also the principle of *nullum crimen sine lege*, which insists on the existence of a law at the time of commission of a crime and on the crime's definition being strictly construed and not extended by analogy. Second, these definitions are so broad, particularly in the Akayesu definition, as to eliminate distinctions between different types of sexual violence. Accordingly, the tribunals had to lay down several definitions in different cases to represent the nature of the sexual offence in question. Finally, a broad definition of rape results in unfair labelling of the offender. Accordingly, it prevents ensuring a proportionate response to the offence and undermines the law's educative and declaratory function. Sending an

inappropriate message to the public would destroy the socio-pedagogical influence of the punishment applied.

Finally, this chapter concluded by emphasizing the main findings of this analysis. It revealed that the drafters of the statutory laws of the international criminal tribunals failed to respond adequately to wartime rape and other forms of sexual violence committed by all parties to the 1990's ethnic conflicts in the former Yugoslavia and Rwanda. The lack of a clear-cut definition of rape and other gender-based crimes in the statutory laws of these international judicial bodies resulted in a lack of uniformity and consistency on both the prosecutorial and sentencing levels. Subdividing, labelling, and making distinctions between different kinds of offences and degrees of lawbreaking, as suggested by the principle of fair labelling, are essential in emphasizing two main principles of criminal law: proportionality and the socio-pedagogical influence of the punishment. The principles of fundamental justice require ensuring a proportionate response to different offences, which implies labelling and punishing offenders in proportion to their lawbreaking and *mens rea*. To overcome the shortcomings of the tribunals and to help them respond adequately to gender-based crimes, the principle of fair labelling stresses that gender-based crimes incorporated in the provisions of the statutory laws of the tribunals must be defined with sufficient specificity to capture what is morally significant about them, on the one hand, and that these crimes be structured in a way that would reflect their nature and the degree of seriousness, on the other.

In addressing the central concern of this thesis and before examining—in light of the principle of fair labelling—shortcomings related to major cases of gender-based crimes within the tribunals' case law, chapter three started by scrutinizing feminist legal literature and tracing its controversial arguments relating to the prosecution of gender-based crimes in these supranational judicial bodies. Notwithstanding their success in changing the landscape of international gender justice in the 1990s, feminist legal scholars were and remain divided over the nature of wartime rape, its significance, and prosecution. In this respect, the chapter examined these different viewpoints in the light of the principle of fair labelling, emphasized that defendants must be convicted in proportion to the culpability represented in their *mens rea*, as well as to the nature and degree of the wrongdoing, the *actus reus*, rather than their ethnicity or the ethnic lineage of their victims. Moreover, based on the examination of the tribunals' jurisprudence relating to gender-based crimes, the chapter discussed violations of other principles and concepts, particularly the offender's right to fair warning or maximum certainty, the right to fair trial without undue delay, and the right to fair sentencing.

As early as the first reports of the systematic mass rape of mainly Bosnian Muslim women in the summer of 1992, feminist legal scholars, individually or collectively through women's human rights institutions, played a significant role in calling for the criminalization of gender-based crimes in international legal instruments. However, before analysing feminists' different views and divisions

over the recognition and prosecution of wartime rape and other gender-based crimes in international criminal tribunals and their statutory law, the chapter critically examined the historical invisibility of gender-based crimes—whether in international humanitarian and human rights instruments or in the jurisprudence of international criminal tribunals—and the role of feminists in surfacing these crimes and bringing them to the world's attention.

In fact, since the first news of mass rape camps in Bosnia-Herzegovina in the early 1990s, feminist theorists and legal scholars worked to increase the world's awareness and understanding of the function of rape as a weapon of war, as a tool of ethnic cleansing, as an act of genocide, and as a means of destroying the culture and infrastructure of an opponent's society. Catherine Mackinnon, a leading feminist legal scholar and a founder of feminist radical theory, argues that wartime rape is a form of genocide, and requires the international community's military intervention. To protect women during armed conflict and to deter rape crimes, she suggests that the UN Security Council pass resolutions under Chapter VII of the United Nations Charter to combat violence against women as a threat to international peace and security. Yet, while many feminist scholars regard wartime rape as a tool of devastation and destruction, others call for considering this crime within its social and cultural context. These contradictory arguments fall into two movements spearheaded by two prominent feminist legal scholars, polarizing many other feminists and activists. These movements are divided over the consideration, importance, and ways of recognizing wartime rape in former

Yugoslavia, particularly, whether the rape of Bosnian Muslim women should be recognized as a form of genocide—genocidal rape. The first "movement," led by Catharine MacKinnon, argues that the rape of Bosnian Muslim women by Serb forces should be understood within the context of genocide because it was carried out with the intention of destroying the Bosnian Muslim community. The second "movement," on the other hand, steered by Rhonda Copelon, contends that Bosnian Muslim women's rape should be regarded as habitual wrongdoing, even when employed on a large scale, emphasizing that the international criminal justice system should deal with rape on all sides on an equal footing.

Nevertheless, after a comprehensive critical analysis of the viewpoints of both movements, this chapter contended that both movements have had positive and negative impacts on the recognition of wartime rape and other forms of gender-based crimes committed in former Yugoslavia, Rwanda, and other war-torn places. Both movements worked hard to surface gender-based crimes and make them visible. As a result of feminist legal scholars' debates and pressure exerted on the international community, as well as calls for diplomatic, legal, and humanitarian intervention to protect victims and bring perpetrators to justice, wartime rape came to be prosecuted as a crime against humanity for the first time in the history of international criminal law. It has been explicitly listed as a crime against humanity in the statutory laws of the ICTY and the ICTR, and as a crime against humanity and a crime of war in the Rome Statute of the ICC.

On the other hand, despite the deep tensions between the two movements on the notion of whether the rape of Bosnian women by Serb forces should be considered a form of genocide, they utterly failed to convince the ICTY to prosecute this crime, even though thousands of Bosnian Muslim and Croatian Catholic women have given birth to the perpetrators' children, a crime that could be prosecuted under Article IV(2)(d) and (e) of the Statute of the ICTY. Instead, the tribunal delivered only symbolic gender justice, presented in the three famous cases known as Čelebići, Furundžija, and Foča. Symbolic justice for judging ethnic symbols!! However, while the ICTY succeeded in delivering at least these symbolic judgements, the ICTR failed signally to prosecute and convict any member of the Rwandese Patriotic Army (RPA) for gender-based crimes allegedly committed during and after the1994 Rwanda genocide in Rwanda and in Eastern Democratic Republic of Congo (DRC) against the Hutu population and refugees.

Moreover, this chapter turned to the case law of the international criminal tribunals and the ICC, and examined the impact of abstractness and ambiguity on the prosecution and convection of gender-based crimes, embodied in the statutory laws of these international criminal judicial bodies. Notwithstanding the remarkable accomplishments of the ICTY, the ICTR, and the SCSL, this chapter argued that gender-based crimes are still ambiguously treated in international criminal law and inadequately addressed in the jurisprudence of these tribunals. This inadequacy—which includes, among other failings, the lack of a clear

prosecutorial strategy and limitations on the tribunals' jurisdiction—is due to the abstractness and ambiguity of the statutory laws of these judicial bodies, which in turn offend against the principle of fair labelling and led to inconsistent prosecutions and verdicts, resulting in the failure of these judicial bodies to adequately address grievous gender-based offences. The rape offence incorporated in the statutes of the ICTY and the ICTR, for example, was interpreted by the trial judges to include different sexual crimes under the same heading, including sexual offences that do not involve penetration, which in turn violates the principle of fair labelling. Accordingly, gender-based crimes in the statutory laws of the tribunals still have to be separated from one another and labelled in order to reflect the nature and level of gravity of the offence, as well as the element of moral blameworthiness or culpability represented in the defendant's *mens rea*.

Indeed, one of the major challenges facing the international criminal tribunals and the ICC has been the abstractness and vagueness of the gender-based crimes in their statutory laws. In the Akayesu case, for example, Trial Chamber I of the ICTR acknowledged the lack of an accepted definition of the crime of rape in international law, which placed the tribunal in a dilemma. In addressing this lacuna, judges ruled that "the Chamber must define rape." This constituted, however, an *ex post facto* law that violates, at least, three legal principles: *nullum crimen sine lege*, which implies that no one should be held criminally responsible for an act unless it constituted a crime at the time it took

place; fair labelling, which necessitates that fair notice should have been provided to the defendant, so that he would have known that his conduct constituted a crime before he carried it out; and the defendant's right to maximum certainty or fair warning. Moreover, the definition of gender-based crimes by trial chambers would give too much discretion to judges, resulting in different definitions—discussed in the previous chapter—for the crime of rape, and leading to inconsistent prosecutions and convictions.

In discussing the tribunals' initial failure to recognize and prosecute gender-based crimes, the chapter claimed that since the establishment of the ICTR, for instance, rape and other gender-based crimes were never investigated or prosecuted consistently within a framework of a definite prosecution strategy. This is due to the fact that rape was overlooked during the first four years succeeding the creation of the Tribunal, which dealt with it as a "lesser" crime and the victims as secondary casualties. In this connection, the chapter examined several cases, including the Akayesu, Cyangugu, and Kajelijeli cases. In the Akayesu case, despite the fact that rape and other forms of sexual violence spread throughout Rwanda during the 1994 genocide, particularly in the Taba Commune where Akayesu served as mayor, the latter's first indictment contained no rape charges. Indeed, many cases proceeded without rape charges although the Prosecutor had strong evidence, e.g., in the Cyangugu case where both prosecutors and judges prevented rape victims from seeking justice at the ICTR, as Binaifer Nowrojee provides. Moreover, rape charges were also dropped

because of negligence on the part of the Office of the Prosecutor, e.g., missing the deadline to appeal the rape acquittals in the Kajelijeli case. By the same token, the April 2000 amended indictment of Radovan Karadžic did not explicitly include rape among the other charges laid against the accused. The indictment referred to rape only under the broad term of "sexual violence" under Counts 1-6 "genocide, complicity in genocide, extermination, murder, and wilful killings," and Count 7 "persecutions."

The lack of a clear definition for rape and other forms of sexual violence in the statutory laws of the tribunals thus impeded the tribunals' ability to adequately respond to gender-based crimes in prosecuting and judging the perpetrators. For example, despite the landmark decision of Akayesu, the ICTR took four years to prosecute and convict him. Similarly, it took the Tribunal approximately one decade to prosecute and convict Nyiramasuhuko. These delays effectively violated the principle of fair labelling, which is designed to ensure the defendant's right to efficient and timely justice, and sent a message to rape survivors that justice was still out of reach. Although wartime rape and other forms of gender-based crimes were utilized systematically on a large scale by drafting thousands of women and girls in the territory of former Yugoslavia, Rwanda, and Sierra Leone for systematic mass rape and various sexual assaults, the ICTY, the ICTR, and the SCSL delivered only symbolic gender justice by judging merely a few wartime rape perpetrators or those who were responsible for using sexual violence as an integral part of the war. In fact the absence of a clear cut definition of rape

and other gender-based crimes in the statutory laws was not resolved by the numerous broad and narrow definitions of rape provided by the trial chambers of the ICTR and the ICTY judgements of Akayesu, Furundžija, and Kunarac, where some of these definitions made it difficult for the prosecution to acquire rape convictions in the tribunals. The definition of rape by Trial Chamber II of the ICTY, emphasizing as it did the *actus reus* of the crime, in fact complicated the prosecution's task of obtaining evidence beyond reasonable doubt for procuring convictions of rape in sexual violence trials. Accordingly, in the Semanza case, Trial Chamber III of the ICTR asserted that the *mens rea* of rape, as a crime against humanity, means the intent to sexually penetrate the victim with the knowledge that the victim does not consent to this act. Based on that, the Trial Chamber found the accused guilty for only an isolated rape incident, despite the fact that he regularly and directly ordered his subordinates to utilize rape, thus demolishing the possibility of bringing more rape crimes before the tribunal. It is worth mentioning that the prosecutor's failure to provide evidence of rape beyond reasonable doubt resulted in the renunciation of rape charges in several cases.

Looking into the case law of the ICTR, one finds that approximately thirty percent of the charges brought before the Tribunal did include rape and other forms of sexual violence: yet of these only one third of the accused were found guilty while two thirds were acquitted due to the failure of the prosecutor to provide evidence beyond reasonable doubt. For example, Trial Chamber I of the ICTR convicted Musema of the rape of a Tutsi woman and gave him a life

sentence pursuant to Article 3(g) of the Statute of the Tribunal; nevertheless, the Appeals Chamber reversed the conviction for lack of evidence beyond reasonable doubt as the prosecutor had failed to prove that the accused had the knowledge that his subordinates had committed rape or that he had failed to take reasonable measures to prevent or punish the perpetrators. Moreover, in the Juvenal Kajelijeli case, the accused was acquitted of rape due to lack of credibility and inconsistency in the testimony on the part of the key witness.

Moreover, there were other acquittals for rape in the ICTR due either to the fact that the prosecution failed to meet the required burden of proof or to the fact that the Prosecutor withdrew rape and sexual violence counts from the original indictments. An example of the first category was the acquittal of rape charges brought against Niyitegeka, Muvunyi, and Kamuhanda. Amazingly, none of these acquittals had ever been appealed by the Prosecutor. Examples for the second category include the prosecutor's withdrawal of rape charges in the indictments of Ndindabahizi, Nzabirinda, Serushago, and Bisengimana. To date, only a few defendants have been found guilty of rape, including Akayesu, Gacumbitsi, Semanza, and Muhimana. Thus, approximately ninety percent of the ICTR's judgements lacked rape charges, while rape acquittals were double the rape convictions in number.

The lack of a statutory definition of rape in international criminal law instruments has placed the international criminal tribunals in a dilemma. It leads to misinterpretations of the law and inconsistent convictions for rape in the

tribunals. For example, in the Muhimana case, Trial Chamber III of the ICTR interpreted the Kunarac and Akayesu definitions of rape as compatible, despite essential differences between them. The Trial Chamber took a further step by re-adopting the Akayesu model, holding that the Kunarac concept of rape contained the Akayesu measures. Accordingly, the Chamber found the accused guilty of rape as a crime against humanity because he had individually committed rape as part of a systematic and massive campaign against the Tutsi ethnic group. At the same time, it did not consider the act of disembowelment of Pascasie Mukaremera by cutting her with a machete from her breasts to her genitals to be a crime of rape, although Trial Chamber I of the same tribunal conceded in the Akayesu case that "sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."

Again, the un-specificity of gender-based crimes in the statutory laws of the tribunals affected their capacity to prosecute these crimes as such. In *Prosecutor* v. *Kunarac, et al.*, for example, Trial Chamber II of the ICTY failed to convict those who were accused of genocidal rape and sexual slavery. Despite the fact that the Trial Chamber had extensive evidence beyond reasonable doubt that victims were targeted because they were Muslims of Bosnian origin and with the intent to forcibly impregnate them so as to make them give birth to Serb children, it failed to convict the accused of rape as an act of genocide. Moreover, the Trial Chamber charged the accused with both "rape" and "enslavement" instead of "sexual slavery" as a crime against humanity. In other words, the Chamber

expanded this definition to include sexual slavery as a crime against humanity, even though slavery—according to the Slavery Convention—means forced labour attached to the right of ownership.

As already pointed out herein, the lack of definitions of rape and other gender-based crimes favours the marginalization of these crimes at the prosecutorial and trial stages, and gives rise to confusion among prosecutors, the defence, and the trial judges at the SCSL. A case in point is *Prosecutor* v. *Moinina Fofana and Allieu Kondewa*, known as the Civil Defence Force (CDF) case, where the initial indictments against these individuals included no allegations of sexual violence in contrast to two parallel indictments against other individuals tried in cases known as the Armed Forces Revolutionary Council (AFRC) and Revolutionary United Front (RUF) cases, which did include sexual charges. The dilemma arose during the CDF judicial processing stage when the prosecutor sought leave to amend the above three indictments, those already containing sexual charges and the CDF case which did not, by adding "one more and new count of forced marriage" as a crime against humanity. In spite of the fact that the trial judges allowed the amendment of the AFRC case, *Prosecutor* v. *Brima, et al.,* to add the crime of forced marriage as a separate crime against humanity under Article 2(i) "[o]ther inhumane acts," they ruled by a majority that they were not satisfied with the evidence adduced by the prosecution on the alleged crime of forced marriage as an independent crime of the offence of sexual slavery under Article 2(g) of the Statute of the SCSL. The trial judges thus

acquitted the accused of the crime of forced marriage, arguing that this crime was subsumed by the crime of sexual slavery and that there was no lacuna in the law necessitating a separate crime of forced marriage as an "other inhumane act."

Moreover, although gender-based crimes have received unprecedented attention in international criminal law in the past fifteen years, the international criminal tribunals have largely failed to recognize and prosecute these crimes on an equal footing with other serious crimes. Many of these crimes were acquitted or withdrawn from the Court during plea bargaining or charge exchange. However, looking more closely at plea agreements between defendants and the prosecution, one notices that a plea bargain often takes place when the defendant agrees to plead guilty to a lesser offence in return for the prosecution's agreement to drop or withdraw a more serious charge. Looking into the above ICTR plea agreements, amazingly, one finds that all the defendants agreed to plead guilty to many serious offences, e.g., murder, in return for dropping charges of rape or other forms of sexual violence.

Finally, on the basis of the above analysis, this chapter revealed that the tribunals had violated the principle of fair labelling and other principles and concepts of criminal law, particularly the offender's right to fair warning or maximum certainty, the right to fair trial without undue delay, and the right to fair sentencing. In this respect, the principle of fair warning or maximum certainty overlaps with the principle of fair labelling. Both principles require that the defendant should only be charged with a crime that is explicitly defined in the

law. Accordingly, charging a person for conduct that is not explicitly defined in the statutory laws of the tribunals as criminal would violate both principles, because they insist that individuals must know that a certain conduct may subject them to criminal prosecution at the time of breaking the law. In this sense, the fair warning principle implies that the potential offender's *mens rea*—the culpability element—is necessary to protect him against the severe adverse consequences attached to lawbreaking. A case in point is *Prosecutor* v. *Brima, et al.* When the Prosecutor sought leave to amend the indictment by adding a new charge of forced marriage, the defence challenged the Prosecutor's application asserting that the crime in question was not defined in the Statute of the SCSL as a crime against humanity, so that bringing such a charge would violate the principle of legality. In fact, the Prosecutor and the defence failed to recognize both the principles of fair labelling and fair warning. The Prosecutor overlooked the principle of fair labelling, which insists that a crime must exist and be explicitly defined and labelled in the Statute, while the defence ignored the accused's right to fair warning or maximum certainty despite the fact that this right overlaps with the principle of legality, which prohibits applying laws retroactively.

Moreover, although the statutory laws of the tribunals provided for the defendant's right to be tried without undue delay, these judicial bodies were slow in processing cases, which adversely affected their capacity to deliver timely and deterrent justice. Indeed, excessive delays in the proceedings of the tribunals and the endemic violation of the right of the accused to be tried without undue delay

were of frequent occurrence in the tribunals' chambers. Of course, these delays gave the impression that the tribunals were not serious about prosecuting gender-based crimes, and suggested to victims and society alike that perpetrators would not be held responsible.

The chapter likewise asserted that the tribunals' commitment to the principles of fundamental justice implied that they had to insure the defendant's rights to a fair trial and sentence. However, fair sentencing implies that a proportion between crime and punishment be established. This function of the law, which is also required by the principle of fair labelling, ensures that the stigma attached to the offender reflects the crime properly. Furthermore, fair sentencing, according to the principle of fair labelling, also requires that the definition and labelling of each crime reflect the element of moral blameworthiness or culpability represented in the defendant's *mens rea*. It stresses that the wording of the conviction should fairly state the defendant's guilt. At the same time, it emphasizes that the offender should be punished in proportion to his *mens rea* and not only to the degree of gravity or seriousness of the offence. In discussing this right, the chapter examined several cases in national criminal law—*R.* v. *Martineau*, the Canadian Supreme Court and *Coker* v. *Georgia*, the Supreme Court of Georgia— as well as in the case law of the tribunals, particularly the cases of *Kunarac*, *Krstić*, and *Blaškić*.

In conclusion, this chapter pointed out that despite the above pitfalls and shortcomings of the laws and jurisprudence, which offered only symbolic gender

justice, the tribunals did manage to lay down a number of groundbreaking judgments that captured the world's attention and set the foundation for a new international criminal justice system. These historical decisions could not have been achieved without the efforts made by feminist legal scholars and human rights activists before and after the setting up of these international criminal judicial bodies. Nevertheless, due to the abstractness and ambiguity of the tribunals' statutory laws on gender-based crimes, the tribunals were unable to respond adequately to these atrocities and bring perpetrators to justice. The lack of a clear-cut definition of the crime of rape and other gender-based crimes, and the absence of an effective prosecutorial strategy to track down perpetrators and secure evidence beyond reasonable doubt resulted in several rape acquittals, placing the tribunals in a sharp dilemma.

III. Contribution to Scholarship

As has already been pointed out in the introductory chapter, this thesis sought to contribute to the growing body of legal scholarship by examining—in the light of the principle of fair labelling—the jurisprudence of post-conflict international gender justice mechanisms, particularly the international criminal tribunals for former Yugoslavia and Rwanda, the Special Court for Sierra Leone, and the International Criminal Court. This critical inquiry is in fact the first legal analysis to focus on the dilemma of prosecuting and punishing wartime rape and other forms of sexual violence in the statutory laws and jurisprudence of the international criminal tribunals and courts with reference to the principle of fair

labelling. The thesis argued that the abstractness and ambiguity of gender-based crimes embodied in the statutory laws of the above judicial bodies—manifested in the lack of accurate definition, classification, and labelling of each crime—resulted in failure by the tribunals to prosecute and punish these crimes adequately. Accordingly, to overcome this shortcoming, these judicial bodies are strongly invited to apply the principle of fair labelling to wartime gender-based offences by separating, categorizing, and labelling these crimes in a manner that would reflect the nature and magnitude of each crime.

Moreover, while many similar scholarly works are obsessed with the latest developments and achievements of international criminal justice, this study was the first analysis to undertake this timely and critical topic with the detail and comprehensiveness that it warrants. Furthermore, affirming that isolated wartime rape incidents are as vicious and horrible to victims as are those inflicted systematically and on a large scale, the thesis urged that rape and other forms of sexual violence in war settings should be prosecuted separately as a crime in itself, not as a subsection of war crimes or crimes against humanity—a notion that was strongly supported by Justice Teresa Doherty of the SCSL while she was commenting on an earlier draft of the introductory chapter of this thesis.

In addition, this work revealed that abstractness and ambiguity of gender-based crimes in the statutory laws of the international criminal tribunals and courts violate the defendant's rights for fair trial, trial without undue delay, and fair sentencing. This issue was critically addressed in chapter three of this

analysis. Finally, the thesis presented a modest model of coherent legal analysis for reconceptualizing, labelling, and defining gender-based crimes, which in turn would contribute to the construction of a legal literature that would help the above judicial bodies—particularly the ICC, as it is a bit late for the *ad hoc* tribunals—to reformulate their statutory laws. This would be a substantial step to adequately prosecute and address wartime gender-based crimes.

IV. Concluding Remarks

In closing, this thesis confirms that the drafters of the statutory laws of the international criminal tribunals and courts failed to enact distinct gender-based crimes and categorize, define, and label them in a manner representing fairly the nature and degree of gravity of each offence, rather than subsuming them under crimes against humanity or war crimes. The abstractness, ambiguity, and lack of a clear-cut definition and labelling of gender-based crimes in the above laws violated the principle of fair labelling and led to inconsistent prosecutions and verdicts.

However, despite the above shortcomings of the laws and jurisprudence, which offered only symbolic gender justice, the tribunals laid down a number of groundbreaking judgments that captured the world's attention and built the foundation for a new international criminal justice system. These historical decisions could not have been achieved without the efforts made by, *inter alios*, feminist legal scholars and human rights activists before and after the setting up of these international criminal judicial bodies.

For consistent prosecutions and verdicts, as has already been pointed out, the principle of fair labelling requires that the statutory laws should meaningfully reflect the crime through a strict and well-constructed definition. Moreover, it stipulates that an offence must be labelled with reference to its nature and magnitude, and that a proportion between crime and punishment should be recognized. Attaching an accurate label to an offence would help the actors in the criminal justice system to secure consistent prosecution and judgement. Moreover, fairly representing the offence would also reduce the judge's discretion and convey an appropriate message to society regarding the wrongfulness of a certain course of action.

However, as Andrew Ashworth has pointed out, fair labelling is a new legal principle, not an absolute injunction. Accordingly, applying this principle—for the first time—to gender-based crimes embodied in the provisions of the statutory laws of the above judicial bodies will inevitably lead to examination and criticism, which may result in a number of actual and hypothetical opposing arguments.

Bibliography

First: Primary Sources

I. Cases

1. Intergovernmental Tribunals

Trial of Major War Criminals before the International Military Tribunals, November 14, 1945-October 1, 1946 (Nuremberg, Germany: [s.n.], 1947-1949) VI: 170 & VII: 494.

The International Military Tribunal for the Far East, The Tokyo Judgment 29 April 1946 - 12 November 1948, at 453-454 (B.V. A. Roling & C. F. Ruter, eds., 1977).

2. International Cases

A. ICTY

Blaškić Case

Prosecutor v. *Tihomir Blaškić*, Order of the President of the Application for the Early Release of Tihomir Blaškić, 29 July 2004, IT-95-14-A.

Prosecutor v. *Blaškić,* (2000) Judgement, 3 March 2000, IT-95-14-T.

Prosecutor v. *Blaškić,* (2004) Appeals Judgement, 29 July 2004, IT-95-14-A.

Brđanin Case

Prosecutor v. *Radoslav Brđanin*, (2004) Judgement, 1 September 2004, IT-99-36-T.

Čelebići Case

Prosecutor v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, (1998) Judgement, 16 November 1998, IT-96-21.

Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, (2001) Appeals Judgement, 20 February 2001, IT -96-21-A.

Prosecutor v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo,* (2001) Sentencing Judgement, 9 October 2001, IT -96-21- T*bis*-R117.

Prosecutor v. *Zdravko Mucić, Hazim Delić and Esad Landžo,* (2003) Judgement on Sentence Appeal, 8 April 2003, IT-96-21-A*bis.*

Foča Case

Prosecutor v. *Dragoljub Kunarac, Radomir Kovač and Zoran Vuković,* (2001) Judgement, 22 February 2001, IT-96-23-T and IT-96-23/1-T.

Prosecutor v. *Dragoljub Kunarac, Radomir Kovač and Zoran Vuković,* (2002) Appeals Judgement, 12 June 2002, IT-96-23-A and IT-96-23/1-A.

Furundžija Case
Prosecutor v. *Anto Furundžija,* (1998) Judgement, 10 December 1998, IT-95-17/1-T.
Prosecutor v. *Anto Furundžija,* (2000) Appeals Judgement, 21 July 2000, IT-95-17/1-A.

Karadžić Case
Prosecutor v. *Radovan Karadžić*, Amended Indictment of 31 May 2000, IT-95-5-1.
Prosecutor v. *Radovan Karadžić,* (2009) Preliminary Motion to Dismiss Joint Criminal Enterprise III –Foreseability, 16 March 2009, ICTY-IT -95-05/18-PT.

Kmojelac Case
Prosecutor v. *Kmojelac,* (2003) Appeals Judgement, 17 September 2003, IT-97-25-A.

Kordić Case
Prosecutor v. *Kordić,* (2001) Judgement, 26 February 2001, IT-95-14/2-T.

Krstić Case
Prosecutor v. *Radislav Krstić*, (2001) Judgement, 2 August 2001; 40 I.L.M.134, IT-98-33-T.

Kupreškić Case
Prosecutor v. *Kupreškić,* (2000) Judgement, 14 January 2000, IT-95-16-T.

Kvočka, et al., Case
Prosecutor v. *Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać,* (2001) Judgement, 2 November 2001, IT-98-30/1-T.
Prosecutor v. *Miroslav Kvočka et al.,* (2005) Appeals Judgement, 28 February 2005, IT-98-30/1-A.

Milutinović Case
Prosecutor v. *Milan Milutinović*, (2003) Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise, ICTY Appeals Chamber, 21 May 2003, IT-99-37-AR72, at para. 23.
Prosecutor v. *Milan Milutinović*, (2003) Peter Robinson Motion re Joint Criminal Enterprise submitted by Peter Robinson and the Counsel for General Ojdanić, 28 February 2003, ICTY- IT-99-37-AR72.

Nikolić Case
Prosecutor v. *Dragan Nikolić,* (1995) Review of Indictment Pursuant to Rule 61. Case No. IT-94-2-S, 20 October 1995.

Prosecutor v. *Dragan Nikolić,*(2003) Sentencing Judgement. Case No. IT-94-2-S, 18 December 2003.

Prosecutor v. *Dragan Nikolić.,* (2005) Judgement on Sentencing Appeal. Case No. 94-2-A, 4 February 2005.

Ojdanić Case

Prosecutor v. *Dragoljub Ojdanić,* (2002) Preliminary Motion to Dismiss Joint Criminal Enterprise for Lack of Jurisdiction, 29 November 2002, IT-99-37-PT.

Prosecutor v. *Dragoljub Ojdanić,* (2003) Motion Challenging Jurisdiction-Joint Criminal Enterprise, ICTY Appeals Chamber, 28 February 2003, IT-99-37-AR72.

Simić Cace

Prosecutor v. *Blagoje Simić, et al.,* (2003) Judgement, Dissenting Opinion of Judge Per-Johan Lindholm, 17 October 2003, IT-95-9-T, at paragraphs pp. 314 & 316.

Stakić Cace

Prosecutor v. *Milomir Stakić*, Judgement of 31 July 2003, IT-97-24-T.

Tadić Cace

Prosecutor v. *Dušku Tadić also Known as "Dule" & Goran Borovinca*, Indictment of 13 February 1995, 34 I.L.M.1028, IT-94-1-I.

Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Prosecutor v. *Duško Tadić also Known as "Dule,")* Decision of 2 October 1995, 35 I.L.M. 32, IT-94-1-AR72, at 48.

Decision on the Defence Motion (Prosecutor v. *Duško Tadić also Known as "Dule,")* Decision of 10 August 1995, 35 I.L.M. 32, IT-94-1-AR72, at 48.

Prosecutor v. *Dušku Tadić,* (1997) Sentencing Judgement, 14 July 1997, IT-95-1-T.

Prosecutor v. *Dušku Tadić,* (1999) Appeals Judgement, 15 July 1999, IT-94-1-A.

B. ICTR

Akayesu Case

Prosecutor v. *Jean-Paul Akayesu,* (1996) Amended Indictment, ICTR-96-4-I.

Prosecutor v. *Jean-Paul Akayesu*, (1998) Judgment, 2 September 1998, ICTR-96-4-T.

Prosecutor v. *Jean-Paul Akayesu,* (2001) Appeals Judgement, 1 June 2001, ICTR-96-4-A.

Bagambiki Case

Prosecutor v. *Emmanuel Bagambiki*, (1997) Indictment, 13 October 1997, ICTR-97-36-I.

Decision on the Application to File Amicus Curiae Brief according to Rule 74 of the Rules of Procedure and Evidence Filed on Behalf of the NGO Coalition for Women's Human Rights in Conflict Situations, (Prosecutor v. André Ntagerura, Emmanuel Bagambiki & Samuel Imanishimwe), Decision of 24 May 2001, ICTR-99-46-T.

Bagosora Case

Prosecutor v. *Théoneste Bagosora, et al.,* (2002) Decision on the Defence Motion for Release, 12 July 2002, ICTR-98-41-T.

Prosecutor v. *Théoneste Bagosora*, (2008) Judgement and Sentence, 18 December 2008, ICTR-98-41-T.

Barayagwiza Case

Jean-Bosco Barayagwiza v. *The Prosecutor,* Appeals Chamber Decision, 3 November 1999, ICTR-97-19, at paragraphs 106 & 112.

Bisengimana Case

Prosecutor v. *Paul Bisengimana*, (2006) Indictment, 19 July 2000, ICTR 00-60-I.

Prosecutor v. *Paul Bisengimana*, (2006) Judgment and Sentence, 13 April 2006, ICTR 00-60-T.

Gacumbitsi Case

Prosecutor v. *Sylvestre Gacumbitsi,* (2001) Indictment, 20 June 2001, ICTR-2001-64-I.

Prosecutor v. *Sylvestre Gacumbitsi*, (2004) Judgment, 17 June 2004, ICTR 2001-64-T.

Prosecutor v. *Sylvestre Gacumbitsi,* (2006) Appeals Judgement, 7 July 2006, ICTR-2001-64-A.

Kamuhanda Case

Prosecutor v. *Kamuhanda*, (2004) Judgement, 22 January 2004, ICTR-95-54A-T.

Kajelijeli Case

Prosecutor v. *Juvénal Kajelijeli*, (2003) Judgement and Sentence, 1 December 2003, ICTR-98-44A-T.

Juvénal Kajelijeli v. *The Prosecutor,* (2005) Appeals Judgement, 23 May 2005, ICTR-98-44A-A.

Karemera Case

The Prosecutor v. *Édouard Karemera, et al.,* (2003) Decision Denying Leave to File an Amended Indictment, 8 October 2003, ICTR-98-44-I.

The Prosecutor v. *Édouard Karemera, et al.,* (2003) Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision OF 8 October 2003

Denying Leave to File an Amended Indictment, 19 December 2003, ICTR-98-44-AR73.

Mpambara Case

Prosecutor v. *Jean Mpambara*, (2001) Amended Indictment, 27 November 2004, ICTR-2001-65-I.

Prosecutor v. *Jean Mpambara*, (2002) Decision on Motion to Appeal against the Decision of Trial Chamber I of 22 October 2002, 25 November 2002, CTR-2001-65-A.

Prosecutor v. *Jean Mpambara*, (2005) Decision on the Prosecution's Request for Leave to File an Amended Indictment, 4 March 2005, CTR-2001-65-1.

Prosecutor v. *Jean Mpambara*, (2006) Judgement, 11 September 2006, ICTR-01-65-T.

Mugiraneza Case

Prosecutor v. *Mugiraneza et al.,* (1999) Indictment, 13 September 1999, ICTR-99-50-I.

Prosecutor v. *Mugiraneza,* (2004) Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, 27 February 2004, ICTR-99-50-AR73.

Muhimana Case

Prosecutor v. *Mikaeli Muhimana,* (2005) Judgement and Sentence, 28 April 2005, ICTR-95-IB-T.

Musema Case

Alfred Musema v. *The Prosecutor,* (1996) Amended Indictment, Date, ICTR-96-13-I.

The Prosecutor v. *Alfred Musema,* (2000) Judgement and Sentence, 27 January 2000, ICTR-96-13-A.

Alfred Musema v. *The Prosecutor,* (2001) Appeals Judgement, 16 November 2001, ICTR-96-13-A.

Decision on the Prosecutor's Request for Leave to Amend the Indictment (Prosecutor v. *Alfred Musema)*, Decision of 18 November1998, ICTR-98-40-T.

Muvunyi Case

Prosecutor v. *Tharcisse Muvunyi*, (2006), Judgement and Sentence, 12 September 2006, ICTR-2000-55A-T.

Nahimana Case

Prosecutor v. *Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze,* (2003) Judgment, 3 December 2003, ICTR-99-52-T.

Ndindabahizi Case

Prosecutor v. *Emmanuel Ndindabahizi*, (2004) Judgment and Sentence, 15 July 2004, ICTR 2001-71-I.

Niyitegeka Case

Prosecutor v. *Eliézer Niyitegeka*, (2003), Judgement and Sentence, 16 May 2003 ICTR-96-14-T.

Ntagerura Case

Prosecutor v. *André Ntagerura*, (1998) Indictment, 29 January 1998, ICTR-96-10-I.

Prosecutor v. *André Ntagerura, Emmanuel Bagambiki & Samuel Imanishimwe,* (2004) Judgement and Sentence, 25 February 2004, ICTR-99-46-T.

Nyiramasuhuko Case

Prosecutor v. *Nyiramasuhuko,* (2003) Decision on the Matter of Proceeding under Rule 15 *bis* (D), 15 July 2003, ICTR-97-42-T., paragraph 34.

Nzabirinda Case

Prosecutor v. *Joseph Nzabirinda*, (2007) Judgment, 23 February 2007, ICTR-2001-77-T.

Semanza Case

Prosecutor v. *Laurent Semanza,* (2003) Judgement and Sentence, 15 May 2003, ICTR-97-20-T.

Laurent Semanza v. *The Prosecutor,* (2005) Appeals Judgement, 20 May 2005, ICTR-97-20-A.

Serushago Case

Prosecutor v. *Omar Serushago*, (1998) Indictment, 8 October1998, ICTR 98-39-I.

Prosecutor v. *Omar Serushago*, (1999) Judgment and Sentence, 5 February1999, ICTR 98-39-S.

Rugambarara Case

Prosecutor v. *Juvénal Rugambarara*, (2007) Sentencing Judgement, 16 November 2007, ICTR-00-59-T.

Prosecutor v. *Juvénal Rugambarara*, (2007) A Decision on the Prosecution Motion to Amend the Indictment, 28 June 2007, ICTR-00-59-I., at paragraph 2 [hereinafter Rugambarara Decision on the Prosecution Motion to Amend the Indictment].

Rwamakuba Case

Prosecutor v. *André Rwamakuba*, (2005) Decision on Defence Motion for Stay of Proceedings: Article 20 of the Statute, 3 June 2005, ICTR-98-44C-PT.

C. SCSL

Fofana, et al., CDF Case

Prosecutor v. Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa, (2004) Indictment, 5 February 2004, SCSL-03-14-PT.

Prosecutor v. *Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa*, (2004) Decision on Prosecuting Request for Leave to Amend the Indictment, 20 May 2004, SCSL-03-14-PT.

Prosecutor v. *Moinina Fofana, and Allieu Kondewa*, (2007) Sentencing Judgement, 9 October 2007, SCSL-03-14-T.

Prosecutor v. *Moinina Fofana, and Allieu Kondewa*, (2008) Appeals Judgement, 9 June 2008, SCSL-03-14-A.

Decision on the Prosecution Request for Leave to Amend the Indictment (Prosecutor v. *Norman, Fofana & Kondewa)*, Decision of 20 May, SCSL-04-14-PT.

Sesay, et al., RUF Case

Prosecutor v. *Issa Hassan Sesay, Morris Kallon, Augustine Gbao,* (2004) Decision on the Prosecution Request for Leave to Amend the Indictment, 6 May 2004, SCSL-2004-15-PT.

Prosecutor v. *Issa Hassan Sesay, Morris Kallon, Augustine Gbao,* (2006) Corrected Amended Consolidated Indictment, 2 August 2006, SCSL-04-15-PT., See Counts 6-9, paragraphs 54-60 (Sexual Violence, including forced marriage).

Prosecutor v. *Issa Hassan Sesay, Morris Kallon, Augustine Gbao,* (2009) Judgment, 2 March 2009, SCSL-04-15-T.

Prosecutor v. *Issa Hassan Sesay, Morris Kallon, Augustine Gbao,* (2009) Appeals Judgment, 26 October 2009, SCSL-04-15-A.

Tamba, et al., AFRC Case

Prosecutor v. *Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, (2004) Decision on Prosecution Application for Leave to File an Interlocutory Appeal against Decision on Motion for Concurrent Fearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT, 1 June 2004.

Prosecutor v. *Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, (2004) Decision on Prosecution Request for Leave to Amend the Indictment, 6 May 2004, SCSL-2004-16-PT.

Prosecutor v. *Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, (2004) Dissenting Opinion of Judge Bankole Thompson, Presiding Judge of the trial Chamber on Prosecution's Motion for Leave to Amend Indictment against Accused Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, 6 May 2004, SCSL-2004-16-PT.

Prosecutor v. *Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, (2005) Further Amended Consolidated Indictment, 18 February 2005, SCSL-2004-16-PT.

Prosecutor v. *Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, (2007) Trial Judgement, 20 June 2007, SCSL-2004-16-T.

Prosecutor v. *Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, (2007) Sentencing Judgement, 19 July 2007, SCSL-2004-16-T.

Prosecutor v. *Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, (2008) Appeals Judgement, 22 February 2008, SCSL-2004-16-A.

Decision on the Prosecution Request for Leave to Amend the Indictment (Prosecutor v. *Alex Tamba Brima, et al.)*, Decision of 6 May 2004, SCSL-2004-16-PT.

Taylor Case

Prosecutor v. *Charles Ghankay Taylor,* (2003) Indictment of 3 March 2003, SCSL-03-01-PT; *Decision on Immunity from Jurisdiction (Prosecutor* v. *Charles Ghankay Taylor.)*, Decision of 31 May 2004, SCSL-03-01-PT.

D. ICC

Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, (The Prosecutor v. *Jean-Pierre Bemba Gombo),* Decision of 15 June 2009, ICC-01/05-01/08-388, at paragraphs 205, 206, 209 & 312.

3. National Cases

Cook v. *Commonwealth,* 20 Va. App. 510, 458 S.E. 2d 317 (Va. App. 1995).

Coker v. *Georgia*, 433 U.S. 584; 97 S. Ct. 2861; 53 L. Ed. nd 982; (1977 U.S. LEXIS 146).

Commonwealth of Pennsylvania v. *Cosgrove*, 436 Pa. Super. 550, 554; 648 A.2d 546, 548; (1994 Pa. Super. LEXIS 2629).

Looper v. *Morgan*, Civil Action No. H-92-0294, 29 (1995 U.S. Dist. LEXIS 10241).

Nunley v. *State of Alaska*, 26 P.3rd 1113, 1116 (Alas. App. 2001).

The People of the State of New York v. *Eisen*, 77 Misc. 2d 1044, 1044 & 1046; 353 N.Y.S.2d 886, 886 & 888 (1974 N.Y. Misc. LEXIS 1297, 1 & 5).

R. v. *Désiré Munyaneza*, (22 May 2009) Montreal Superior Court, 500-73-002500-052, C.A.H.W.C.A., at 737.

R. v. *Effert* [2008] A.J. No. 338, 2008 ABQB 200, 443 A.R. 196, at Papa. 34.

R. v. *Finta*, [1989] 50 c.c.c. (3d) 236 C.J., affd at (1992) 73 c.c.c. (3d) 65 (Ont. C.A.), at p. 132.

R. v. *Gordon*, [2009] 241 C.C.C. (3d) 388, 246 O.A.C. 239, 65 C.R. (6th) 112 at paras. 26 &31.

R. v. *Maciel*, [2007] 219 C.C.C. (3d) 516, 222 O.A.C. 174, 47 C.R. (6th) 319 at paras. 80-83.

R. v. *Martineau* [1990] 2 S.C.R. 633, S.C.J. No. 84, A.C.S. no 84, 2 R.C.S. 633, 76 Alta. L.R. (2d) 1, at paras. 5, 11, 13, 38, 40, 72, 84, 88, & 104.
R. v. *Vaillancourt*, [1987] 2 S. C. R. 63; 1987 S. C. C. 78, at paragraph 53.

II. International Documents and Treaties

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002), 2178 U.N.T.S. 138.

Charter of the International Military Tribunal (IMT), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 8 August 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280.

Charter of the International Military Tribunal of the Far East (IMTFE), 19 January 1946, 26 Apri1, 1946, T .I.A.S. No.1589, 4 Bevans 20.

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, 39 UN GAOR, Supp. (No.51) at 197, UN Doc. A/39/51 (1984), reprinted in 23 International Le Aterials 1027 (1984), *Substantive changes noted in* 24 I.L.M. 535 (1985) (Entered into force on 26 June1987).

Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I), Opened for signature 12 August 1949, 6 U.S.T. 3114, T.I.A.S. No.3362, 75 U.N.T.S. 31 (Entered into force on 21 October 1950).

Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II), 75 U.N.T.S. 85 (Entered into force on 21 October 1950).

Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), Opened for signature 12 August 1949, 6 U.S.T. 3516, T.I.A.S. No.3365, 75 U.N.T.S. 287 (Entered into force on 21 October 1950).

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, GA Res. 260A (III), 3 UN GAOR at 174, UN Doc. A/810 (1948), 78 U.N.T.S. 277.

Convention Relative to the Treatment of Prisoners of War (Geneva III), Opened for signature 12 August 1949, 6 U.S.T. 3316, T.I.A.S. No.3364, 75 U.N.T.S. 135 (Entered into force on 21 October 1950).

Declaration on the Protection of Women and Children in Emergency and Armed Conflict, (1974), GA Res. 3318 (XXIX), 29 UN GAOP Supp. (No.31) at 146, UN Doc. A/9631 (1974) at Articles 4 & 5.

Finalized Draft Text of the Elements of Crimes, PrepCom on ICC, 2 November 2000, UN Doc. PCNICC/2000/1/Add.2.

The International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Adopted on 11 February 1994, last Amendment on 28 February 2008, UN Doc. IT/32/Rev. 41, reprinted in 33 I.L.M. 484.

The International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Adopted on 29 June 1995, last Amendment on 14 March 2008.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), Opened for signature 12 August 1949, 6 U.S.T. 3516, T.I.A.S. No.3365, 75 U.N.T.S. 287 (Entered into force on 21 October 1950).

The Hague Convention IV Respecting the Laws and Customs of War on Land, and its Annex, 18 October 1907, 36 Stat. 2277, 1 Bevans 631. (Entered into force on 26 January 1910).

International Convention for the Suppression of Terrorist Bombing, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998), entered into force May 23, 2001.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Protocol I), Opened for signature on 12 December 1977, 1125 U.N.T.S. 3 (Entered into force on 7 December 1978).

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, (Protocol II), Opened for signature on 12 December 1977, 1125 U.N.T.S. 609 (Entered into force on 7 December 1978).

Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, 6 June 2000, UN Doc. UNTAET/REG/2000/15.

Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (17 July 1998), 37 I.L.M. 999-1069 (Entered into force on 1 July 2002).

Slavery Convention, Concluded on 25 September 1926, A 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253 (Entered into force on 9 March 1927).

Special Court for Sierra Leone, Rules of Procedure and Evidence, Adopted on 7 March 2003, last Amendment on 27 May 2008.

Statute of the International Criminal Tribunal for the Former Yugoslavia, United Nations SCOR, 48th Sess., 3175. Annex, at 40, UN Doc. S/25704, 3 May 1993. (As Amended on 19 May 2003 by Security Council's Resolution 1481).

Statute of the International Criminal Tribunal for Rwanda, UN Security Council's Resolution S/RES/955 (1994) Annex, Adopted in the Security Council's 3454th meeting on 8 November 1994.

Statute of the Special Court for Sierra Leone, UN Doc. S/2002/246, appendix II, 2178 U.N.T.S. 138. (06/03/2002).

UN Security Council's Resolution 1315 (2000), *The Establishment of the Special Court for Sierra Leone* (4 August 2000), UN Doc. S/RES/1315 (2000).

III. Governmental Legislations and Documents

California Penal Code, § 261 (a) (2).

Canadian Criminal Code, R.S.C., 1985, s.213(a)&(d) and s.21(1)&(2).

Canada, Senate Committee on Legal and Constitutional Affairs, *Bill S-210: An Act to Amend the Criminal Code (Suicide Bombings)*, Submitted by Professor Ed Morgan, April 9, 2008.

Charter of Human Rights and Freedoms, Constitution Act, 1982 (79) Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, (Entered into force on 17 April 1982).

Code pénal, (1993), art. 222 C.pén.

Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946).

Criminal Code of Korea, (1985) Chapt. XXXII, Art. 297.

The Criminal Code of the Russian Federation, (1996), Art. 131 (1).

Law Reform Commission of Canada, *Report on Sexual Offences* (Ottawa: Minister of Supply and Services Canada, 1978).

Law Reform Commission of Canada, *Working Paper 22, Criminal Law: Sexual Offences* (Ottawa: Minister of Supply and Services Canada, 1978).

The Lieber Code, U.S. Department of Army, General Orders No. 100 (April 1863), reprinted in *The Law of War*, vol. 1 (New York, N.Y.: Random House, 1972).

Maryland Ann Code, (1957), Art. 27, 463 (9/1).

New York Penal Law, §130.05 & §130.35.

Penal Code of the Socialist Republic of Bosnia and Herzegovina, (1991), Chapt. XI, Art. 88 (1).

Polish Criminal Code, (1995), Art. 168 (1).

Swiss Penal Code, (1999), Art. 190;

Second: Secondary Sources

I. Articles in Journals

"A Framework for the Allocation of Prevention Resources with a Specific Application to Insider Trading," (1976) 74:5 Michigan Law Review 975-1022.

Abrams, K., "Feminists in International Human Rights: The Changer and the Changed," (2003) 21 Berkeley Journal of International Law 390-394.

Abreu, V., "Women's Bodies as Battlefields in the Former Yugoslavia: An Argument for the Prosecution of Sexual Terrorism as Genocide and for the Recognition of Genocidal Sexual Terrorism as a Violation of *Jus Congens* under International Law," (2005) 6:1 The Georgetown Journal of Gender and the Law 1-20.

Afflitto, F., "Victimization, Survival and the Impunity of Forced Exile: A Case Study from the Rwandan Genocide," (2000) 34:1 Crime, Law and Social Change 77-97.

Akhavan, P., "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism," (2009) 31 Human Rights Quarterly 624–654.

_____, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?," (2001) 95:1 American Journal of International Law 7-31. Reprinted in R., Falk, et al., eds., *Human Rights: Critical Concepts in Political Science*, 5 vols. (New York, N.Y.: Routledge, 2007) III: 123-159.

_____, "Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes against Humanity and Genocide," (2000) 94 American Society of International Law Proceedings 279-284.

_____, "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment," (1996) 90:3 American Journal of International Law 501-510.

_____, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," (2005) 99:2 The American Journal of International Law 403-421.

Allen, B., Toward a New Feminist Theory of Rape': A Response from the Field," (2002) 27:3 Signs 777-781.

Almond, P., "Understanding the Seriousness of Corporate Crime: Some Lessons for the New 'Corporate Manslaughter' Offence," (2009) 9:2 Criminology and Criminal Justice 145–164.

Alvarez, J., "Lessons from the Akayesu Judgment," (1999) 5 ILSA Journal of International & Comparative Law 359-370.

Amann, D., & Sellers, M., "The United States of America and the International Criminal Court," (2002) 50 American Journal of Comparative Law 381-405.

Ambos, K., "General Principles of Criminal Law in the Rome Statute," (1999) 10:1 Criminal Law Forum 1-32.

_____, "Impunity and International Criminal Law, A Case Study on Colombia, Peru, Bolivia, Chile and Argentina," (1997) 18:1-4 Human Rights Law Journal 1-15.

_____, "Joint Criminal Enterprise and Command Responsibility," (2007) 5: 1 Journal of International Criminal Justice 159-183.

Andenaes, J., "The General Preventive Effects of Punishment," (1966) 114:7 University of Pennsylvania Law Review 949-983.

Keller, A., "Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR," (2001-2002) 12:1 Indiana International and Comparative Law Review 53-74.

Andrews, L., "Sailing around the Flat Earth: The International Tribunal for the Former Yugoslavia as a Failure of Jurisprudential History," (1997) 11:2 Emory International Law Review 471-513.

Andrias, R., "Rape Myths; A Persistent Problem in Defining and Prosecuting Rape," (1992) 7:2 Criminal Justice 2-7.

Aolain, F., "Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War," (1997) 60:3 Albany Law Review 883-904.

Arbour, L., "Article: Providing Access to Justice in a Culture of Impunity," (2000) Pennsylvania Bar Association Quarterly 139-141.

_____, "The Prosecution of International Crimes: Prospects and Pitfalls," (1999) 1 Washington University Journal of Law and Policy 13-25.

_____, "The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results," (1999) 3 Hofstra Law and Policy Symposium 37-46.

Argibay, C., "Sexual Slavery and the 'Comfort Women' of World War II," (2003) 21:2 Berkeley Journal of International Law 375-389.

Arsanjani, M., "The Rome Statute of the International Criminal Court," (1999) 93:1 American Journal of International Law 22-43.

Ashworth, A., "Principles, Pragmatism and the Law: Commission's Recommendations on Homicide Law Reform," (2007) Criminal Law Review 333-344.

_____, "Towards a Theory of Criminal Legislation," (1989) 1:1 Criminal Law Forum 41-63.

Askin, K., "Crimes within the Jurisdiction of the International Criminal Court," (1999) 10:1 Criminal Law Forum 33-59.

_____, "Gender Crimes Jurisprudence in the ICTR: Positive Developments," (2005) 3 Journal of International Criminal Justice 1007-1018.

_____, "The International War Crimes Trial of Anto Furundžija: Major Progress toward Ending the Cycle of Impunity for Rape Crimes," (1999) 12 Leiden Journal of International Law 935-955.

_____, "Kunarac Judgment," (2001) 8:3 Human Rights Brief 20-21.

_____, "Omarska Camp, Bosnia-Broken Promises of 'Never again'," (2003) 30:1 Human Rights 12-17.

_____, "Prosecuting Wartime Rape and other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles," (2003) 21:2 Berkeley Journal of International Law 288-349.

_____, "The Quest for Post-Conflict Gender Justice," (2003) 41 Columbia Journal of Transnational Law 509-519.

_____, "Reflections on Some of the Most Significant Achievements of the ICTY," (2003) 37:4 New England Law Review 903-914.

_____, "The Rwanda and Yugoslav Tribunals: Revolutionizing the Prosecution of War Crimes against Women," (2001) Africa Legal Aid Quarterly 10-13.

_____, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status," (1999) 93 The American Journal of International Law 97-123.

Aswad, E., "Torture by Means of Rape," (1996) 84:5 The Georgetown Law Journal 1913-1943.

Aydelott, D., "Mass Rape during War: Prosecuting Bosnian Rapists under International Law," (1993) 7:2 Emory International Law Review 585-631.

Bachrach, M., "The Protection and Rights of Victims under International Criminal Law," (2000) 34:1 The International Lawyer 7-20.

Baeza, P., "Impunity: An Impossible Reparation," (2000) 69 Nordic Journal of International Law 27–34.

Baker, B., "Twilight of Impunity for Africa's Presidential Criminals," (2004) 25:8 Third World Quarterly 1487–1499.

Balthazar, S., "Gender Crimes and the International Criminal Tribunals," (2006) 10:1 Gonzaga Journal of International Law 43-48.

Barrett, R., & Little, L., "Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals," (2003) 88: I Minnesota Law Review 30-85.

Bassiouni, M. C., "Combating Impunity for International Crimes," (2000) 71:2 University of Colorado Law Review 409-422.

Bassiouni, M. C., "Crimes against Humanity: The Need for a Specialized Convention," (1994) 31:3 Columbia Journal of Transnational Law 457-494.

_____, "Draft Statute: International Criminal Tribunal," (1991) 15:2-3 Nova Law Review 373-432.

_____, "Enslavement as an International Crime," (1991) 23:2 New York University Journal of International Law & Politics 445-517.

_____, "International Crimes: Jus Cogens and Obligation Erga Omnes," (1996) 59:4 Law and Contemporary Problems 63-74.

_____, "Normative Framework of International Humanitarian Law: Overlaps, Gaps, and Ambiguities," (1998) 8 Transnational Law & Contemporary Problems 199-276.

_____, "Observations Concerning the 1997-98 Preparatory Committees Work," (1997) 25:2 Denver Journal of International Law and Policy 397-420.

Bassiouni, M. C., "Searching for Peace and Achieving Justice: The Need for Accountability," (1996) 59:4 Law & Contemporary Problems 9-28.

Baum, L., "Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court," (2001) 19 Wisconsin International Law Journal 197-229.

Bedont, B., & Hall-Martinez, K., "Ending Impunity for Gender Crimes under the International Criminal Court," (1999) 4:1 The Brown Journal of World Affairs 65-85.

Beigbeder, Y., *International Justice against Impunity: Progress and New Challenges* (Boston: Martinus Nijhoff Publishers, 2005).

Belair, K., "Unearthing the Customary Law Foundations of 'Forced Marriages' During Sierra Leone's Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women's Rights in Post-Conflict Sierra Leone," (2006) 15Columbia Journal of Gender and Law 551-607.

Bell, C., & O'Rourke, C., Does Feminism Need a Theory of Transitional Justice? An Introductory Essay," (2007) 1 The International Journal of Transitional Justice 23-44.

Beltz, A., "Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victim's Rights with the Due Process Rights of the Accused," (2008) 23:1 St. John's Journal of Legal Commentary 167-209.

Benedetti, F., & Washburn, J., "Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterward on the Rome Diplomatic Conference," (1999) 5:1 Global Governance: A Review of Multilateralism and International Organizations 1-37.

Benzing, M., "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity," (2003) 7 Max Planck Yearbook of United Nations Law 591-632.

Berg, B., "The 1994 ILC Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure," (1996) 28:2 Case Western Reserve Journal of International Law 221-264.

Berger, R., et al., "The Dimensions of Rape Reform Legislation," (1988) 22 Law and Society Review 329-356.

Bergoffen, D., "From Genocide to Justice: Women's Bodies as a Legal Writing Pads," (2006) 32:1 Feminist Studies 11-37.

Biehler, A., "War Crimes against Women," (2002) 13 Criminal Law Forum 507-513.

Binder, C., et al., "Empty Words or Real Achievement? The Impact of Security Council Resolution 1325 on Women in Armed Conflicts," (2008) 101 Radical History Review 22-41.

Blatt, D., "Recognizing Rape as a Method of Torture," (1992) 19 New York University Review of Law and Social Change 821-865.

Boed, R. "Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda," (2002) 13 Criminal Law Forum 305.

Bogdan, A., "Individual Criminal Responsibility in the Execution of a Joint Criminal Enterprise in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia," (2006) 6 International Criminal Law Review 63-120.

_____, "The United States and the International Criminal Court: Avoiding Jurisdiction through Bilateral Agreements in Reliance on Article 98," (2008) 8:1-2 International Criminal Law Review1-54.

Bongiorno, C., "A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor," (2002) 33 Columbia Human Rights Law Review 623.

Boon, K., "Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent," (2001) 32:3 Columbia Human Rights Law Review 625-675.

Bos, P., "Feminists Interpreting the Politics of Wartime Rape: Berlin, 1945; Yugoslavia, 1992–1993," (2006) 31:4 Signs: Journal of Women in Culture and Society 995-1025.

Brounéus, K., "Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts," (2008) 39:1 Security Dialogue 55-76.

Brown, D., "The International Criminal Court and Trial in Absentia," (1999) 24:3 Brooklyn Journal of International Law 763-796.

Brunet, A., & Helal, I., "Monitoring the Prosecution of Gender-Related Crimes in Rwanda: A Brief Field Report," (1998) 4:4 Journal of Peace Psychology 393-397.

Buss, D., "Prosecuting Mass Rape: Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vuković," (2002) 10:1 Feminist Legal Studies 91-109.

_____, "Rethinking 'Rape as a Weapon of War'," (2009) 17:2 Feminist Legal Studies 145-163.

_____, "Women at the Borders: Rape and Nationalism in International Law," (1998) 4:2 Feminist Legal Studies 171-203.

de Busschere, A., "The Human Treatment of Women in Times of Armed Conflict: Equality and the Law of Humanity," (1987) 26:1-3 Revue de droit penal militaire et de droite de la guerre 576-610.

Cahn, N., "Beyond Retribution and Impunity: Responding to War Crimes of Sexual Violence," (2005) 1:1 Stanford Journal of Civil Rights and Civil Liberties 217-270. Originally, this paper is the George Washington University Law School Public Law and Legal Theory Working Paper No.104 (26 August 2004). It is available from the Social Science Research Network at: <http://ssm.com/ abstracts=586123> (Accessed on: 15 September 2005).

Campanaro, J., "Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes," (2001) 89: 8 Georgetown Law Journal 2557-2592.

Carlson, E., "Sexual Assault on Men in War," (1997) 349:9045 The Lancet 129.

Carlton, G., "Equalized Tragedy: Prosecuting Rape in The Bosnian Conflict under the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia," (1997) 6:1 Journal of International Law and Practice 92-109.

Carpenter, A., "Surfacing Children: Limitations of Genocidal Rape Discourse," (2000) 22:2 Human Rights Quarterly 428-477.

Carpenter, R. C., "Forced Maternity, Children's Rights and the Genocide Convention: A Theoretical Analysis," (2000) 2:2 Journal of Genocide Research 213–244.

_____, "Recognizing Gender-Based Violence against Civilian Men and Boys in Conflict Situations," (2006) 37:1 Security Dialogue 83-103.

Casey, L., & Rivkin, D., Jr., "The Limits of Legitimacy: The Rome Statutes' Unlawful Application to Non-State Parties," (2004) 44:1 Virginia Journal of International Law 63-89.

Cassese, A., "Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine: Before The Pre-Trial Chamber Extraordinary Chambers in the Courts of Cambodia. Case File No.: 001/18-07-2007-ECCC/OCIJ (PTC 02)," (2009) 20 Criminal Law Forum 289–330.

_____, "The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise," (2007) 5 Journal of International Criminal Justice 109-133.

_____, "The Statute of the International Criminal Court: Some Preliminary Reflections," (1999) 10 European Journal of International Law 144-171.

Cavanaugh, K., "Forced Impregnation and Rape as a Means Genocide," (2002) 8:2 New England Journal of International and Comparative Law 1-21.

Chalmers, J., "Just an Expert Group That Can't Say No: Reforming Corporate Homicide Law," (2006) 10:2 Edinburgh Law Review 290-297.

Chalmers, J., & Leverick, F., "Fair Labelling in Criminal Law," (2008) 71:2 Modern Law Review 217-246.

Chaney, K., "Pitfalls and Imperatives: Applying the Lessons of Nüremberg to the Yugoslav War Crimes Trials," (1995) 14 Dickinson Journal of International Law 57-94.

Chappell, D., "Law Reform, Social Policy, and Criminal Sexual Violence: Current Canadian Responses," (2006) 528 Annals of the New York Academy of Sciences 379–387.

Charlesworth, H., "Feminist Methods in International Law," (1999) 93:2 The American Journal of International Law 379-394.

Charlesworth, H., & Chinkin, C., "The Gender of Jus Cogens," (1993) 15:1 Human Rights Quarterly 63-76.

Charlesworth, H., & Chinkin, C., & Wright, S., "Feminist Approaches to International Law," (1991) 85 American Journal of International Law 613-645.

Chinkin, C., "Amicus Curiae Brief on Protective Measures for Victims and Witnesses, Submitted by Dean and Professor of Law Christine Chinkin," (1996) 7:1 Criminal Law Forum 179-212.

_____, "Rape and Sexual Abuse of Women in International Law," (1994) 5:3 European Journal of International Law 326-341.

_____, "The Yugoslav Crisis: New International Law Issues," (1994) 5 European Journal of International Law 326-341.

Cissé, C., "The End of a Culture of Impunity in Rwanda? Prosecution of Genocide and War Crimes before Rwandan Courts and the International Criminal Tribunal for Rwanda," (1998) 1 Yearbook of International Humanitarian Law 161-188.

Clark, J., "Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation," (2009) 20:2 European Journal of International Law 415-436.

Clark, R., "Possible Amendments for the First ICC Review Conference in 2009," (2007) 4 New Zealand Yearbook of International Law 103-119.

Clarkson, C., "Theft and Fair Labelling," (1993) 56 The Modern Law Review 554-558.

Cleiren, C., & Tijssen, M., "Rape and other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues," (1994) 5:2-3 Criminal Law Forum 471-506. Reprinted in (1996) Nemesis Essays 109-131.

Coan, C., "Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia," (2000) 26:1 North Carolina Journal of International Law and Commercial Regulation 183-237.

Cohen, L. & Backhouse, C., "Desexualizing Rape: Dissenting View on the Proposed Rape Amendments," (1980) 2:4 Canadian Woman Studies 99-103.

Cohn, C., "Sex and Death in the Rational World of Defense Intellectuals," (1987) 12:4 Signs 687-718.

Cole, A., "Prosecutor v. Gacumbitsi: The New Definition for Prosecuting Rape under International Law," (2008) 8:1-2 International Criminal Law Review 55-86.

Copelon, R., "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law," (2000) 46 McGill Law Journal 217-240.

Copelon, R., "Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law," (1994) 5:2 Hastings Women's Law Journal 243-266.

_____, "Women and War Crimes," (1995) 69:1-2 St-John's Law Review 61-69.

Coughlan, S., "Reforming Homicide Law to Separate Guilt from Sentence: An International Gloss," (2008) Canadian Criminal Law Review1-18.

Crawford, J., "The ILC Adopts a Statute for an International Criminal Court," (1995) 89:2 American Journal of International Law 404-416.

_____, "The ILC's Draft Statute for an International Criminal Tribunal," (1994) 88:1 American Journal of International Law 140-152.

Creta, V., "The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Right of the Accused under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for Former Yugoslavia," (1998) 20:2 Houston Journal of International Law 381-418.

Crofts, T., "Two Degrees of Murder: Homicide Law Reform in England and Western Australia," (2008) 8:2 Oxford University Commonwealth Law Journal 187-210.

Crooms, L., "Using a Multi-Tiered Analysis to Reconceptualize Gender-Based Violence against Women as a Matter of International Human Rights," (1999) 33 New England Law Review 881-906.

Culver, K., "Analyzing Criminal Attempts," (1998) Canadian Journal of Law and

Jurisprudence 441-456.
Daly, E., "Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda," (2002) 34 International Law and Politics 355-396.
Damaška, M., "What Is the Point of International Criminal Justice?" (2008) 38:1 Chicago-Kent Law Review 329-365.
Damgaard, C., "The Special Court for Sierra Leone: Challenging the Tradition of Impunity for Gender-based Crimes?," (2004) 73 Nordic Journal of International Law 485–503.
Dana, S., "Revisiting the Blaskić Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY," (2004) 4 International Criminal Law Review 321-348.
Danilenko, G., "The Statute of the International Criminal Court and Third States," (2000) 21:3 Michigan Journal of International Law 445-494.
Danner, A., & Martinez, J., "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law," (2005) 93:75 California Law Review 75-170.
Davis, P., "The Politics of Prosecuting Rape as a War Crime," (2000) 34:4 The International Lawyer 1223-1248.
Dawson, G., "Defining Substantive Crimes within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression?," (2000) 19:3 New York Law School Journal of International and Comparative Law 413-452.
Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, (The Prosecutor v. Jean-Pierre Bemba Gombo), Decision of 15 June 2009, ICC-01/05-01/08-388, at paras.199-200.
Defeis, E., "U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity." (2008) 7:2 Washington University Global Studies Law Review 185-214.
Del Ponte, C., "Investigation and Prosecution of Large-scale Crimes at the International Level: The Experience of the ICTY," (2006) 4:2 Journal of International Criminal Justice 539-558.
Demleitner, N., "Forced Prostitution: Naming an International Offense," (1994) 18 Fordham International Law Journal 163-197.
Dieckmann, J., & Kerll, C., "UN Ad Hoc Tribunals Under Time Pressure - Completion Strategy and Referral Practice of the ICTY and ICTR from the Perspective of the Defence," (2008) 8: 1-2 International Criminal Law Review 87-108.
"Discussion," (2008) 6 Journal of International Criminal Justice 681-709.
Dobson, R, "Sexual Torture of Men in Wartime Croatia was Common," (2004) 328 British Medical Jouma1 1280.
Doherty, T., "Developments in the Prosecution of Gender-Based Crimes - the Special Court for Sierra Leone Experience," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 327-335.

Donat, P., & D'Emilio, J., "A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change," (1992) 48:1 Journal of Social Issues 9-22.

Drumbl, M., Case Notes Prosecutor v. Radislav Krstić: ICTY Authenticates Genocide at Srebrenica and Convicts for Aiding and Abetting," (2004) 5:2 Melbourne Journal of International Law 1-16.

Duffy, H., "Toward Eradicating Impunity: The Establishment of an International Criminal Court," (1999) 26:4 Social Justice 115-124.

Easterday, J., "Obscuring Joint Criminal Enterprise Liability: The Conviction of Augustine Gbao by the Special Court of Sierra Leone," (2009) 3 Berkeley Journal of International Law Publicist 37-46.

Eaton, S., "Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime," (2004) 35:4 Georgetown Journal of International Law 873-919.

Eboe-Osuji, C., "Rape as Genocide: Some Questions Arising," (2007) 9:2 Journal of Genocide Research 251–273.

Eide, A., Preventing Impunity for the Violator and Ensuring Remedies for the Victim," (2000) 69 Nordic Journal of International Law 1-10.

El Zeidy, M., "The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422," (2002) 35:5 Vanderbilt Journal of Transnational Law 1503-1544.

Engle, K., "'Calling in the Troops': The Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Intervention," (2007) 20 Harvard Human Rights Journal 189-226.

_____, "Feminism and its (Dis) Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina," (2005) 99:4 American Journal of International Law 778-816.

_____, "Judging Sex in War," (2008) 106:6 Michigan Law Review 941-961.

Erb, N., "Gender-Based Crimes under the Draft Statute for the Permanent International Criminal Court," (1998) 29 Columbia Human Rights Law Review 401-435.

Estrich, S., "Rape," (1986) 95:6 The Yale Law Journal 1087-1184.

Falvey, Jr., J., "Criminal Sexual Conduct as a Violation of International Humanitarian Law," (1997) 12:2 St. John's Journal of Legal Commentary 385-410.

Farhang, C., "Point of No Return: Joint Criminal Enterprise in Brđanin," (2010) 23 Leiden Journal of International Law 137–164.

Feliciati, C., "Restorative Justice for the Girl Child in Post-conflict Rwanda," (2006) 7:4 Journal of International Women's Studies 14-35.

Fenrick, W., "Should Crimes against Humanity Replace War Crimes?," (1999) 37:3 Columbia Journal of Transnational Law 767-785.

_____, "Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia," (1995) 6 Duke Journal of Comparative and International Law 103-125.

Ferencz, B., "An International Criminal Code and Court: When They Stand and Where They've Going," (1992) 30:2 Columbia Journal of Transnational Law 375-399.

Ferzan, K., "The Structure of Criminal Law," (2009) 28:2 Criminal Justice Ethics 223-237.

Fierens, J., "Gacaca Courts: Between Fantasy and Reality," (2005) 3 Journal of International Criminal Justice 896-919.

Fisher, S., "Occupation of the Womb: Forced Impregnation as Genocide," (1996) 46:1 Duke Law Journal 91-133.

Fitzgerald, K., "Problems of Prosecution and Adjudication of Rape and other Sexual Assaults under International Law," (1997) 8:4 European Journal of International Law 638-663.

Fletcher, G., & Ohlin, J., "Reclaiming Fundamental Principles of Criminal Law in the Darfur Case," (2005) 3 Journal of International Criminal Justice 539-561.

"Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard," (1952) 62:1 The Yale Law Journal 55-83.

Friedman, L., "Definition of War Crimes and their Use in the International Criminal Tribunals for the Former Yugoslavia and Rwanda," (1999) 3 Hofstra Law and Policy Symposium 9-14.

Fuchs, S., "Male Sexual Assault: Issues of Arousal and Consent," (2004) 51 Cleveland State Law Review 93-121.

Gardam, J., "Gender and Non-Combatant Immunity," (1993) 3 Transnational Law Contemporary Problems 344-370.

Garms, U. & Peschke, K., "War Crimes Prosecution in Bosnia and Herzegovina (1992-2002): An Analysis through the Jurisprudence of the Human Rights Chamber," (2006) 4 Journal of International Criminal Justice 258-282.

Gibson, C., "Testing the Legitimacy of the Joint Criminal Enterprise Doctrine in the ICTY: A Comparison of Individual Liability for Group Conduct in International and Domestic Law," (2008) 18 Duke Journal of Comparative & International Law 521-547.

Glazebrook, P., "Revising the Theft Acts," (1993) 52:2 The Cambridge Law Journal 191-194.

Goldstone, R., "Prosecuting Rape as a War Crime," (2002) 34 Case Western Reserve Journal of International Law 277-285.

Goldstone, R., & Dehon, E., "Engendering Accountability: Gender Crimes under International Criminal Law," (2003) 19 New England Journal on Public Policy 121-145.

Gordon, M., "Rape as a Crime in International Humanitarian Law: Where to from Here?," (2002)13 European Journal of International Law 697-719.

Green, J., et al., "Affecting the Rules for the Prosecution of Rape and other Gender-Based Violence before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique," (1994) 5:2 Hastings Women's Law Journal 171-241.

Green, J., "Uncovering Collective Rape: A Comparative Study of Political Sexual Violence (2004) 34:1 International Journal of Sociology 97-116.

Green, L., "Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law," (2002) 33 Columbia Human Rights Law Review 733-776.

Green, S., "Looting, Law, and Lawlessness," (2007) 81 Tulane Law Review 1129-1174.

Greenwood, C., "Command Responsibility and the Hadzihasanovic Decision," (2004) 2 Journal of International Criminal Justice 598-605.

Griffin, M., "Ending the Impunity of Perpetrators of Human Rights Atrocities: A Major Challenge for International Law in the 21st Century," (2000) 838 International Review of the Red Cross 369-389.

Grump, D., & Grump, S., "In Defence of the Felony Murder Doctrine," (1985) 8 Harvard Journal of Law and Public Policy 359-398.

Gruskin, S., "Negotiating the Relationship of HIV/AIDS to Reproductive Health and Reproductive Rights," (1995) 44:4 American University Law Review 1191-1205.

Guliyeva, G., "The Concept of Joint Criminal Enterprise and ICC Jurisdiction," (2008-2009) 5:1 Eyes on the ICC 49-84.

Gustafson, K., "The Requirement of an 'Express Agreement' for Joint Criminal Enterprise Liability A Critique of Brđanin," (2007) 5 Journal of International Criminal Justice 134-158.

deGuzman, M., "The Road from Rome: The Developing Law of Crimes against Humanity," (2000) 22:2 Human Rights Quarterly 335-403.

Haan, V., "Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia," (2005) 5 International Criminal Law Review 167-201.

Haffajee, R., "Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory," (2006) 29 Harvard Journal of Law and Gender 201-221.

Hall, C., "Rape: The Politics of Definition," (1988) 105:1 South African Law Journal 67-82.

Halley, J., "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law," (2008) 30 Michigan Journal of International Law 1-123.

Hallock, H., "The Violence against Women Act: Civil Rights for Sexual Assault Victims," (1992-1993) 68 Indiana Law Journal 577-620.

Hansen, L., "Gender, Nation, Rape: Bosnia and the Construction of Security," (2000) 3: 1 International Feminist Journal of Politics 55-75.

Hansen-Young, T., "Defining Rape: A Means to Achieve Justice in the Special Court for Sierra Leone," (2005) 6 Chicago Journal of International Law 479-494.

Hawkins, G., "Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects," (1969) 2 Wisconsin Law review 550-565.

Healey, S., "Prosecuting Rape under the Statute of the War Crimes Tribunals for the Former Yugoslavia," (1995) 21:2 Brook Journal of International Law 327-383.

von Hebel, H., "Putting an End to Impunity: From The Hague to Rome," (1999) 12 The Hague Yearbook of International Law 83-90.

von Hebel, H., & Kelt, M., "Some Comments on the Elements of Crimes for the Crimes of the ICC Statute," (2000) 3 Yearbook of International Humanitarian Law 273-288.

Heller, K., "What Happens to the Acquitted?" (2008) 21:3 Leiden Journal of International Law 663-680.

Henham, R., "The Ethics of Plea Bargaining in International Criminal Trials," (2005) 26:3 Liverpool Law Review 209–224.

Henham, R., "The Philosophical Foundations of International Sentencing," (2003) 1:1 Journal of International Criminal Justice 64-85.

Henham, R., & Drumbl, M., "Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia," (2005) 16:1 Criminal Law Forum 49-87.

Hernández-Truyol, B., "Sex, Culture and Rights: A Reconceptualization of Violence for the Twenty- First Century," (1997) 60:3 Albany Law Review 607-634.

Hinch, R., "Inconsistencies and Contradictions in Canada's Sexual Assault Law," (1988) 14 Canadian Public Policy 282-294.

von Hirsch, A., "'Neoclassicism,' Proportionality, and the Rationale for Punishment: Thoughts on the Scandinavian Debate,"(1983) 29 Crime Delinquency 52-70.

Hoefgen, A., "There will be no Justice unless Women are Part of the Justice: Rape in Bosnia, the ICTY and Gender Sensitive Prosecution," (1999) 14:2 Wisconsin Women's Law Journal 155-179.

Horder, J., "Intention in Criminal Law—A Rejoinder," (1995) 58 The Medical Law Review 678-691.

_____, "Rethinking Non-Fatal Offences against the Person," (1994) 14:3 Oxford Journal of Legal Studies 335-351.

Hunt, D., "International Criminal Court-High Hopes, Creative Ambiguity and an Unfortunate Mistrust in International Judges," (2004) 2 Journal of International Criminal Justice 56-70.

Hwang, P., "Defining Crimes against Humanity in the Rome Statute of the International Criminal Court," (1998) 22:2 Fordham International Law Journal 457-504.

Jackson, E., "Catharine MacKinnon and Feminist Jurisprudence: A Critical Appraisal Source," (1992) 19:2 Journal of Law and Society 195-213.

Jackson, J., "Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial Inquisitorial Dichotomy," (2009) Journal of International Criminal Justice 1-23.

Jansen, G., "Gender and War: The Effects of Armed Conflict on women's Health and Mental Health," (2006) 21 Affilia 134-145.

Jeffrey, D., "Two Wrongs Do Make a Right: The International Criminal Tribunal for the Former Yugoslavia was Established Illegally - But it Was the Right Thing to Do...So Who Cares?," (2002-2003) 28 North Carolina Journal of International Law and Commerce 395-420.

Jochnick, C., "Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights," (1999) 21 Human Rights Quarterly 56-79.

Johnson, L., "Closing an International Criminal Tribunal while Maintaining International Human Rights Standards and Excluding Impunity," (2005) 99:1 American Journal of International Law 158-174.

Jordash, W., & Van Tuyl, P., "Failure to Carry the Burden of Proof How Joint Criminal Enterprise Lost its Way at the Special Court for Sierra Leone," (2010) Journal of International Criminal Justice 1-23.

Joyner, C., "Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability," (1996) 59:4 Law & Contemporary Problems 153-172.

_____, "Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability," (1998) 26:4 Denver Journal of International Law and Policy 591-624.

Kahan, D., "Social Influence, Social Meaning, and Deterrence," (1997) 83:2 Virginia Law Review 349-395.

Kalajdžić, J., "Rape, Representation and Rights: Permeating International Law with the Voices of Women," (1996) 21:2 Queen's Law Journal 457-497.

Kalosieh, A., "Consent to Genocide?: The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foča," (2003) 24:2 Women's Rights Law Reporter 121-135.

Kalra, M., "Forced Marriage: Rwanda's Secret Revealed," (2001) 7 U.C. Davis Journal of International Law and Policy 197-221.

Karagiannakis, M., "The Definition of Rape and its Characterization as an Act of Genocide: A Review of the Jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia," (1999) 12 Leiden Journal of International Law 479-490.

Keatts, B., "The International Criminal Court: Far from Perfect," (2000) 20:1 New York Law School Journal of International and Comparative Law 137-151.

Kennedy, D., "When Renewal Repeats: Thinking against the Box," (2000) 32 International Law and Politics 335-500.

Kennedy-Pipe, C., & Stanley, P., "Rape in War: Lessons of the Balkan Conflicts in the 1990s," (2000) 47:3-4 International Journal of Human Rights 67-84.

King, Jr., H., "The Legacy of Nuremberg," (2002) 34 Case Western Reserve Journal of International Law 335-356.

King, K., & Greening, M., "Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavian," (2007) 88:5 Social Science Quarterly 1049-1071.

Kirsch, P., & Holmes, J., "The Rome Conference on an International Criminal Court: The Negotiating Process," (1999) 93 The American Journal of International Law 2-12.

Koenig, D., "Two Transformations of Sexual Assault: The First in Domestic Law and the Second in the United Nations International Criminal Courts for Yugoslavia & Rwanda & the ICC Treaty," (2004) 50 The Wayne Law Review 185-199.

Kohn, E., "Rape as a Weapon of War: Women's Human Rights during the Dissolution of Yugoslavia," (1994) 24:1-3 Golden Gate University Law Review 199-221.

Koskenniemi, M., "Between Impunity and Show Trials," (2002) 6 Max Planck Yearbook of United Nations Law1-35.

Kuo, P., "Prosecuting Crimes of Sexual Violence in an International Tribunal," (2002) 34 Case Western Reserve Journal of International Law 305-321.

Langston, L., "No Penetration-And it's Still Rape," (1998) 26:1 Pepperdine Law Review 1-36.

Laviolette, N., "Commanding Rape: Sexual Violence, Command Responsibility, and the Prosecution of Superiors by the International Criminal Tribunals for the Former Yugoslavia and Rwanda," (1998) 10:36 Canadian Yearbook of International Law 93-149.

Lawson, T., "A Shift Toward Gender Equality in Prosecutions: Realizing Legitimate Enforcement of Crimes Committed Against Women in Municipal and International Criminal Law," (2009) 33:2 Southern Illinois University Law Journal 1-35.

Lehr-Lehnardt, R., "One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court," (2002) 16 Brigham Young University Journal of Public Law 317-340.

Leigh, M., "The United States and the Statute of Rome," (2001) 95:1 American Journal of International Law 124-131.

Levy, A., "International Prosecution of Rape in Warfare: Nondiscriminatory Recognition and Enforcement," (1994) 4 University of California at Los Angeles Women's Law Journal 255-297.

Lewis, D., "Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law," (2009) 27 Wisconsin International Law Journal 1-49.

Lietzau, W., "Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court," (1999) 32 Cornell International Law Journal 477-488.

Lindsey, C., "Women and War: An Overview," (2000) 839 International Review of the Red Cross 561-579.

Lindsey, R., "From Atrocity to Data: Historiographies of Rape in Former Yugoslavia and the Gendering of Genocide," (2002) 36:4 Patterns of Prejudice 59-78.

Lloret, J., "Impunity in Cases of Serious Human Rights Violations: Argentina and Chile," (1993-1994) 3 Spanish Yearbook of International Law 3.

Loh, W., 'What Has Reform of Rape Legislation Wrought? A Truth in Criminal Labelling' (1981) 37:4 Journal of Social Issues 28-52.

Luping, D., "Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 431-496.

Lyon, M., "No Means No?: Withdrawal of Consent during Intercourse and the Continuing Evolution of the Definition of Rape," (2004) 95:1The Journal of Criminal Law and Criminology 277-314.

Lyons, M., "Hearing the Cry without Answering the Call: Rape, Genocide, and the Rwandan Tribunal," (Decision in Prosecutor v. Akakesu) (2001) 28 Syracuse Journal of International Law and Commerce 99-124.

Mackinnon, C., "Defining Rape Internationally: A Comment on *Akayesu*," (2006) 44 Columbia Journal of International Law 940-958.

_____, "Rape, Genocide, and Women's Human Rights," (1994) 17 Harvard Women's Law Journal 5-16.

_____, "Women's September 11th: Rethinking the International Law of Conflict," (2006) 47:1 Harvard International Law Journal 1-31.

Mardorossian, C., "Toward a New Feminist Theory of Rape," (2002) 27:3 Signs: Journal of Women in Culture and Society 743-775.

Mandery, E., "Qualified Impunity or Absolute Impunity? The Moral Hazards of Extenchip Qualified Immunity to Lower-Level Public Officials," (1994) 17:2 Harvard Journal of Law and Public Policy 479-519.

Maogoto, J., "The International Criminal Tribunal for Rwanda: A Paper Umbrella in the Rain? Initial Pitfalls and Brighter Prospects," (2004) 73:2 Nordic Journal of International Law 187-221.

Maravilla, C., "Rape as a War Crime: The Implications of the International Criminal Tribunal for the Former Yugoslavia's Decision in Prosecutor v. Kunarac, Kovac, and Vuković on International Humanitarian Law," (2000-2001) 13:3 Florida Journal of International Law 321-341.

Marks, S., "Forgetting 'The Policies and Practices of the Past': Impunity in Cambodia," (1994) 18:2 Fletcher Forum for World Affairs 17-43.

Marler, M., "The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute," (1999) 49:3 Duke Law Journal 825-853.

Mattarollo, R., Impunity and International Law," (1998) 11 Revue Quebecoise de Droit International 81-94.

McGlynn, C., "Rape as 'Torture'? Catharine MacKinnon and Questions of Feminist Strategy," (2008) 16: 1 Feminist Legal Studies 71-85.

McGoldrick, D., "The Permanent International Criminal Court: An End to the Culture of Impunity?," (1999) The Criminal Law Review 627-655.

McHenry, J., "Justice for Foča: The International Criminal Tribunal for Yugoslavia's Prosecution of Rape and Enslavement as Crimes against Humanity," (2002) 10:1 Tulsa Journal of Comparative & International Law 183-222.

_____, "The Prosecution of Rape under International Law: Justice that is Long Overdue," (2002) 35:4 Vanderbilt Journal of Transnational Law 1269-1311.

Meier, E., "Prosecuting Sexual Violence Crimes during War and Conflict: New Possibilities for Progress," (2004) 10 International Legal Theory 83-134.

Meindersma, C., "The Prosecution of Rape and other Forms of Sexual Assault before the International Tribunal for the Former Yugoslavia," (1996) Nemesis Essays 133-166.

Meron, T., "Rape as a Crime under International Humanitarian Law," (1993) 87:3 The American Journal of International Law 424-428.

_____, "Reflections on the Prosecution of War Crimes by International Tribunals," (2006) 100 American Journal of International Law 551-579.

Miglin, J., "From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone." (2007) 16 Dalhousie Journal of Legal Studies 21-46.

Miller, A., "From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape," (2003)108 Pennsylvania State Law Review 349-373.

Milne, A., "Prosecuting Cases of Gender Violence in The International Criminal Tribunal for Rwanda," (2005) 11 Buffalo Human Rights Law Review 107-128.

Mitchell, B., "Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling," 64:3 Modern Law Review 393 – 412.

Mitchell, D., "The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*: Clarifying the Doctrine," (2005) 15:2 Duke Journal of Comparative & International Law 219-257.

Mokhtar, A., "Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects," (2005) 26:1 Statute Law Review 41-55.

Momtaz, D., "War Crimes in Non-International Armed Conflicts under the Statute of the International Criminal Court," (1999) 2 Yearbook of International Humanitarian Law 177-192.

Morris, M., "Facilitating Accountability: The Potential Value of International Guidelines against Impunity," (1998) 4:2 ILSA Journal of International & Comparative Law 401-406.

Morris, M., "International Guidelines against Immunity: Facilitating Accountability," (1996) 59:4 Law & Contemporary Problems 29-39

Moshan, B., "Women, War and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes against Humanity," (1998) 22 Fordham International Law Journal 154-184.

Mugwanya, G., "Expunging the Ghost of Impunity for Several and Gross Violations of Human Rights and the Commission of Delicti Jus Gentium: A

Case for the Domestication of International Criminal Law and the Establishment of a Strong Permanent International Criminal Court," (1999) 8:3 Michigan State University-DCL Journal of International Law 701-779.

Mukai, M., "Ad-hoc Tribunals: The Failure to Contribute to Precedence-setting for a Universal Model of International Justice," (2009) 3 Berkeley Journal of International Law Publicist 48-53.

Mukaman, D., & Collins, A., "Rape Survivors of the Rwandan Genocide," (2006) 17 Journal of Critical Psychology 140-164.

Murphy, T., & Whitty, N., "What is a Fair Trial? Rape Prosecutions, Disclosure and the Human Rights Act," (2000) 8 Feminist Legal Studies 143–167.

Nahapetian, K., "Selective Justice: Prosecuting Rape in the International Criminal Tribunals for the Former Yugoslavia and Rwanda," (1999) 14 Berkeley Women's Law Journal 126-135.

Nebesar, D., "Gender-Based Violence as a Weapon of War," (1998) 4 University of California Davis Journal of International Law and Policy 147-180.

Nersessian, D., "Whoops! I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes," (2006) 30 Fletcher Forum of World Affairs 81.

Nessel, L., "Rape and Recovery in Rwanda: The Viability of Local Justice Initiatives and the Availability of Surrogate State Protection for Women that Flee," (2007) 15 Michigan State Journal of International Law 101-145.

Niarchos, C., "Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia," (1995) 17:4 Human Rights Quarterly 649-690.

Nier, C., "The Yugoslavian Civil War: An Analysis of the Applicability of the Laws of War Governing Non-International Armed Conflicts in the Modern World," (1992) 10:2 Dickinson Journal of International Law 303-331.

Nikolić-Ristanović, V., "Refugee Women in Serbia-Invisible Victims of War in the Former Yugoslavia," (2003) 73 Feminist Review 104-113.

Nowrojee, B., "Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims," (2005) 18 Harvard Human Rights Journal 85-105.

Ohlin, J., "Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise," (2007) 5 Journal of International Criminal Justice 69-90.

Obote-Odora, A., "Rape and Sexual Violence in International Law: ICTR Contribution," (2005) 12 New England Journal of International and Comparative Law 135-159.

Oomen, B., "Rwanda's *Gacaca*: Objectives, Merits and Their Relation to Supranational Criminal Law," Online: Centre for International studies and Research <http://www.ceri-sciences-po.org/themes/reimaginingpeace/va/resources/rwanda_gacaca_oomen.pdf> (Accessed on: 8 September 2009).

Oosterhoff, P., et al., "Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret," (2004) 12:23 Reproductive Health Matters 68-77.

Oosterveld, V., "The Definition of 'Gender' in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?" (2005) 18 Harvard Human Rights Journal 55-84.

_____, "Gender, Persecution and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution" (2006) 17(1) *Duke Journal of Comparative and International Law* 49-89.

_____, "Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court" (2005) 12(1) *New England Journal of International and Comparative Law* 119-133.

_____, "Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 407-430.

_____, "Sexual Slavery and the International Criminal Court: Advancing International Law," (2004) 25 Michigan Journal of International Law 605-651.

_____, "The Special Court for Sierra Leone, Child Soldiers and Forced Marriage: Providing Clarity or Confusion?" (2007) 45 Canadian Yearbook of International Law 131-172.

_____, "The Special Court for Sierra Leone's Consideration of Gender-Based Violence: Contributing to Transitional Justice?" (2009) 10:1 Human Rights Review 73-98.

Oosterveld, V., & Marlowe, A., "Prosecutor v. Brima et al., Prosecutor v. Fofana and Kondewa, Special Court for Sierra Leone," (2007) 101(4) American Journal of International Law 848-857.

O'Rourke, A., "Joint Criminal Enterprise and Brđanin: Misguided Overcorrection," (2006) 47:1 Harvard International Law Journal 307-325.

O'Shea, A., "The Statute of the International Criminal Court," (1999) 116 South African Law Journal 243-261.

Park, A., "'Other Inhumane Acts': Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone," (2006) 15:3 Social & Legal Studies 315-337.

Pati, R., "The ICC and the Case of Sudan's Omar al Bashir: Is Plea-Bargaining a Valid Option?," (2009) 15 U.C. Davis Journal of International Law & Policy 265-327.

Peterson, L., "Shared Dilemmas: Justice for Rape Victims under International Law and Protection for Rape Victims Seeking Asylum," (2008) 31 Hastings International and Comparative Law Review 509-530.

Peskin, V. "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme," (2005) 3:4 Journal of International Criminal Justice, 950-961.

Pfirter, D., "The Position of Switzerland with Respect to the ICC Statute and in Particular the Elements of Crimes," (1999) 32 Cornell International Law Journal 499-506.

Phelps, A., "Gender-Based War Crimes: Incidence and Effectiveness of International Criminal Prosecution," (2006) 12 William and Mary Journal of Women and the Law 499-520.

Philips, R., "The International Criminal Court Statute: Jurisdiction and Admissibility," (1999) 10:1 Criminal Law Forum 61-85.

Pichon, J., The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court," (2008) 8 International Criminal Law Review 185–228.

Pilch, F., Rape as Genocide: The Legal Response to Sexual Violence, Online: Columbia International Affairs (2010) <http://www.ciaonet.org/wps/pif01/pif01.pdf> (Accessed on: 24 September 2009).

Pillay, N., "Equal Justice for Women: A Personal Journey," (2008) 50 Arizona Law Review 657- 671.

Piacente, N., "Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy," (2004) 2 Journal of International Criminal Justice 446-454.

Pocar, F., "Persecution as a Crime under International Criminal Law," (2006-2008) 2 Journal of National Security & Policy 355-366.

Popoff, E., "Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases," (2001) 33:2 George Washington International Law Review 363-395.

Power, H., "Towards a Redefinition of the *Mens Rea* of Rape," (2003) 23:3 Oxford Journal of Legal Studies 379-404.

Powles, S., "Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity," (2004) 2 Journal of International Criminal Justice 606-619.

Pratt, K., & Fletcher, L., "Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia," (1994) 9 Berkeley Women's Law Journal 77-102.

Prosecuting Genocide in Rwanda: The Gacaca system and the International Criminal Tribunal for Rwanda, Online: The Norwegian Helsinki Committee, Report II, (2002) <http://www.donika.com/prosecuting_genocide_in_rwanda.htm> (Accessed on: 9 September 2009).

Puar, J., "On Torture: Abu Ghraib," (2005) 93 Radical History Review13-38.

Pufong, M., & Swain, R., "Rape in Militarised Conflicts: Variations in International Outrage and Responsiveness," (2008) 4:3 International Journal of Law in Context 237–275.

Quick, O., & Wells, C., "Getting Tough with Defences," (2006) Criminal Law Review 514-525.

Ray, A., "The Shame of it: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries," (1997) 46:3 American University Law Review 793-840.

Reiter-Korkmaz, A., "Women Always Lose the War: Criminalisation and Prosecution of Wartime Rape," (1998) 3 Human Rights Law Review 3.

Rikhof, Joseph. "Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity," (2009) 20:1 Criminal Law Forum 1-51.

Roberts, D., "Rape, Violence and Women's Autonomy," (1993) 69 Chicago Kent Law Review 359-388.

Roberts, J., & Gebotya, R., "Reforming Rape Laws: Effects of Legislative Change in Canada," (1992) 16:5 Law and Human Behavior 555-573.

Robertson, G., "Ending Impunity: How International Criminal Law can put Tyrants on Trial." (2005) 38:3 Cornell International Law Journal 649-671.

Robinson, D., "Defining 'Crimes against Humanity' at the Rome Conference," (1999) 93:1 American Journal of International Law 43-57.

Robinson, D., "The Identity Crisis of International Criminal Law," (2008) 21 Leiden Journal of International Law 925-963.

Robinson, D., & von Hebel, H., "War Crimes in Internal Conflicts: Article 8 of the ICC Statute," (1999) 2 Yearbook of International Humanitarian Law 193-209.

Robinson, P., "The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY," (2009) 3 Berkeley Journal of International Law Publicist 1-11.

Rodley, N., "Breaking the Cycle of Impunity for Gross Violations of Human Rights: The Pinochet Case in Perspective," (2000) 69 Nordic Journal of International Law 11-26.

Roht-Arriaza, N., "Combating Impunity: Some Thoughts on the Way Forward," (1996) 59:4 Law and Contemporary Problems 93-102.

Rumney, P., "The Khmer Rouge on Trial: Law, Genocide and Impunity," (1999) 4:2 Contemporary Issues in Law 169-187.

Russell-Brown, S., "Rape as an Act of Genocide," (2003) 21 Berkeley Journal of International Law 350-374.

SaCouto, S., & Cleary, K., "The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 337-359.

Sadat, L., "The Legacy of the ICTY: The International Criminal Court," (2002-2003) 37 New England Law Review 1073-1080.

Saltzman, L., et al., "National Estimates of Sexual Violence Treated in Emergency Departments," (2007) 49-2 Annals of Emergency Medicine 210-217.

Sarooshi, D., "The Statute of the International Criminal Court," (1999) 48:2 International and Comparative Law Quarterly 387-404.

Sato, H., "The Defense of Superior Orders in International Law: Some Implications for the Codification of International Criminal Law," *(*2009) 9 International Criminal Law Review 97–137.

Van Schaack, B., "The Definition of Crimes against Humanity: Resolving the Incoherence," (1999) 37:3 Columbia Journal of Transnational Law 787-850.

_____, "Engendering Genocide: The Akayesu Case before the International Criminal Tribunal for Rwanda," Online: Santa Clara University - School of Law, Legal Studies Research Paper No. 08-55 (2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154259> (Accessed on: 20 October 2009).

_____, "Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 361-406.

Schabas, W., "A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone," (2004) 15:1-2 Criminal Law Forum 3-54.

_____, "Definitional Traps' and Misleading Titles," (2009) 4:2 Genocide Studies and Prevention 177-183.

_____, "Genocide Trials and Gacaca Courts," (2005) 3 Journal of International Criminal Justice 879-895.

_____, "The International Criminal Court: An Historic Step to Combat Impunity," (1998) 17 Refuge 21-29.

_____, "Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems," (1996) 7:3 Criminal Law Forum 523-560.

_____, "Mens Rea and the International Criminal Tribunal for the Former Yugoslavia," (2003) 37:4 New England Law Review 1015-1036.

_____, "Sentencing by International Tribunals: A Human Rights Approach," (1997) 7:2 Duke Journal of Comparative and International Law 461-517.

Scharf, M., "A Critique of the Yugoslavia War Crimes Tribunal," (1997) 25:2 Denver Journal of International Law and Policy 305-312.

_____, "The Draft Statute for an International Criminal Court," (1999) 3 International Criminal Law 637-653.

_____, "Trading Justice for Efficiency: Plea Bargaining and International Tribunals," (2004) 2:4 Journal of International Criminal Justice 1070-1081.

Scheffer, D., "Article 98(2) of the Rome Statute: America's Original Intent," (2005) 3 Journal of International Criminal Justice 333-353.

_____, "The United States and the International Criminal Court," (1999) 93:1 The American Journal of International Law 12-22.

Schiessl, C., "An Element of Genocide: Rape, Total War, and International Law in the Twentieth Century," (2002) 4:2 Journal of Genocide Research 197–210.

Shargel, J., "In Defense of the Civil Rights Remedy of the Violence against Women Act," (1997) 106-6 The Yale Law Journal 1849-1883.

Van Sliedregt, E., "Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide," (2006) Journal of International Criminal Justice 1-24.

Sellers, P., "Arriving at Rwanda: Extension of Sexual Assault Prosecution under the Statutes of the *ad hoc* International Criminal Tribunals," (1996) 90 The American Society of International Law, Proceedings of the Annual Meeting 605-615.

_____, "Emerging Jurisprudence on Crimes of Sexual Violence," (1998) 13 American University International Law Review 1523-1531.

_____, "Gender Strategy is not a Luxury for International Courts," (2009) 17:2 American University Journal of Gender, Social Policy, and the Law 301-325.

Sellers, P., & Okuizumi, K., "International Prosecution of Sexual Assaults," (1997) 7:1 Transnational Law & Contemporary Problems 45-80.

Shachar, A., "Religion, State, and the Problem of Gender: Re-imagining Citizenship and Governance in Diverse Societies" (2005) 50 McGill Law Journal 49.

Shapo, H., "Recent Statutory Developments in the Definition of Forcible Rape," (1975) 61:7 Virginia Law Review 1500-1543.

Sharlach, L., "Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda," (2000) 22:1 New Political Science 89-102.

Short, J., "Sexual Violence as Genocide: The Developing Law of the, International Criminal Tribunals and the International Criminal Court," (2003) 8 Michigan Journal of Race and Law 503-527.

Shute, S., & Horder, J., "Thieving and Deceiving: What Is the Difference? (1993) 56:4 The Modern Law Review 548-554.

Snider, L., "Legal Reform and Social Control: The Dangers of Abolishing Rape," (1985) 13:4 International Journal of the Sociology of Law 337-356.

Spees, P., "Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power," (2003) 28 Signs: Journal of Women in Culture and Society 1233–1254.

Sperling, C., "Special Feature: Women as Perpetrators of Crime: Mother of Atrocities: Pauline Nyiramasuhuko's Role in the Rwandan Genocide," (2006) 33 Fordham Urban Law Journal 637-664.

Splittgerber, S., "The Need for Greater Regional Protection for the Human Rights of Women: The Cases of Rape in Bosnia and Guatemala," (1996) 15:1 Wisconsin International Law Journal 185-227.

Steel, A., "Money for Nothing, Cheques for Free? The Meaning of 'Financial Advantage' in Fraud Offences," (2007) 31 Melbourne University Law Review 201-239.

Stephens, B., "Humanitarian Law and Gender Violence: An End to Centuries of Neglect?," (1999) 3 Hofstra Law and Policy Symposium 87-109.

Stuart, D., "Criminal Reports Forum: Objective Fault in the Supreme Court", (1993) 23 C.R. (4^{th}) 240-79.

_____, "Supporting General Principles for Criminal Responsibility in the Model Penal Code with Suggestions for Reconsideration: A Canadian Perspective," (2000-2001) 4 Buffalo Criminal Law Review 13-51.

Suikkari, S., "Debate in the United Nations on the International Law Commission's Draft Statute for an International Criminal Court," (1995) 64:2 Nordic Journal of International Law 205-221.

Sullivan, R., "First Degree Murder and Complicity—Conditions for Parity of Culpability between Principal and Accomplice," (2007) 1 Criminal Law and Philosophy 271–288.

Summers, M., "Immunity or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States that are not Parties to the Statute of the International Criminal Court," (2006) 31:2 Brooklyn Journal of International Law 463-493.

Tadros, V., "The Homicide Ladder," (2006) 69:4 Modern Law Review 601-618.

Tang, K.-L., "Rape Law Reform in Canada: The Success and Limits of Legislation," (1998) 42:3 International Journal of Offender Therapy and Comparative Criminology 258-270.

Tavernier, P., "The Experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda," (1997) 321 International Review of the Red Cross 605-621.

Taylor, R., "The Nature of 'Partial Defences' and the Coherence of (Second Degree) Murder," (2007) Criminal Law Review 345-359.

Teitelbaum, A., "Statute of the International Criminal Court: A Critique," (1999) 26:4 Social Justice 107-114.

Temkin, J., "Prosecuting and Defending Rape: Perspectives from the Bar," (2000) 27:2 Journal of Law and Society 219-248.

"Theft or Swindler: Who Cares?" (1991) 50 The Cambridge Law Journal 389-392.

Thelle, E., "The Gacaca Jurisdictions: A Solution to the Challenge of the Rwandan Judicial Settlement?" (2001) Human Rights in development Yearbook 73-107.

Thomas, D., & Ralph, R., "Rape in War: Challenging the Tradition of Impunity," (1994) 14 SAIS Review 81-99.

Tolbert, D., "The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings," (2002) 26:2 The Fletcher Forum of World Affairs 7-19.

Tompkins, T., "Prosecuting Rape as a War Crime: Speaking the Unspeakable," (1995) 70:4 Notre Dame Law Review 845-890.

Valabhji, N., "Cumulative Convictions Based on the Same Acts under the Statute of the ICTY," (2002) 10 Tulane Journal of International and Comparative Law 185-202.

Vandenberg, M. & Askin, K. "Chechnya another Battleground for the Perpetration of Gender Based Crimes," (2001) 2:3 Human Rights Review 140-149.

Villa-Vincencio, C., "Why Perpetrators should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet," (2000) 49:1 Emory Law Journal 205-222.

De Vito, D., et al., "Rape Characterised as Genocide" (2009) 6:10 SUR - International Journal on Human Rights 29-51.

Wagner, J., The Systematic Use of Rape as a Tool of War in Darfur: A Blueprint for International War Crimes Prosecutions," (2005) 37 Georgetown Journal of International Law 193-243.

Wald, P., "Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal," (2002) 5 Yale Human Rights and Development Law Journal 217-239.

_____, "The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court," (2001) 5 Washington University Journal of Law & Policy 87-118.

Washburn, J., "The Negotiating of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century," (1999) 11 Pace International Law Review 361-377.

Watson, A., "Children Born of Wartime Rape: Rights and Representations," (2007) 9:1 International Feminist Journal of Politics 20-34.

Webb, J., "Genocide Treaty-Ethnic Cleansing-Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia," (1993) 23:2 Georgia Journal of International and Comparative Law 377-408.

Weisburd, A., "The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina," (1995) 17 Michigan Journal of International Law 1-51.

Wells, S., "Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda," (2005) 14 Southern California Review of Law and Women's Studies 167-196.

Wertheimer, A., "What is Consent? And is it Important?," (2000) 3 Buffalo Criminal Law Review 557-583.

Wessel, J., "Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing," (2006) 44:2 The Columbia Journal of Transnational Law 377-452.

Willis, R., "The Gun Is Always Pointed: Sexual Violence and Title III of the Violence against Women Act," (1991-1992) Georgia Law Journal 2197-2226.

Wisotsky, A., "A Legal Resource for the International Human Rights Community," (2001) 8:3 Human Rights Brief 18-27.

Wexler, L., "Committee Report on Jurisdiction, Definition of Crimes, and Complementarity," (1997) 25 Denver Journal of International Law and Policy 221.

Williams, G., "Convictions and Fair Labelling," (1983) 42:1 The Cambridge Law Journal 85-95.

Williams, S., ICTY Referrals to National Jurisdictions: A Fair Trial or a Fair Price? (2006) 17 Criminal Law Forum 177–222.

Van der Wilt, H., "Joint Criminal Enterprise Possibilities and Limitations," (2007) 5:1 Journal of International Criminal Justice 91-108.

Wing, A., & Merchan, S., "Rape, Ethnicity and Culture: Spirit Injury from Bosnia to Black America," (1993) 25:1 Columbia Human Rights Law Review 1-48.

Wirth, S., "Immunities, Related Problems, and Article 98 of the Rome Statute," (2001) 12: 4 Criminal Law Forum 429-458.

Women's Initiatives for Gender Justice, *Amicus Curiae Observations of the Women's Initiatives for Gender Justice Pursuant to Rule 103 of the ICC Rules of Procedure and Evidence*, in the case of The *Prosecutor* v. *Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-466, 28 August 2009. (Submitted by Rhonda Copelon, Director, International Women's Human Rights Law Clinic, City University of New York School of Law, USA, and Others, on the negotiating history and applicability of key provisions of the Rome Statute and elements of crimes as well as developments in international law which compel the cumulative charging of rape and torture).

Wood, S., "A Woman Scorned for the 'Least Condemned' War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda," (2004) 13:2 Columbia Journal of Gender and Law 274-327.

Yee, S., "A Proposal to Reformulate Article 23 of the ILC Draft Statute for an International Criminal Court," (1996) 19:3 Hastings International and Comparative Law Review 529-537.

Yoon, Y., "International Sexual Slavery," (1995) 6:1 Touro International Law Review 417-436.

Zacklin, R., "The Failings of *Ad Hoc* International Tribunals," (2004) 2:2 Journal of International Criminal Justice 541-545.

Zawati, H., "Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime against Humanity," (2007) 17:1 Torture Journal 27-47.

de Zayas, A., "Impunity for War Crimes, or Mistaken Identity?," (1995) 6 Criminal Law Forum 547-555.

Zemach, A., "Fairness and Moral Judgments in International Criminal Law: The Settlement Provision in the Rome Statute," (2002-2003) 41 Columbia Journal of Transnational Law 895-922.

II. Books

Abel, C., & Marsh, F., *Punishment and Restitution: A Restitutionary Approach to Crime and the Criminal* (Westport, Conn.: Greenwood Press, 1984).

Andersson, N., et al., eds., *International justice and impunity: the case of the United States* (Atlanta, G.A.: Clarity Press, Inc., 2008).

Arnold, T., et al., eds., *Menschengerechtes Strafrecht: Festschrift für Albin Eser zum 70 Geburtstrg* (München: C.H. Beck, 2005).

Ashworth, A., *Principles of Criminal Law*, fifth ed., (New York, N.Y.: Oxford University Press, 2006).

Ashworth, A., *Principles of Criminal Law*, sixth ed., (New York, N.Y.: Oxford University Press, 2009).

Ashworth, A., & Mitchell, B., eds., *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000).

Askin, K., *War Crimes against Women: Prosecution in International War Crimes Tribunals* (The Hague, The Netherlands: Martinus Nijhoff Publishers, 1997).

Bassiouni, M. C., *Crimes against Humanity in International Criminal Law* (London: Kluwer Law International, 1999).

_____, ed., *International Criminal Court: Compilation of United Nations Documents and Draft ICC Statute before the Diplomatic Conference* (Rome: No Peace without Justice, 1998).

_____, *The International Criminal Court: Observations and Issues before the 1997-1998 Preparatory Committee, and Administrative and Financial Implications* (Toulouse, France: Eres Publications, 1997).

_____, ed., *Post-conflict justice* (Ardsley, N.Y.: Transnational Publishers, 2002).

Bassiouni, M. C., & Joyner, C., eds., *Reining in Immunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17- 21 September 1998* (Paris: International Association of Penal Law, 1998).

Bassiouni, M. C., & Manikas, P., *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson, N.Y.: Transnational Publishers, 1996).

Bassiouni, M. C., & McCormick, M., *Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia*, Occasional Paper No.1 (Chicago, Ill.: International Human Rights Law Institute, DePaul University, 1996).

Boot, M., *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerpen, Belgium: Intersentia, 2002).

Bridgeman, J., *Feminist Perspectives on Law: Law's Engagement with the Female Body* (London: Sweet & Maxwell, 1998).

Broomhall, B., *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003).

de Brouwer, A-M. *Supranational Criminal Prosecution of Sexual Violence: the ICC and the Practice of the ICTY and the ICTR* (Antwerpen, Belgium: Intersentia, 2005).

Brownlie, I., *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963).

Cassese, A., *International Criminal Law*, 2nd ed., (New York, N.Y.: Oxford University Press, 2008).

Clark, R., & Sann, M., eds., *The Prosecution of International Crimes: A Critical Study of the International Tribunal for the Former Yugoslavia* (New Brunswick, N.J.; London: Transaction, 2002).

Clarkson, C., *Understanding Criminal Law* (London: Sweet and Maxwell, 2005).
Cryer, R., et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007).
Damgaard, C., *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Berlin: Springer, 2008).
Decaux, E., et al., eds., *From Human Rights to International Criminal Law: Studies in Honour of an African jurist, the Late Judge Laïty Kama* (Boston, Mass.: Martinus Nijhoff Publishers, 2007).
Dörmann, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (New York, N.Y.: Cambridge University Press, 2002).
Duff, R., & Green, S., eds., *Defining Crimes: Essays on the Special Part of the Criminal Law* (New York, N.Y: Oxford University Press, 2005).
Fletcher, G., *Rethinking Criminal Law* (New York, N.Y.: Oxford University Press, 2000)
Hagan, J., *Justice in the Balkans: Prosecuting War Crimes in The Hague Tribunal* (Chicago, Ill.: University of Chicago Press, 2003).
Gardam, J., & Jarvis, M., *Women, Armed Conflict and International Law* (The Hague, The Netherlands: Kluwer Law International, 2001).
Grotius, H., *De jure belli ac pacis libri tres* [The Law of War and Peace] (Amstelodami: Apud Viduam Abrahami Asomeren, 1701).
Henham, R., *Punishment and Process in International Criminal Trials* (Burlington, VT: Ashgate, 2005).
Herring, J., *Criminal Law: Text, Cases, and Materials* (New York, N.Y.: Oxford University Press, 2008).
Jones, J., *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (Irvington-on-Hudson, N.Y.: Transnational Publishers, Inc., 1998).
Katz, S., *Understanding the Rape Victim: A Synthesis of Research Findings* (New York, N.Y.: John Wiley & Sons, Inc., 1979).
Lee, J., et al., *Annotated Rome Statute of the International Criminal Court* (Vancouver, B.C.: International Center for Criminal Law Reform & Criminal Justice Policy, 2002).
Leiboff, M., & Thomas, M., *Legal Theories: Context and Practices* (Pyrmont, NSW: Lawbook Co., 2009).
Leverick, F., *Killing in Self-Defence* (New York, N.Y.: Oxford University Press, 2006).
MacKinnon, C., *Are Women Human?: And Other International Dialogues* (Cambridge, MA: Belknap Press of Harvard University Press, 2006).
Meron, T., *Henry's Wars and Shakespeare's Laws* (New York, N.Y.: Oxford University Press, 2002).
_____, *War Crimes Law Comes of Age: Essays* (New York, N.Y.: Oxford University Press, 1998).

Morris, V., & Scharf, M., *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, 2vol. (Irvington-on- Hudson, N.Y.: Transnational Publishers, 1995).

_____, *The International Criminal Tribunal for Rwanda*, 2 vols. (Irvington-on- Hudson, N.Y.: Transnational Publishers, 1998).

Politi, M., & Nesi, G., eds., *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Aldershot, U.K.: Ashgate Publishing, Ltd., 2001).

Quénivet, N., *Sexual Offenses in Armed Conflict and International Law* (Ardsley, N.Y.: Transnational Publishers, 2005).

Ratner, S., et al., *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (New York, N.Y.: Oxford University Press, 2009).

Robinson, P., *Structure and Function in Criminal Law* (New York, N.Y.: Oxford University Press, 1997).

Roht-Arriaza, N., ed., *Impunity and Human Rights in International Law and Practice* (New York, N.Y.: Oxford University Press, 1995).

Sadat, L., & Scharf, M., eds., *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Leiden, the Netherlands: Martinus Nijhoff Publishers, 2008).

Schabas, W., *An Introduction to the International Criminal Court* (Cambridge, N.Y.: Cambridge University Press, 2007).

_____, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge, N.Y.: Cambridge University Press, 2006).

Shute, S., et al., eds., *Action and Value in Criminal Law* (New York, N.Y.: Oxford University Press, 1993).

Simester, A., & Sullivan, G., *Criminal Law: Theory and Doctrine* (Portland, Or.: Hart, 2007).

Sjoberg, L., Gender, *Justice, and the Wars in Iraq: A Feminist Reformulation of Just War Theory* (Lanham, MD: Lexington Books, 2006).

Slye, R., & Van Schaack, B., *International Criminal Law: Essentials* (New York, N.Y.: Aspen Publishers, 2009).

Smart, C., *Feminism and the Power of Law* (London: Routledge, 1989).

Stuart, D., *Charter Justice in Canadian Criminal Law*, 4th ed. (Toronto, Ont.: Thomson Canada, 2005).

Taylor, T., *The Anatomy of the Nüremberg Trials: A Personal Memoir* (New York, N.Y.: Knopf, 1992).

Temkin, J., *Rape and the Legal Process* (New York, N.Y.: Oxford University Press, 2002).

Thakur, R., & Malcontent, P., eds., *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (New York, N.Y.: United Nations University Press, 2004).

Trial of Major War Criminals before the International Military Tribunals, November 14, 1945-October 1, 1946, 42 vols., (Nuremberg, Germany: [s.n.], 1947-1949) VI: 41.

Vohrah. L., et al., eds., *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (New York, N.Y.: Kluwer Law International, 2003).

West, D., *Sexual Crimes and Confrontations: A Study of Victims and Offenders* (Aldershot, U.K.: Gouer, 1987).

Zawati, H., *The Triumph of Ethnic Hatred and the Failure of International Political Will: Gendered Violence and Genocide in the Former Yugoslavia and Rwanda* (New York, N.Y.: The Edwin Mellen Press, 2010).

III. Collection of Essays

Ambos, K., "Some Preliminary Reflections on the *Mens Rea* Requirements of the Crimes of the ICC Statute and of the Elements of Crimes," in Vohrah. L., et al., eds., *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (New York, N.Y.: Kluwer Law International, 2003) 11-40.

Andenaes, J., "General Prevention: A Broader View of Deterrence," in R. Gerber & P. McAnany, eds., *Contemporary Punishment: Views, Explanations, and Justifications* (Notre Dame, Ind.: University of Notre Dame Press, 1972) 108.

Arcel, L., "Deliberate Sexual Torture of Women in War: The Case of Bosnia-Herzegovina," in A. Shalev, et al., eds., *International Handbook of Human Response to Trauma* (Dordrecht, The Netherlands: Kluwer Academic Publishers, 2000) 179-193.

Ashworth, A., "The Elasticity of *Mens Rea*," in C. Tapper, *Crime, Proof, and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworths, 1981) 45-70.

Ashworth, A., & Mitchell, B., "Introduction," in A. Ashworth & B. Mitchell, eds., *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000) 1-20.

Askin, K., "The Kunarac Case of Sexual Slavery: Rape and Enslavement as Crimes against Humanity," in A. Klip & G. Sluiter, eds., *Annotated Leading Cases of International Criminal Tribunals*, Vol. V (Antwerpen, Belgium: Intersentia, 2003) 806-817.

Askin, K., "Prosecuting Gender Crimes Committed in Darfur: Holding Leaders Accountable for Sexual Violence," in S. Totten & E. Markusen, eds., *Genocide in Darfur: Investigating the Atrocities in the Sudan* (New York, N.Y.: Routledge, 2006) 141-158.

_____, "Women's Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC," in D. Shelton, ed., *International Crimes, Peace, and Human Rights: The Role of the*

International Criminal Court (Ardsley, N.Y.: Transnational Publishers, Inc., 2000) 47-63.

Bassiouni, M. C., "The Legacy of Legalism and the Need to Combat Impunity for International Crimes," in J. Arnold, et al., eds., *Menschengerechtes Strafrecht: Festschrift für Albin Eser zum70 Geburtstrg* (München: C.H. Beck, 2005) 705-715.

_____, "Principles of Legality in International and Comparative Criminal Law," in M. C. Bassiouni, ed., *International Criminal Law: Sources, Subjects, and Contents*, vol. 1 (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008) 73-105.

_____, "Proposed Guiding Principles for Combating Impunity for International Crimes," in M. C. Bassiouni, ed., *Post-Conflict Justice* (Ardsley, N.Y.: Transnational Publishers, 2002) 255-282.

Bedont, B., "The Renewed Popularity of the Rule of Law: Implications for Women, Impunity, and Peacekeeping," in D. Mazurana, et al., eds., *Gender, Conflict, and Peacekeeping* (Lanham, MD: Rowman & Littlefield, 2005) 83-108.

Bensouda, F., "Gender and Violence under the Rome Statute," in E. Decaux, et al., eds., *From Human Rights to International Criminal Law: Studies in Honour of an African jurist, the Late Judge Laïty Kama* (Boston, Mass.: Martinus Nijhoff Publishers, 2007) 401-417.

Bickford, L., "Jurisdiction, Definition of Crimes, and Triggering Mechanism," in M.C. Bassiouni, ed., *The International Criminal Court: Observations and Issues before the 1997-1998 Preparatory Committee and Administrative and Financial Implications* (Chicago, Ill.: International Human Rights Law Institute, DePaul University, 1997) 177-229.

Borchelt, G., "Sexual Violence against Women in War and Armed Conflict," in A. Barnes, ed., *The Handbook of Women, Psychology, and the Law* (San Francisco, CA: Wiley, John & Sons, Inc., 2005) 293-327.

Britton, B., "Rape," in S. Ruzek, et al., eds., *Women's Health: Complexities and Differences* (Columbus, Ohio: Ohio State University Press, 1997) 492-500.

Chinkin, C., "Gender-Related Crimes: A Feminist Perspective," in R. Thakur and P. Malcontent, eds., *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (New York, N.Y.: United Nations University Press, 2004) 116-134.

Clark, R., "Crimes against Humanity and the Rome Statute of the International Criminal Court," in M. Politi & G. Nesi, eds., *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Aldershot, U.K.: Ashgate Publishing, Ltd., 2001) 75-93.

Clark, R., "Impunity for Power is the Law of the Jungle," N. Andersson, et al., eds., *International justice and impunity: the case of the United States* (Atlanta, G.A.: Clarity Press, Inc., 2008) 10-19.

Clarkson, C., "Context and Culpability in Involuntary Manslaughter: Principle of Instinct?," in A. Ashworth & B. Mitchell, eds., *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000) 133-165.

Cleiren, C., & Hijssen, M., "Rape and other forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues," in R., Clark & M. Sann, eds., *The Prosecution of International Crimes: A Critical Study of the International Tribunal for the Former Yugoslavia* (New Brunswick, N.J.; London: Transaction, 2002) 165-183.

Coomaraswamy, R., & Kois, L., "Violence against Women," in K. Askin & D. Koenig, eds., *Women's International Human Rights Law*, vol.1 (Ardsley, N.Y.: Transnational Publishers, Inc., 1999) 177-217.

Copelon, R., "Gendered War Crimes: Reconceptualizing Rape in a Time of War," in J. Peters & A. Wolper, eds., *Women's Rights, Human Rights: International Feminist Perspectives* (New York, N.Y.: Routledge, 1995) 197-214.

_____, "Surfacing Gender: Reconceptualizing Crimes against Women in Time of War," in A. Stiglmayer, ed., *Mass Rape: The War against Women in Bosnia-Herzegovina* (Lincoln, Neb.: University of Nebraska Press, 1994) 197. Reprinted in (1994) 5:2 Hastings Women's Law Journal 243-266 & in L. Lorentzen & J. Turpin, eds., *The Women and War Reader* (New York, N.Y.: New York University Press, 1998) 63-79 & in N. Dombrowski, ed., *Women and War in the Twentieth Century: Enlisted with or without Consent* (New York, N.Y.: Garland Publishing, Inc., 1999) 332-359.

Flinterman, C., "The international Criminal Court: Obstacle or Contribution to an Effective System of Human Rights Protection?," in R. Thakur and P. Malcontent, eds., *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (New York, N.Y.: United Nations University Press, 2004) 264-271.

Gardam, J., "The Law of Armed Conflict: A Gendered Regime?," in D. Dallmeyer, ed., *Reconceiving Reality: Women and International Law* (Washington, D.C.: The American Society of International Law, 1993) 171-201.

Hallett, N., "The Evolution of Gender Crimes in International Law," in S. Totten, et al., eds., *The Plight and Fate of Women in Genocidal Situations, Volume 7 of Genocide: A Critical Bibliographic Review* (New Brunswick, N.J.: Transaction Publishers, 2008) 183-203.

Hawkins, G., "Punishment and Deterrence: The Educative, Moralizing, and Habituative Effects," in S. Grupp, ed., *Theories of Punishment* (Bloomington, Ind.: Indiana University Press, 1971) 163-179.

Jallow, H., "Challenges of Investigating and Prosecuting International Crimes," in E. Decaux, et al., eds., *From Human Rights to International Criminal Law: Studies in Honour of an African jurist, the Late Judge Laïty Kama* (Boston, Mass.: Martinus Nijhoff Publishers, 2007) 437-459.

Kazan, P., "Sexual Assault and the Problem of Consent," in S. French, et al., eds., *Violence against Women: Philosophical Perspectives* (London: Cornell University Press, 1998) 27-42.

Knoops, G-J., "Revisiting the Abu Ghraib Prosecutions from the Perspective of the ICTY and the ICTR," in E. Decaux, et al., eds., *From Human Rights to International Criminal Law: Studies in Honour of an African jurist, the Late Judge Laïty Kama* (Boston, Mass.: Martinus Nijhoff Publishers, 2007) 593-615.

Kolodkin, R., "An Ad Hoc International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law in the Former Yugoslavia," in R., Clark & M. Sann, eds., *The Prosecution of International Crimes: A Critical Study of the International Tribunal for the Former Yugoslavia* (New Brunswick, N.J.; London: Transaction, 2002) 165-183.

Kuper, L., "Genocide and Mass Killings: Illusion and Reality," in B. Ramcharan, ed., *The Right to Life in International Law* (Dordrecht, the Netherlands: Martinus Nijhoff Publishers, 1985) 114-119.

Kuzmanović, J., "Legacies of Invisibility: Past Silence, Present Violence against Women in the Former Yugoslavia," in J. Peters & A. Wolper, eds., *Women's Rights Human Rights: International Feminist Perspectives* (New York, N.Y.: Routledge, 1995) 57-61.

Lauren, P., "From Impunity to Accountability: Forces of Transformation and the Changing International Human Rights context," in R. Thakur and P. Malcontent, eds., *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (New York, N.Y.: United Nations University Press, 2004) 15-41.

Macek, I., "The Plight and Fate of Women during the Crisis in the Former Yugoslavia," in S. Totten, et al., eds., *The Plight and Fate of Women in Genocidal Situations, Volume 7 of Genocide: A Critical Bibliographic Review* (New Brunswick, N.J.: Transaction Publishers, 2008) 83-105.

MacKinnon, C., "Crimes of War, Crimes of Peace," in S. Shute & S. Hurley, eds., *On Human Rights: The Oxford Amnesty Lectures, 1993* (New York, N.Y.: Basic Books, 1993) 83-109, reprinted in (1993) 4 UCLA Women's Law Journal 59-76, and in E. Richter-Lyonette, ed*., In the Aftermath of Rape: Women's Rights, War Crimes and Genocide* (Givrins, Switzerland: The Coordination of Women's Advocacy, 1998) 13-32.

_____, "Genocide's Sexuality," in M. Williams & S. Macedo, eds., *Political Exclusion and Domination* (New York, N.Y.: New York University Press, 2004) 313-356, reprinted in MacKinnon, C., *Are Women Human?: And Other International Dialogues* (Cambridge, MA: Belknap Press of Harvard University Press, 2006) 209-233.

_____, "Rape, Genocide, and Women's Human Rights," in S. French, et al., eds., *Violence against Women: Philosophical Perspectives* (London: Cornell University Press, 1998) 43-56.

Mettraux, G., "Continuing Definitional Issues Regarding Crimes against Humanity, Including the Policy Element and the Scope of the Crime," in L. Sadat, ed., *Forging a Convention for Crimes against Humanity* (New York, N.Y.: Cambridge University Press, forthcoming 2011).

Muehlenhard, C., et al., "Is Rape Sex or Violence? Conceptual Issues and Implications," in D. Buss & N. Malamuth, eds., *Sex, Power, Conflict: Evolutionary and Feminist Perspectives* (New York, N.Y.: Oxford University Press, 1996) 119-137.

Nikolić-Ristanović, V., "Definitions of Violence in War and the Experience of Women: The Subject of Research," in V. Nikolić-Ristanović, ed., *Women, Violence and War: Wartime Victimization of Refugees in the Balkans* (Budapest: Central European University Press, 2000) 21-33.

_____, "Seksualno nasilje," [Sexual Violence] in V. Nikolić-Ristanović, et al., eds., *Žene, Nasilje i Rat* [Women, Violence and War] (Beograd: Institut Za Kriminološka i Sociološka Istraživanja, 1995) 36. (Serbo-Croatian).

Nilsson, J., "The Principle *Nullum Crimen Sine Lege*," in O. Olusanya, ed., *Rethinking International Criminal Law: The Substantive Part* (Groningen: Europa Law Publishing, 2007) 37-64.

Nyanduga, B., "Addressing Impunity: A Challenge to the International Criminal Justice System with a Specific Reference to Africa and the African Human Rights system," in E. Decaux, et al., eds., *From Human Rights to International Criminal Law: Studies in Honour of an African jurist, the Late Judge Laïty Kama* (Boston, Mass.: Martinus Nijhoff Publishers, 2007) 643-658.

Oosterveld, V., "Gender-based Crimes against Humanity," in L. Sadat, ed., *Forging a Convention for Crimes against Humanity* (New York, N.Y.: Cambridge University Press, forthcoming 2011).

_____, "Prosecution of Gender-Based Acts of Genocide" in S. Totten, et al., eds., *The Plight and Fate of Women in Genocidal Situations, Volume 7 of Genocide: A Critical Bibliographic Review* (New Brunswick, N.J.: Transaction Publishers, 2008) 205-218.

_____, "Prosecution of Gender-Based Crimes in International law," in D. Mazurana, et al., eds., *Gender, Conflict, and Peacekeeping* (Lanham, MD: Rowman & Littlefield, 2005) 67-82.

Pilch, F., "Rape as Genocide," in S. Totten, et al., eds., *The Plight and Fate of Women in Genocidal Situations, Volume 7 of Genocide: A Critical Bibliographic Review* (New Brunswick, N.J.: Transaction Publishers, 2008) 169-182.

Pillay, N., "The Rule of International Humanitarian Jurisprudence in Redressing Crimes of Sexual Violence," in Vohrah. L., et al., eds., *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (New York, N.Y.: Kluwer Law International, 2003) 685-692.

Roberts, L., "Mortality after the 2003 Invasion of Iraq," in N. Andersson, et al., eds., *International Justice and Impunity: The Case of the United States* (Atlanta, G.A.: Clarity Press, Inc., 2008) 82-89.

Roht-Arriaza, N., "Conclusion: Combating Impunity," in N. Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice* (New York, N.Y.: Oxford University Press, 1995) 281-304.

Schabas, W., "Crimes against Humanity: The State Plan or Policy Element," in L. Sadat & M. Scharf, eds., *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Leiden, the Netherlands: Martinus Nijhoff Publishers, 2008) 347-364.

Scharf, M., "A Critique of the Yugoslavia War Crimes Tribunal," in M. C. Bassiouni, ed., *The International Criminal Court: Observations and Issues before the 1997-1998 Preparatory Committee and Administrative and Financial Implications* (Chicago, Ill.: International Human Rights Law Institute, DePaul University, 1997) 259-266.

Sellers, P., "Individual(s') Liability for Collective Sexual Violence," in K. Knop, ed., *Gender and Human Rights* (New York, N.Y.: Oxford University Press, 2004) 153-194.

_____, "Rape under International Law," in B. Cooper, ed., *War Crimes: The Legacy of Nüremberg* (New York, N.Y.: TV Books, 1999) 159-166.

Sharlach, L., "State Rape: Sexual Violence as Genocide," in K. Worcester, et al., eds., *Violence and Politics: Globalization's Paradox* (New York, N.Y.: Routledge, 2002)107-123.

Sharpe, J., "The Unspeakable Limits of Rape: Colonial Violence and Counter-Insurgency" in Patrick Williams & Laura Chrisman, eds., *Colonial Discourse and Postcolonial Theory: A Reader* (New York: Columbia University Press, 1994) 221-243.

Simester, A., & Sullivan, G., "On the Nature and Rationale of Property Offences," in R. Duff & S. Green, eds., *Defining Crimes: Essays on the Special Part of the Criminal Law* (New York, N.Y: Oxford University Press, 2005) 168-195.

Sluiter, G., "The Jurisprudence of the Ad Hoc Tribunals since 1993 and Their Contribution to the Legal Definition of Crimes against Humanity," in L. Sadat, ed., *Forging a Convention for Crimes against Humanity* (New York, N.Y.: Cambridge University Press, forthcoming 2011).

Stern, B., & Fouchard, I., "Sexual Violence as Genocide: The Important Role Played by the Bassiouni Commission in the Recent Development of International Criminal Law," in L. Sadat & M. Scharf, eds., *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Leiden, the Netherlands: Martinus Nijhoff Publishers, 2008) 285-307.

Stiglmayer, A., "The Rapes in Bosnia-Herzegovina," in A. Stiglmayer, ed., *Mass Rape: The War against Women in Bosnia-Herzegovina* (Lincoln, Neb.: University of Nebraska Press, 1994) 82-169.

Stiglmayer, A., "The War in the Former Yugoslavia," in A. Stiglmayer, ed., *Mass Rape: The War against Women in Bosnia-Herzegovina* (Lincoln, Neb.: University of Nebraska Press, 1994) 1-34.

Stover, E., "Witnesses and the Promise of Justice in The Hague," in E. Stover & H. Weinstein, eds., *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (New York, N.Y.: Cambridge University Press, 2004) 104-120.

Tadros, V., "The Distinctiveness of Domestic Abuse: A Freedom-Based Account," in R. Duff & S. Green, eds., *Defining Crimes: Essays on the Special Part of the Criminal Law* (New York, N.Y: Oxford University Press, 2005) 119-142.

Totten, S., "The Darfur Genocide: The Mass Rape of Black African Girls and Women," in S. Totten, et al., eds., *The Plight and Fate of Women in Genocidal Situations, Volume 7 of Genocide: A Critical Bibliographic Review* (New Brunswick, N.J.: Transaction Publishers, 2008) 137-168.

_____, "The Plight and Fate of Females during and following the 1994 Rwandan Genocide," in S. Totten, et al., eds., *The Plight and Fate of Women in Genocidal Situations, Volume 7 of Genocide: A Critical Bibliographic Review* (New Brunswick, N.J.: Transaction Publishers, 2008)107-135.

Venturini, G., "War Crimes in International Armed Conflict," in M. Politi & G. Nesi, eds., *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Aldershot, U.K.: Ashgate Publishing, Ltd., 2001) 95-105.

Walsh, M., "Gendering International Justice: Progress and Pitfalls at International Criminal Tribunals," in D. Pankhurst, ed., *Gendered Peace: Women's Struggles for Post-War Justice and Reconciliation* (New York, N.Y.: Routledge, 2008) 31-64.

Werle, G., Principles of International Criminal Law (The Hague, The Netherlands: T.M.C. Asser Press, 2005).

Wexler, L., "A First Look at the 1998 Rome Statute for a Permanent International Criminal Court: Jurisdiction, Definition of Crimes, Structure and Referrals to the Court," in M. C. Bassiouni, ed., *International Criminal Law: Enforcement*, vol. 3 (Ardsley, N.Y.: Transnational Publishers, 1999) 655-694.

_____, "First Committee Report on Jurisdiction, Definition of Crimes and Complementary," in M. C. Bassiouni, ed., *The International Criminal Court: Observations and Issues before the 1997-1998 Preparatory Committee and Administrative and Financial Implications* (Chicago, Ill.: International Human Rights Law Institute, DePaul University, 1997) 163-176. Reprented in Wexler, L., "Committee Report on Jurisdiction, Definition of Crimes, and Complementarity," (1997) 25 Denver Journal of International Law and Policy 221.

IV. Book Reviews

Biehler, A. "War Crimes against Women," Book Review of War *Crimes against Women: Prosecution in International War Crimes Tribunals*, by K. Askin (2002) 13:4 Criminal Law Forum 507-513.

Mettraux, G., Book Review of *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* by M. Boot (2002) 2 International Criminal Law Review 423-427.

Rowe, P., Book Review of *The Rome Statute of the International Criminal Court, a Challenge to Impunity* by Politi, M., & Nesi, G., eds., (2002) 73 British Yearbook of International Law 377-378.

V. Encyclopaedic Articles

Conflict in the Former Yugoslavia: An Encyclopedia, 1st ed., "Rape," by J. Allcock, at 233.

Encyclopedia of Genocide and Crimes against Humanity, "International Criminal Tribunal for the former Yugoslavia," by P. Akhavan & M. Johnson, at 558.

VI. Dissertations

Algård, A., *Does the Gacaca system in Rwanda provide an effective remedy in compliance with international norms and standards*? (LL.M., Faculty of Law, University of Lund, 2005).

Bosman, H., *Gacaca Courts in Post-Conflict Rwanda: The Quest for Reconciliation and Justice* (Graduation Thesis, Faculty of Law, University of Amsterdam, 2007).

Daniel, J., *No Man's Child: The War Rape Orphans* (M.A., Ludwing Boltzman Institute of Human Rights, University of Vienna, 2003).

Hassan-Morlai, P., *Evidence in International Criminal Trials: Lessons and Contributions from the Special Court for Sierra Leone* (LL.M., University of East London, 2007).

Hill, G., *Gender in the International Criminal Court Negotiations* (LL.M., University of Toronto, 2001).

Howarth, K., *The Legal Narrative of War-Time Sexual Violence against Women: Transformation and Transformative Potential* (LL.M., University of Toronto, 2003).

Hubbard, J., *Breaking the Silence: Women's Narratives of Sexual Violence during the 1994 Rwandan Genocide* (M.Sc., Virginia Polytechnic Institute and State University, 2007).

Loikkanen, L., *Tortured Minds, Broken Bodies: How can Rape Constitute Genocide* (M.A., Thesis, University of Helsinki, 2005).

Manning, R., *The Destruction of Women and Girls Through Systematic Sexual Violence in the Democratic Republic of Congo: A Multifaceted Political and Social Examination* (M.A., Department of Political Studies, University of Saskatchewan, 2008).

Mee, C., *Nothing but this Otherness: Rape Discourses in Peace and War* (Ph.D., Temple University, 1999).

Morton, J., *The Making of International Law in the Post-World War II Era: The International Law Commission of the United Nations* (Ph.D., University of South Carolina, 1995).

Sarai, S., *The Rape of the Balkan Women: An Argument for the Full Recognition of Wartime Rape as a War Crime* (M.A., Queen's University at Kingston, 2000).

Soonarane, G., *Rape: An Act of Genocide or a Crime against Gender?* (LL.M., University of Toronto, 2006).

Whyte, A., *Placing Blame or Finding Peace: A Qualitative Analysis of the Legal Response to Rape as a War Crime in the Former Yugoslavia* (M.A., University of Manitoba , 2005).

VII. Magazines

Gutman, R., "Rape by Order: Bosnian Women Terrorized by Serbs," *New York Newsday* (23 August 1992) 7 & 39.

Marder, D., "Once again, Rape becomes a Weapon of War," *The Atlanta Journal - Constitution* (17 February 1993) A 11.

Rall, A., "The Rwandan Genocide Mercilessly Put to Death Millions of Innocent Women and Children," *Off Our Backs* 26:3 (1996) 16-19.

VIII. Newspapers

"A Landmark Ruling on Rape," *New York Times* (24 February 2001) A12.

Gutman, R., "Serbs Rape of Muslim Women in Bosnia Seen as Tactic of War," *Houston Chronicle* (23 August 1992) A1.

Taylor, D., "Congo Rape Testimonies: Aged One to 90, the Victims of Hidden War against Women," *The Guardian* (5 December 2008) 17.

IX. NGOs' Reports

Amnesty International, News Release, AI-Index: IOR 40/13/98, "International Criminal Tribunal for Rwanda: Achievements and Shortcomings," (30 April 1998).

Broken Bodies, Shattered Minds Torture and Ill-Treatment of Women, Amnesty International, 6 March 2001, AI Index: ACT 40/001/2001.

Brunet, A., & Helal, I., *A Holistic Approach to Addressing Gender-Related Crimes at the Rwandan Tribunal* (Montreal, Quebec: Rights & Democracy, 1998).

Callamard, A., *Documenting Human Rights Violations by State Agents* (Montreal, Quebec: Rights & Democracy, and Amnesty International, 1999).

Clifford, L., et al., *International Justice Failing Rape Victims,* Online: Tribunal Update 483 (5 January 2007) <http://www.iwpr.net/?p=tri&s=f&o=328311&apc_state=henptri> (Accessed on: 21 October 2009).

Glassborow, K., *Forced Marriage Appeal may Influence the ICC*, Institute for War and Peace Reporting, Africa Reports No. 123 (24 July 2007).

Goldstein, A., *Recognizing Forced Impregnation as a War Crime under International Law*, Center for Reproductive Law and Policy, Report, 1993.

Human Rights Watch Commentary for the December 1997: Preparatory Committee Meeting on the Establishment of an International Criminal Court (New York, N.Y.: Human Rights Watch, 1997).

Human Rights Watch, Press Release, "Rwanda Tribunal to Rule on Akayesu Case," (1 September 1998).

The International Criminal Court: Ending Impunity for Reproductive Rights Violations Involving Sexual Violence, Center for Reproductive Law and Policy, Reproductive Freedom News, 26 October 1998.

The International Criminal Court: Ensuring an Effective Role for Victims-Memorandum for the Paris Seminar, April 1999, Amnesty International, April 1999, AI-Index: IOR 40/06/99.

The International Criminal Court: 16 Fundamental Principles for a Just, Fair and Effective International Criminal Court, Amnesty International, May 1998, AI-Index: IOR 40/12/98.

The International Criminal Court: Making the Right Choices - Part I: Defining the Crimes and Permissible Defences and Initiating a Prosecution, Amnesty International, January 1997, AI-Index: IOR 40/01/97.

The International Criminal Court: Making the Right Choices - Part II: Organizing the Court and Guaranteeing a Fair Trial, Amnesty International, November 1997, AI-Index: IOR 40/11/97.

The International Criminal Court: Making the Right Choices - Part III: Ensuring Effective State Cooperation, Amnesty International, November 1997, AI-Index: IOR 40/13/97.

The International Criminal Court: Making the Right Choices - Part IV: Establishing and Financing the Court and Final Clauses, Amnesty International, March 1998, AI-Index: IOR 40/04/98.

The International Criminal Court: Preliminary Comments Concerning the Elements of War Crimes Other than Grave Breaches of the Geneva Conventions - Part I., Amnesty International, July 1999, AI-Index: IOR 40/11/99.

International Criminal Tribunal for Rwanda: Justice Delayed, International Crisis Group, Africa Report n°30, 7 June 2001.

International Criminal Tribunals for Rwanda: Trials and Tribulations, Amnesty International, April 1998, AI-Index: IOR 40/03/98.

Narrowing the Impunity Gap: Trials before Bosnia's War Crimes Chamber, Human Rights Watch, February 2007, Vol. 19, No. 1(D).

Rape and Forced Pregnancy in War and Armed Conflict Situations: Stark Violations of Women's Reproductive and Sexual Self Determination, Center for Reproductive Law and Policy, Reproductive Freedom News, 30 April 1996.

Rape is a War Crime: How to Support the Survivors, Lessons from Bosnia-Strategies for Kosovo, International Centre for Migration Policy Development, Report, 1999.

The Rome Statute for an International Criminal Court: The Beginning of the End of Impunity (Montreal, Quebec: Rights & Democracy, 1999).

Rwanda: "Marked for Death," Rape Survivors Living with HIV/AIDS in Rwanda, Amnesty International, 5 April 2004, AI-Index: AFR 47/007/2004.

Shattered Lives: Sexual Violence during the Rwandan Genocide and Its Aftermath (New York, N.Y.: Human Rights Watch, 1996).

Sierra Leone, Getting Away with Murder, Mutilation, Rape: New Testimony from Sierra Leone, Human Rights Watch, July 1999, Vol. 11, No. 3(A).

Sierra Leone: Rape and Other Forms of Sexual Violence against Girls and Women. Amnesty International, 28 June 2000, AI Index: AFR 51/35/00.

The Special Court for Sierra Leone: Promises and Pitfalls of a "New Model," International Crisis Group, 4 August 2003.

Stop Violence against Women Justice Shelved: Impunity for Rape in Bosnia-Herzegovina, Amnesty International, October 2004, AI-Index: EUR 63/005/2004.

Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda, Human Rights Watch, September 2004, Vol.16, No. 10(A).

Sudan, Darfur: Rape as a Weapon of War: Sexual Violence and its Consequences, Amnesty International, 19 July 2004, AI-Index: AFR 54/076/2004.

Towards an Effective International Criminal Court-Meeting the Challenge (Montreal, Quebec: Rights & Democracy, 1998).

"We'll Kill You if You Cry,": Sexual Violence in the Sierra Leone Conflict, January 2003, Vol. 15, No. 1(A).

X. Conferences and Lectures

Akhavan, P., "National Perspectives and Reservations," paper presented at "From a Culture of Impunity to a Culture of Accountability: International Criminal Tribunals, the International Criminal Court, and Human Rights Protection," A conference sponsored by University of Utrecht, The Netherlands, November 2001.

_____, "Responsibilities: Individual, National and Multilateral," Option Paper, Plenary Panel 2: The Responsibility to Prevent, Stockholm International Forum, 2004.

MacKinnon, C., "The ICTR's Legacy on Sexual Violence: The Recognition of Rape as an Act of Genocide-*Prosecutor* v. *Akayesu*," in Guest Lecture Series of the Office of the Prosecutor, the ICC, The Hague, 27 October 2008. Reprinted in (2008) 14:2 New English Journal of International Comparative Law 101-110.

Oosterveld, V., "Commenting on "Gender-based Crimes against Humanity," paper presented at *Crimes against Humanity Initiative: April Experts'*

Meeting. A conference sponsored by Washington University Law Whitney R. Harris World Law Institute, April 12-15, 2009.

_____, "Gender-Based Crimes against Humanity," In *Crimes against Humanity Initiative: April Experts' Meeting*. A Conference Sponsored by Washington University Law Whitney R. Harris World Law Institute, April 12-15, 2009.

Zawati, H., "De Bosnie-Herzégovine au Rwanda, le Kosovo et la Tchétchénie: déclaration de la guerre sur le corps des femmes," dans *Atelier: le viol au masculin et au féminin: sévices sexuelles en conditions de violence.* Réseau d'intervention auprés des personnes ayant subi la violence organisée (RIVO), Montréal, Québec, 27 octobre 2000).

_____, "Old Weapon, New Crimes: Wartime Rape of Kosovar Women as a Crime against Humanity," (Institute of Islamic Studies Lecture Series, McGill University, 15 March 2000).

XI. Letters & Amicus Curiae

Amicus Curiae Brief Respecting the Need to include Sexual Violence Charges in the Indictment, The Prosecutor v. Samuel Imanishimwe, Emmanuel Bagambiki, André Ntagerura, Case No.: ICTR-99-46 T, The Coalition for Women's Human Rights in Armed Conflict Situations, March 1st, 2001.

Boyle, F., "Comment on the Agreement on Basic Principles in Geneva of 8 September 1995," A Letter to the Parliament of the Republic of Bosnia and Herzegovina from Francis A. Boyle, Professor of International Law (11 September 1995).

Brunet, A., "Letter to Prosecutor Hassan Jallow," A Letter to Hassan Jallow, the Prosecutor of the International Criminal Tribunal for Rwanda from Ariane Brunet, Women's Rights Coordinator at Rights & Democracy, Montreal, Canada, (8 February 2005).

Copelon, R., et al., "Amendment of the Karadzic Indictment Respecting Rape and Sexualized Violence," A Letter to Serge Brammertz, the Chief Prosecutor, ICTY, The Hague, from Rhonda Copelon, Director, International Women's Human Rights Law Clinic, City University of New York School of Law, USA, and others, (23 August 2008).

Djokić, D., "Memorandum on War Crimes and Crimes of Genocide Committed against the Serbian People in the Area of the Former Commune of Odžak by Ustashi-Fundamentalist Paramilitary Formations and Members of the National Guard of the Republic of Croatia, Samac, 21 May 1993," A Letter to the Secretary-General from Dragomir Djokić, the Chargé d'affaires of the Permanent Mission of Yugoslavia to the United Nations (6 August 1993), UN Doc. A/48/299-S/26261.

International Criminal Tribunal for Rwanda: Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and other Sexual Violence within the

Competence of the Tribunal in Akayesu, ICTR-96-4-1, 27 May 1997 (Montreal, Quebec: Rights & Democracy, 1998).

Women's Initiatives for Gender Justice, Amicus Curiae Observations of the Women's Initiatives for Gender Justice Pursuant to Rule 103 of the ICC Rules of Procedure and Evidence, in the case of The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-466, 31 July 2009.

Women's Initiatives for Gender Justice, Amicus Curiae Observations of the Women's Initiatives for Gender Justice Pursuant to Rule 103 of the ICC Rules of Procedure and Evidence, in the case of The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-466, 28 August 2009. (Submitted by Rhonda Copelon, Director, International Women's Human Rights Law Clinic, City University of New York School of Law, USA, and Others, on the negotiating history and applicability of key provisions of the Rome Statute and elements of crimes as well as developments in international law which compel the cumulative charging of rape and torture).

XII. UN Documents

1. UN Reports

Finalized Draft Text of the Elements of Crimes, PrepCom on ICC, 2 November 2000, UN Doc. PCNICC/2000/1/Add.2.

Nowrojee, B., "Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?, Occasional Paper 10 (Geneva: United Nations Research Institute for Social development, 2005).

Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act, UN Doc. A/Conf.183/2/Add.1.

Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol.1, UN GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22.

Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol.2, UN GAOR, 51st Sess., Supp. No. 22 A, UN Doc. A/51/22.

Report of the Secretary-General, *Report on the Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia,* United Nations SCOR, 48th Sess., UN Doc. S/25704, (3 May 1993), para 34.

UN Commission on Human Rights, *Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45*, UN Doc. E/CN.4/1995/42 (22 November 1994), at paragraph 180.

UN Commission on Human Rights, *Report of Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment,* UN Doc. E/CN.4/1994/31, (6 January 1994), at paragraphs 431-432.

UN Commission on Human Rights, *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki*, UN Doc. E/CN.4/ 1993/50 (10 February 1993).

UN Commission on Human Rights, *Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict: Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur,* UN Doc. E/CN.4/Sub.2/1998/13 (22 June 1998).

2. Security Council Resolutions

Statute of the International Criminal Tribunal for Rwanda, UN Security Council's Resolution S/RES/955 (1994) Annex, Adopted in the Security Council's 3454th meeting on 8 November 1994 [hereinafter The Statute of the ICTR].

UN Security Council, *Annex II, Rape and Sexual Assault: A Legal Study*, UN SCOR, UN Doc. S/1994/674/Annex II (27 May 1994).

UN Security Council, *Annex IX, Rape and Sexual Assault*, UN SCOR, UN Doc. S/1994/674/Annex IX (28 December 1994).

UN Security Council, Annex IX. A, Sexual Assault Investigation, UN SCOR, UN Doc. S/1994/674/Annex IX. A (28 December 1994).

UN Security Council, Final Report of the Commission of Experts Established Pursuant to Security Council's Resolution 780 (1992), UN Doc. S/1994/674 (27 May 1994).

UN Security Council, *The Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, UN Doc. S/1994/1405 (9 December 1994).

UN Security Council's Resolution 955 (1994), *Adopting the Statute of the International Criminal Tribunal for Rwanda* (8 November 1994), UN Doc. S/RES/955 (1994), 33 I.L.M. 1598-1613 (1994).

UN Security Council's Resolution 827 (1993), Approving the UN Secretary-General's Report, Deciding to Establish the Tribunal, and Specifying Implementing Tasks (25 May 1993), UN Doc. S/RES/827 (1993); 32 I.L.M. 1203-1205 (1993).

UN Security Council's Resolution 1503 (2003), *Calling on the ICTY and the ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategies)* (28 August 2003), UN Doc. No. S/RES/1503 (2003).

UN Security Council's Resolution 808 (1993), *Deciding that an International Tribunal shall be Established for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991* (22 February 1993), UN Doc. S/RES/808 (1993).

UN Security Council's Resolution 1315 (2000), *The Establishment of the Special Court for Sierra Leone* (4 August 2000), UN Doc. S/RES/1315 (2000).

UN Security Council's Resolution 1820 (2008), *Noting that Rape and other Forms of Sexual Violence can Constitute a War Crime, a Crime against Humanity, or a Constitutive Act with Respect to Genocide* (31 March 2008) UN Doc. S/RES/1820 (2008).

UN Security Council's Resolution 935 (1994), *Requesting the Secretary-General to Establish, As a Matter of Urgency, an Impartial Commission of Experts to Examine and Analyze Information Submitted Pursuant to the Present Resolution* (1 July 1994), UN Doc. S/RES/935 (1994).

UN Security Council's Resolution 780 (1992), *Requesting the UNSC to Establish an Impartial Commission of Experts to Analyze Information Submitted Pursuant to Resolution 771 (on Violations of International Humanitarian Law) and Obtained through its Own Investigations and to Provide Conclusions* (6 October 1992), UN Doc. S/RES/780 (1992), 31 I.L.M. 1476 (1992).

XIII. Web Documents

Bosnia-Herzegovina: Mass Rape, Forced Pregnancy, Genocide, Online: Equality Now: Women's Action 3.1, February 1993 <http://www.equalitynow.org/english/actions/action_0301_en.html> (Accessed on: 22 January 2010).

Clifford, et al., L., *International Justice Failing Rape Victims,* Online: Tribunal Update 483 (5 January 2007) <http://www.iwpr.net/?p=tri&s=f&o=328311&apc_state=henptri> (Accessed on: 21 October 2009).

Dermod, J., "AFRC Appeal: Joint Criminal Enterprise," Online: Transnational Law Blog (27 March 2008) <http://transnationallawblog.typepad.com/transnational_law_blog/sierra_leone/> (Accessed on: 21 May 2010).

Gruber, A., "Rape, Feminism, and the War on Crime," (2009) University of Iowa <http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=aya_grub> (Accessed on: 7 September 2009).

Drumbl, M., "CTY Appeals Chamber Delivers Two Major Judgments: *Blaski?* and *Krsti?* Online: ASIL (August 2004) <http://www.asil.org/insigh143.cfm> (Accessed on: 21May 2010).

Hinson, Z., "An Examining of Joint Criminal Enterprise in the Special Court's Decision of the AFRC Trial," Online: Centre for Accountability and the Rule of Law (CARL-SL) (28 July 2007) <http://www.carlsl.org/home/index.php?option=com_content&view=article&id=90:byzoilahinson&catid=4:articles&Itemid=23> (Accessed on: 21 May 2010).

International Criminal Tribunal for Rwanda: Witness Support and Protection, Online: War Crimes Research Office, Washington College of Law, 7 June 2003, <http://www.wcl.american.edu/warcrimes/2003ictr_protection.cfm> (Accessed on: 19 April 2008).

Jordash, W., "Joint Criminal Enterprise at the Special Court for Sierra Leone," Online: International Law Bureau (20 November 2009) <http://www.internationallawbureau.com/blog/?p=950> (Accessed on: 21 May 2010).

Laughland, J., "Conspiracy, Joint Criminal Enterprise and Command Responsibility in International Criminal Law," Online: ICTR Legacy from the Defence Perspective (2009) <http://www.heritagetpirdefense.org/papers/John_laughland_Conspiracy_joint_criminal_enterprise_and_command_responsibility.pdf> (Accessed on: 21 May 2010).

Lyons, B., "Tortured Law/Tortured "Justice" – Joint Criminal Enterprise in the Case of Aloys Simba," Online: ICTR Legacy from the Defence Perspective (October 2009) <http://www.ictrlegacydefenseperspective.org/papers/Beth_Lyons_Joint_Criminal_Enterprise_in_the_Case_of_Aloys_Simba.pdf> (Accessed on: 21May 2010).

Lyth, A., The Development of the Legal Protection against Sexual Violence in Armed Conflicts: Advantages and Disadvantages. Online: Kvinna till Kvinna Foundation (December2001) <http://www.iktk.se/publikationer/rapporter/pdf/development.pdf> (Accessed on: 12 December 2007).

Pjani, J., "Joint Criminal Enterprise," Online: Odsjek Krivicne Odbrane BIH (OKO) (2010) <http://www.okobih.ba/files/docs/Jasmina_Pjanic_ENG_i_BHS.pdf (Accessed on: 21 May 2010).

Rose, C., "Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-Based Crimes," Online: SelectedWorks<http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=cecily_rose> (Accessed on: 21 May 2010).

Sellers, P., "The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation," Online: The OHCHR Women's Human Rights and Gender Unit (WRGU) – Conceptual Framework and Main Priorities (2006) <http://www2.ohchr.org/english/issues/women/docs/Paper_ Prosecution_of_Sexual_Violence.pdf> (Accessed on: 18 March 2010).

Staggs, M., "Second Interim Report on the Special Court for Sierra Leone "Bringing justice and ensuring lasting peace": Some Reflections on the Trial Phase at the Special Court for Sierra Leone," U. C. Berkeley War Crimes Studies Center 30 March 2006. <http://socrates.berkeley.edu/~warcrime/documents/ SecondInterimReport_003.pdf> (Accessed on: 13 March 2010).

Widell, J., "Joint Criminal Enterprise in the International Criminal Tribunal for Yugoslavia," Online: Serbianna (16 September 2005) <http://www.serbianna.com/columns/widell/003.shtml> (Accessed on: 21 May 2010).