CONFRONTING IMPUNITY IN SEXUAL VIOLENCE AGAINST WOMEN IN KENYA
THE ROLE OF LOCAL AND INTERNATIONAL CRIMINAL TRIBUNALS

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A thesis submitted to the University of Nairobi Law School
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DECLARATION
I Anne Atieno Amadi, declare that this thesis is my original work except where indicated by special reference in the text. The thesis has not been submitted to any other institution for the award of a post graduate degree or any other award either in Kenya or elsewhere.

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DEDICATION

To all women survivors of sexual violence who have had the courage to turn their sorry stories into positive actions.
ACKNOWLEDGEMENTS

I am indebted to my supervisor, Dr Jane Dwasi for assisting in formulating my disjointed ideas into a coherent manuscript. I am also grateful to my lecturers who imparted knowledge in public international law and enabled me to understand the concepts articulated in this paper. I appreciate the Reader and Supervisor of Corrections, Professor Ben Sihanya, for painstakingly studying the manuscript and providing greater insights and clarity on the content and presentation of my ideas. The Sihanya Mentoring Guidelines on LLM Research Project Citation, Punctuation, formatting, Corrections and Marking Scheme2012/2013;18/9/2013 Revised 22/8/2014 have been provided invaluable assistance in finalizing the study.

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I am forever grateful to God for He is good and His mercies endure forever.
LIST OF ABBREVIATIONS
AFRC  Armed forces Revolutionary Council (Sierra Leone)
CIPEV  Commission of Inquiry on the Post-Election Violence (Kenya)
CCL  Control Council Law, No. 10, 1946
CDF  Civil Defence Forces
CEDAW  Convention on the Elimination of all forms of Discrimination against Women
CSO  Civil Society Organization(s)
CWHRCS  Coalition of Women’s Human Rights in Conflict Situations
DEVW  Declaration on the Elimination of Violence against Women
DPP  Director of Public Prosecutions
GBV  Gender Based Violence
GVRC  Gender Violence Recovery Centre(s)
ICC  International Criminal Court
ICT  International Criminal Tribunals
ICTR  International Criminal Tribunal for Rwanda
ICTY  International Criminal Tribunal for former Yugoslavia
IOCD  International and Organized Crime Division (High Court of Kenya)
IMT  International Military Tribunal
NGO  Non-Governmental Organization(s)
OTP  Office of the Prosecutor
PEV  Post Elections Violence
RUF  Revolutionary United Front (Sierra Leone)
SCSL  Special Court for Sierra Leone
SGBV  Sexual and Gender Based Violence
UDHR  Universal Declaration of Human Rights
UNDAW  United Nations Division for the Advancement of Women
UNSCR  United Nations Security Council Resolution
LIST OF CITED KENYAN STATUTES

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Evidence Act
Penal Code
LIST OF CITED REGIONAL INSTRUMENTS


INTERNATIONAL INSTRUMENTS

Control Council Law No. 10, 1946.


Declaration on the Protection of Women and Children in Emergency and Armed Conflict, 1974

Geneva Conventions, 1948.


LIST OF CITED CASES

General v. Adolf Eichmann, Court of Jerusalem, Criminal Case 40/61

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Prosecutor v. Dusko Tadic (ICTY) 94-1-T


Prosecutor v. Issa Hassan Sesay, Morris kallon &Augustine Gbao, (SCSL)-04-15-A

Prosecutor v Jean Paul Akayesu, (ICTY) 1996-4T


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CHAPTER 1

CONFRONTING SEXUAL VIOLENCE AGAINST WOMEN IN CONFLICT SITUATIONS

1.1 Introduction to the study on sexual violence against women in conflict situations

Kenya has enjoyed longer periods of relative peace in comparison to countries in the eastern sub-region of Africa. However, there have been periods of conflict characterized by widespread impunity occasioning egregious violations of human rights. The controversial swearing in of Mwai Kibaki as President of Kenya in 2007 simultaneously precipitated a political, constitutional, humanitarian, economic and social crisis in Kenya. The post-election violence that followed the disputed presidential elections saw a wave of sexual abuse targeted at women and girls. This was perhaps the clearest manifestation of the gravity of sexual violence problem in Kenya. Throughout history, sexual violence against women has been a standard tool of domination and warfare.

Sexual violence as a weapon of war targets individuals not only on the basis of group membership, but also uniquely on the basis of gender. History has shown that in times of war or conflict situations, women and girls are targeted for rape and other sexual assaults on the basis of their sex, often irrespective of their age, ethnicity or political affiliation. Women have been subjected to rape by men from all sides of the conflict—both enemy and friendly forces.

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5 Van Den Haag (1962) The War in Katanga, Report of a Mission. There were press reports of abuses committed against women by Troops serving with the UN forces. The Guardian 19th February 1994)
including their own neighbours. Although men too are subjected to sexual violence during conflict situations, women and girls have been disproportionately affected.

International criminal tribunals (ICTs) have been established to limit the impunity associated with mass slaughter and dislocation of ethnic groups, torture and rape as weapons of war. Increasingly, tribunals such as the International Criminal Tribunal for former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and more recently, the International Criminal Court (ICC), have become sophisticated in addressing sexual violence.

The statutes in respect of the ICTY and ICTR specifically recognize sexual aggression and the tribunals have made pronouncements whose effect is to give prominence to sexual violence as a serious matter. More and more, These ICTs have formally recognized sexual crimes committed against women during situations of conflict, and the fact that their impacts extend far beyond the immediate victim. Yet women who have been sexually victimized during conflict situations are generally still reluctant to come forward and participate in the prosecution of suspected perpetrators said to bear the greatest responsibilities for atrocities committed against them.

This chapter provides an overview of the problem of conflict related sexual violence against women. It also describes the methodology of the study including the objectives, scope, conceptual and theoretical and conceptual framework of the study.

That sexual violence is always used as a weapon of and tactic in conflict was evident in the violent conflict that followed the disputed presidential election results in Kenya in 2007/2008. Incidents of sexual and gender based violence (SGBV) were widespread with Nairobi, Nyanza,
Rift Valley, Coast and Western provinces reporting the highest number of cases. Reports indicate that at least 1200 people were killed, thousands injured, over 300,000 displaced, over 42,000 houses destroyed, businesses looted and destroyed. As observed by the Commission of Inquiry into the Post-Election Violence (CIPEV) in Kenya:

“Members of the Commission also were horrified by stories of sexual violence that came to their attention in the conduct of their survey. Like others, they too felt compassion for victims of post-election sexual violence and wanted to learn and expose what happened.”

The reluctance of women victims of sexual violence to participate in local and international criminal justice processes may be due to practical challenges such as distance from home to the tribunals, cost of participation in the process among other logistical inconveniences. It could also be due to institutional weaknesses that have resulted in lack of confidence in the international criminal justice system. The general unwillingness or reluctance to address sexual and gender-based violence provides an added challenge to societies seeking to attain the goals of transitional justice in the wake of new conflicts, where previous conflicts have not been resolved.

In Kenya, the failure to prosecute perpetrators of past human rights violations was found to be a major contributing factor to the violence in 2007-2008. By the time the conflict broke out, the findings of numerous studies and inquiries aimed at addressing the past violations had not been implemented or discussed beyond the report submission. Studies have also found that citizens too feel distanced from state institutions to the extent that they do not identify with these institutions as places from which they can seek or expect protection or any form of help.

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8 Ibid.
Increasingly, ICTs have formally recognized sexual crimes committed against women during situations of conflict, and the fact that its impact extends far beyond the immediate victim. This study examines the procedure and nature of trials in ICTs in dealing with sexual violence against women during conflict situation. It concludes that international criminal tribunals as currently structured cannot effectively administer justice for women in relation to sexual and gender based violence (SGBV).

Recognizing that little or no attention is given to the issue of sexual violence against women in conflict situations, the UN Security Council Resolution (UNSCR) 1325\(^{10}\) unanimously adopted in October 2000 is a landmark legal and political framework that acknowledges, among others, the need for the protection of women and girls from sexual and gender-based violence in conflict situations. It covers emergency and humanitarian situations. The Resolution notes that little was being done to address women’s and girls’ needs during or after conflict or to strengthen their participation in peace building processes.

The UN Resolution 1325 addresses not only the inordinate impact of war on women, but also the pivotal role women should and do play in conflict management, conflict resolution and sustainable peace. It advocates for the prevention of violence against women through the promotion of women’s rights, accountability and law enforcement, including by prosecuting those responsible for war crimes, genocide, crimes against humanity and other violations of international law.\(^{11}\)

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\(^{10}\) The United Nations Security Council Resolution 1325 was adopted in recognition of the serious impact that armed conflict has on women and children and the potential of women to contribute to all the processes which aim to establish and sustain peace.

\(^{11}\) UN Security Council Resolution 1325, Article 10.
The UN Security Council Resolution 1325 also advocates respecting the civilian and humanitarian nature of refugee camps; excluding sexual violence crimes from amnesty agreements as they may amount to crimes against humanity, war crimes or genocide, strengthening women’s rights under national law; and supporting local women’s peace initiatives and conflict resolution processes.

This paper contributes to the discourse on the accountability of perpetrators of sexual violence and persons said to bear the greatest responsibility for atrocities committed during conflict situations. It investigates gender discrimination as a possible factor affecting the effectiveness of ICTs in addressing sexual violence. It further makes recommendations on how the tribunals may be restructured and strengthened to deliver outcomes that will make a difference to the lives of victims of rape.

For ICTs to secure justice for victims of sexual violence more effectively, the study suggests a structured interaction between international criminal tribunals and national justice mechanisms to enhance accessibility, responsiveness and adequacy in their structures, procedures and processes.

1.2 Statement of the Problem of the legal protection of women against sexual violence against women

Women and girls hardly ever fight in wars, yet they suffer the most as direct targets when sexual violence is deliberately used as a tactic of warfare.\(^{12}\) Despite a strong global dialogue on sexual violence in conflict situations, the international community seems helpless to stop sexual violence in conflict.\(^{13}\)

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One of the greatest challenges to seeking accountability for sexual violence is the extent to which it is normalized and condoned by society in pre-conflict situations.\textsuperscript{14} Furthermore, weak state institutions and poor service provision for prevention and response to sexual and gender based violence make it the more difficult to prevent or respond to it during and after conflict.

In Kenya, the 2007/2008 post-election violence victims of rape still await justice, seven years after the atrocities. The violence and the inequalities that women face in crises do not exist in a vacuum but are the direct results and reflections of the violence, discrimination and marginalization that women face in times of relative peace.\textsuperscript{15}

It is difficult to get statistics on sexual and other forms of gender based violence against women, mainly due to under reporting of the offences due to fear and also poor record keeping by police, among other reasons. Throughout the Rwanda genocide, for example, widespread rape directed predominantly against Tutsi women occurred in every prefecture.\textsuperscript{16} Thousands of women were raped in the streets, at checkpoints, in cultivated plots, in or near government buildings, hospitals, churches and other places where they sought sanctuary, either individually or held as sex slaves in groups.\textsuperscript{17} Their dead bodies were left naked, bloody with dry semen, and spread-eagled in public view.\textsuperscript{18}

Yet out of the thousands of rape cases that have occurred in conflict situations, very few individuals have been convicted and punished by international war crimes tribunals for

\textsuperscript{14} Federation of Women Lawyers (FIDA), Kenya (2010), Towards Integrating Gender in the Transitional Justice process in Kenya. FIDA Kenya.
\textsuperscript{15} The Sexual Violence Research Institute, (2011), accessed at www.svri.org/emergencies.htm, retrieved on 17th January 2012
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid.
committing or commanding widespread sexual violence.\textsuperscript{19} Case law from international criminal tribunals have failed to demonstrate that sexual violence against women in conflict situations is recognized as amongst the gravest of offences committed during armed conflict, and should therefore be punished accordingly.

Generally, persons arraigned as suspects before ICTs are senior government officers, politicians and other respectable people of high status in society. For example, the ongoing cases at the ICC relating to the 2007-2008 post-election violence in Kenya are against the current president Uhuru Kenyatta and The deputy president William Ruto.\textsuperscript{20} As in other similar cases, suspects appearing before international criminal tribunals do so by virtue of their alleged role in sponsoring or supporting the conflict from one side or the other, or failing to act to prevent human rights abuses while in a position of authority to do so. They are rarely, if ever, the actual sexual offenders.

The real perpetrators are often the ordinary citizens or lower level security forces such as police or soldiers, some known to the victims. Victims rarely, if at all, have a chance to testify in these tribunals due to logistical difficulties, lack of awareness or willingness to retell the sordid sorry stories, or lack of resources to access the ICTs.

In the Kenya cases only 660 victims have been given formal recognition by the ICC, 327 in Case One and 233 in Case Two.\textsuperscript{21} Yet reports indicate that at least 3000 women were sexually molested.\textsuperscript{22} Interestingly, only Case Two involving Uhuru Kenyatta has charges relating to rape, even though it is widely accepted that rape was widespread in all areas of Kenya that experienced the violence.

\textsuperscript{19} Ibid.
\textsuperscript{20} Prosecutor v. Uhuru Muigai Kenyatta ICC-01/09-02-11.
\textsuperscript{21} Prosecutor v. William Samoei Ruto and Joshua Arap Sang ICC-01/09-01.
The ICC sits in The Hague, thousands of miles away from Kenya where the atrocities took place. The violence took place over six years ago and the hearing of the first case is still going on. The second case that has sexual violence charges is yet to be started. Considering the practical difficulties associated with bringing victims and witnesses before these tribunals, it is impossible for all those victimized to have their day in court, and therefore might never feel the sense of justice.

In addition to logistical challenges, international criminal tribunals lack appropriate psychosocial support systems for traumatized sexual violence victims who have suffered not just physical violations but also other long term complications associated with psychological, social and economic difficulties. The prosecution and punishment of suspects bearing the greatest responsibility for human rights abuses in the countries that have experienced conflict such as Rwanda, former Yugoslavia and Sierra Leone so far have not had a deterrent effect on perpetrators in other countries.\(^{23}\)

The fact that real perpetrators of violence do not appear before the courts is also a draw back as they go scot free, which is a major source of frustration for victims.

1.3 Study Objectives

The objective of this study is to demonstrate that, in spite of the prevalence and far reaching consequences of sexual violence in war and conflict situations, ICTs as currently structured cannot effectively administer justice in sexual violence matters, in a manner that inspires confidence in women to come forward and seek justice before the tribunals. It further

\(^{23}\) For example, the conflict in Kenya happened after the Rwanda conflict, in spite of the convictions of perpetrators of human rights abuses before the ICTR in Arusha.
demonstrates that conviction and punishment of suspects does not satisfy the needs of victims of sexual violence, as their immediate and long term pain and trauma remain unaddressed.

Accordingly, the study makes recommendations for reforms within these tribunals that would deal with the real perpetrators of sexual violence in a manner that is practical and therefore attractive to victims of rape and sexual assaults to participate in the prosecution of offenders with the confidence that they will receive justice.

1.4 Conceptual and Theoretical Framework for sexual violence against women

War is an inherently patriarchal activity, and rape is one of the most extreme expressions of the patriarchal drive toward masculine domination over women. Armed conflict is a predictor of sexual violence against women.\(^\text{24}\) The patriarchal ideology is further enforced by the aggressive character of the war itself, which is to dominate another nation or people.\(^\text{25}\)

Feminist theory supports equality for women and men. Radical feminists believe that male power and privilege is the basis of social relations and that sexism is the ultimate tool used by men to keep women oppressed. Socialist feminism evolved from the ideas of Karl Marx,\(^\text{26}\) who blamed capitalism for increasing patriarchy by concentrating power in the hands of a small number of men. As early as the *Communist Manifesto*,\(^\text{27}\) Marx and Friedrich Engels argued that the ruling class oppresses women, relegating them to second-class citizenship in society and within the family:


\(^{26}\) Karl Marx and Friedrich Engels are regarded as the founders of the Marxist revolutionary socio-economical ideology called “Marxism.”

\(^{27}\) Manifesto of the Communist party, (1848) accessed at https://www.marxists.org/archive/marx/works/1848
"The bourgeois sees in his wife a mere instrument of production....He has not even a suspicion that the real point aimed at [by communists] is to do away with the status of women as mere instruments of production."28

Friedrich Engels explicitly argued that rape and violence against women were built in to the family at its beginning:

“The man took command in the home also; the woman was degraded and reduced to servitude-she became the slave of his lust and a mere instrument for the production of children....In order to make certain of the wife's fidelity and therefore the paternity of his children, she is delivered over unconditionally into the power of the husband; if he kills her, he is only exercising his rights.”29

Claude Levi Strauss, a leading anthropologist within the structuralist school argues that “human society is primarily a masculine society.30 He asserts that “the deep polygamous tendency which exists among all men always makes the number of available women seem insufficient.” For this reason, Strauss argues, women have been the passive victims of men’s sexual aggression since the beginning of human society.

While men are victims of sexual violence, sexual assault against women occurs with greater frequency and in a more predictable pattern than assaults against men, even in situations of unarmed imprisonment.31 It is historically acknowledged throughout the ages, that triumph over women by rape became a way to measure victory, as part of a soldier’s proof of masculinity and success, and a tangible reward for service rendered and actual reward of war.

Just as war is accepted as part of history, rape too has become regarded as a natural, foreseeable and unavoidable consequence of war. Whether as a measurement of success or as a reward to the

28 Ibid.
victor, rape is often conducted as a message between men, overwhelmingly inflicted upon women. Perpetrators of sexual and gender based violence are often motivated by a desire for power and domination and therefore rape is common in armed conflict and internal strife, and is an act, just like other forms of torture, mostly meant to hurt, control and humiliate, while violating a person’s physical and mental integrity.

Communities practice and normalize violations against women such as rape, sexual exploitation, assault and abuse, domestic violence, trafficking of women and girls, forced prostitution, sexual harassment and discrimination, denial of rights and harmful traditional practices such as female genital mutilation (FGM), widow inheritance, and early and forced marriage.

The reality and relentlessness of their suffering gives women a very different consciousness about the justness of the social order to that held by dominant groups. Women may be unaware of possibilities of social change or may be hopeless about any possible change for the better, hence resigning to fate and accepting the legitimacy of established order. Feminists have considered questions relating to how the international system serves to perpetuate gender inequalities, including the manner in which punishment is meted to offenders.

The radical feminist standpoint is based on the distinctive experiences associated with women’s lives in a gendered social world, and suggests that it is from the vantage point of the most

34 The Kenya Demographic Health Survey (2008-09) showed that almost half (45 percent) of women aged 15-49 have experienced either physical or sexual violence. In terms of specific forms of GBV, the report reveals that 25 percent of women have experienced only physical violence, 7 percent have experienced only sexual violence, and 14 percent have experienced both physical and sexual violence.
oppressed that the complexities of subordination can best be grasped and strategies devised for a more equitable enjoyment of human rights.  

Prior to the 1990s, theorists ignored war rape as a side effect of rape or as isolated acts by individual soldiers motivated by sexual desire. The discourse around sexual violence in conflict situations has generated a phraseology that seeks to employ shock tactics to elicit the impetus to act and address sexual violence. Phrases such as “rape as a weapon of war;” “the war is fought on women’s bodies;” “the rape capital of the world;” among others have become a common part of the global language on sexual violence in conflict situations intended to communicate the premeditation and deliberateness of sexual violence and the importance of ending it.

The development of the international discourse on sexual violence has been nothing short of exponential since sexual violence in armed conflicts became a global problem. Perhaps this is also attributable to an attempt to undo some of the injustice occasioned by decades of silence of sexual violence in conflicts.

The “Sexed’ Story” is the older explanatory framework, often called the “sexual urge” or “pressure cooker” theory which assumes that ‘wartime rape is a result of the sexual desires

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of men, resulting from their biological make up. It also assumes that “war suspends the social constraints that hinder men from being the sexual animals they naturally are/can be.”

The “Gendered” Story is the more recent understanding of rape in conflict; that instead of being biologically driven, rape in war is the product of an idealized militarized masculinity in which rape becomes a particularly effective means to humiliate(feminize) enemy men by sullying “his” women/nation/homeland and proving him to be an inadequate protector. In the “Gendered” Story, the perpetrators are not necessarily men and the victims are not always women; however, the acts of sexual violence are masculine and masculinity is a learned attribute.

With this understanding, it becomes possible for sexual violence in conflict to be eradicated, through learning a better form of masculinity. Although sexual violence has been and continues to be used as a “deliberate strategy” and a tool ‘to serve specific purposes’ many other “less strategic” and “more complex factors” can influence the perpetration of this form of violence.

Among these factors are entrenched and widespread beliefs and norms about the subordinate status of women. The ‘Gendered Story’ has quickly become the almost universal understanding of rape in war amongst academics, practitioners, policymakers, and the courts.

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39 Ibid.
40 Ibid at 21.
41 KoffiAnnan, i (2004); United Nations Fund for Women (UNIFEM) & DPKO 2010, p. 10.
Rape has generally been considered a dishonourable act, but not of sufficient import to merit political consideration or mention in the negotiations for peace, reparations and post conflict reconstruction. The de facto acquiescence over centuries to sexual violence as part and parcel of warfare has accordingly been dubbed “one of the greatest conspiracies of silence.”

1.5 Hypothesis

The study is based on the following four hypotheses:

First, sexual violence is never calibrated in transitional justice processes, and when it is done, it is as an afterthought.  

Second, when key officials of the tribunals such as investigators are not sufficiently gender competent, investigations tend to be ineffective as sexual violence is either misunderstood or dismissed as less significant, too time consuming and difficult to prove.

Third, failure to deal with sexual violations against women in conflict situations is as a result of gender discrimination and patriarchal attitudes in the international community.

Fourth, international criminal tribunals as currently structured are grossly inadequate to address the situation of female victims of rape during conflict situations.

1.6 Research Questions

This study attempts to answer the following four research questions;

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First, what obstacles hinder the participation of women in international criminal tribunal processes?

Second, is the international criminal tribunal justice system effective in addressing the plight of rape victims?

Third, to what extent have the international criminal tribunals taken gender concerns into consideration when addressing sexual violence?

Fourth, how can the tribunals be transformed into effective tools for empowering women, providing redress and contributing to the healing process for communities in post conflict situations?

1.7 Scope of the study on sexual violence against women in conflict situations

Although sexual violence in conflict situations happens all over the world, this study confines itself to situations in Rwanda, and former Yugoslavia as countries which have experience internal armed conflict, and been subjected to international criminal justice processes. It also considers the Special Court for Sierra Leone which is a hybrid court system with a mix of local and international judicial structures, for purposes of comparison. It draws comparisons with the Kenyan situation relating to the 2007-2008 post-election violence which is currently subject of proceedings before the International Criminal Court (ICC).

The study recognizes that although the Kenya cases before the ICC are yet to be heard and determined, there are lessons that can be learned from the experiences of these countries. In so doing, the study proposes reforms which can help the country develop appropriate structures for dealing with cases of sexual violence in conflict situations.
The study also analyses samples of cases determined by the ICTs. Situations of internal disturbances and tensions such as riots and sporadic acts of similar nature are excluded due to constraints of time and resources.

1.8 Research Method
The main methodology applied in this study is literature review and content analysis study of national and transnational constitutions, laws, documents, reports, newspapers and online materials. These are on sexual violence and criminal the context of international criminal tribunals and the Kenyan experience. Some of the documents reviewed are scholarly articles on the subject and recorded accounts from previous studies on the subject.

The research adopted the use of secondary of information. It analysed available literature including text books, scholarly articles and reports on the subject. The text books available at the University of Nairobi, School of Law Library were supplemented with information available on the United Nations websites, reports by non-governmental organizations (NGOs) as well as local daily newspapers.

For purposes of illustration, the study also analyses case studies with samples from the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for former Yugoslavia, the Special Court for Sierra Leone and the International Criminal Court, as well as the ongoing Kenya cases at the ICC.

1.9 Literature Review on sexual violence against women in conflict situations
A significant amount of literature exists on the issue of sexual violence against women and girls in conflict situations. The literature is reviewed from the historical perspectives, specifically covering the first international criminal tribunals which were established in the 20th Century after the Second World War. From the historical perspectives it delves into the experiences of
contemporary international criminal tribunals to examine progress made in prosecuting sexual violation in conflict situations. It further considers national regional, international instruments that evolved in ensuring greater protection for victims of sexual violence.

From a historical perspective, Sita Balthazar\textsuperscript{45} observes that the statute of Nuremberg Tribunal set up after the Second World War, which was the first ICT of modern times, makes no mention of rape or any sexual based crimes, neither is it enumerated as a crime against humanity nor as a war crime. In spite of the widespread sexual violence during the Second World War, sexual offences were never prosecuted by the Nuremberg Tribunal. Balthazar in \textit{Gender Crimes and the International Criminal Tribunals} points out that during the Nuremberg trials after the Second World War, sexual crimes, along with pillage, were viewed as inevitable aspects of war, and therefore unpunishable.

In addition to equating rape to pillage, prosecutors generally shied away from the subject as too distasteful.\textsuperscript{46} It was considered as something either too atrocious to prosecute or impossible to prevent and therefore unworthy of prosecution.

Binaifer Nowrojee in \textit{Your Justice is too slow: Will the ICTR fail Rwanda Rape Victims?} offers an examination of international justice from the perspective of rape survivors from the Rwandan genocide, and exposes the squandered opportunities that have characterized sexual violence prosecutions since inception of the ICTR.\textsuperscript{47} By the tenth anniversary of the ICTR, ninety per cent of the convictions had nothing to do with rape, while the number of acquittals for rape doubled

\textsuperscript{45} Sita Balthazar, (2008) \textit{Gender Crimes and the International Criminal Tribunals}, Gonzaga School of Law, Vol 10
\textsuperscript{46} \textit{Ibid}.
\textsuperscript{47} Binaifer Nowrojee (2005) \textit{Your Justice is too slow: Will the ICTR fail Rwanda’s rape Victims?} Occasional paper 10, United Nationa Research Institute for Social Development..
the number of convictions for rape, against the background of hundreds of thousands of rapes that took place in the Rwanda genocide.

Theodore Meron in *Rape as a Crime under International Humanitarian Law* states that during the Second World War II, rape and other forms of sexual assault not only occurred with deliberation and regularity, but also were given license, either as an encouragement for soldiers or as an instrument of Policy.\(^{48}\) Patricia Visseur Sellers argues in *Rape under International Law in War Crimes: The Legacy of Nuremberg* argues that although humanitarian law has prohibited sexual violence against women for more than a century, customary international law has historically ignored and failed to punish gender based crimes.\(^{49}\)

According to Astrid Aafijes, in *Gender Violence: The Hidden War Crime*, most provisions addressing the needs of women are expressed in terms of protection rather than prohibitions.\(^{50}\)

Jocelyn Companaro in *Women War and International Law: The Historical Treatment of Gender-Based War Crimes* points out that while rape is universally accepted as a natural, foreseeable and unavoidable consequence of war. She further observes that these violations are inflicted upon women with alarming regularity. Yet, measures to prevent or punish such occurrences have been extremely ineffective, or in some situation, nonexistent.\(^{51}\) Although humanitarian law has prohibited sexual violence against women for more than a century, customary international law has historically ignored and failed to punish gender based crimes.

\(^{49}\), Patricia Visseur Sellers (1999), Rape Under International Law in War Crimes.
Minow and Strom in *The Lessons of Nuremberg* that prosecution of offenders in ICTs happens far away from the survivors and victims most affected by the violence, and further that these tribunals have not deterred genocide, mass atrocity and crimes of aggression, hence the need to summon the hopes and commitments of new generations around the world.\(^{52}\)

While the last century has produced evidence on ICTs commitment to end widespread sexual violence during war and other cases of armed conflict, the actions taken are often both insufficient to protect civilian women from sexual violence and regarded as less than other rules of war.

The Report by the United Nations Division for the Advancement of Women (UNDAW)\(^{53}\) indicates that while it is true that various forms of sexual violence were not highlighted in commentaries about the trials, the transcripts of the trials reveal that vast amounts of evidence of sexual violence were entered into the trial records. The tribunals heard repeated evidence of gang rape, forced sterilization, forced abortion, forced nudity, forced prostitution, sexualized torture, sexual mutilation and other forms of sexual violence. The post Second World War trials indeed prosecuted gender crimes, but the crime got subsumed under the rubric of mass atrocity and thus their inclusion was largely obscured.

All these authors have indicated the shortcomings of the ICTs in dealing with perpetrators or sponsors of human rights abuses in general and sexual violence in particular. However, none of them has considered the critical role that national criminal justice structures could play in complementing the international criminal tribunals. This study introduces and demonstrates how

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\(^{53}\) UN Division for the Advancement of Women, Department of Economic and Social Affairs of April 1998; Sexual violence and Armed Conflict: United Nations Response.
national courts, law enforcement agencies and prosecution systems can be transformed and applied as effective tools for securing justice for victims of sexual violence by international criminal tribunals.

1.10 Description of Chapters

Information in this study is presented in five chapters. This chapter provides a background to the research describes the methodology adopted in conducting the study.

Chapter 2 analyses the gruesome facts of sexual violence against women during the 20th Century conflicts and describes how it has been dealt with by the first international criminal tribunals. It responds to the question; what obstacles hinder the effective participation of women in international criminal tribunal processes? It further describes and analyses the failings of the international criminal tribunals of the 20th Century and demonstrates that the protection of women against sexual violence in conflict situations has always been inadequate. It argues that violations of a sexual nature against women should be prosecuted, not only because of the harm they cause to society as a whole, but because of the resulting personal victimization and injury to women. It concludes that while the first international criminal tribunals had the chance to effectively prosecute sexual violence, they have passed opportunities to the detriment of the victims.

Chapter 3 attempts to answer the question as to whether the international criminal justice system as currently structured is effective in addressing the plight of victims of rape in conflict situations. It discusses the contemporary institutional and legal framework on rape as a form of violence in conflict situations. It examines the progress made in international criminal law in ensuring justice for women subjected to sexual violations during conflict situations and analyses
definitions and substantive provisions in statutes of the international criminal tribunals, among other international instruments.

It further analyses procedural provisions that guide the hearing and determination of cases of sexual assault against women and girls during conflict. It concludes that the existence of laws and procedures for dealing with sexual violence against women in conflict situations has not necessarily translated to justice for women survivors of sexual violence.

Chapter 4 seeks to answer the question: to what extent have international criminal tribunals taken gender concerns into consideration when addressing sexual violence? It presents samples of cases that have contributed to gender sensitive interpretation of international crimes. It examines the prosecution processes of these tribunals in handling cases of sexual violence and identifies the challenges faced by the tribunals in dealing with such cases.

Chapter 4 acknowledges that significant progress has been made in addressing sexual violence in conflict situation. However, the outcomes of the trials have fallen short of the expectations of victims and survivors of sexual violence. The chapter concludes that justice by the international criminal tribunals could better be served through the establishment of local national prosecution structures.

It concludes that failure to deal with sexual violations against women in conflict situations is as a result of gender discrimination and patriarchal attitudes in the international community. International criminal tribunals as currently structured are grossly inadequate to address the situation of female victims of rape during conflict situations.
Chapter 5 contains summaries of findings, conclusions and recommendations. It responds to the research question: how can international criminal tribunals be transformed into effective tools for the legal protection of women from sexual violence and contribute to the healing process for communities in post conflict situations? It deliberates on the provisions of the Rome Statute of the International Criminal Court as well as national laws, and makes recommendation for institutional and legal reforms within the justice chain (police, prosecution and judiciary).

Acknowledging the difficulties in prosecuting sexual violence relating to the post-election violence conflict, Chapter 5 proposes ways in which the subject may be dealt with in future to secure justice for women victims of sexual in conflict situations.
CHAPTER 2
THEORY AND PRACTICE ON SEXUAL ABUSE OF WOMEN IN KENYA AND OTHER CONFLICT SITUATIONS

2.1 Introduction

When considering the concept of gender based war crimes, rape is often the first to come to mind. However, the term encompasses a number of violent acts including sexual slavery, forced pregnancy, sexual torture or mutilation and forced nudity, among others. These crimes are gender based because they are incidents of violence committed against women almost exclusively and on the basis of their gender.

This chapter analyses the gruesome facts of sexual violence against women during the 20th Century conflicts and describes how it has been dealt with by the first international criminal tribunals. It responds to the question; what obstacles hinder the effective participation of women in international criminal tribunal processes? It further describes and analyses the failings of the international criminal tribunals of the 20th Century and demonstrates that the protection of women against sexual violence in conflict situations has always been inadequate.

This should prompt the thinking and decision making for more appropriate measures for dealing with the subject. The study argues that violations of a sexual nature against women should be prosecuted, not only because of the harm they cause to society as a whole, but because of the resulting personal victimization and injury to women.

2.2 An Historical Perspective of the Legal Protection of Women against Sexual Violence in Conflict Situation

The 20th Century was one of the most violent periods in history. The period subsequent to the Second World War (1939-1945) witnessed the development of many norms in the field of international humanitarian and human rights law. During the Second World War, rape and other forms of sexual assault not only occurred with deliberation and regularity, but were also “given license, either as an encouragement for soldiers or as an instrument of policy.” Both the Nazi (German) and Japanese governments implemented various forms of forced prostitution and overlooked large scale occurrences of rape.

Axis leaders such as Adolf Hitler of Germany, Prime Minister Benito Mussolini of Italy and Emperor Hirohito of Japan expressed their opinions that “man should be trained for war and woman for the recreation of the warrior,” and that it is acceptable when “a soldier who has crossed thousands of kilometres through blood and fire has fun with a woman or takes a trifle.”

That sexual and gender based violence (SGBV) is often used as a weapon of and tactic in conflict was evident in the violent conflict that followed the disputed presidential election results in Kenya in 2007/2008. Incidents of SGBV were widespread with Nairobi, Nyanza, Rift Valley, Coast and Western provinces as they then were reporting the highest number of cases. Reports indicate that at least 1200 people were killed, thousands injured, over 300,000 displaced, over 42,000 houses destroyed, businesses looted and destroyed.

While the 20th Century produced evidence of an international commitment to end widespread sexual violence during war and armed conflict, the actions taken were insufficient to protect

57 Askin, o.p cit.
civilian women from sexual violence which was generally regarded as less important than other “rules of war.”60 Most provisions addressing the needs of women during war were expressed in terms of protection rather than prohibitions. For example, the Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 provides that “Women shall be treated with all consideration due to their sex.”

Following the War, the victors established the International Military Tribunal of Nuremberg and the International Criminal Tribunal for the Far East in Tokyo through treaties. The main purpose of the Nuremberg and Tokyo tribunals was to hold trials of high level Nazis and Japanese accused of committing crimes against peace, crimes against humanity and war crimes. The major war criminals of the Axis powers were brought to trial for war crimes, crimes against peace and crimes against humanity before the Nuremberg and Tokyo tribunals.

More and more, the well-being of the individual became a central issue in international law as states became liable for the treatment of individuals, be it foreigners or own nationals. Both the Nuremberg and Tokyo trials have contributed immensely to the development of international humanitarian law by creating an arena that fostered the promotion of peaceful settlement of international conflicts.

2.3 The International Military Tribunal of Nuremberg Trials

The Nuremberg trials were established to bring the masterminds of World War II to justice for the crimes committed under their command. These trials expressed the normative principles of holding accountable for violations of both the law of nations and the human rights of civilians.

Additionally, the trials clearly demonstrated that perpetrators of such crimes could be prosecuted anywhere.\footnote{Ibid.}

In addition to granting jurisdiction over conventional war crimes, the Nuremberg Charter granted the tribunal jurisdiction over two crimes never prosecuted before: crimes against peace and crimes against humanity.\footnote{Charter of the International Military Tribunal (IMT), annexed to Agreement for the prosecution and Punishment of the Major War Criminals of the European Axis, Article 6, Aug 8\textsuperscript{th} 1945, 59.} Previously, high ranking German officials had been protected from accountability for their actions during war. This position changed, with Article 6(a) of the Nuremberg Charter defining crimes against peace as including the;

\begin{quote}
“…planning, preparation, initiation or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy.”\footnote{Ibid.}
\end{quote}

The inclusion of crimes against peace in the Charter made initiating war an illegal act and provided the vehicle for allowing individual government leaders to be criminally punished for starting a war of aggression.\footnote{Edward Wise., \textit{The Significance of Nuremberg in War Crimes: The Legacy f Nuremberg}, in Belinda Cooper, \textit{War Crimes: The Legacy of Nuremberg} (New York: TV Books): 55-61.}

The Nuremberg Charter defined crimes against humanity as including murder, extermination, enslavement, deportation and other “inhumane acts” committed against any civilian population before or during war, or persecution on political, racial or religious grounds.\footnote{International Military Tribunal of Nuremburg \textit{Charter op cit} Article 6(g).} This definition included crimes committed against a state’s own citizen as well as those committed against
civilians in an occupied territory. For the first time, government officials could be found criminally responsible for persecuting or exterminating their own citizens.  

While the addition of these two substantive crimes was a step forward in the development of international humanitarian law, it is interesting to note that the Nuremberg Charter did not mention rape or sexual assaults at all, despite numerous reports and transcripts containing evidence of vile and tortuous rape, forced prostitution and forced sterilization, forced abortion, pornography, sexual mutilation and sexual sadism.  

Although the defendants’ indictments listed most violations of the laws or customs of war such as murder and pillage, the indictments ignored the existence, and failed to make charges of rape. Sexual crimes along with pillage were viewed as inevitable aspects of war and therefore unpunishable. Further, prosecutors shied away from the subject as too distasteful. In fact, a French prosecutor when asked about rape of French women could only say;

“The Tribunal will forgive me if I avoid citing the atrocious details…”

Clearly, this prosecutor had not been adequately prepared to handle the sordid details of rape and sexual violence. The importance or necessity of preparing officers of the court to deal with sexual violence was neither considered a priority nor a requirement.

66 Wise, op cit, note 32 at 57.  
67 Aafujes, op cit at 161.  
70 Ibid.  
71 Ibid.
While it had the power, authority and flexibility to prosecute sex crimes and to give directions regarding proceedings in matters relating to rape, by failing to insist that the details on sexual violence be presented in full, the tribunal missed an opportunity to make a difference in the lives of women who had been violated. The thought to include women officers to help deal with matters which male officers found difficult to address does not seem to have been considered at all. Rather than confronting rape and treating it as a serious crime, it was explained away as something unworthy of prosecution.

Without rape being specifically mentioned and provided for in the Nuremberg Charter, there were neither standards nor particulars that could be applied in dealing with the crime. Investigators would then deal more with crimes specifically prohibited by the Charter, than with the non-existent crime of rape, widespread as it was. However, although gender specific crimes were not directly included within the expansive language of the Nuremberg Charter, the tribunal had power to include rape among the crimes charged.\(^{72}\)

Article 6(b) of the Charter defined war crimes to include, but not to be limited to “a number of specifically enumerated crimes.”\(^{73}\) The language of this clause gave prosecutors the opportunity to charge rape as a war crime despite its absence from the list of specific offences. Furthermore, rape and other sexual assaults could have fallen under enumerated war crimes, such as “devastation not justified by military necessity” and “ill treatment of civilian population.”\(^{74}\)

This failure to prosecute sexual assaults overlooked the horrific suffering of women during the Second World War, and further inexcusably perpetuated the notion that rape is not as grave as

\(^{72}\) Ibid at 138.
\(^{73}\) Internationa Military Tribunal of Nuremberg Charter Art 6(c).
\(^{74}\) Ibid.
other war crimes. The notion that rape and sexual assaults were lesser crimes resulted in the exclusion of these atrocities from the public record and also demonstrated and perpetuated the belief that sexual assaults inevitably accompany war.\(^{75}\)

The fact that rape was not specifically mentioned is a pointer to the fact that it was considered a minor issue. This may be attributable to the fact that sexual violence does not affect men as much as it does women. The existing gender discrimination and patriarchy could not provide equal opportunity for women to participate at decision making levels, hence the lack of women’s input in a matter that so grievously affected them.

The other international criminal tribunal established after the Second World War was the International Military Tribunal for the Far East.

2.4 **The International Criminal Tribunal for the Far East**

The International Military Tribunal for the Far East (The Tokyo Tribunal) was established in an effort to prosecute Japanese officials for crimes committed during the Second World War. It was accepted on January 19, 1946, and promulgated by the United States Executive Decree.\(^{76}\)

The Tokyo Charter established the tribunal for the “just and prompt trial and punishment of all major war criminals in the Far East.”\(^{77}\) It was modelled after the Nuremberg Charter which granted the Tokyo Tribunal jurisdiction over the prosecution of war crimes and the newly articulated crimes against peace and crimes against humanity, which targeted high level

\(^{75}\) Askin *op. cit*, note 12 at 97-98.

\(^{76}\) Lael Richard, (1982) *The Yamashita Precedent: war Crimes and Command Responsibility*, Under orders from the joint Chiefs of Staff, General McArthur had absolute authority over the establishment of rules, regulations and procedures and ordered for military commissions within his jurisdiction.

\(^{77}\) Charter of the International Military Tribunal for the Far East, Article 1.
orchestrators of war. Just like the Nuremberg Charter, the Tokyo Charter also failed to enumerate rape as a prosecutable violation.

Japan’s military sexual slavery, the so called “comfort women” system before and during the Second World War was one of the most horrendous forms of wartime sexual violence against women known to the 20th Century. Some historians estimate that as many as 200,000 women, many from China and South Korea, were forced into the Imperial Japanese Army’s brothels before and during World War II.

Although the international community was aware of sexual assaults taking place throughout the War, few actions, if any, were taken to prevent such atrocities from occurring or to punish those guilty of committing them. The UN Human Rights Committee, which was looking at the issue as part of a regularly scheduled review, said that all reparation claims brought by victims before Japanese courts have been dismissed, and all complaints seeking criminal investigations and prosecutions have been rejected on grounds of the statute of limitations.

This inexcusable failure to act continued after the War ended, an even greater injustice to women in light of the fact that as the War came to an end, war crimes tribunals were established to address the crimes committed by European and Asian Axis powers.

Unlike the Nuremberg Charter, the Tokyo Tribunal included rape among the crimes charged in the indictments. Defendants were charged for alleged acts “carried out in violation of recognized

78 Ibid, article 5(a) See also Roling B. V.A., The Tokyo Trial and Beyond, Reflections of a Peace Monger.
80 Ibid, at 163.
customs and conventions of war including mass murder, rape and other barbaric cruelties.\textsuperscript{82}

Although only prosecuted in conjunction with other crimes, a number of defendants were charged and successfully prosecuted for rape under prohibitions against “inhumane treatment,” “ill treatment” and “failure to respect family honour and rights.”\textsuperscript{83} Furthermore, the tribunal found Japanese officials guilty of rape “because they failed to carry out their duty to ensure that their subordinates complied with international law.”\textsuperscript{84}

The inclusion of rape in the Tokyo indictments resulted in the first prosecution of the rampant sexual violence of the Second World War. General Tomoyuki Yamshita, a high ranking Japanese general, was convicted for the commission of war crimes, including “torture, mass rape, murder and mass executions of very large numbers of residents of the Philippines, including women and children.”\textsuperscript{85} Although the prosecution of rape was only achieved when pursued in conjunction with other crimes, the inclusion of rape in the indictment established an important precedent for future prosecutions.

The precedential value of Yamshita is further heightened, as the General was found guilty not of a rape he himself had committed, but of the rape committed by those under his command.\textsuperscript{86} Thus, this decision established a precedent for holding military commanders responsible for failing to prevent or punish criminal behaviour about which they knew or should have known.\textsuperscript{87}

\textsuperscript{83} Sellers, \textit{op cit} at 163.
\textsuperscript{85} In \textit{Re Yamshita}, (1946) 327 US 1,51.
\textsuperscript{86} Askin, \textit{op cit} 12 at 203.
\textsuperscript{87} Lael \textit{op cit}, 95.
For the first time, rape was included among those acts deemed worthy of international prosecution.

Evidence of rape during the Japanese occupation of Nanking was prescribed during the trial of General Takuro Matsui who had the command of Japanese forces there. General Matsui was convicted of war crimes and crimes against humanity based in part on evidence of rape committed by his troops.

However, none of the women who had been raped were actually called to testify, and the subject of women’s victimization was only given incidental attention. No institution in authority considered the necessity of seeking out women victims of sexual violence who may have wanted to testify on their victimization, neither were any efforts made to prepare women to engage with the tribunal in any way.

While the Tokyo Tribunal may have established a precedent for prosecuting rape as a war crime, it failed to prosecute rape independent of charges for “greater” crimes. The fact that sexual assaults were not specifically listed as a crime within the tribunal’s jurisdiction reduced rape to a minor infraction and reinforced the historically held view that rape is a relatively insignificant crime.

Even though the Tokyo indictments marked an improvement over Nuremberg’s total failure to address the occurrence of rape, the prosecution of sexual assaults in the tribunal was only considered only when the defendant had been charged with other crimes. The tribunals did not recognize the existence of gender specific crimes as actual and separate atrocities deserving to be prosecuted, and shamefully, internationally guaranteed human rights were not fully applied to

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88Askin *op. cit.*
women. No thought whatsoever seems to have been given to the need for any form of support for women victims of sexual violence. Neither was special measures put in place that would have ensured women felt confident enough to appear before these tribunals to tell their stories.

At institutional level, in the Nuremberg and Tokyo War Crimes Tribunals, there were a handful of women participating in lower level positions serving as judges, prosecutors or decision makers. In the circumstances there was no room for substantive input by women in the judicial processes, hence the almost total disregard for the monstrous sexual violence.

In 1946, the United Nations General Assembly affirmed the principles of international law recognized in the Nuremberg Charter and judgments. However, the Nuremberg and Tokyo tribunals were both criticized on four grounds. First; that they were victors’ tribunals before which only that vanquished were called to account for violations of international humanitarian law. Second; that the defendants were prosecuted and punished for crimes expressly defined for the first time in instruments adopted by the victors at conclusion of the war. Thirdly; that the tribunals functioned on the basis of limited procedural rules that inadequately protected the rights of the accused. And fourth, that it was a tribunal of first and last resort, because it had no appellate chamber.90

In spite of the enormity of the issue of sexual violence during the Second World War, these critics did not consider the fact that only nominal attention was given to sexual violence against women, and the level of injustice caused to the countless victims was largely ignored. The critique also does not consider the protection of the rights of the victims alongside those of the

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89 Askin, op cit 163.
accused, as gender discrimination continued unabated in the arena of international criminal justice.

After the Nuremberg and Tokyo trials concluded, the Allied powers began a second series of trials for the prosecution of “lesser” war criminals. These trials were conducted by national military courts and drew their authority from Control Council Law No. 10 (CCL),\textsuperscript{91} which “established a uniform legal basis for the prosecution of war criminals and other similar offenders, other than those dealt with by the Nuremberg and Tokyo tribunals.”\textsuperscript{92}

2.5 The Control Council Law No. 10, 1946

The Control Council Law (CCL) No.10,1946 was an improvement on the Nuremberg and Tokyo charters as far as sexual violence against women was concerned. The CCL specifically listed rape as an atrocity or offence constituting a crime against humanity.\textsuperscript{93}

The CCL gave the Council jurisdiction over;

\begin{quote}
“\ldots atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”\textsuperscript{94}
\end{quote}

Unlike the Nuremberg which prosecuted only those who instigated the war, the CCL allowed for the prosecution of those persons responsible for carrying out war crimes, hence permitting the prosecution of a larger group of rapists.

\textsuperscript{91} Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Humanity and against Peace, Dec 20\textsuperscript{th} 1945, official Gazette of the Control Council for Germany, 49, 1946.
\textsuperscript{92} \textit{Ibid} at the preamble.
\textsuperscript{93} \textit{Ibid}, Article II, 1 (c).
\textsuperscript{94} \textit{Ibid}.
However, like in the Nuremberg trials, rape was not included in any of the indictments despite the overwhelming evidence establishing the existence of sexual abuses.\textsuperscript{95} Once again, those in charge of pursuing justice failed to recognize or give due attention to the occurrence of sexual violations against women.

Although the CCL trials, like the Tokyo trials, recognized sexual violence against women, they failed to ensure the future and consistent prosecution of such crimes. However, the next fifty years produced a number of agreements that compensated for some of the omissions of the Nuremberg, Tokyo, and CCL trials and that offered a glimmer of hope that the future would give priority to sexual violence in international criminal law.

\subsection*{2.6 Post Nuremberg, Tokyo and Control Council Law No. 10 Developments}

After the Nuremberg, Tokyo, and CCL trials, the international community drafted several humanitarian law instruments to increase the attention paid to sexual violence in times of war.\textsuperscript{96} Some of these documents were specifically developed to address wartime crimes against women and the need for their protection. Others were developed to address human rights generally, but through their application, encompassed the specific issue of gender based crimes. Although these instruments were not instant or perfect cures for the neglectful treatment of women under international law, they played an integral part in the development of international humanitarian law and increased the awareness of gender based crimes and the need for effective prevention and punishment.

\textsuperscript{95} Sellers, \textit{op. cit} at 163.

\textsuperscript{96} \textit{Ibid}. 

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The first post Second World War humanitarian law instrument was drafted under the direction of the United Nations General Assembly for the codification of the laws of Nuremberg.\textsuperscript{97} The “Nuremberg Principles”\textsuperscript{98} articulated seven governing principles of international law including individual responsibility for the commission of international crimes; the right to fair trial procedures in international law; and the recognition of crimes against peace, war crimes and crimes against humanity as international crimes.\textsuperscript{99} These principles define the crimes by listing the general elements of each, and enumerate offences falling within their reach.

Despite evidence of sexual violence described in the trials, the Nuremberg principles mirror the events of the trials, yet fail to mention or address sexual violence or rape as an internationally recognized crime.

2.7 The Geneva Conventions, 1949

The Geneva Conventions are a set of treaties regarding humanitarian issues of civilians and combatants in wartime. The four Geneva Conventions of 1949 explicitly recognized issues particular to women in wartime.\textsuperscript{100} The Conventions detail the protection states owe to specific groups, and each of the four conventions contains a list of identical grave breaches or serious

\textsuperscript{97} By General Assembly Resolution, the International law Commission developed the Nuremberg Principles: Seven principles of international law recognized by the charter and judgment of Nuremberg. 5 UNGA, 2\textsuperscript{nd} Session, Supplement No. 12 at UN Doc A/1316 (1950).


\textsuperscript{99} \textit{Ibid.}

\textsuperscript{100} The convention signed at Geneva on August 12, 1949 consists of the following: Geneva Convention for the Amelioration of the Condition of Wounded and Sick in the Armed Forces in the Field, Aug 12 1949, Geneva Convention for the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug 12\textsuperscript{th} 1949, Geneva Convention Relative to the Treatment of Prisoners of War, Aug 12\textsuperscript{th} 1949, Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug 12\textsuperscript{th} 1949.
violations, consisting of violence to life and person, in particular murder of all kinds, torture or inhuman treatment.\textsuperscript{101} The Common Article 3 prohibits;

“a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

b) taking of hostages;

c) outrages upon personal dignity, in particular humiliating and degrading treatment.”

While Common Article 3 of the Conventions can be interpreted to implicitly prohibit all forms of sexual assault,\textsuperscript{102} the most important of the four conventions for advancing prohibitions of violence against women is the Fourth Geneva Convention of 1949 which “unequivocally and without precedent prohibits rape and forced prostitution.”\textsuperscript{103}

Although rape is not expressly listed among the enumerated “grave breaches” of the Fourth Geneva Convention, and thus not subject to universal jurisdiction,\textsuperscript{104} Article 27 of the Convention provides that: “Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

It goes on to provide that;

“….women shall be especially protected against rape, enforced prostitution, or any form of indecent assault.”\textsuperscript{105} This express prohibition of rape indicates great progress in the recognition of sexual crimes after the Second World War trials.

A woman who has been sexually violated suffers in a very personal way in terms of loss of dignity, self- worth, stigma which affects her participation in public activities impeding her self-

\textsuperscript{101} Theodore Meron, \textit{op. cit.}
\textsuperscript{102} Common Article 3 of the Geneva Conventions of 1949 prohibits “violence to life and person, in particular mutilation, cruel treatment and torture, and outrages upon personal dignity.
\textsuperscript{103} Fourth Geneva Convention \textit{op cit.}
\textsuperscript{104} Askin \textit{op. cit.} at 245.
\textsuperscript{105} Convention Relative to the protection of Civilian Persons in Time of War, Aug 12\textsuperscript{th} 1949.
actualization, However, the language of the statute and its allusions to honour and dignity does not adequately recognize the harm and injustice of rape as an attack on an individual woman.

Instead, such language minimizes the injustice of rape and fails to acknowledge that the harm a woman suffers is deeper than just a mere infliction upon her personal honour or that of her family, or community. Rather, it is a harm felt much more intensely and personally. Furthermore, rape does not only offend a woman’s dignity, but can also result in permanent damage to her sense of safety and view of reality and security.106

The prohibitions of the Geneva Conventions were supplemented and extended with the adoption of two protocols; Additional Protocols I and II. The Additional Protocols to the Geneva Conventions strengthened the message that rape was prohibited in both international and internal armed conflicts.107 The Additional Protocol I applies to international armed conflicts and specifically states that women shall be the object of special respect and shall be protected in particular against rape, forced prostitution or any other form of indecent assault.108 The two protocols extend the protections of the Geneva Conventions to include both international and internal conflicts as well as to periods after the war ends if the territory is still under foreign occupation.109

None of these provisions prohibiting sexual assault against women are accompanied by guidelines on how women victims should be handled, neither do they acknowledge the need, nor

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107 Askin, op.cit War Crimes Against Women: Prosecution in War Crimes Tribunals op. cit at 246.
108 Additional protocol I op. cit, article 76.
109 Additional Protocol I op. cit, article 4(2)(e).
provide for responsive interventions that would serve to restore the dignity of women willing to testify on their sexual assaults before the courts.

In the 1949 Geneva Conventions and Additional Protocol I, certain crimes are designated as “grave breaches.”\textsuperscript{110} Classification of a particular crime as a grave breach is significant because states have a duty to search for persons alleged to have committed grave breaches and, if found within their territory, to bring them before their courts or alternatively to extradite them for prosecution.

The effect of the grave breach system is to create a hierarchy, with some violations of the law of armed conflict considered more egregious than others. Sexual violence is not expressly designated as a grave breach, although the view that sexual violence fits within categories of grave breaches, such as “wilfully causing great suffering or serious injury to body or health”\textsuperscript{111} and “torture or inhuman treatment”\textsuperscript{112} has gained considerable acceptance. Nonetheless, the absence of express reference to sexual violence as a grave breach is a reflection of the international community’s historical failure to appreciate the seriousness of sexual violence during armed conflict.

Failure of these instruments to categorize sexual violence as a violent crime that attacks bodily integrity presents a serious obstacle to addressing crimes of sexual violence against women. It directly reflects and reinforces the trivialization of such offences and entrenches gender

\textsuperscript{110} Article 50 of Geneva Convention I and article 85 of Additional protocol 1.
\textsuperscript{111} Sexual Violence and Armed Conflict: United Nations Response, UN Division for the Advancement of Women, Department of Economic and Social Affairs, April 1998.
\textsuperscript{112} Ibid.
discrimination against women who are disproportionately affected by sexual violence in conflict situations.\textsuperscript{113}

2.8 The Declaration on the Protection of Women and Children in Emergency and Armed Conflict, 1974

Another attempt at addressing the need for protection of women in times of conflict is the Declaration on the Protection of Women and Children in Emergency and Armed Conflict.\textsuperscript{114} The Declaration recognizes the particular suffering of women and children during armed conflict. It emphasizes the important role that women play in society, in the family and particularly in the upbringing of children, and the corresponding need to accord them special protection.

The Declaration also urges states to comply with their obligations under international instruments, including the 1949 Geneva Conventions that offer important guarantees of protection for women and children.\textsuperscript{115} However, there is no explicit reference to women’s vulnerability to sexual violence during armed conflict.

Clearly, at the time the Declaration was adopted, concern over the situation of women during armed conflict was closely connected with their role as mothers and caregivers, and very little recognition was given to issues affecting women in their own right. However, the Declaration does make a general plea for compliance with the laws of armed conflict. It also stipulates that all necessary steps shall be taken to prohibit, among others, degrading treatment and violence, which may be considered to implicitly encompass sexual violence.\textsuperscript{116} Although this document

\textsuperscript{114} Declaration on the Protection of Women and Children in Emergency and Armed Conflict Proclaimed by the UN General Assembly Resolution 3318 (XXIX) of 14\textsuperscript{th} December 1974, accessed at http://www.unhcr.ch/html/menu3/24.htm. On 28\textsuperscript{th} May 2008
\textsuperscript{115} Ibid.
\textsuperscript{116} Ibid , Article 4.
fails to address specifically the issue of wartime rape, the preamble does acknowledge that women are “too often the victims of inhuman acts during periods of armed conflict and are in need of special protection.” 117

The Declaration also establishes mistreatment of women during war as a criminal offence. 118 While the document adds validity to the need to recognize the exposure of women to sexual violence in conflict situations, it is only a non-binding declaration. Thus, it plays a limited role in ending or reducing foreseeable, gender-specific war crimes. It is not binding on international criminal tribunals but can be used as a basis for the tribunals to take deliberate steps to address sexual violence against women in conflict situations.

2.9 Conclusion
This chapter aimed at determining the extent to which international criminal tribunals have taken gender concerns into consideration when addressing sexual violence. It has discussed the manner in which the international military tribunals established after the Second World War dealt with cases of sexual violence.

It observes that the omission of gender based crimes from the language of the Nuremberg and Tokyo tribunals’ charters demonstrate the historical inattention paid to the injuries women suffer during conflict situations. This is further demonstrated by the failure to prosecute such crimes under the charters’ expansive language, and the failure to take advantage of its flexible jurisdiction granted to the tribunals by their respective charters. The tribunals passed on the opportunity to vindicate the rights of women and allowed the crime of rape to remain virtually unexposed and unpunished. This failure by the Nuremberg and Tokyo Tribunals to appropriately

117 Ibid.
118 Ibid, Article 5.
prosecute sexual crimes and their continued minimization of the harm suffered by women victims of sexual violence in times of conflict, resulted in the absence of forceful precedent for future punishment of wartime sexual assaults.

In Kenya, the unresolved past human rights violations that were at the root of the violent electoral conflict in 2007/2008 included sexual and gender based violence and this conflict was characterized by widespread cases of SGBV.\textsuperscript{119} The Constitution of Kenya,\textsuperscript{120} international treaties to which Kenya is party and international customary law all call for prompt, thorough and impartial investigations into violations of human rights, including SGBV.

These institutional failures demonstrate the discriminatory trends against women by the international community, evidenced by the refusal to adequately recognize the need for the legal protection of women against sexual violence in conflict situations.

The next Chapter discusses the institutional framework for addressing sexual violence in contemporary international criminal tribunals. It analyses the relevant provisions of the statutes of the International Criminal Tribunal for former Yugoslavia, the International al for Rwanda and the Special Court for Sierra Leone.


\textsuperscript{120} Constitution of Kenya, Chapter 4, Bill of Rights.
CHAPTER THREE

INSTITUTIONAL FRAMEWORK AND LITERATURE ON SEXUAL VIOLENCE:
KENYA AND INTERNATIONAL CRIMINAL TRIBUNALS

3.1 Introduction

In Chapter # we argued that the omission of gender based crimes from the language of the Nuremberg and Tokyo Tribunals’ charters demonstrated the historical inattention to injuries women suffer during conflict situations. This led to the absence of forceful precedent for future punishment of wartime sexual assaults.

Currently, Kenya does not have an institutional framework for addressing systematic gender based violence arising out of conflict situations. This chapter examines the progress made by international criminal law in ensuring justice for women subjected to sexual violations during conflict situations and seeks to answer the questions to whether the international criminal justice system as currently structured is effective in addressing the plight of victims of rape in conflict situations to what extent have the international criminal tribunals taken gender concerns into consideration when addressing sexual violence.

The Chapter analyses definitions and substantive provisions in statutes of the international criminal tribunals, among other international instruments. It further analyses procedural provisions that guide the hearing and determination of cases of sexual assault against women and girls during conflict. It concludes that the existence of laws and procedures for dealing with sexual violence against women in conflict situations has not necessarily translated to justice for women survivors of sexual violence.
The sexual violence committed during the conflicts in former Yugoslavia and Rwanda were, different in the sense that they were committed as part of a deliberate system of ethnic cleansing,\textsuperscript{121} as an official policy of war to get rid of an “unwanted group.” In both conflicts, women were the channels for humiliation, subordination and emotional destruction of entire communities to cause people to flee. Forced impregnation of women by a member of a different ethnic group was used to ensure destruction or removal of communities.\textsuperscript{122}

Both the ICTY and ICTR have made significant advances in the recognition of sexual violence in the former Yugoslavia and Rwanda conflicts, and allowed new jurisprudence to emerge, increasing the likelihood that wartime abuse against women would henceforth be rigorously prohibited, prosecuted and punished. However, these advancements have not been flawless.

3.2 The International Criminal Tribunal for Former Yugoslavia

The massive and widespread sexual violence in the Bosnia-Herzegovina conflict was a key element in motivating the creation of the International Criminal Tribunal for Former Yugoslavia.\textsuperscript{123} The sexual assaults were committed as a method of ethnic cleansing of the regions and occurred with such regularity that it required international response.

The ICTY was granted jurisdiction to “prosecute persons responsible for serious violations of international humanitarian law” committed in former Yugoslavia, including grave breaches of the Geneva Conventions of 1949; violations of the law or customs of war; genocide and crimes against humanity.\textsuperscript{124} It also mandated the prosecution of perpetrators of sexual assaults, which

\textsuperscript{121} Sharon Healy, \textit{(1995), Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia, 21 Brooklyn Journal of International Law, 327,366-367.}
\textsuperscript{122} Askin \textit{, op cit 270.}
\textsuperscript{123} Prosecutor v Anto Furundzija IT-95-17?1-A(21 Juky 2000) para 201.
\textsuperscript{124} \textit{Ibid} at articles 1-5.
makes a significant development in the recognition and protection of women’s rights in times of war.\textsuperscript{125}

The ICTY was a creation of the UN Security Council Resolution 798 of 1994, which paved way for its establishment in the aftermath of the war in Bosnia Herzegovina, in which systematic rape was used as a war instrument, an estimated 20,000-50,000 women were sexually violated in the war.\textsuperscript{126}

The Resolution contains the first ever condemnation by the UN Security Council of rape in war, declaring the Security Council to be “appalled by reports of the massive, organized and systematic detention and rape of women, in particular Muslim women, in Bosnia and Herzegovina.”\textsuperscript{127} The sexual assaults were committed as a method of ethnic cleansing of the regions and occurred with such regularity that it required international response.

The ICTY statute contains provisions that expressly or impliedly offer protection to victims and witnesses of sexual violence before the tribunal. Article 2(b) of the ICTY Statute identifies “torture and inhumane treatment” as a grave breach of the Geneva Conventions. Article 3 of the Statute prohibits violations of the laws and customs of war, including torture.”\textsuperscript{128}

Rule 96 of the Statute states that in cases of sexual assault; first no corroboration of the victim’s testimony is required, second, prior sexual conduct of the victim is inadmissible evidence and

\textsuperscript{125} Patricia Sellers, & Kaoro Okuizumi (1997) International prosecution of sexual assaults 7 Transnational and Contemporary Problems, 45,47.


\textsuperscript{127} SC Resolution 798(1992) Three years earlier, after the invasion of Kuwait by Iraq, a UN report documented the prevalence of rape perpetrated against Kuwaiti women by Iraqi soldiers during the invasion, but the UN Security Council did not refer to sexual violence against women in its resolutions relating to the Gulf conflict. See “Sexual Violence in Armed Conflict: United Nations Response” by the UN Division for the Advancement of Women (April 1998).

\textsuperscript{128} ICTY Statute op. cit Rule 96.
third, consent is not a defence in situations in which the victim was subjected to or reasonably believed she was subjected to the threat of violence to herself or another.\textsuperscript{129} Kenya’s Sexual Offences Act contains similar provisions, recognizing that corroboration is often difficult to achieve, given the circumstances under which rape occurs.

These provisions address the need for greater procedural protection of women as victims of sexual assault. The protective language recognizes the coercive nature of rape and offers protection for a victim against the humiliation and difficulty of verifying her horrific ordeal. It also protects the victim against a defence attorney’s attempt to argue that the victim invited or accepted her abuse.

Furthermore, the use of the broad term “sexual assaults” illustrates the ICTY’s desire to prosecute not only rapes, but other types of sexual crimes as well.\textsuperscript{130} Each of these provisions strengthens the protection of victims, which should encourage them to come forward with their stories so that the perpetrators of these heinous crimes can be brought to justice.

The ICTY has made significant strides in addressing impunity for sexual violence against women in conflict situations. At the prosecutor’s request, a range of protective measures for victims and witnesses were adopted. Some of the protective measures include the use of pseudonyms; the editing of court transcripts to delete reference to the victim’s identity (redaction); the giving of testimony in camera and by one-way closed-circuit television; scrambling of victims and witnesses voices and images; and prohibitions on photographs,
sketches or videotapes of victims and witnesses. These practices have been adopted by the ICC.

In the ongoing Kenya cases witnesses have been allowed to provide *in camera* testimonies or have their identities redacted and voices and images scrambled for their protection.

The most controversial aspect of the protective measures granted by the ICTY has been the decision to allow, provided that certain conditions are met, the identity of some victims and witnesses to be kept from the accused even at the trial stage. This has been considered to be a violation of the accused person’s right to a fair trial as guaranteed by international human rights instruments.

At the hearing of the Kenya case at the ICC, the prosecution pressed for stringent witness protection measures. The prosecution cited the difficulty of the Kenyan cases after the identity of the first witness identified as Witness 536 was feared to have been exposed after her testimony. The procedure allowing derogation from the rights is in the interest of fairness in the context of the exceptional circumstances faced by witnesses, including raped women.

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131 ICTY Bulletin *op. cit* at 5.
133 For example, the first witness only known as Witness 536 in the ICC testifying against Kenya’s Deputy President William Ruto only appeared as pixilated coloured squares, her identity kept secret to protect her from attack. Accessed at articles.latimes.com/2013/Sep/17 on 15th July 2014.
In addition to offering protection to victims testifying, the ICTY Rules of Procedure and Evidence adopted on February 11, 1994 provide for the creation of a Victims and Witnesses Unit.\(^{137}\) The Victims and Witnesses Unit recommends protective measures for victims and witnesses. It also requires counselling and support for sexual assault survivors and witnesses.\(^{138}\) The Rules also require a “supportive and responsive legal ear” to those affected by sexual violence. Counselling is included as part of the support. This is an important measure towards encouraging the reporting of incidents of sexual violence.\(^{139}\)

Section (B) of the same rule requires that “due consideration shall be given, in the appointment of staff, to the employment of qualified women.”\(^{140}\) Once again, ICTY has acknowledged the importance of maintaining a female presence in the investigations and prosecutions of rape and sexual assaults. The creation of procedural rules sensitive to the needs of victims of sexual assault by the ICTY is an encouraging step toward the emergence of a gender-conscious approach to sex-crime prosecutions of perpetrators of wartime sexual assaults.\(^{141}\)

The ICTY statute explicitly lists rape as a crime against humanity for the first time in the history of ICTs.\(^{142}\) The explicit enumeration of rape in the Statute is a great advance from the tribunals of Nuremberg and Tokyo. Unfortunately, it is only enumerated as a crime against humanity. The failure to include rape or other sexual violations included in the Statute, such as the provisions on grave breaches (Article 2), violations of the laws and customs of war (Article 3) or genocide

\(^{137}\) ICTY Statute, Rule 34.


\(^{139}\) Coan, \textit{op cit} at 225.

\(^{140}\) ICTY Rules \textit{op cit} Rule 34 (B).


\(^{142}\) ICTY Statute, Article 5(g).
(Article 40), lessened the tribunal’s ability to effectively recognize and redress the harms suffered by thousands of women.

The provisions of the ICTY helped establish critical elements for successful prosecution of sexual violations. Due to these provisions, cases of sexual violence were reported, taken seriously, and thoroughly investigated. The creation of the position of Legal Advisor for gender issues was aimed at ensuring that the large number of sexual violence allegations would be properly addressed.

There is no doubt that the appointment of a Legal Advisor for gender issues greatly improved the ICTY’s approach to prosecuting sexual violence. It recognized the folly of ignoring gender in the quest for justice for women victims of sexual violence in conflict situations. It also provided an important focus for international dialogue on the issue. In addition, one investigation team was established specifically to investigate sexual violence,\textsuperscript{143} because “teams that are gender integrated tend to look at the sexual assault component of investigations earlier and with more profundity.”\textsuperscript{144}

The ICTY has held that rape and other forms of sexual violence may constitute, albeit implicitly, grave breaches of the Geneva Conventions, laws or customs of war and genocide.\textsuperscript{145} However, specific language addressing gender concerns in other provisions of the ICTY Statute is lacking. This may be seen as reinforcing the assumption that the particular harms suffered by women during armed conflict do not reach the level of severity of those harms suffered by men.

\textsuperscript{143} UN Report of the Secretary- General on Rape and the abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia, (A/51/557), 25 October 1996, para 23.
\textsuperscript{144} ICTY Bulletin no. 7, 21 June 1996, at.5.
The International Criminal Tribunal for Rwanda was established shortly after the ICTR in response to the genocide that took place in Rwanda in 1994. Both the ICTR Statute and the Rules of Procedure and Evidence\textsuperscript{146} were greatly influenced by the ICTY Statute.

3.3 The International Criminal Tribunal for Rwanda (ICTR)

The International Criminal Tribunal for Rwanda was established by the United Nations Security Council in response to the 1994 genocide in Rwanda. The ICTR was established “for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda between January and December 1994.”\textsuperscript{147}

It is estimated that many thousands of women were subjected to sexual violence during the Rwanda conflict. As in Yugoslavia, women were individually raped, gang raped, raped with objects, sexually mutilated and held in sexual slavery.\textsuperscript{148} These atrocities, among many others, were committed as part of a deliberate plan to terrorize and destroy the Tutsi ethnic group.\textsuperscript{149}

Just like the ICTY, the ICTR Statute explicitly enumerates rape as a crime against humanity.\textsuperscript{150} The ICTR statute provides as much scope for addressing sexual violence as the ICTY. In fact, in addition to listing rape as a crime against humanity as the ICTY does, the ICTR Statute also expressly refers to “rape, enforced prostitution and indecent assault” as violations of Common Articles 3 of the 1949 Geneva Conventions and Additional protocol II.\textsuperscript{151}

\textsuperscript{146} UN Doc IT/32,33 1994.
\textsuperscript{147} ICTR Statute, Special Resolution 955, UNSC 49\textsuperscript{th} Session.
\textsuperscript{149} Ibid.
\textsuperscript{150} ICTR Art 3(g).
\textsuperscript{151} The jurisdiction of the Rwanda Tribunal differs from that the Yugoslav tribunal due to the fact that the Rwanda situation is primarily classified as an internal conflict, while the conflict in former Yugoslavia has elements of both
However, one notes, that in drafting the ICTR statute, no adequate measures were put in place to deliberately deal with the violations of a sexual nature against women. In appointing judges and other support staff for the ICTR, there was no requirement for gender expertise, neither was there provision for special units that would deal with issues of sexual violence. There was nothing to give women the confidence to appear before and expect justice from the tribunal.

The Special Court for Sierra Leone established after conflict in Sierra Leone is a unique court set up to address atrocities committed in that country. It adopted some of the features and approaches of both the ICTY and the ICTR.

3.4 The Special Court for Sierra Leone

The Sierra Leone conflict (1991-2002) began in March 1991 with the launch of an attack by the Revolutionary United Front (RUF). The RUF became known for gender based crimes such as widespread rape, sexual slavery and forced marriage.\textsuperscript{152}

Throughout the nine-year Sierra Leonean Conflict, there was widespread and systematic sexual violence against women and girls including individual and gang rape.\textsuperscript{153} Sexual assault was carried out in many forms; with objects such as firewood, umbrellas and sticks. In thousands of cases, sexual violence was followed by the abduction of women and girls and bondage to male combatants in slavery like conditions often accompanied by forced labour.\textsuperscript{154}


The Special Court for Sierra Leone (SCSL) was established in 2002 at the request of the Government of Sierra Leone to bring to justice those most responsible for atrocities carried out in its territory during the internal conflict that began in 1991. It is a tribunal established to try “those bearing the greatest responsibility” for serious violations of international humanitarian law and certain provisions of Sierra Leonean domestic law since November 30, 1996.\textsuperscript{155} The Court became operational in 2003. The SCSL became the first court to complete its mandate and transition to a residual mechanism in 2013.\textsuperscript{156}

Unlike the ICTY and ICTR, the SCSL is a “mixed” tribunal comprising both international and domestic elements. Its jurisdiction and procedures are governed by the Statute, which was appended to the Agreement, and by its Rules of Procedure and Evidence, which the judges drafted.\textsuperscript{157} The Court is often referred to as a “hybrid tribunal” because of its mixed jurisdiction and composition.

The Special Court has jurisdiction over crimes against humanity,\textsuperscript{158} serious violations of Article 3 Common to the Geneva Conventions,\textsuperscript{159} intentional direction of attacks against humanitarian or peacekeeping personnel,\textsuperscript{160} conscription of children into armed forces or groups and using them to participate actively in hostilities,\textsuperscript{161} and some aspects of Sierra Leonean law relating to the abuse of girls and arson.\textsuperscript{162} The report of the Secretary General explains that genocide was not

\begin{footnotes}
\footnotetext[155]{This limitation on the temporal jurisdiction of the war, based on the date of the failed Abidjan Accord, was intended to keep the budget was intended to keep the budget down in comparison to the other international criminal tribunals.}
\footnotetext[156]{Residual Special Court for Sierra Leone Agreement(Ratification) Act 2012, accessed at \url{www.rscsl.org} on 14th July 2014}
\footnotetext[157]{These rules are an altered and abbreviated version of the Rules of the ICTR. They were amended on August 1, 2003.}
\footnotetext[158]{Special Court Statute, Art. 2.}
\footnotetext[159]{\textit{Ibid} Art 3.}
\footnotetext[160]{\textit{Ibid} Art 4(b).}
\footnotetext[161]{\textit{Ibid} Art 4(c).}
\footnotetext[162]{\textit{Ibid} Art 5.}
\end{footnotes}
included because of lack of evidence that killing was perpetrated in Sierra Leone “against an identified national, ethnic, racial or religious group with intent to annihilate the group as such.”163 Grave breaches of the Geneva Conventions of 1949 are also excluded, largely because the conflict was seen as domestic and grave breaches apply only to international conflicts.

The inclusion of domestic crimes in the Statute has been attributed to various factors. In part, it is an attempt to legitimize and revitalize the existing domestic legal system, which many see as complex and inaccessible.164 It has been attributed to gaps in international law regarding arson and crimes against girls and an attempt to ground the Court in the specific circumstances of the Sierra Leone conflict.165

The SCSL operates a witness-protection programme intended to meet victims’ and witnesses’ needs, including psychological assistance before, during and after trial. Most witnesses before the Court benefit from protective measures. There has been at least one contempt proceeding pending for disclosure of the identity of a protected witness. Some witnesses have required relocation, either to neighbouring countries, usually under informal arrangements or overseas.166

In the Kenya post-election violence situation, the Director of Public Prosecution (DPP) acknowledged that sexual and gender based violence (SGBV) is one of the most heinous forms

165 Ib id at 363-366.
166 Keriako Tobiko, 2011, Responses to Sexual and Gender based Violence (SGBV) in Kenya, A speech by the Kenya Director of Public prosecutions during the National Consultations leading to the International Conference on the Great Lakes Region (ICGLR) special session on SGBV, 25th-26th October 2011.  
165 Ib id.  
165 Ib id.
of criminality and has been used to perpetuate international crimes.\textsuperscript{167} According to the DPP, prosecuting SGBV is majorly hampered by poor investigations due to lack of tools and facilities to collect and preserve evidence.\textsuperscript{168}

Worse still, the prosecutors lack appropriate training and skills to prosecute SGBV. The office of the DPP has admitted to facing serious challenges in prosecuting rape and other sexual atrocities that were committed during the 2007 post-election violence.\textsuperscript{169} Some of the difficulties identified by the prosecution include late reporting of cases, lack of medical records and difficulty in identifying perpetrators, especially where the accused are security officers. The DPP appointed a task force to review, re-evaluate and examine files related to PEV.

According to the status report released by the task force, the DPP’s office has so far reviewed 4,408 of 6081 files relating to PEV. Only 24 post-election violence suspects have been prosecuted out of the 6,081 cases presented to the task force for review by the police. Out of the 24 cases, 11 relate to SGBV. However, the quality of evidence available is such that they could not sustain convictions due to difficulties in gathering and preserving evidence during the mayhem.

The situation is further compounded by the fact that getting convictions in cases previously investigated under the Penal Code before the domestication of the International Crimes Act, 2008 presents legal challenges, as the law cannot apply retrospectively. The DPP recommended
the establishment of a special unit of the High Court to accelerate the disposal of cases relating to PEV.\footnote{Athman Amran, The Standard, 18\textsuperscript{th} May 2012, Post-election violence suspects may face international law. accessed at www.standardmedia.co.ke on 14\textsuperscript{th} July 2014.}

3.5 Conclusion

This chapter has discussed the roles and mandates of contemporary international criminal tribunals, The ICTY, ICTY and SCSL, with a view to determining the extent to which international criminal tribunals taken gender concerns into consideration when addressing impunity for sexual violence in conflict situations.

The discussion concludes that the attention paid to the sexual crimes in Yugoslavia and Rwanda and to their subsequent prosecutions has resulted in an increased recognition of gender-based war crimes under international law. The jurisprudence of the tribunals represents a momentous advance in the international law and attitude toward prosecuting gender crimes committed in times of conflict. Women may have a greater understanding of the personal and exploitive nature of sexual assaults, and female presence in the ICTY contributed to prosecutions that were both successful and respectful of those involved. Yet, in spite of the strides, neither tribunal’s statutes nor rulings codified internationally accepted principles of criminal law that would bind countries.

The discussions justify the hypothesis that when key officials of the tribunals such as investigators are not sufficiently gender competent, investigations tend to be ineffective as sexual violence is either misunderstood or dismissed as less significant, too time consuming and difficult to prove.
The conceptual developments in this area provide the legal tools to ensure accountability at all levels of the chain of command, and for all aspects of these crimes. The way is now open for international judicial bodies and domestic courts to prosecute gender based crimes as war crimes, grave breaches of the Geneva Conventions, crimes against humanity, and genocide. Victims and witnesses are protected by a gamut of procedural safeguards, which may provide a basis for domestic legal reform of rape and sexual assault laws.
CHAPTER 4

CASE STUDIES AND COMPARISONS OF PROSECUTION AND PUNISHMENT OF SEXUAL OFFENDERS IN INTERNATIONAL CRIMINAL TRIBUNALS

4.0 Introduction

In Chapter 3 we argued that the focus on sexual violence by the International Criminal Tribunal for former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone demonstrated an increased recognition of gender based war crimes under international law. Although these tribunals have made significant progress in developing jurisprudence on the subject, neither their statutes nor rulings are binding on domestic jurisdictions.

On the Kenya post-election violence situation, the International Criminal Court has an indictment on rape and other forms of sexual violence, constituting a crime against humanity in violation of article 7(1)(g) of the Rome Statute.\(^\text{171}\) The Kenyan indictments went to the International Criminal Court after failed attempts to conduct a criminal investigation of the key perpetrators in Kenya. This was in accordance with the recommendations of the Commission on Inquiry to investigate the post-election violence.

This Chapter seeks to answer the question: to what extent have international criminal tribunals taken gender concerns into consideration when addressing sexual violence? It presents samples of cases that have contributed to gender sensitive interpretation of international crimes. It examines the prosecution processes of these tribunals in handling cases of sexual violence and identifies the challenges faced by the tribunals in dealing with such cases.

\(^{171}\) Prosecutor v. Uhuru Muigai Kenyatta, ibid
It acknowledges that significant progress has been made in addressing sexual violence in conflict situation. However, the outcomes of the trials have fallen short of the expectations of victims and survivors of sexual violence. The chapter concludes that justice by the international criminal tribunals could better be served through the establishment of local national prosecution structures.

The cases of Dusko Tadic, Dragan Nikolic, Anto Furundzija (ICTY), Jean paul Akayesu, Pauline Nyiramasuhuko (ICTR) and Foday Sankoh, Issa Sesay, Johny Paul Korom, Sam Hinga Norman (SCSL) have been selected taking into account the allegations of widespread sexual violence in the respective conflict situations from which they arose. They have been examined to determine the complexities involved in dealing with cases relating to sexual violence based on real experiences of ICTs.

They also illustrate the different ways in which the ICTs have interpreted international law in addressing the problem. They also demonstrate that in some situations, the ICTs have handled the cases in a manner that compromised the administration of justice for women victims and survivors of sexual violence in conflict situations.

174 Prosecutor v. Anto Furundzija IT-95-17/1.
175 Prosecutor v. Jean Paul Akayesu ICTR-96-4.
177 Prosecutor v. Foday Sankoh Special Court for Sierra Leone 2003-02-PT-054.
4.1 Dusko Tadic

Omarska Detention Camp

Dusko Tadic, was a citizen of former Yugoslavia of Serb ethnic descent. He was the first individual prosecuted for rape as a separate war crime, not in conjunction with other crimes. The Tadic trial resulted in a number of significant decisions for the future of sexual violence crimes under international law.

The first count of the indictment charged Tadic with a crime against humanity for taking part in a “campaign of terror which included killing, torture, sexual assaults, and other physical and psychological abuse” and for his participation in the torture of more than 12 female detainees including several gang rapes.\(^{179}\)

Subsequent counts alleged that Tadic had subjected a woman detainee to “forcible sexual intercourse” for which he was charged with grave breach,\(^{180}\) a violation of laws or customs of war,\(^{181}\) and a crime against humanity.\(^{182}\) Although acts of sexual assault were explicitly enumerated as a crime against humanity, the ICTY Office of the Prosecutor determined that these acts could also be prosecuted implicitly under other provisions of the statute: grave breaches, violations of the laws and customs of war, and genocide.\(^{183}\)

Although prosecutions under these provisions can be extremely difficult, they may be brought, not as enumerated crimes under Article 5(g), but because rape can be an element of proof (usually \textit{actus reus}) of the crimes set out in the three other provisions of the ICTY Statute. The

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\(^{179}\) Second Amendment Indictment, Prosecutor v Tadic, Indictment case no. IT-94-1-T.

\(^{180}\) Ibid at count 2 (inhuman treatment constituting a grave breach under article 2(b) of ICTY Statute).

\(^{181}\) Ibid, count 3 (Cruel treatment constituting violation of the laws and customs of war under article 3 of the ICTY statute).

\(^{182}\) Ibid, count 4 (Rape constituting crime against humanity under Article 5(g0 of the ICTY statute).

\(^{183}\) Sellers and Okizumi op.cit at 57.
broad interpretation of the ICTY Statute expanded the Tribunal’s ability to prosecute sexual assaults despite the omission of rape among the list of enumerated crimes from provisions other than article 5(g). This demonstrated the ICTY’s ability, flexibility and eagerness to prosecute those responsible for the sexual violence in the “Balkans” region (so-called because of the Balkan mountain range that dominates the landscape of the European peninsula that terminates with Greece but which is now considered derisive).\(^{184}\]

However, the independent rape charges were subsequently withdrawn because the witness was too afraid to testify for fear of reprisals. Nothing whatsoever was done to encourage or empower the victim of such horrendous ordeals.

The tribunal, just like in Nuremberg, unfortunately missed the opportunity to deal with issues of extreme fear and trauma suffered by women victims of sexual violence. Although the charges of rape were dropped, Tadic was convicted on charges of sex crimes involving violent and horrific sexual assaults and mutilation.\(^{185}\) However, the charges were brought for the assaults inflicted upon men, not women. Because the female witnesses refused to testify, the actions forming the basis of Tadic’s sexual assault charges were those committed against a group of men held in the Omarska camp.\(^{186}\)

The role of the psychologist, psychiatrist and other relevant professionals would have helped the Tribunal determine what made the women more afraid than the men, or whether men experienced sexual violence differently from women. This would have provided guidance and laid a basis for dealing with the two genders differently in cases of sexual violence.

\(^{185}\) Ibid.  
\(^{186}\) Ibid at 102.
The trial chamber’s decision was progressive towards addressing sexual violence in conflict situations for a number of reasons. First, even though it was not proven that Tadic had committed the sexual violence himself, he was still found responsible for his participation in the sexual violence at Omarska for being “aware of the policy of discrimination against non-Serbs.”\textsuperscript{187} The chamber found that customary international law “imposes direct individual criminal responsibility for criminal conduct upon an individual who has knowledge of and substantially effects the commission of an illegal act, even when the individual is not a primary participant.”\textsuperscript{188} Tadic was deemed an “inactive participant” in discrimination, or persecution that included acts of rape and other forms of sexual violence.\textsuperscript{189} Thus, Tadic’s presence and encouragement of the commission of sexual assaults were grounds for finding him criminally responsible for the acts themselves.

Second, although the remaining charges consisted of sexual assaults upon men, and therefore could not support a charge of prosecution on the basis of gender, the decision made specific note of the horrific sexual assaults that female Omarska prisoners endured. The decision also recognized the enormous pain and suffering of the female victims that resulted from sexual assaults.\textsuperscript{190} Publicly documenting and acknowledging the existence of rape and sexual violence both validates the prosecution of sexual violence crimes and assures the success of future attempts to punish violation against women.

Finally, by enforcing Rule 96 of the ICTY Rules of Procedure and Evidence which guides the taking of evidence in sexual assault cases, the trial chamber firmly established that corroboration

\textsuperscript{187} Tadic \textit{op. cit} at 477.
\textsuperscript{188} Askin \textit{op. cit} at 104.
\textsuperscript{189} Tadic \textit{op. cit} 61.
of an alleged sexual assault victim’s testimony is neither required by the ICTY nor is it a part of customary international law.\textsuperscript{191} The trial chamber itself recognized the importance of Rule 96 when it ruled that “the testimony of a victim of sexual assault is granted the same presumption of reliability as the testimony of victims of other crimes, something long denied to victims of sexual assault by the common law.”\textsuperscript{192}

By rejecting historical practices, the ICTY refused to impede the prosecution of sexual crimes with unfair procedural rules. This ruling acknowledges the gravity of sexual violations against women in conflict situations.

The role of the ICTY in addressing sexual violence in conflict situations can also be interrogated and evaluated in the case Dragan Nikolic,

\subsection{4.2 Dragan Nikolic

Susica Detention Camp

The case of Prosecutor v Dragan Nikolić\textsuperscript{193} demonstrates the proactive role of the ICTY in administering justice for impunity for sexual violence in the former Yugoslavia conflict.

Dragan Nikolić was commander of the Serb-run Sušica Detention Camp in the municipality of Vlasenica, Bosnia and Herzegovina in 1992. While in charge of the camp, he participated in creating and maintaining an atmosphere of terror and systematic sadism in the camp for the Bosnian Muslims and other non-Serb detainees. Nikolić personally killed nine people, and

\textsuperscript{191} Tadic \textit{op. cit.} at 536.
\textsuperscript{192} \textit{Ibid.}
\textsuperscript{193} In re Dragan Nikolić Indictment 9 The Prosecutor v Dragan Nikolić (1994) ICTY No IT-94-2-1.
tortured and beat other detainees. Under his guidance women of all ages were raped or sexually assaulted.\textsuperscript{194}

Even with the progress made by the ICTY, there were still problems with sexual violence investigations by the Office of the Prosecutor of the Tribunal. The indictment issued against Nikolić related to events which took place at the Susica Detention Camp in Eastern Bosnia and Herzegovina.\textsuperscript{195} At the indictment before the Trial Chamber, several witnesses gave evidence about sexual violence that had occurred at the Susica camp. On the basis of the evidence, the trial Chamber invited the Prosecutor to amend the indictment to include charges of sexual violence. The reasoning of the trial chamber was as follows:

“From multiple testimony and the witness statements submitted by the prosecutor to this Trial Chamber, it appears that women (and girls) were subjected to rape and other forms of sexual assault during their detention at Susica camp. Dragan Nikolić and other persons connected with the camp are alleged to have been directly involved in some of these rapes and sexual assaults. These allegations do not seem to relate solely to isolated instances. The Trial Chamber feels that the prosecutor may be well-advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolić with rape and other forms of sexual assault, either as a crime against humanity or as grave breaches or war crimes.”\textsuperscript{196}

This statement is remarkable in its activist concern for the prosecution of gender crimes. This was an unheard of stance for an international judicial body. It is also remarkable in its suggestion that the judges would be open to considering the indictment of rape and sexual violence beyond the enumerated ground of a crime against humanity. This implies that that the Tribunal was prepared to develop the jurisprudence around war crimes and grave breaches of the Geneva Conventions to include gender crimes. This groundbreaking position is significant considering that it came in one of the ICTY’s earliest judicial statements.


\textsuperscript{195} \textit{In re Dragan Nikolić: Indictment 9 The Prosecutor v Dragan Nikolić} (1994) ICTY No IT-94-2-1.

The attitude of the judges in the Nikolić case is reflected in the decision made by Judge Phillip Waki, Chair of the Commission of Inquiry into the Post-Election Violence in Kenya (CIPEV). The CIPEV was mandated to investigate the facts and circumstances surrounding the post-election violence and the conduct of state security agencies in handling the violence, and to make appropriate recommendations regarding these matters. Its mandate did not explicitly include gender considerations. However, the Commission noted that in the evidence presented before it, accounts of sexual violence consistently came up. Through consultations with non-governmental organizations, the Commission established the position of a gender advisor, which had not been factored into the Commission. Through the financial support of United Nations Development Fund for Women (UNIFEM, now UN Women), the position of the Gender Advisor to the CIPEV which was created.

The Commission, which put the number of sexual offences during the post-election violence at over 3000 observed that:

“sexual violence is a form of violence and as the Commission was about violence, it felt strongly that there should be a focus on it in its investigations and secondly, being people from various walks of life, the members of the Commission also were horrified by stories of sexual violence that came to their attention in the conduct of their survey. Like others, they too felt compassion for victims of post-election sexual violence and wanted to learn and expose what happened.”

Both the ICTY and CIPEV on their own motion proactively decided to ensure that sexual violence was given the attention it deserved in their respective situations, an encouraging position in the development of jurisprudence on international law.


198 CIPEV Report, at 238.
The other matter that has contributed to the jurisprudence on sexual violence in conflict situations before the ICTY was the case of Anto Furundzija.\footnote{Prosecutor v. Anto Furundzija IT -95-17/1, ICTY Chamber II, Dec 10, 1998.}

### 4.3 Anto Furundzija

**“The Jokers” Special Military Police**

Prosecutor v Anto Furundzija\footnote{IT -95-17/1, ICTY Chamber II, Dec 10, 1998.} demonstrates the value of a gender expertise on the bench, illustrating how ICTs can broaden the interpretation of international law to cover situations or concepts not expressly addressed in the law.

Anto Furundzija was the commander of a special military police unit called “the Jokers” and was charged with violations of laws or customs of war for his involvement and failure to stop or curtail the sexual assault of a Bosnian Muslim woman.\footnote{McDonald op cit at p 13.}

The charges of rape as a war crime were based on Article 4(2)(e) of the Additional Protocol II to the Geneva Conventions, which enumerates rape as a war crime under the rubric of “outrages upon personal dignity.” The Prosecutor submitted that substantive offences prohibited both “by treaty law”\footnote{Citing “the Geneva Conventions of 1949, Additional protocol I of 1977 and Additional Protocol II of 1977. Other serious sexual assaults are expressly or implicitly prohibited in various provisions of the same treaties” Para 165} and, most significantly, as a matter of customary international law, and made the finding that “it is indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators.”\footnote{Ibid para 270-275.}
Finding that earlier definitions of rape lacked specificity, the trial chamber developed a more explicit definition, one that “unequivocally encompassed forced oral or anal sexual acts.”

Furthermore, the court declared that Article 5 of the ICTY statute explicitly provided for the prosecution of rape while it implicitly covers other less grave forms of serious sexual assault as “other inhuman acts.”

Because of the explicit prohibition by the ICTY Statute, the court found support for its declaration that rape was “the most serious manifestation of sexual assault.” The ICTY once again recognized that rape is a form of torture and offered, for the first time, a broad and clearly articulated definition of rape.

In addition to expanding the Tribunal’s definition of and ability to prosecute rape, Furundzija also addressed the ICTY’s evidentiary requirements. The judgment was reached almost exclusively on the testimony of a female victim, Witness A, despite the defendant’s claim that the victim’s recollection of the events was impaired and unreliable as a result of her suffering from Post-Traumatic Stress Disorder (PTSD). This was in response to the defence’s attempt to discredit the evidence of Witness A on the basis of her trauma.

The Trial Chamber found Furundzija guilty, despite Witness A’s difficulty recalling particular details of the sexual assault. In so doing, the Chamber established the rule that even testimony of a witness suffering from PTSD as a result of sexual violence can be credible and accurate.

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204 Furundzija op.cit at 185. The Chamber defined rape as ‘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) the mouth of the victim by the penis of the perpetrator by coercion or force or threat of force against the victim or a third person.

205 Ibid at 175.

206 Ibid.

207 Ibid at 174-186.

The decision clearly articulated that “there is no reason why a person with PTSD cannot be a perfectly reliable witness.”

The Trial Chamber’s ruling expanded the definition of rape, laying a basis for greater protection to victims of gender based crimes; both were necessary tools in combating the defence’s efforts to discredit witnesses by manipulating the inevitable trauma and hardships suffered by a victim of gender based violence.

The defence counsel attempted to use the supposed activism of a female judge as a ground of appeal against a judgment of the ICTY. The counsel alleged in the Furundzija appeal that Judge Florence Mumba, who had presided in the case gave the appearance of bias. This was attributed to a period of time when she served as representative of the Zambian government on the United Nations Commission on the Status of Women (CSW).

The appellant argued that since the CSW had participated in a campaign for the reaffirmation of rape as a war crime, “an appearance was created that Judge Mumba had improperly sat in judgment that would advance a legal and political agenda which she helped create whilst a member of the CSW.”

The argument seemed to imply that a judge without any gender expertise would be fairer in presiding over such a case. This demonstrates how gender discrimination and bias may be directed not just at female victims or witnesses, but also at the female judicial officer on the basis of her gender expertise. In dismissing the allegation against Judge Mumba, the Appeals Chamber

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209 Ibid at 109.
210 Ibid.
211 Anto Furundzija v Prosecutor IT-95-17/1-A(21 July 2000).
212 Ibid at para 164-70.
213 Ibid at para 169.
elaborated the much changed international arena as regards gender crimes, an arena in which there is a “determination to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.”

The Chamber went so far as to say that even if Judge Mumba sought to implement the relevant objectives of CSW, the goals merely reflected the objectives of the United Nations, and were contemplated by the Security Council resolutions leading to the establishment of the Tribunal. Indeed, according to the Appeals Chamber, Judge Mumba’s prior membership of the CSW, far from rendering her biased, was actually an asset that should be considered part of the requisite experience of judges demanded by Article 13(1) of the ICTY Statute.

Although *Furundzija* played an integral part in the development of the ICTY’s ability to prosecute sexual violence in conflict situations based crimes, it also indirectly weakened incentives for victims to testify. In *Furundzija*, the defence’s objections regarding Witness A’s PTSD led the Trial Chamber to order the disclosure of private and highly personal counselling records, and to grant the defence permission to present evidence addressing Witness A’s treatment or counselling. In order to recover from the trauma of rape or sexual assault, it is often necessary for a victim to reveal the deeply personal feelings surrounding her attack.

A woman’s willingness to reveal these details depends on the belief that her counselling and relationship with her counsellor are confidential and that neither will be divulged. The possibility

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214 *Ibid* para 201.
215 Article 13 states that “in the overall composition of the Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.” For judicial analysis of the Article, see *ibid* para. 204-205.
216 *Ibid* at 22.
of these records becoming public could deter a woman from seeking counselling in order to avoid public disclosure of the intimate details of her sexual assault.

In the Kenya post-election violence situation, the evidence gathered by the Commission of Inquiry into the Post-Election Violence (CIPEV) pointed to the fact that the worst cases of sexual abuse occurred in the Kibera and Mathare slums of Nairobi, where hundreds of women and girls were gang raped by marauding youths and law enforcers. The CIPEV found that there were many cases of rape, gang rape, defilement, genital mutilation, sodomy, forced circumcision and insertion of objects and other forms of sexual exploitation. Yet only a handful of victims, 31 in all, were willing to share their experiences with the Commission.

If few women seek help in dealing with their trauma, fewer women may come forwards to testify against their assailants. Without the testimony of the victims, the ability to prosecute perpetrators of rape and other forms of sexual violence is severely, if not completely, curtailed. The ICTY’s release of personal records inexcusably increases the chances of such curtailment.

Criticism has been levelled against certain aspects of the ICTY as well as its jurisprudence. It has been noted that “the number of women in key positions remains low. Nevertheless it is generally acknowledged that reacting to the allegations of sexual violence against women and

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219 Ibid.
220 Charlesworth, H., Chinkin (2002) The law of International Boundaries notes that the number of women in key positions in international law generally remains low and that in the twelve international courts and tribunals studied in September 2002 women occupied only 26 of the 173 judicial positions, which translates to 14-15%.
appointing female staff is demonstration of a greater degree of understanding of the need for women’s participation, by the ICTY as compared to other ICTs.\textsuperscript{221}

As for ICTY jurisprudence, some have argued that the sentences eventually handed down for crimes of sexual violence have been too short,\textsuperscript{222} while others have complained that the tribunal has not gone far enough in delineating specific crimes of sexual violence against women. In comparison with the ICTY, the ICTR also dealt with the widespread sexual violence during the Rwanda conflict of 1994. The Trial Chamber in the case of Jean Paul Akayesu\textsuperscript{223} was the first to interpret and apply the 1948 Geneva Convention on the Prevention and Punishment of the Crime of Genocide.

4.4 Jean Paul Akayesu

The Rwanda Genocide

Prosecutor v Jean Paul Akayesu\textsuperscript{224} showcases the indifferent attitude with which sexual violence against women has been approached by sections of the international criminal justice process. It demonstrates how increasingly, ICTs have become proactive in ensuring that sexual violence in conflict situations is not casually excluded from the indictments by the prosecution.

The Rwanda genocide was sparked by the death of the Rwandan President Juvenal Habyarimana, of the Hutu ethnic group, when his plane was shot down above Kigali airport on April, 6,
Within hours a campaign of violence spread from the capital throughout the country, and did not subside until three months.

When the violence began in 1994, rape of Tutsi women was widespread. The targeted use of sexual violence against Tutsi women was fuelled by both ethnic and gender stereotypes; Tutsi women were targeted on the basis of the genocide propaganda which had portrayed them as calculated seductress-spies bent on dominating and undermining the Hutu. Tutsi women were also targeted because of the gender stereotype which portrayed them as beautiful and desirable, but inaccessible to Hutu men whom they allegedly looked down upon and were "too good" for. Rape served to shatter these images by humiliating, degrading, and ultimately destroying the Tutsi women.

Jean Paul Akayesu, former mayor of the Taba Commune in Rwanda, was the first international war criminal to be tried and convicted of genocide as defined in Article II of the Genocide Convention, 1949.

The original indictment against Akayesu did not allege sexual violence. The trial commenced, and when witnesses began to make consistent references in their testimony to widespread sexual violence in the Taba Commune, it became clear that the issue could no longer be disregarded. At this time, there was also an Amicus Curiae (friend of the court) brief filed by the Coalition of Women’s Human Rights in Conflict Situations (CWHRCS), which urged the ICTR to request an amendment of the indictment to include sexual violence.

227 Ibid.
228 Ibid.
229 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, May 1997.
This non-inclusion of gender considerations in addressing conflict related situations is reflected in the Kenyan situation. The Koffi Annan led mediation process came up with a Statement of Principles to guide the constitutional, institutional and legal reforms. These principles did not address gender and this omission was consequently reflected in the mandate of the CIPEV. The exclusion of gender in the terms of reference of the mediation process and its outcomes is a demonstration of the manner in which sexual violence is viewed generally, even in peacetime. This is not unique to Kenya, but is rather a reflection of how peace processes are handled in general across the region.

The “precedent shattering judgment” against Jean Paul Akayesu greatly expanded the international community’s ability to prosecute gender based war crimes. Genocide is defined in Article II of the Genocide Convention, 1949, which provides that:

“there must be an intention to destroy, in whole or in part, a national, ethnic, racial or religious group through the commission of such acts as killing or causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; impose measures to prevent births within the group; or forcibly transferring children of the group to another group”.

At first sight, rape does not appear to fall within this definition, but it has been forcefully argued that where it has been carried out on a massive and systematic basis for the purposes of

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230 The Statement summarizes the fourth agendum of the four point program of the mediation process namely: Immediate action to stop violence and restore fundamental rights and liberties. This consisted of efforts to enhance security, protect people and their property and restore respect for the sanctity of human life; Immediate measures to address the humanitarian crisis, promote reconciliation, healing and restoration; overcoming the political crisis; and, long term solutions.


232 Askin op cit at 122.

233 ICTR Statute, Article II(c).

234 Ibid Article II(d).

235 Ibid Article II(e).

236 Ibid Article (e).
producing babies of the ethnic class of the rapist, of destroying the family life of the victims and of cleansing the surrounding area of all other ethnic groups, rape becomes genocidal.

This argument has been further supported by allegations that impregnated women were forcibly detained until it was too late to abort.\textsuperscript{237} Although the 12 counts of the original indictment did not contain allegations of rape or sexual violence, witness testimonies and reliable reports, in addition to pressure from numerous human rights organizations, prompted further investigations that subsequently led to an amended indictment that charged the suspect with sexual violence.\textsuperscript{238}

Evidence of massive and systematic sexual violence was presented throughout the trial, ending any doubts that sexual violence was an essential and integral part of the genocide committed in Rwanda.\textsuperscript{239}

The amended indictment alleged that Akayesu had knowledge of, and at times was physically present during the commission of sexual violence against Tutsi civilians who sought refuge at the Taba police bureau.\textsuperscript{240} Sexual violence was defined to include the “forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse such as forced nudity.”\textsuperscript{241}

The ICTR in its judgment expanded the meaning of rape by stating that;

\textsuperscript{237} Kadic \textit{v. Radovan Karadžić}, Civil Action no. 43, CN 1163, United States District Court, Southern District of New York, see preliminary statement.

\textsuperscript{238} The original indictment was amended in 1997 to include charges of sexual violence as genocide (Counts 1-2; rape and sexual violence under Article 2(3)(a) of the ICTR Statute); crimes against humanity (count 13, rape, count 14; other inhuman acts); and violations of common article 3 of the Geneva Conventions (Count 15; outrages upon personal dignity, in particular rape, and degrading and humiliating treatment and indecent assault.


\textsuperscript{240} Amended indictment, Akayesu ibid.

\textsuperscript{241} Ibid.
“The tribunal defines rape as a physical invasion of a sexual nature, committed on a person, under circumstances which are coercive. The tribunal considers sexual violence, which includes rape, as any act of sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body, but may include acts which do not involve penetration or even physical contact.”

This expanded definition recognizes that violations of a sexual nature need not be physical. Perpetrators may be found guilty even when they have not touched the victim. This is important as it recognizes that individuals in positions of power may encourage sexual violence even if they do not personally participate in a sexual act in a conflict situation.

In the Kenyan post-election violence situation, when the then Police Commissioner Brigadier Hussein Ali appeared before the CIPEV, he stated that the police force had no statistics on SGBV because the force had not deemed it necessary to document them. The Commission concluded that this cavalier attitude towards sexual crimes by the police was due to the fact that its officers were perpetrators of some of the crimes.242

“It is the commission’s view that the involvement of state security agents in the perpetration of sexual violence and the fear of incriminating themselves may partly explain why the police omitted data on sexual violence in the reports they presented to the commission.”243

The Police commissioner’s response demonstrates a pattern of indifference to or denial of the sexual atrocities that took place during the crisis. The police were either unaware of the processes to follow or were simply guided by the social attitude to sexual and gender based violence that existed before the conflict.

The Trial Chamber in the Akayesu case observed;

“..."

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243 Ibid.
circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of interahamwe among refugee Tutsi women at the Bureau Communal. Sexual violence falls within the scope of ‘other inhumane acts’ set forth in Article 3(i) of the Tribunal’s Statute, “outrages upon personal dignity, “set forth in Article 2(2)(b) of the Statute…."

The victim had been subjected to the indignity of displaying her nakedness and even though there was no physical contact, the tribunal was satisfied that coercion of this nature was rape. The inclusion of forced nudity as a form of sexual abuse acknowledged the mental harm victims of violent sexual crimes suffer, even in the absence of physical harm.

This demonstrated the ICTR’s willingness to broadly prosecute sexual assaults. This is a progressive pronouncement which demonstrates the increasing sensitivity of international criminal tribunals to the need to protect women against sexual violence during conflict situations.

The inclusion of forced nudity as a form of sexual abuse acknowledged the mental harm victims of violent sexual crimes suffer, even in the absence of physical harm. This demonstrated the ICTR’s willingness to broadly prosecute sexual assaults.

Akayesu was found individually responsible for genocide committed as the Trial Chamber found that he committed the sexual assaults with a specific genocidal intent to destroy, in whole or in part, the Tutsis. By finding Akayesu also guilty of crimes against humanity for acts of sexual assault, the ICTR articulated a broad and progressive definition of rape, defining it as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”

By explicitly acknowledging that rape is a violation of personal dignity, the decision declared that rape does in fact constitute torture and expounded the notion that the coercive nature of

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245 Ibid.
sexual assault “need not be evidenced by a show of physical force.” Expanding boundaries even further, the ICTR stated that such violations are not “limited to physical invasion of the human body and may include other acts which do not involve the penetration or even physical contact.”\textsuperscript{246} The case significantly widened the parameters for prosecuting gender-based crimes. For the first time, rape was recognized as a form of genocide. It is also significant that for the first time an international body recognized that other forms of sexual violence resulting in mental harm could be prosecuted, even in the absence of physical harm.

Despite promulgating a broader interpretation of what constitutes sexual violence, the ICTR has been criticized for infrequently charging sexual violence.\textsuperscript{247} Although the ICTR indicted more than forty defendants and despite the overwhelming evidence of incidents of sexual violence, relatively few defendants were brought up on rape or sexual violence.

A few cases before the Tribunal were amended to include charges of rape such as the case of \textit{Pauline Nyiramasuhuko}.\textsuperscript{248}

\textbf{4.5 Pauline Nyiramasuhuko}

\textbf{First Woman Convicted of Rape}

The ICTR is the first international criminal tribunal to find a woman guilty of rape. Pauline Nyiramasuhuko, herself a Tutsi, was a former social worker, Minister for Women Development and Family Welfare, and lecturer on women empowerment.\textsuperscript{249} One of the largest mass rape-murders of a Tutsi population during this conflict was orchestrated by Pauline Nyiramasuhuko. On one occasion she convinced the Tutsi people within the village of Butare to gather for a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{246} Ibid.
\item \textsuperscript{247} Human Rights Watch, World Report 1999: Women’s Human Rights, The Role of the International Community.
\item \textsuperscript{249} Hogg, N. (2010), Women’s Participation in the Rwandan Genocide: Mothers or Monsters? \textit{International Review of the Red Cross}, 92(877), at 69-102.
\end{itemize}
\end{footnotesize}
humanitarian aid drop, whereupon they were cut down by automatic weapons, grenades, and machetes. She ordered the Hutu aggressors to rape all of the women before killing them.\textsuperscript{250} When the men became fatigued, she provided gasoline from her own vehicle so that the remaining women could be burned to death. One young Tutsi woman was raped by Nyiramasuhuko’s son who had received “permission” from his mother. After being forced to watch the rape of her own mother and the murders of several of her relatives, the young woman was allowed to live so that she could “deliver a progress report” as a witness to the massacre.\textsuperscript{251}

In 1999, Pauline Nyiramasuhuko, former Minister, and her son, former militiaman Arsen Ntahobali, were charged in an amended indictment with two charges of rape: one as a crime against humanity, and another as a violation of the Geneva Conventions on war crimes.\textsuperscript{252} \textit{Prosecutor v. Pauline Nyiramasuhuko and another}\textsuperscript{253} is one of the cases where the Tribunal on its own motion directed the amendment of an indictment to ensure sexual violence charges were included, based on the facts presented by witnesses. The particular amendment promises improved opportunities in the future to successfully prosecute gender-based war crimes.

The indictment alleged that Nyiramasuhuko and Ntahobali set up roadblocks in order to identify, kidnap, rape and kill members of the Tutsi population.\textsuperscript{254} While Ntahobali was charged for his direct participation in the raping of Tutsi women, rape charges were brought against


\textsuperscript{252}\textit{Prosecutor v. Pauline Nyiramasuhuko op. cit.}

\textsuperscript{253}\textit{Ibid.}

\textsuperscript{254}\textit{Ibid}
Nyiramasuhuko for using her influence to incite those under her authority to commit acts of rape and abuse against women during the Rwandan conflict.\textsuperscript{255}

The indictment also charged both defendants with violations of Common Article 3 of the four Geneva Conventions for “outrages to the personal dignity, in particular humiliating and degrading treatment by forcing Tutsi women to publicly undress” before being led to their deaths.\textsuperscript{256}

Once again, the ICTR established a precedent; Nyiramasuhuko is not only the first woman to be charged with genocide, but also the first women to be charged with rape. Charging Nyiramasuhuko with rape committed by those under her command reinforces the position that sexual violations of any kind and committed by any person, male or female, high ranking official or regular citizen will not be tolerated.

Although the ICTR contributed to an increase in sexual violence prosecutions, the Tribunal has been criticized for failing to adequately investigate and amend indictments to include rape charges within the framework of genocide, crimes against humanity and war crimes.\textsuperscript{257} Additionally, the failure to conduct investigations has continued despite plentiful evidence establishing that thousands of Rwandan women were subjected to gender based violence.\textsuperscript{258} While some of these omissions can be attributed to methodology and investigative procedures not conducive to collecting rape testimonies in the Rwandan context,\textsuperscript{259} the inaction

\textsuperscript{255} Ibid.
\textsuperscript{256} Ibid.
\textsuperscript{257} Human Rights Watch op. cit at 94-96.
\textsuperscript{258} Aafijes \emph{op cit.}
\textsuperscript{259} Human Rights Watch \emph{op. cit.}
nonetheless suggests that wartime violations against women are not considered as important or as serious as other crimes.\textsuperscript{260}

This view perpetuates the international community’s failure to prioritize sexual violence on its agenda. It also dangerously discourages witnesses from participating in investigations and trials, thereby enveloping sexual violence in a shroud of silence.

The absence of adequate witness protection has also been a significant impediment to women testifying before the Rwanda Tribunal. Reports by non-governmental organizations (NGO) suggest that many survivors of sexual violence in Rwanda were inhibited from coming forward due to fear of death, harassment and intimidation.\textsuperscript{261}

The Rules of Procedure and Evidence of the ICTR provide the same protections to victims and witnesses as the ICTR Rules, However, the ICTR Rules further include provisions relating to physical and psychological rehabilitation of victims as well as room to “develop long and short term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property and family.”\textsuperscript{262}

In spite of these progressive provisions, there was no trauma counselling for women or support persons to accompany the victims and witnesses travelling to the seat of the ICTR in Arusha, Tanzania. Neither were there mechanisms for follow up.

Sexual and gender-based violence was the most reported form of human rights abuse in Sierra Leone. Even before the establishment of the Special Court, Human Rights Watch concluded that

\textsuperscript{260}Ibid.

\textsuperscript{261}Ibid.
sexual violence in Sierra Leone amounted to crimes against humanity. The Special Court for Sierra Leone also heard and determined cases of sexual violence relating to the decade long Sierra Leone conflict which ended in 2002.

4.6 Foday Sankoh, Issa Sesay, Johny Paul Korom and Sam Hinga Norman

The Sierra Leone Crisis.

*Prosecutor v Foday Sankoh* and others illustrates the reluctance of some judges in international crimes courts to pay attention to gender issues when dealing with sexual violence in conflict situations. This is regardless of the circumstances that would justify due consideration of the unique situation of women.

The Special Court for Sierra Leone issued a first round of indictments in March 2003 against Chief-in-Command of all three major factions in the war, the Revolutionary United Front (RUF) led by Foday Sankoh and Issa Sesay, the Armed Forces revolutionary Council (AFRC) led by Johny Paul Korom and Civil Defence Forces (CDF) led by Sam Hinga Norman. This batch of indictments also included the indictment of Charles Taylor, former President of Sierra Leone although it was kept under seal.

The arrests of the four were known within the Office of the Prosecutor (OTP) as “Operation Justice” and further arrests were made in June and September 2003. There were a total of 13 indictments and arrests, and each of the indictments included charges under international law.

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including serious violations of Common Article 3 of the Geneva Conventions and crimes against humanity.\textsuperscript{266}

At the SCSL, the case against members of the pro Government militia, the Civil Defence Forces (CDF) did not include rape or other sexual offences. 11 people associated with all three Sierra Leone’s former warring factions standing trial at the court were charged with various war crimes, crimes against humanity and other serious violations of international humanitarian law.

Maxine Marcus, an investigating attorney at the Court, said prosecutors did try to amend the CDF indictment to include allegations of crimes of sexual violence. In the amendment sought by the prosecution, it was alleged that the CDF were committing acts of sexual violence against their own, rather than from the opposing warring factions’ community. The judges refused to allow the amendment requested for, arguing that the accused would have insufficient time to prepare a defence against the allegations.\textsuperscript{267} In any case, they outrageously argued, since the CDF were committing rape against their own women, it did not amount to a war crime!\textsuperscript{268}

According to the prosecutor, the issue was further complicated by the fact that rape is not considered a serious crime in Sierra Leone. According to prosecutor Marcus, “women were regarded as war rations” during the conflict and just as soldiers and militias would take crops from the fields to sustain themselves, women too were treated in the same way. There was almost an open permission to use women to support the war effort.

\begin{quote}
“\textit{For example, they do not have a right to refuse sex within marriage. As such, perpetrators view very narrowly what rape is. If they capture and keep and feed a woman, they may view themselves as having a right to rape her. Perpetrators would deny raping when phrased as such, but if investigators phrase it differently, such as asking if they had women ‘available to them for gratification they would say yes. The fact that rape was not included in the CDF indictment was...}"
\end{quote}

\textsuperscript{266} Perriello, T and Wierda M, (2006), The Special Court for Sierra Leone Under Scrutiny.
\textsuperscript{267} ibid.
\textsuperscript{268} Ibid.
big letdown for those who were raped by CDF soldiers, because it was a huge risk to them even to give evidence....This was an instance in which rape was used by troops against their own community, so it took us (prosecution investigators) a long time to build confidence and get the evidence and witness statements....These women were exposing their own community – their neighbours and cousins. Their trauma wasn’t even recognized by their own communities, which did not consider their rapes to be grievous crimes.\textsuperscript{269}

In January 2004, the prosecution filed amended indictments in all cases. These expanded the time frames of crimes charged and added a new charge of forced marriage. This charge has been criticized by gender advocates, who argue that it contributes to stigmatization of victims and that it could be adequately subsumed by existing legal concepts such as enslavement and rape. They believe that this constitutes bad precedent.

The prosecution argued that the decision was taken pursuant to consultation with women’s groups in Sierra Leone and is sensitive to the particular cultural context, and that the charges form part of the vigorous approach in investigating and prosecuting gender violations.\textsuperscript{270}

In general, the Special Court placed significant emphasis on the role of sexual violence in the conflict through the contents of its Statute, the indictments issued by the prosecution, and in the evidence presented at trial. For example, the prosecutor is obliged under the Court’s Statute to give due consideration to employing staff with experience working on gender related crimes.\textsuperscript{271}

The prosecution had attempted to include counts of sexual violence in all of its indictments, unlike the Consolidated RUF and AFRC indictments. However, there were no counts of sexual violence in the CDF indictment.

Sexual violence was generally thought to be uncommon in the CDF, and particularly within the Kamajor society, whose internal rules prohibit fighters from harming civilians and from having

\textsuperscript{269} Ibid.
\textsuperscript{270} Ibid.
\textsuperscript{271} Statute of the Special Court, Article 15(4).
sexual intercourse before going to battle. Researchers at Human Rights Watch were only able to document a few cases of sexual violence perpetrated by the CDF in a report published in January 2003. However, in 2003, prosecution investigators eventually uncovered evidence of sexual violence perpetrated by CDF forces after indictments had already been issued. This raised the question of whether to amend the indictment to include a new area of criminal allegations. Unfortunately, the prosecution’s efforts to bring charges of sexual violence against the CDF indictees were precluded by problems of timing and by a crippling ruling that denied the proposed amendment. Although the prosecution had evidence of sexual violence charges eight months before they filed their motion to amend the consolidated CDF indictment, victims of sexual violence expressed reluctance to come forward to testify, and it took several months to confirm evidence and secure the participation of witnesses.

Further delays were caused when the prosecution decided to wait for a ruling on combining the individual cases before filing their motion to amend. This meant that the prosecution waited until early February 2004 to file a motion that would otherwise have been filed in early November 2003. The Chamber did not rule on the motion until, May 2004, merely weeks before the start of the CDF trial.

Despite noting the “importance that gender crimes occupy in international criminal justice,” the majority decision implied that granting leave to add sexual violence charges at that point in the pre-trial proceedings would amount to “creating exceptions” for gender offenses, and it would

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272 Witness TF-008 (who testified on 16th November 2004) and Witness TF2-190 (who testified on 10th February 2004) gave evidence suggesting that these were widely known kamajor laws; however, the former also testified to the breakdown of order within the Kamajors as they moved from a hunting society to a combat force, and traditional initiation procedures controlling admittance into the society were allegedly relaxed.

273 Human Rights Watch “We’ll Kill You if You Cry,” Vol. 15, No. 1 (A). HRW noted, however, that this low number may have been due to the fact that it focused most of its efforts on investigating rebel abuses.

274 Ibid.
prejudice the rights of the accused because the additions had not been made in a timely fashion.\(^{275}\) There was indeed a case for “creating exceptions” since rape and sexual violence against women is exceptional in the sense that it affects women disproportionately. Gender crimes by their very nature require gender exceptions and the court here only paid lip service to the observation that gender crimes occupy an important part in international criminal justice, yet proceeded to trivialize the whole issue. The reasoning of the Judges indeed confirms the discriminatory and patriarchal attitudes and tendencies against women.

In a separate dissenting opinion, Judge Pierre Boutet stated that the majority opinions did not give “due consideration to the special features related to the proper exercise of discretion by the prosecution and to the nature of the counts to be added to the consolidated indictment: gender based crimes.”\(^{276}\) He noted that “a special consideration should be brought to bear” when dealing with gender based crimes, particularly in light of the reluctance of victims to come forward to report and testify.\(^{277}\)

The prosecution sought leave to appeal the decision, contending among other things that the high profile nature of gender based crimes under international law constitutes an “exceptional circumstance” in order to meet the requisite legal standard for appeal.\(^{278}\) However, this request was rejected by the trial chamber on the grounds that the threshold for exceptional circumstances had not been met, and the prosecution had exhibited a lack of diligence in carrying out its

\(^{275}\) Decision on Prosecution Request for Leave to Amend the Indictment, SCSL-04-14(CDF) 20\(^{th}\) May 2004, para 8.


\(^{277}\) Ibid para 26.

\(^{278}\) Prosecution’s Application for leave to File an Interlocutory Appeal Against the Decision on the Prosecution’s Request for Leave to Amend the Indictment, SCSL-04-14(CDF), June 4, 2004.
investigations for gender crimes.\textsuperscript{279} Here, again, the supposed negligence of the prosecution was being visited upon the victims, even further reducing women’s confidence in coming out to testify about their violations.

The Kenyatta case has garnered significant attention because the defendant is sitting head of state. The case is also noteworthy because it represents the only major effort to investigate and initiate prosecution of sexual violence committed against women, men and children during the 2007-2008 post-election violence.\textsuperscript{280}

\textbf{4.7 Conclusion}
This chapter confirms the hypothesis that indeed sexual violence is never calibrated in transitional justice processes, and when it is done, it is as an afterthought.\textsuperscript{281} It finds that through international war crimes tribunals, progress has been made in the last decade in prosecuting crimes committed exclusively or disproportionately against women. This gives hope that efforts will be made not only to ensure the prosecution of these serious violations, but also to prevent them from happening.

The ICTY, ICTR and SCSL have demonstrated a shift in the attitudes and treatment of gender based crimes. These crimes were recognized through the explicit and implicit prohibitions in the tribunals’ statutes. As a result the harms women suffered mentally and physically were acknowledged and prosecuted. This is partly attributable to the presence of women in decision making positions in the contemporary tribunals. One of the bars to the influence of the tribunals for positive reform of legal systems and social attitudes in the former Yugoslavia and Rwanda is

\textsuperscript{279} Majority Decision on the Prosecution’s Application for leave to File an Interlocutory Appeal Against the Decision on the Prosecution’s Request for Leave to Amend the Indictment, SCSL-04-14(CDF), June 4 2004.
that the communities on behalf of whom the tribunals act often feel alienated from them. The distance between the “Balkans” (regarded as derogatory, see page 60) and The Hague, between Kigali and Arusha, led to the people for whom justice is being sought feeling as though they did not own the process, and that they are not affected by the results. The Tribunals face a special challenge in ensuring that their judgments are reported to and understood by the people of the Former Yugoslavia and Rwanda, most especially the victims of and witnesses to gender based crimes.

The next Chapter 5 provides a summary of findings, conclusions and makes recommendations for combating sexual violence by international criminal tribunals and Kenya.
CHAPTER 5
SUMMARY OF FINDINGS CONCLUSIONS AND RECOMMENDATIONS
CONFRONTING SEXUAL VIOLENCE IN INTERNATIONAL CRIMINAL TRIBUNALS AND IN KENYA

5.1 Introduction
The key objective of this study was to demonstrate that, in spite of the prevalence and far reaching consequences of sexual violence in conflict situations, international criminal tribunals as currently structured cannot effectively administer justice for victims. This Chapter responds to the research question as to how international criminal tribunals can be transformed into effective tools for the legal protection of women from sexual violence and contribute to the healing process for communities in post conflict situations.

Chapter 4 argued that one of the bars to the effectiveness of the international criminal tribunals is that the communities on behalf of whom they act often feel alienated from them. This Chapter examines the provisions of the Rome Statute of the International criminal Court ((CC), and makes recommendations for institutional and legal reforms within our jurisdiction. It makes recommendations focusing on institutions that make up the justice chain in Kenya, particularly the police, prosecution, the judiciary as well as civil society organizations.

Acknowledging the difficulties in prosecuting sexual violence relating to the post- election violence conflict, the Chapter proposes ways in which the subject may be dealt with in future to secure justice for women victims of sexual in conflict situations in Kenya.
The recommendations are based on the key findings based on the objectives and hypotheses of the study. 282

5.2 Summary of Findings the Legal Protection of Women against Sexual Violence in Conflict Situations.

From the Post 2nd World War experiences of the Nuremberg and Tokyo tribunals283 huge gaps existed that hindered justice for women victims of sexual violence in conflict situations. Obstacles hindering women from participating in both local and international criminal justice processes still exist. These include the cost, distance, technicalities as well as hindrances associated with the distinctive experiences of women in a gendered social world as discussed earlier.284

However, the international criminal tribunals discussed in Chapters 2 and 3 have demonstrated that violence against women in conflict situations is now getting the deserved attention. For example, both the ICTY and ICTY have been proactive in ensuring that sexual violence charges were included in the indictments, where the prosecution had omitted to do so. On the other hand, the experience of the SCSL where the tribunal declined to allow an amendment to include rape charges demonstrates the need to safeguard the gains made in providing legal protection for women victims of rape in conflict situations.

The study also finds that the ICTY. ICTR and SCSL have put in place mechanisms for enhanced support for victims and witnesses in sexual crime cases arising out of conflict situations. These include the inclusion of specific provisions in their respective statutes on sexual violence. They

282 See Chapter 1 at 1.5.
283 See Chapter 2 at 2.3 and 2.4.
284 See Prosecutor v Dragan Nikolic (ICTY) and Prosecutor v Akayesu (ICTR) in Chapter 4 at 4.2 and 4.4.)
also include protective measures such as the use of pseudonyms, editing of court transcripts to delete references to witness identities (redaction), providing for in camera sessions and the use of technology to protect voices and images of witnesses and victims.

Yet even with these advancements, the numbers of prosecutions for rape are not commensurate with the widespread sexual violence targeting women in conflict situations. Victims are largely forgotten.

Three Kenyans are facing charges before the International Criminal Court for indictments relating to the 2007-2008 post-election. On 30th December 2007 following the announcement of the results of the general elections, violence broke out amid allegations that the Electoral Commission of Kenya (ECK) had rigged the election in favour of the incumbent, President Mwai Kibaki. The sporadic eruptions continued for several weeks, bringing death and destruction to thousands across the country. The international community responded to the situation, and an African Union sponsored panel of Eminent personalities led by the then United Nations Secretary General. Koffi Annan brokered a settlement between the main political parties.

One of the outcomes of the Koffi Annan led process was the creation of the Commission of Inquiry on the Post-Election Violence (CIPEV), a non-judicial body mandated to investigate

287 The Statement of Principles on Long Term Issues and Solutions, hereinafter the Statement, was adopted on 23rd May 2008 by the representatives of the two main protagonists in the electoral conflict who had been brought together by the Koffi Annan. www.dialoguekenya.org accessed on 20th May 2012.
and report on the causes of the violence, CIPEV completed its work in October 2008.\textsuperscript{288} One of the recommendations of the CIPEV was the establishment of a local tribunal to deal with perpetrators of the violence, which included sexual violence. Seemingly being cautious about the possible lack of support for the establishment of such a tribunal, the Commission ensured that the recommendations in its report were accompanied by clauses that would initiate consequences for inaction or intransigence.

The Report stated;

\begin{quote}
\textquote{“….if an agreement for the establishment of the Special Tribunal is not signed, or the Statute for the Special Tribunal fails to be enacted….a list containing names of, and relevant information on, those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Special Prosecutor of the International Criminal Court.”}\textsuperscript{289}
\end{quote}

Kenya failed to set up the tribunal and that is how the Kenyan cases confirmed before the ICC ended up before the Court.

After two Kenyan cases were confirmed by the ICC, there were renewed, albeit belated, calls for the prosecution of the Kenyan facing charges of international crime locally.\textsuperscript{290} The discourse has raised the issue of what should happen to those who do not bear the greatest responsibility for the violence, but who none the less actively participated in rape and other sexual atrocities and who are yet to be brought to justice.

Substantial progress has been made by international criminal tribunals towards addressing sexual violence in conflict situations\textsuperscript{291} The International Criminal Tribunal Yugoslavia, the


\textsuperscript{289} Ibid.

\textsuperscript{290} See Chapter 3 which discusses the institutional framework for addressing sexual violence, particularly the ICTY, ICTY and the SCSL at 3.2,3.3 and 3.4.
International Criminal Tribunal for Rwanda and the Special Court for Sierra Liberia are all ad
t hoc tribunals whose *jurisdiction ratione temporis* (the jurisdiction of a court of law over a
proposed action in relation to the passage of time) are restricted to conflicts within specific
periods in former Yugoslavia, Rwanda and Sierra Leone. All other international crime arising
from regions outside these states are excluded.

The Rome Statute of the International Criminal Court which came into force on July 1, 2002
establishes the ICC, a permanent tribunal to prosecute individuals for genocide, crimes against
humanity and war crimes committed as of the date of its establishment. One of the most unique
characteristics of the ICC Statute is the principle of complementarity, which imposes a duty on
state parties to exercise criminal jurisdiction over those responsible for international crimes
within their boundaries. In effect, national jurisdiction comes first and ICC’s jurisdiction second.

Paragraph 10 of the preamble of the Rome Statute provides that;

“…the International Criminal Court established under this Statute shall be complementary to
national criminal jurisdictions”;

Article 1 of the Rome Statute further emphasizes that the Court “shall be complementary to
national criminal jurisdictions.”

The Constitution of Kenya entrenches international treaties to which Kenya is party and
international customary law into Kenya’s domestic law. This provides a basis for prompt,
thorough and impartial investigations into violations of human rights, including sexual and
gender based violence. The Sexual Offences Act, 2006 has provisions on sexual offences, their
definition, prevention and the protection of all persons from harm from unlawful sexual acts,\(^{292}\) and for connected purposes.

The International Crimes Act, 2008 makes provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes. It also contains provisions to enable Kenya to co-operate with the ICC in the performance of its functions. These legal frameworks place the burden on the state to ensure that those responsible for perpetrating certain crimes are prosecuted.

Findings of past studies and inquiries aimed at addressing historical human rights violations in Kenya found that previous reports on past injustices had never been implemented.\(^{293}\) As a result, Kenyan citizens generally feel distanced from state institutions. Accordingly, they do not identify with these institutions as places from which they can seek or expect protection or any form of help.\(^{294}\) A study conducted by the Kenya National Commission on Human Rights (KNCHR) corroborates this view.\(^{295}\) According to the Rome Statute of the ICC,\(^ {296}\) the prosecution of crimes before the Court is only admissible if and to the extent that an effective prosecution at the national level is thwarted by legal or factual obstacles. The ICC therefore can only admit cases as a consequence of the failure to prosecute at the national level.

In post conflict situations, the fear of possible manipulation of local tribunals by political leaders may, as was the case in Kenya, frustrate efforts towards the establishment of such an institution, hence the preference of an international process. On the other hand, depending on who is facing

\(^{292}\) The Sexual Offences Act, 2006.


\(^{294}\) Sexual Offences Act op.cit.


\(^{296}\) Rome Statute of the International Criminal Court, Article 17.
indictment, the same political leaders may want a local tribunal to protect certain political interests\textsuperscript{297}.

Ad hoc tribunals like the ICTY and ICTR, have faced the challenge of lack of state cooperation. This includes hindering the gathering of evidence and unwillingness to arrest individuals.\textsuperscript{298} The heavy reliance on state cooperation by the ICC frustrates prosecution processes at the Court.\textsuperscript{299} The challenge therefore is how national criminal justice systems can be insulated from the politics of the day for purposes of effectively securing justice for international crimes of sexual and gender based violence against women. The Rome Statute envisages such a situation and stipulates that the ICC will still act if a local tribunal is created “for the purpose of shielding the person(s) concerned from criminal responsibility,” or if the process is being conducted in a manner “inconsistent with an intent to bring the person concerned to justice.”\textsuperscript{300}

While the ICC has an important role to play in prosecuting the worst crimes of sexual violence, it lacks the capacity and the mandate to address every situation in which widespread sexual violence is perpetrated, hence the need for national processes to compliment the international criminal justice structures.

Kenya enacted the Sexual Offences Act 2006 to deal with sexual offences. However, the Act does not recognize sexual offences that occur in conflict situations such as genocide, war crimes or crimes against humanity. Therefore perpetrators of sexual violence such as that which occurred during PEV cannot, strictly speaking, be prosecuted under this Act.

\textsuperscript{297} See how Kenya handled the local tribunal process at 5.2.1.
\textsuperscript{300} The Rome Statute of the International Criminal Court, Article 17 (1)(a) & (b) and (2).
To circumvent this challenge, one of the ways through which Kenya could deal with the many cases of rape committed during PEV would be to invoke the provisions of the International Crimes Act, 2010 which domesticates the Rome Statute of the ICC in Kenya. The effect of applying the provisions of the International Crimes Act would be to lower the standard of proof required, widen the elements of crime and also provide for a special fund to cater for reparations to help victims.

There was an expectation by Kenyans that the cases at the ICC would be concluded more expeditiously than they would be at home. Due to the long delay in finalizing the cases, the interest of victims and communities in the trials has shifted given the high political meanings ascribed to the processes. There have been claims of witness intimidation.301 Some witnesses have since died, some under mysterious circumstances without a chance of testifying either in the national courts or at the ICC.302

The cases against some of the suspects have since been dropped, and there is anxiety that the prosecution cases seem to be crumbling partly due to withdrawals by witnessed from the prosecution process.303

The practical difficulties associated with bringing witnesses before the ICC make it impossible for all those victimized to have their day in court, and therefore might never feel the sense of justice through the international criminal justice process. Even where perpetrators could have

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been prosecuted locally, the focus shifted to the ICC. The hearing of one of the cases is yet to begin and calls for creativity and innovation in managing the high expectations of victims. This is more so given the relative speed with which the other transitional arrangements have evolved.

Despite lacking the capacity to comprehensively address gender concerns in the post-election violence and instead focusing on the sexual violence only, the CIPEV did make some recommendations that, if implemented, will go a long way in enhancing gender justice in the transitional processes. Among the recommendations of the Commission were the need to ensure individual criminal responsibility for perpetrators, police reforms, constitutional reforms and the establishment of a special tribunal to investigate and prosecute perpetrators of the violence, failing which the matter would be referred to the International Criminal Court (ICC).\(^\text{304}\)

Accordingly, the recommendations made focus on creating structures that can be effectively used to punish not just sponsors, but also the real perpetrators of sexual violence, and deter impunity in a manner that cannot be politically manipulated, while at the same time addresses the peculiar circumstances of women victims of sexual violence.

5.3 **Recommendations for addressing impunity for sexual violence against women in conflict situations**

The ICC, being the permanent criminal tribunal whose jurisdiction covers every state party that has ratified or acceded to it, requires restructuring to address the challenges currently facing international criminal tribunals. The proposed restricting should focus on attributes required to effectively address sexual violence in conflict situations.

The key attributes should include accessibility by victims and witnesses, promptness in dealing with the cases, independence from political or other influence, responsiveness to the

\(^{304}\) CIPEV Report *op cit.* at 269-270.
circumstances of the victims and survivors, adequacy in terms of support systems for victims and survivors and reliability. It must also be adequately publicized so that the general public can get involved in its processes from an informed position.

5.3.1 **Accessibility of justice processes by victims and witnesses**

International criminal tribunals do not ordinarily sit in the country where the atrocities have been perpetrated, and therefore are not located close to the scenes of the crimes. They are not the *forum delicti commisi* (the law of the place where the tort was committed). As the Supreme Court of Israel rightly pointed out in the *Adolf Eichmann*\(^{305}\) case;

> “…normally, the great majority of the witnesses and the greater part of the evidence are concentrated in the state where the crime was perpetrated and this is therefore the *forum conveniens* (forum that is most convenient or appropriate for the resolution of a particular dispute) for the conduct of the trial,”\(^{306}\)

Due to the limitations of international institutions, national courts are an avenue through which international criminal justice can be more effectively implemented. In the case of mass rape, where thousands of women have been victims, it is not equitable or practical for significant numbers to travel to the location of the tribunals.

One of the key recommendations of the CIPEV was for the establishment of a special tribunal for Kenya to try those who bore the greatest responsibility for the crimes committed during the post-election violence. Failure by the Kenyan National Assembly to enact legislation for the establishment of the proposed special tribunal within the specified time resulted in the Kenya

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\(^{305}\) *General v Adolf Eichmann*, District Court of Jerusalem, Criminal case 40/61. Adolf Eichman was Adolf Hitler’s Chief Advisor on the Jewish problem” and was in charge of killing the Jews of Germany, Austria, Czechoslovakia, Poland and Hungary. Though not indicted by the Nuremberg trials, he was cited as the person most responsible for the Nazi program of killing the Jews.

\(^{306}\) Ibid.
cases being taken to the ICC. As a result, the ICC Prosecutor began investigations in *proprio motu* (on his or her own initiative) into the situation in Kenya.

Kenya enacted the International Crimes Act, 2008 which incorporates international crimes into Kenyan law. Section 161 of the Act provides that;

“The Prosecutor may conduct investigations in Kenyan territory-
(a) in accordance with the provisions of Part 9 of the Rome Statute and as specified in section 23; or
(b) as authorised by the Pre-Trial Chamber under paragraph 3(d) of article 57 of the Rome Statute.”

In the same breath, Section 152 of the ICC Act provides that;

The ICC may sit in Kenya for the purpose of performing any of its functions under the Rome Statute and under the ICC Rules, including any of the following—
(a) taking evidence;
(b) conducting or continuing any proceedings;
(c) giving judgment in any proceedings;
(d) reviewing a sentence.

These provisions provide a basis for the decentralization of the trials from The Hague to Kenya, and to the extent possible, to the particular locations where mass violations have taken place. For operational purposes, this would require collaboration with the existing judicial and law enforcement systems.

The Judicial Service Commission (JSC) has deliberated on the possibility of operationalizing the proposed International and Organized Crimes Division (IOCD) to deal with the crimes proscribed in the Act. This is in accordance with Section 8(2) which provides that the crimes proscribed in the Act “shall be tried in the High Court of Kenya.” The division is proposed to be piloted in Nairobi, with the intention of devolving it based on need and the experience of the
The proposed creation of the IOCD offers an opportunity for securing justice for systematic sexual and gender based violence against women.

The difficulty of distance could also be overcome if national courts were accorded some complimentary roles in supporting international criminal tribunals. Through this collaboration, the national judiciary, police and prosecution can provide the physical structures and some administrative support, while the international court would, through an independent and transparent process, appoint the investigators, prosecutors and judicial officers to deal with cases at the location of the conflict.

The collaboration could be extended through amending statutes such as the International Crimes Act, the Evidence Act and the Sexual Offences Act to include provisions enabling domestic courts, in sexual violence cases, to take evidence and submit it to the tribunals for consideration and determination.

To ensure independence and impartiality, special judicial officers appointed through the UN processes and specially trained on matters of sexual and gender based violence should be placed within the local courts to take up this role. This would not only ease evidence collection but also reduce the cost of prosecution a great deal in terms of travel and accommodation costs as well as the time of witnesses and victims. Through the proposed process, counsel would have a chance to cross examine witnesses and provide their written submissions also to be forwarded to the tribunals. The special judicial officers may, where appropriate, be required to submit their findings to the trial chambers dealing with suspects alleged to bear the greatest responsibility, for consideration and determination of cases.
Section 168 of the International Crimes Act enables the Attorney-General or the Minister, as the case may be, to

“...make a request to the ICC for assistance in an investigation into, or trial in respect of, conduct that may constitute a crime within the jurisdiction of the ICC or that constitutes a crime for which the maximum penalty under Kenyan law is a term of imprisonment of not less than five years....”

This provides a further opportunity for enhanced efficiency through collaboration between the ICC and national courts. The use of local courts to complement the international tribunal would ensure more individuals are held to account for their misfeasance, malfeasance and non-feasance. A transnational justice system enshrined in the statutes would ease the operations of the tribunals and enable the maximum benefit as far as testimonies are concerned. On December 17, 2008 President Kibaki and Prime Minister Raila Odinga signed the agreement that would lead to the establishment of a special court to try post-election violence suspects. This was just before expiry of the deadline given by the Commission of Inquiry into the violence, for handing over the secret envelope to the International Criminal Court. Parliament which was required to approve the necessary legislation to establish a special local tribunal went on recess 307

Shortly thereafter the draft legislation to set up the tribunal was brought for debate in parliament, and despite passionate pleas by the Prime Minister and former Attorney General Amos Wako, the House rejected the bill. 308 In spite of repeated pleas by a section of the government and the Catholic Church, the Methodist Church, among others, for the establishment of the special tribunal, parliament insisted on the matter proceeding to the ICC. 309 On July 30, 2009, a divided Cabinet gave up on a local tribunal and decided to hand over those indicted by the International

308 Ibid. Parliament rejected the Constitution of Kenya (Amendment) Bill presented by Justice minister Martha Karua and backed by President Kibaki and Prime Minister Odinga for establishment of a local tribunal, with several MPs popularising the “Don’t be Vague, ask for Hague” slogan.
Criminal Court to The Hague and clean up the police force and the local courts. The ICC then had to move in and start its process.

In the Statement on the Situation in Kenya, The Prosecutor stated;

“…. The Office of the Prosecutor is doing what we promised to do. The Prosecutor has a clear mandate – to fight impunity and contribute to the prevention of future crimes. The prosecution is working to bring to justice those most responsible for attacking, raping, displacing and pillaging thousands of innocent Kenyans.. The Prosecutor and her office are working for the people of Kenya, for the victims of massive crimes; for women who were raped and infected with HIV, for parents who lost their children, for families those who lost their homes. Now let justice run its course”

The creation of a local tribunal is still a viable option which would make it possible to get as many cases as possible investigated and prosecuted. More middle and low level perpetrators would also be punished, and victims whose lives have been destroyed would receive justice and accountability.

5.3.2 Promptness in the delivery of Justice
The tribunals being physically far removed from women victims of sexual violence presents practical difficulties connected with long distance travel to strange lands\textsuperscript{310} where familiar social support is absent. Given the gender roles assigned to women, they further face the dilemma of who will be left behind to mind their families or affairs. The incentive to appear before the tribunals is further reduced by the length of time these cases, and the uncertainly of how long it is likely to take to be heard and determined. The fact that a woman has travelled a long way to go and testify on her sexual violation, in itself increases stigmatization, leading difficulties reintegrating into the community. This is a discouraging factor to women.

\textsuperscript{310} See Chapter 1, e.g the distance between Kigali in Rwanda and Arusha.
The International Crimes Act, 2008 provides an opportunity for the Kenyan justice system to incorporate mechanisms that would give life to the provisions of Section 4 of the Act which provides that;

“(1) The provisions of the Rome Statute specified in subsection (2) shall have the force of law in Kenya in relation to the following matters:

(a) the making of requests by the ICC to Kenya for assistance and the method of dealing with those requests;

b) the conduct of an investigation by the Prosecutor or the ICC;

(c) the bringing and determination of proceedings before the ICC;

(d) the enforcement in Kenya of sentences of imprisonment or other measures imposed by the ICC, and any related matters;

(e) the making of requests by Kenya to the ICC for assistance and the method of dealing with those requests”.

For the justice process to make sense to the victims, survivors, their families and communities at large, cases of sexual violence should be dealt with as fast as possible. The local judicial processes proposed above would facilitate faster justice processes so that women do not experience fatigue and disillusionment while seeking justice and accountability.

5.3.3 Perception of Independence of the Judiciary
The perception of independence and freedom from political, ethnic, religious or other influence is critical in the administration of justice. A Kenyan judge presiding over a case related to the 2007-2008 post-election violence may not be perceived as independent. Kenyan politicians seek support from their ethnic and sub-ethnic groups and grievances strongly felt by the citizens is often expressed or resolved through ethnic channels.311

Judges do belong to the same ethnic groups and the perception of fairness and objectivity may be compromised depending on the ethnicity and perceived political leanings of the Judge, the accused on the dock, the complainant or witness. To address perception of fairness and independence in this situation may require the appointment of international judges to preside over international crime given the nature of the Kenyan society. An international judge here means a judge from a different country, with knowledge, skills and experience in international law is likely to be viewed as independent from any political or ethnic inclinations.

5.3.4 Responsiveness to the circumstances of survivors and victims

Lack of gender knowledge and sensitivity remains a major challenge not only for women victims of violations but also for prosecutors and judges appointed to serve in international criminal tribunals. As Discussed in Chapter 4 in the case of Furundzija, this study has demonstrated the value addition availed by presence of a judge with gender expertise. Due to her knowledge of gender related concepts she was able to ensure justice for victims of sexual violence, a matter that was contested by the defence counsel.312

For these tribunals to be reliable in dealing with sexual violence, it is imperative that gender training with a focus on criminal justice and sexual violence be a requirement not just for judicial officers, but also administrative and support staff who are likely to interact with victims, survivors or witnesses at and stage of the processes.

Gender discrimination against women is rife in all sectors of society, and calls for gender equity, gender parity and gender equality remain controversial and are often resisted by society in general, the judiciary and law enforcement officers included.

312 Prosecutor v. Anto Furundzija, (ICTY) IT 95-17/1
An international criminal justice system served by officers well versed in gender based violence, particularly sexual violence in situations of conflict will have a deeper appreciation of the notion that rape and other forms of sexual assault are more than mere infringements upon the honour of the victim or the men “in charge of protecting her,” but rather a denial of a woman’s fundamental human rights which must be protected at all costs guaranteed by the as Constitution.  

The fact that gender training does not necessarily form part of a lawyer’s training casts doubt as to whether a judge who is not conversant with gender concepts is best qualified to deal with sexual violence against women. Gender training should be an absolute necessity for officers serving in these tribunals given the amount of gender based violence that happens in situations of conflict. The requirement for gender training with a focus on sexual violence in conflict situations should apply to police, investigators, prosecutors, court support staff, court registrars, lawyers and trial judges.

Because of the gravity, humiliation, and stigma of sexual assaults, it is imperative that any rules governing prosecutions of such crimes recognize the destructive nature of the crimes and afford greater procedural and post-trial protection for victims. As stated by Judge Pierre Boutet in his dissenting opinion, special consideration should be brought to bear when dealing with gender based crimes, particularly in light of the reluctance of victims to come forward to report and testify. In this regards, procedures that protect rape victims are necessary to ensure victims’ safety, and to maintain their credibility and integrity within their communities. Efforts must begin with addressing gender discrimination through developing appropriate training, public sensitization and legislation on non-discrimination.

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313 Constitution of Kenya Articles 27 on equality and freedom from discrimination.
314 See Chapter 1 at 1.2
Currently gender expertise is not a key requirement for the appointment of judges of these tribunals. This demonstrates the unpreparedness of the international community to match the amount of gender violence with levels of gender expertise required in addressing it. The United Nations Security Council and national criminal justice systems which have facilitated the creation of these tribunals must begin to develop and implement intensive trainings on sexual and gender based violence before dispatching the judges and other officials to the tribunals.

Sexual offences may be difficult to prove, worse still, if the investigator does not have the required skills acquired through sound training and experience. At the investigations level, investigators must be trained on investigating sex related crimes to improve efficiency. In the case of Rwanda, for example, it is not clear whether there was any forensic equipment available to assist in investigating rape.

Other necessary measures include the use of trained female investigators and interpreters, and guarantees of appropriate protection for women who testify in court. Through these measures, women will not only be encouraged to appear before the tribunals to offer testimony but also the women having gone through the second ordeal of reliving their testimonies will leave the tribunals feeling more empowered, dignified and ready to return to their normal lives.

5.3.5 Adequacy of support mechanisms in the criminal justice structures
The focus of international criminal tribunals has been on punishing the criminals or wrongdoers, rather than providing compensation and support to those who have suffered the harms described above. Admittedly this a defect shared by municipal criminal legal systems, but these may be backed up by other domestic support services. An international crimes tribunal must be supplemented by long-term practical assistance from governments, such as medical care, shelter, support and counselling.
Survivors of rape must be provided the space to specify their own needs within their own communities. Appropriate support must be made available to all concerned within the community to enable survivors to regain control of their own lives. This may be achieved through supporting the establishment of community based initiatives such as the creation of support groups.

The cogent humanitarian response necessitates a comprehensive intervention protocol. The immediate physical effects of sexual assault must be treated medically. This should include the administration of antibiotics, screening for sexually-transmitted diseases, and emergency contraception. Moreover, psychological support and counselling should be accessible to victims since emotional problems often manifest in the aftermath of sexual assault. This is especially important given that the period of two years following the attack is often the most traumatic time for victims.

It is paramount that proper documentation be maintained and that avenues for reporting are accessible; not just in the immediate aftermath, but bearing in mind that a victim may decide to report at a later date. Accordingly, “rape kits” are an effective method by which physical evidence can be gathered and preserved. In combination with victim and eye-witness statements, a sufficient amount of evidence may be collected in order to facilitate criminal charges. The appropriate humanitarian response would thereby fulfil the basic requirements needed to pursue criminal prosecution.

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5.3.6 Women’s participation in International Criminal Justice Processes

The national values and principles of governance espoused Article 10 of the Constitution of Kenya bind all state organs state officers. The principle of public participation in decision making and implementation is now a tenet that must be observed and respected by the state in protecting rights of women.

Deliberate efforts must be made to ensure the participation of women, especially those affected by the conflict, in the process of prescribing and adjudicating the laws of armed conflict and even in the discussions leading to the setting up of the international criminal tribunals.

5.3.7 The role of civil society organizations in protecting women from sexual violence in conflict situations

The communities and societies that make up the nation of Kenya are still largely patriarchal, which is a challenge to gender sensitive and responsive approaches to transitional justice. The unwillingness or reluctance of communities to speak out on SGBV results in further entrenchment of impunity and distortion of facts on historical gender-based violence, which further undermines the legitimacy of processes put forward to address these legacies.320

Civil society organizations (CSOs), particularly those focusing on women’s rights and gender based violence can play a key role in assisting the tribunals. Organizations such as the Federation of Women Lawyers (FIDA) Kenya tend to be more trusted by the women they serve compared to, for example, police investigators.

The Commission of Inquiry into the Post Election Violence recommended that at the very least, citizens should be informed about the existence of Gender Violence Recovery Centres (GVRCs) offering free medical services to victims of sexual violence. This was upon realizing that a majority of those appearing before the CIPEV were not aware of the existence of these Centres. It recommended awareness campaigns across the country.\textsuperscript{321} This is a task that can be best implemented by CSOs.

These organizations may contribute to the justice process through preparing women for their engagement with the tribunals not only through counselling and other support services throughout their proceedings. They may also carry out research aimed at ensuring evidence based interventions. Fact finding missions by CSOs can also help determine what is on the ground and seek views of the community to entrench participatory approaches to addressing sexual violence against women even during peacetime.

CSOs can also offer legal representation or participate in the hearings as \textit{amicus curie} (friend of the court). As \textit{amicus curie} they would have a chance to address issues that may not have been adequately canvassed by the prosecution, hence providing a broader perspective of the issues for the benefit of the tribunal. Their role must be recognized and given a legal basis through inclusion of enabling provisions in the statutes. The statutes should go further to, include provisions relating to sufficient funding of these organizations either by the concerned state, the United Nations or any other body to enable them effectively carry out these complimentary roles.
5.4 Conclusion
This study has illustrated the difficulties and shortcomings of international criminal tribunals in addressing sexual violence in conflict situations. It has also demonstrated that increasingly, these tribunals are prioritizing and giving more attention to the issue. However, there is opportunity for enhanced effectiveness in prosecuting conflict related sexual violence through a mixed model of courts with input from both international and local courts.

Kenya in her efforts to secure justice for sexual and gender based violence has an opportunity to protect women against sexual violence in conflict situations not only through the full inclusion and recognition of sexual offences in her law, but also through the vigorous and responsive prosecution of these crimes.
BIBLIOGRAPHY


accessed on 30th November 2014.


The Kenya Demographic Health Survey (2008-09).


Manifesto of the Communist party.(1848) available at https://www.marxists.org/archive/marx/works/1848 accessed on July 23rd 2014..


Perriello, Tom and Wierda Marieke (2006), The Special Court for Sierra Leone Under Scrutiny.


Sihanya (2014) Mentoring Guidelines on LLM research Project Citation , Punctuation, Form(atting), Corrections, Submissions and Marking Scheme 2012/2013;18/9/2013 Revised 22/8/14


Van Den Haag (1962), The War in Katanga, Report of a Mission 10. There were press reports of abuses committed against women by Troops serving with the UN forces. The Guardian 19th February 1994).