

**ACCOUNTABILITY FOR GENDER BASED VIOLENCE: PROSECUTING SEXUAL
OFFENCES IN THE POST-ELECTION VIOLENCE 2007-2008**

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DECLARATION

I, **Joy Abucheri Bigambo** do “declare that this is my original work and has not been submitted and is not” currently being submitted for a degree in any other institution.

Signed..... Date.....

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This dissertation is submitted for examination with my knowledge and approval as the University Supervisor.

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DEDICATION

This thesis is dedicated to my parents **Prof and Mrs Okumu Bigambo and Jael Mahero Bigambo** for providing me with the foundation that began this long journey. **To my husband (Mr Patrick Kitabye Wamukulu for both emotional and material support without which this project would have been possible. To my siblings and children-Abigail Taraji and Amanda Jael** for encouraging me and for those who played a part and not mentioned above I only wish to say thank you so much.

LIST OF ABBREVIATIONS

ABA	American Bar Association
ACHPR	“African Charter on Human and Peoples’ Rights”
CEDAW	“Covenant on Elimination of Discrimination Against Women”
“COVAW	Coalition on Violence Against Women
DEVAW	The Declaration on the Elimination of the Violence against Women
DRC	Democratic Republic of Congo
HIV	Human Immunodeficiency Virus
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ICL	International Criminal Law
IMT	International Military Tribunal
IMTFE	International Military Tribunal for Far East
JCE	Joint Criminal Enterprise
NGO	Non Governmental Organizations
ODM	Orange Democratic Movement
OSCE	Organization for Security and Co-operation in Europe
PEV	Post Election Violence”

SANE.....Sexual Assault Nurse Examiner

“SGBV.....Sexual and Gender Based Violence

UDHR.....Universal Declaration of Human Rights”

SCSL.....Special Chamber for Sierra Leone

VAW.....Violence Against Women

LIST OF CASES

Oloo s/o Gai v. R [1960] EALR 86.

“*Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No.

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Jurisdiction, IT-94-1-AR72, IT-94-1-AR72, 2 October 1995

Prosecutor v. Jean-Paul Akayesu, Trial Chamber Judgment, International Criminal Tribunal for

Rwanda, ICTR-96-4-T, 731 (Sept. 2, 1998).

Prosecutor v. Thomas Lubanga Dyilo, Decision Regarding the Practices Used to Prepare and

Familiarise Witnesses for Giving Testimony at Trial, Case No. ICC-01/04-01/06

(November 30, 2007).

Prosecutor v. Delalic, Trial Chamber Judgment, International Criminal Tribunal for the Former

Yugoslavia, IT-96-21-T (Nov. 16, 1998).”

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ABSTRACT

The post-election violence that occurred in Kenya after 2007 elections was characterized by massive human rights violation key among them being sexual offences. However very little accountability took place despite the existence of evidence of its commission. This followed a familiar pattern in accountability mechanisms for sexual crimes witnessed in other conflicts chief among them being the 1st and 2nd World Wars. Failure to prosecute sexual offences at the International Military Tribunals in Europe and South East Asia happened despite the existence of accountability mechanisms in international humanitarian law. The turning point occurred after the “establishment of the *Ad hoc* tribunals of ICTY and ICTR” in former Yugoslavia and Rwanda respectively to try international crimes in the two territories. At the ICTR, *Akayesu* was the first person in international criminal law to be convicted of sexual crimes. Lessons learned at *Ad hoc* tribunals have been carried “to the Rome statute of International Criminal Court” where sexual crimes form part of the courts’ jurisdiction. However, a number of challenges still exist in finding accountability mechanisms.

This study examined the development of accountability mechanisms for sexual offences in the context of the post-election violence. The finding is that despite the existence of overwhelming evidence of massive commission of sexual offences during the conflict, no tangible prosecutions took place either in local courts or “at the International Criminal Court at The Hague. This shows that despite the” long term ramifications of sexual violence on its victims, the crime is not treated as seriously as murder or robbery. The failure of criminal justice systems therefore calls for innovative means of accountability mechanisms just like those

witnessed in investigating other crimes. Desk top analysis of secondary data was used as well as a comparative review of other jurisdictions to make an assessment of best practices.

1.12. Introduction

In no other area is our collective failure to ensure effective protection for civilians more apparent... than in terms of the masses of women and girls, but also boys and men, whose lives are destroyed each year by sexual violence perpetrated in conflict.¹

This statement made by the “UN Secretary General Ban Ki moon describes the legal status of” sexual or gender based sexual violence on the global scale. Sexual violence has often been used by combatants and non combatants in times of conflict for the advancement of military and political agenda.² This was not any different in Kenya’s post election violence that occurred in the year 2007-2008.³ Despite this fact, accountability for sexual offences is minimal due to political, social and economic reasons. It has largely been ignored as it is traditionally considered a less serious crime than murder for example.⁴ Sexual assault has been taken as a bounty for combatants, an unfortunate but necessary part of the violence of conflicts. It is the imperceptible crime of conflicts, a crime of little consideration for those who commit it and as a consequence little consideration is given to those who are affected.⁵ As an illustration, the international criminal court (ICC) at the Hague did not think that sexual offences committed against Kenyan women was a serious enough crime worthy of prosecution at the court.

This study made a critical analysis of the challenges experienced in prosecuting sexual offences in post election violence in Kenya in the period 2007/2008. Some of the issue addressed include: shortage of properly trained prosecutors who appreciate sexual offences, poor protection of witnesses, cultural issues, the cost of international criminal system and a general loss of credibility in the international criminal justice system.

¹ “In a speech by Ban Ki-moon, United Nations Secretary-General, United Nations Security Council, “Report of the Secretary-General on the Protection of Civilians in Armed Conflict,” October 28, 2007, S/2007/643,12.”

² “Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*” 252.

³ Mukabi Narotso Benardatte, ‘The Impact of the 2007/2008 Post Election Violence on Women in Kakamega County, Kenya’, (2015) 5 (6) *International Journal of Academic Research in Business and Social Sciences* 208.

⁴ Ibid.

⁵ Ibid.

1.13. Background

The rules of war have traditionally regulated the conduct of war. The aim of these rules was to protect the civilian population especially children and women against violations of a sexual nature.⁶ “However it was not until 1474 that an international tribunal managed to prosecute a combatant for” failing to respect rules of war.⁷ International humanitarian law evolved from these practices with a similar aim of lessening the suffering of combatants and non-combatants in time of war. The idea behind humanitarian law is that care must be taken at all cost to eliminate or lessen harm that might occur to civilians during conflict. This could include treating them humanly.⁸

While sexual violence has always been a problem in Kenya,⁹ following the election violence of, 2008, there was a 7 500 percent increase in the incidents of sexual violence.¹⁰ Not only did this result in further acts of wide spread violence, but it also resulted in a breakdown of health services available for victims.¹¹ Despite the fact that sexual offences were prohibited in international humanitarian law, they are neglected in practice.¹² For example in spite of overwhelming evidence of sexual offences during the Rwanda genocide the crime was generally given little attention by the UN Security Council in the early stages of the conflict.¹³ The reasons for this included the perception that sexual offences are crimes of a private nature, committed in

⁶ “Wilbourn Benton, *Introduction, to Nuremberg, German Views of the War Trials*” at 2.

⁷ Cherif M “Bassiouni, The Time Has Come for an International Court”, (1991) 1 (1) *IND. INT’L and COMP. L. REV* 1: The trial of *Peter van Hagenbach* was the first international criminal trial, taking place 471 years before Nuremberg. The trial was held in Breisach, Germany, with twenty-seven judges of the Holy Roman Empire presiding.”

⁸ “Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*’, (2003) 21 *Berkeley Journal of International Law*” 288.

⁹ Benardatte *supra* note 3 at 209

¹⁰ Megan Nobert, *Creating International Accountability: The Non-“Prosecution of Sexual Violence Post-Conflict” as a Violation of Women’s Rights*.

¹¹ Kyle Kinner, ‘A Paradigm Shift in Prevention’, (2008) 13 *Caucus for Evidence-Based Prevention Newsletter* 1.

¹² Askin *supra* note 8 at 288.

¹³ “Gardam, Judith G. and Michelle J. Jarvis, *Women, Armed Conflict and International Law*” 152–53.

isolated places with few if any witnesses.¹⁴ The offence was also viewed as a byproduct of war and were it not for NGOs and advocacy groups that provided information on these crimes, they would have remained out of the limelight for a much longer period and escape accountability.¹⁵

The UN has estimated that between “250,000 and 500,000 thousand Tutsis and moderate Hutus were raped during the conflict that occurred in Rwanda in 1994. Rape was described as systematic and used as a weapon of war to target Tutsi civilians.”¹⁶ This number is conservative because the formula for estimating rape in Rwanda around this time (1994) was to count women who had unwanted pregnancies. Consequently, this figure did not include those who were unable to become pregnant and those without injuries inflicted on them. It does not also include those who were gang raped and either aborted or committed infanticide.¹⁷ Some were mutilated through the cutting of breasts or had objects “inserted into their genitals,¹⁸ while others were murdered soon after being raped.”¹⁹ Those who survived referred to rape as a “living death” and do not consider themselves as having any value since a considerable number were infected with HIV.²⁰

The “conflicts in Rwanda and the former Yugoslavia debunked this” perception and demonstrated that sexual offences can be systematic when perpetrated with genocidal intent as

¹⁴ Haffajee, “Rebecca L., ‘Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory’, - (2006) 29 *Harvard Journal of Law and Gender* 204.”

¹⁵ “Richard J. Goldstone and Estelle A. Dehon, ‘Engendering Accountability: Gender Crimes under International Criminal Law’, 123”.

¹⁶ “Special Rapporteur of the Commission on Human Rights, *Report on the Situation of Human Rights in Rwanda*,” 16, “U.N. Doc. E/CN.4/1996/68 (Jan. 29, 1996).”

¹⁷ “Human Rights Watch, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath* (1996), available at <http://hrw.org/reports/1996/Rwanda.htm> [hereinafter *Shattered Lives*]. The violence was directed predominantly toward the Tutsi minority group and Hutu majority moderates and was perpetrated by Interahamwe Hutu militia members, Rwandan Armed Forces (*Forces Armées Rwandaises*) soldiers, and other civilians. Doctors have attested to the high prevalence of rapes, in particular, after examining numerous victims immediately following the genocide”.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Smith, James M. ed, “*A Time to Remember, Rwanda: Ten Years After the Genocide at 21*”.

part of political framework without political connection.²¹ As part of systematic criminal acts, rape, forced labour, nudity, torture and “other forms of sexual offences against women” were committed with the concurrence of military superiors.²² The *Akayesu* case will go down in the history “of international criminal law as the” first conviction for the commission of sexual offences.²³ It defined the term ‘rape’ in “international criminal law to” mean “a physical invasion of a sexual nature, committed on a person under circumstances, which are coercive.”²⁴ “It has been recognized that the ICTY and the ICTR had different standards for sexual offenders.”

1.14. Statement of the Problem

The PEV had one thing in common; massive sexual violence perpetrated against girls and women. Accountability mechanisms put in place such as the ICC had in mind the prosecution of other “international crimes such as crimes against humanity and war crimes,” sexual violence was not contemplated. Even when *Akayesu* was convicted of sex related crimes, the *ad hoc* tribunals (ICTY and ICTR) could not agree on the scope of “rape as a crime in international criminal law.” Whereas the ICTY adopted a narrower definition of rape,²⁵ the ICTR approach was a broad one²⁶ with the effect that the burden of proof in ICTY became even greater. This further complicated the prosecution of sex offences.

Violent conflicts are gendered in the sense that while men are killed on the battle field, women and children fall victim to sexual violence, slavery and sex trafficking. It would appear

²¹ Haffajee “*supra* note” 14 at 204.

²² Askin “*supra* note 8 at” 16.

²³ *Prosecutor v. “Akayesu*, ICTR 96-4-T, Judgment at 706-07: the Trial Chamber stated that” the acts described in the indictment of rape and sexual violence constituted genocide.

²⁴ *Ibid* at 688.

²⁵ “*Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgment, para. 185 (Dec. 19, 1998). This was the first decision by a UN Tribunal convicting an accused of rape as a war crime.”

²⁶ *Akayesu supra* note 23 at 688.

that after the post election violence in 2007/2008, more effort and emphasis was put into the prosecution of violations that occur on the battlefield but not in the minds and souls of “victims of sexual and gender based violence.” The belated prosecution of sexual offences sends a message that some crimes are more important than others which is not justifiable because sexual violence leave permanent scars on the victims. It is not an accident that to date no form of accountability for sexual offences has been done on the victims of the PEV in Kenya.

To deter the commission of sex related offences in times of conflict, proper measures would need to be taken to improve evidence gathering, better protection of witnesses, improvement in training and harmonization of prosecutorial procedure between common law and civil law.

1.4. Objectives

1. To analyze challenges of prosecuting sexual offences
2. To analyze Kenya’s legal framework on sexual offences
3. To make recommend on the way forward

1.5. Research Questions

1. What challenges are experienced in the prosecution of sexual offences?
2. What is Kenya’s legal framework on the prosecution of sexual offences?

1.6. Hypothesis

Prosecuting sexual offences has proved more challenging than the other crimes in terms of the substance and the procedure. The challenge is “that crimes of rape and sexual violence” are

“difficult to investigate thus difficult to prosecute” because many victims fear exposing their vulnerability.

1.7. Significance

In times of conflict, “women and children are the most vulnerable victims of all forms of violence: domestic violence, physical violence, psychological violence and sexual violence”. Whereas accountability for physical violence and other forms of violence have been exerted through courts of law, impunity still reigns in the context of sexual offences especially during the PEV of 2007/2008. This study adds a voice to those calling for more measures and better methods of ensuring accountability for sexual violence. It is an academic exercise that hopes to expand knowledge in this critical area that has been ignored for a long time despite massive evidence to the contrary. In so doing it should motivate more research into better models of accountability for sexual crimes.

1.8. Theoretical Framework

The failure of accountability mechanisms in sexual offences can be explained by the theory of social contract. The thesis of this theory is that morality and ethics is a set of basic rules agreed up on by rational beings. Therefore they agreed to form a social contract between them which became a source of authority.²⁷ The theory was first attributed to Thomas Hobbes who is often quoted as saying that ‘the life of man in a state of nature is solitary, poor, nasty, and brutish and short’²⁸, for that matter man in this state needs the protection of the law to regulate behavior.

²⁷ Driver, J, *Ethics: The fundamentals* (Blackwell Publishing: Victoria, 2007).

²⁸ Hobbes, T and Curley E, *Leviathan: with selected variations from the latin edition of 1668* Vol. 2 (Hacket Publishers: London, 1994) at 7.

The theory is born out of the reality that human beings are self centered and left on their own, they would promote personal interests. This would not be a desirable situation in society as justice and fairness is thrown out of the window. To avoid this happening, man entered a social contract by establishing laws that are binding to protect the interests of every member of society.

Applying the theory in the context of sexual violence, gender based violence occurs during wars and conflicts in general because those who monopolize violence have this mistaken belief that their environment is a state of nature and therefore will not be punished. The idea that a group of people can suspend existing that are designed to protect vulnerable groups is an indictment on states and the international community. Therefore, they need to do more and ensure accountability for sexual offences. In terms of sexual violence, the gap is not “lack of laws but failure to enforce existing ones therefore more needs to be done to correct this.”

1.9. Literature Review

There is a dearth of information on accountability for sexual crimes because in a large part it is a crime that is committed without eye witnesses and few are willing to report it. This is despite the fact that prohibition of sexual offences has existed in international humanitarian law though not in international criminal from as early as the 20th Century. The earliest prohibitions existed in the The Hague Convention of 1907. During the 1st and 2nd World Wars, sexual offences were not in the category of those prosecuted in spite of massive evidence of the existence of sexual offences especially in the Far East where captured women were turned into sex slaves. As such reporting on sexual offences is a fairly recent phenomenon that was only taken seriously “after the establishment of the *ad hoc* (ICTY and ICTR) tribunals of the former Yugoslavia and Rwanda respectively.”

The prosecution of crimes in general depends on the availability of credible witnesses, however in sexual offences it takes on a whole new meaning. *Ad hoc* tribunals were affected by the non availability of witnesses for various reasons. In a conflict prone region procuring witnesses can be particularly difficult due to distance, death and sometimes refusal to testify. Witnesses sometimes die often in suspicious circumstances, over time some become unwilling to testify due to intimidation or threats to life and family.²⁹

In Rwanda for example witnesses would refuse to travel and give evidence and would justify it by a local saying to the effect that: “the rain does not wait for you when you go to Arusha.”³⁰ This shows the low priority given to testifying in the ICTR. Some would opt out of testifying due to the failure by the tribunal to compensate them for the time and risks involved in giving testimony. The international criminal justice system has also suffered credibility problems where the witnesses view accused persons living a better and higher standard of life in Arusha than themselves. The result is “that witnesses who had earlier granted witness statements simply fail to show up. The” problem of non availability of witnesses has been exacerbated by the poor witness protection programme.³¹

Sexual offences consist of some of the most violent crime that can ever occur to a woman. This is reflected in the way “rape is treated in Kenyan society. The survivors feel helpless and intimidated at the same time. The framing of this experience also depicts a picture of self hate and deprecation. Rape survivors often feel or are made to feel they somehow invited the attack on themselves. Matters are made worse with societal attitudes that treat women” as

²⁹ “Obote-Odora, Alex, Rape and Sexual Violence in International law: ICTR Contribution,” 144: which meant that they gave more priority to farming activities than giving evidence in a foreign country.

³⁰ Ibid.

³¹ Ibid.

property and sexual objects.³² “Sexual violence is encouraged in many ways in various cultures and women are often blamed for it, a view that reflects a massive abdication of responsibility.

The women in the camps were also exposed to sexual and gender-based violence in the course of obtaining basic resources such as food, water and fuel for themselves and their families. In Nakuru and Eldoret rapes and other forms of sexual abuse were frequently reported when displaced women and girls had to leave camp areas to gather firewood.³³ In Naivasha and Nakuru displaced women were forced to exchange sex for aid, including food from national and international workers, according some of the reports we got from the IDPs in the Nairobi camps from individuals who were relocated from those two camps. It was also striking that the rape attacks were a form of punishment for perceived or imagined political divergence. Some women were raped simply because they came from a community that harbors divergent political views from the perpetrators.”

1.9.1. Challenges of Creating Accountability for Sexual Offences

Sexual offences have been committed in conflict in various forms globally since time immemorial as a strategy and a ‘weapon of war’ even in the 21st century.³⁴ As early as the 1st century, prohibitions of sexual violence were contained in military codes that were designed to protect innocent persons like women, children, farmers, merchants and priests from harm of any nature.³⁵ This was oftenly done on paper but in reality prosecuting sexual crimes was not given priority as “The legacy of impunity for wartime rape is often the normalization of chronic rape in

³² K. Shilabukha, Why men should talk about the sin of rape, *East African Standard*, Thursday, 20 September 2007 at 16.

³³ Ibid.

³⁴ E. Rehn and E. Johnson Sirleaf, *Women, war, peace: the independent experts' assessment on the impact of armed conflict on women and women's role in peace-building* (UNIFEM, New York, 2002) at 88.

³⁵ Patricia Viseur Sellers, *The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation* at 6.

the post-conflict phase.”³⁶ For various reasons of patriarchy, women were historically considered as ‘property’ and therefore could be owned and controlled by men.³⁷ For that reason, when a sexual assault was perpetrated against a woman it did not constitute “a crime against her but against the man’s property” (usually her father and later her husband).³⁸ In times of war, women became “legitimate spoils of war just like livestock and other chattels. During the middle ages, rape and slavery of women became an inducement for war”.³⁹

1.9.2. Proposals for Reform

According to Kitale,⁴⁰ addressing SGBV “requires national education and sensitization at all levels at the family and community level and at the level of service provision so that doctors, lawyers, judges and police are able to respond to survivors efficiently, effectively and supportively. It further requires advocating for improved legislation to protect women and girls, as well as policies that support gender equity and equality.”⁴¹

“While the broad outline of roles and responsibilities within this multi-sectoral model provides a general framework for addressing violence against women, an assessment undertaken in 2001 concluded that implementation was weak in virtually every conflict-affected setting around the world. Foremost among the limitations to establishing multi-sectoral programming was the failure at both the international and national levels to prioritize violence against women”

³⁶ “Patrick Cammaert, Letter to the Editor on ‘Sexual Violence and War’, *International Herald Tribune*, 13 February 2009.”

³⁷ Askin *supra* note 8 at 288.

³⁸ Alexandra “Wald, ‘What’s Rightfully Ours: Toward a Property Theory of Rape’, (1997) 30 *Columbia Journal of Law & Social Problems*” 459.

³⁹ Askin *supra* note 8 at 297.

⁴⁰ Charles Cleophas Makau Kitale, “*Internal Displacement in the Kenyan Context: Challenges of Justice, Reconciliation and Resettlement*” (Institute of Social Studies: The Hague, 2011).

⁴¹ J Feinberg, “Autonomy”, In: J. Christman (Ed). *The Inner Citadel: Essays on Individual Autonomy* (Oxford University Press: New York, 1989) at 23.

“as a major health and human rights concern. The result was a lack of financial, technical and logistical resources necessary to tackle the issue. Many survivors, the 2001 assessment observed, were not receiving the assistance they needed and deserved, nor was sufficient attention being given to the prevention of violence. The outcomes of an independent experts’ investigation spearheaded by the United Nations Development Fund for Women the following year echoed these findings in their conclusion that the standards of protection for women affected by conflict were glaring in their inadequacy, as is the international response.”

1.10. Research Methods

This is a qualitative research that relied on desk top analysis of secondary and primary data. The secondary data will include: books, journal articles, conference papers, newspaper reports and electronic media. Primary data will include: The Constitution, Acts of Parliament and international legal instruments.

1.11. Chapter Breakdown

Chapter 1: Introduction: This is the introduction which covers the background, objectives, questions of the study, hypothesis, justification, theoretical review, research methodology and the literature review.

Chapter 2: Background to Sexual Crimes in International Law: Covers an assessment and historical development of accountability mechanisms for sexual offences in international law.

Attention is placed on sexual offences in “international humanitarian law, international customary law and international criminal law”

Chapter 3: Policy and Legal Framework Addressing SGBV in Kenya: This chapter discusses the legal and policy framework for the establishment of accountability mechanisms for sexual offences. Areas to be addressed include, international frameworks on SGBV especially those under UDHR, ICCPR, ICESCR and CEDAW. Regional accountability mechanisms for SGBV like the “African Charter on Human and People’s Rights, Protocol to the African Charter on Human and People’s Rights,” AU Solemn Declaration on Gender Equality. Domestic frameworks include substantive law on sexual offences comprising the Constitution of Kenya, the Penal Code, the “Sexual Offences Act, Procedural law on sexual offences” (Criminal Procedure Act, the Evidence Act and the Criminal Procedure Code). Lastly the policy framework consisting of the Kenya National Legal and Policy Framework on Gender Violence on the Management of Sexual Violence.

Chapter 4: Best Practices in Creating Accountability for Sexual Offences: Covers best practices from various jurisdictions on accountability mechanisms for sexual offences and the challenges therein.

Chapter 5: Conclusion and recommendation

CHAPTER TWO

BACKGROUND TO SEXUAL CRIMES IN INTERNATIONAL LAW

2.1. Introduction

Sexual offences have been committed in various forms in conflict globally since time immemorial first as a strategy and a ‘weapon of war’ even during the 21st century.⁴² As early as the 1st century, prohibitions of sexual violence were contained in military codes that were designed to protect innocent persons like women, children, farmers, merchants and priests from harm of any nature.⁴³ This was oftenly done on paper but in reality prosecuting sexual crimes was not given priority.⁴⁴ For various reasons of patriarchy, women were historically considered as ‘property’ and therefore could be owned and controlled by men.⁴⁵ For that reason, when a sexual assault was perpetrated against a woman it did not constitute ‘a crime against her but against the man’s property (usually her father and later her husband).⁴⁶ In times of war, women became legitimate spoils of war just like livestock and other chattels. During the middle ages, rape and slavery of women became an inducement for war.’⁴⁷

Later when rape was prohibited by customary international law, sexual violence was not officially encouraged, however sexual offenses were either ignored or tolerated by military leaders.⁴⁸ Rape was considered an inevitable consequence of armed conflict, therefore sexual violence generated very little interest as it was viewed as a by-product of conflict.⁴⁹ As men and boys waged war, they in the same breath targeted the most vulnerable members of society for

⁴² “E. Rehn and E. Johnson Sirleaf, *Women, war, peace: the independent experts' assessment on the impact of armed conflict on women and women's role in peace-building* (UNIFEM, New York, 2002) at 88”.

⁴³ Sellers “*supra* note 35 at” 6.

⁴⁴ Cammaert “*supra* note 35 at 5”.

⁴⁵ Askin *supra* note 8 at 288.

⁴⁶ Wald *supra* note 37 at 459.

⁴⁷ Askin *supra* note 8 at 297.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* at 40.

attack, the women. This is the background up on which the prosecution of sexual crimes against women is analyzed.

“The ICTY in *Prosecutor v. Kunarac, Vovac and Vukovic*,⁵⁰ became the first international war crimes prosecution tribunal to hand down judgment on charges that were purely based on sexual violence against women. The accused was found guilty of crimes against humanity and war crimes as principle and accessories to rape, enslavement and violation of personal dignity.

This chapter analyses the historical origin of sexual offences in international law. It focuses on the origin of accountability mechanisms in international humanitarian law. The instruments to be considered are the Hague Convention of 1907, the 4 Geneva Conventions of 1949⁵¹ and the 2 Additional Protocols to Geneva Conventions of 1977.⁵² Second, is the concurrent development of international human rights law (IHRL) that began with the creation of the Universal Declaration of Human Rights (UDHR), International Covenant for Civil and Political Rights (ICCPR), International Covenant for Social, Economic and Cultural Rights (ICSECR) and finally Convention on Elimination of Discrimination Against Women (CEDAW)⁵³ especially Commentary No. 19 which specifically elaborates on sexual offences. Third is the role of international criminal law (ICL) especially institutions created after the 2nd World War namely

⁵⁰ Case No. IT-96-23T, Judgment, 22 February 2001 (hereinafter *Kunarac*)

⁵¹ The “First Geneva Convention Relative to Wounded on Land; The Second Convention relative to the Ship wrecked and Wounded at Sea”; The Third Convention Relative to Prisoners of War.

⁵² “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, done 8 June 1977, 1125 U.N.T.S. 3, entered into force 7 December 1978 (Additional Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, done 8 June 1977, 1125 U.N.T.S. 609, entered into force 7 December 1978 (Additional Protocol II).”

⁵³ “CEDAW Committee, 1992, ‘General Recommendation No. 19, Violence against women’, reprinted in *Compilation of general comments and general recommendations adopted by human rights treaty bodies*, 1998, UN Doc. HRI/GEN/1/Rev.9” (Vol. II), pp. 331-336.

IMT held in Nuremberg⁵⁴ and IMTFE held in Tokyo.⁵⁵ Special attention will be given to establishment “of International Criminal Tribunal for the former Yugoslavia (ICTY)⁵⁶ and International Criminal Tribunal for Rwanda (ICTR)⁵⁷ that laid ground work for the prosecution of sexual offences that laid the foundation for the establishment of the Rome Statute of the International Criminal Court (ICC).”⁵⁸

2.2. Gender Crimes in International Law

“The unique nature of sexual violence is that it is a gender based crime that exemplifies human rights violations as a part of gender discrimination.⁵⁹ Gender based violence undermines, impairs, nullifies and deprives females of the exercise of their human rights that are inalienable, indivisible, inter-dependent and inclusive.⁶⁰ It further deprives women and girls of the ability of to exercise their civil, political, economic, social cultural and the right to development.⁶¹ Various human rights instruments, declarations and conventions such as the Convention on the”

⁵⁴ “Charter of the International Military Tribunal, Annexed to the London Agreement, 8 August 1945, art. 26, 82 U.N.T.S. 280, 59 Stat. 1544, 8 AS No. 472” (“London Charter”);

⁵⁵ “Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946, art. 17, T.I.A.S. 1589, as amended, 26 April 1946” (“Tokyo Charter”).

⁵⁶ “Statute of the International Criminal Tribunal for the former Yugoslavia, attached to the Report of the Secretary general Pursuant to Paragraph 2 of the Security Council Resolution 808, U.N. Doc. S/25704, Annex (1993), (hereinafter ICTY).”

⁵⁷ “Statute of the International Criminal Tribunal for Rwanda, attached to Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed on the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994, S.C. Res. 955, Annex (8 Nov. 1994), (hereinafter ICTR).”

⁵⁸ “Rome Statute of the International Criminal Court, opened for signature 17 July 1998, UN Doc. A/CONF.183/9 51998, 37 ILM 999 (1998), entered into force 1 July 2002 (hereafter Rome Statute of the ICC).”

⁵⁹ “Sellers *supra* note 34 at 7”.

⁶⁰ “Preamble, UDHR”

⁶¹ “Sellers *supra* note 34 at 4.”

“Elimination of all Forms of Discrimination Against Women (CEDAW),⁶² upholds the right of everybody to equal access to justice”.

“Before the codification of IHL, customs of war prohibited rape for example in 1474, an international military court sentenced Hagenbach to death for war crimes including rape committed by his troops.⁶³ In 1600s, Hugo Grotius was of the view that rape should be punished in wartime as it is in peacetime.”⁶⁴

2.3. “Sexual Violence in International Humanitarian Law” (IHL)

It is only recently that sexual crimes attracted the attention of “international humanitarian law (IHL), international human rights law (IHRL) and international criminal law” (ICL) in particular.⁶⁵ This is attributed to the fact that before 1990, the drafting and enforcement of humanitarian law was undertaken by men who neglected the prosecution of sexual offences.⁶⁶ Whereas men still play an important role in international legal fora, deliberate policies have ensured that women have taken up top positions which has changed the international legal

⁶² “General Comment No. 10”

⁶³ “William Parks, *Command Responsibility for War Crimes*, (1973) 62 *MI. L. REv.* 1.”

⁶⁴ “HuGo GROTIUS, *DE JURE BELLI Ac PACiS LIBRI TRES* 656-57 (Francis W. Kelsey trans., 1995)”.

⁶⁵ “Morten Borgesmo, *Understanding and Proving International sex crimes* (Torkel Opsahl Academic E Publisher: Beijing, 2012) at iii; Articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi), and also the ICC Elements of Crimes for genocide, Article 6(b)(1), Rome Statute of the International Criminal Court (ICC Statute)”.

⁶⁶ “Christine M. Chinkin, *Peace and Force in International Law, in* *Reconceiving Reality: Women and International Law* 212 (Dorinda G. Dallmeyer ed., 1993): Despite the far-reaching consequences of conflict upon women, their voices are silenced in all levels of decision-making about war The whole area of the use of force is the one from which women's exclusion is most absolute.) For a review of women in high level positions of power in international law.”

landscape.⁶⁷ This is important because women in high positions have succinctly articulated gender crimes.⁶⁸

IHL forms a critical starting point in the prosecution of sexual offences because Article “2 and 3 of the ICTY” grants the “tribunal the jurisdiction over grave breaches enumerated in the Geneva Conventions as well as serious violations of laws and customs of war.”⁶⁹ Additionally Article 4 of ICTR on war crimes provides a window for the tribunal to prosecute “serious violations of 1977 Additional Protocol II and Common Article 3 of the 1949 Geneva Conventions.”⁷⁰ For that matter, discourse on sexual crimes in international criminal law (ICL) cannot be discussed outside the confines of IHL. This is because the sexual violations arise out of the conduct of warfare in international and domestic conflicts.⁷¹ IHL, ICL and IHRL are quite similar in as much as they offer protection to individuals and overlaps for women and girls.⁷² IHL is invoked as soon as armed conflict commences while “crimes against humanity and genocide are not connected to war before prosecution can commence.”

IHL is popularly known as the law of armed conflict which comprises “rules, regulations and laws governing members of armed forces and civilians in times of armed conflict”. It is the law that aims at lessening violations to combatants and non combatants alike during times of

⁶⁷ “Two of the three Chief Prosecutors of the ICTY/ICTR Tribunals have been women (Louise Arbour from Canada and Carla del Ponte from Switzerland), one of the three Registrars of the ICTY has been a woman (Dorothy De Sampayo from the Netherlands), and both the ICTY and ICTR have had a woman as President of the Tribunal (Gabrielle Kirk McDonald from the U.S. (ICTY) and Navanethem Pillay from South Africa (ICTR))”.

⁶⁸ “Askin *supra* note 8 at 296.”

⁶⁹ “The ICTY Statute grants subject matter jurisdiction over: Article 2, Grave breaches of the Geneva Conventions of 1949”

⁷⁰ “The ICTR Statute grants subject matter jurisdiction over: Article 2: Genocide”

⁷¹ “In *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998, sexual violence was defined as “... includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the body and may include acts that do not involve penetration or physical contact.” para. 598.

⁷² “Juan E.Mendez, International Human Rights Law, International Humanitarian Law, and International Criminal Law and Procedure: New Relationships, in *International Crimes, Peace, and Human Rights: the Role of the International Criminal Court* 65, 67-71 (Dinah Shelton ed., 2000).”

conflict.⁷³ Through it, mandatory rules have been established that limit how war can be waged, conduct of hostilities on land, air and sea. It as well standardizes the treatment of combatants (the wounded and prisoners of war), stipulating distinctions between combatants and non combatants.⁷⁴ The most important principle of IHL is that under no circumstances should civilians be targets of attack and other harmful acts.⁷⁵ Further it prescribes human treatment and minimization of suffering during times of armed conflict. Whereas this is the case, armed conflicts usually experience “breaches of laws and customs of war. When the violations are serious, humanitarian law imposes individual responsibility” on those with highest degree of responsibility for the commission and omission (military/civilian/political leaders) or those who fail to take action to prevent, stop or punish the perpetrators.⁷⁶ IHL governs *jus in bello* whether or not a conflict is viewed as international or not. Although violations of sexual offences were hardly enforced, they formed part and parcel of the prohibitions envisaged in humanitarian law.

Although sexual violence was prohibited in the early 18th century, the reality was different, which helped exacerbate sexual violence in conflicts around the world. There seemed to be a silent campaign in conflicts involving powers to protect and spread western social and religious values of racial superiority in an attempt to civilize the world.⁷⁷ Inflicting “sexual violence”

⁷³ “Askin *supra* note 8 at 288”.

⁷⁴ “Leslie C. Green, *The Contemporary Law of Armed Conflict* (2d ed. 2000)”.

⁷⁵ “Articles 48-58 of Additional Protocol I stipulate requirements for protecting civilians from the effects of hostilities. Essentially, attacks may only be directed against military objectives and precautions must be taken to the maximum extent possible under the circumstances and in correlation to the military advantage anticipated, to prevent incidental death to civilians and harm to civilian objects. Thus, death of civilians does not necessarily imply criminal sanction, as the law recognizes that civilian casualties are inevitable during war; the law does however impose duties upon combatants and their superiors to minimize harm to civilians and civilians may never under any circumstances be intentionally targeted for attack. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1331 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol I].”

⁷⁶ “Helen Durham, ‘International Humanitarian law and the Protection of Women’, in *Listening to the Silences: Women and War*, Durham and Gurd (eds.), International Humanitarian Law Series, No. 8, (Martinus Nihoff: 2005) at 96.”

⁷⁷“Sellers *supra* note 34 at 6”

“during the Crusades, colonial times, wars of conquest, raids on indigenous lands and military occupation were not just seen as exceptions to *jus in bello* but generally accepted as rights of occupation forces.”⁷⁸

2.3.1. Customary International Law

Customary international law that codified IHL had existed for thousands of years. At the outbreak of the 1st World War in 1914, the conduct of war was governed by the Hague Convention of 1907.⁷⁹ The convention prohibited sexual violence terming it as "family honour and rights must be respected."⁸⁰ “At the beginning of the 20th century, violating family honor was understood to include sexual assault.⁸¹ It therefore becomes clear that at the turn of the century, customary law and Hague law prohibited sexual; violence.”⁸²

Arising from the atrocities of the 1st World War, “allied powers established the War Crimes Commission in 1919 to investigate and make recommendations on how to punish Axis war criminals. The commission listed 32 violations of the laws and customs of war committed by the Axis powers. Rape and abduction of women and girls for purposes of forced prostitution” became punishable. These provisions were later reinforced in the 20th century as war crimes, however its enforcement was not given priority.⁸³

2.3.2. Hague Convention of 1907

⁷⁸ “Ibid at 7.”

⁷⁹ “Convention Concerning the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (ser. 3) 461 (entered into force Jan. 26, 1910).”

⁸⁰ “Hague Convention IV at art. XLVI”.

⁸¹ “Susan Brownmiller, *Against our will: Men, Women and Rape* (1975); Peter Karsten, *Law, Soldiers and Combat* (1978) at 42.”

⁸² “Askin *supra* note 8 at 300.”

⁸³ “U.N. War Crimes Commission’, (1949) 13 *Law Reports of Trials of War CIM A.S* 122.”

The 19 and 20th centuries saw advancement in codification of sexually violent crimes. The “1863 Lieber Code,⁸⁴ drew upon customary international law and forbade in Article 44”, “all rape” “and provided in Article 47 that” “crimes ... such as ...rape ... are punishable.”⁸⁵ “Article I of the Annex to the II Hague Convention of July 1899 and Article I of the IV Hague Convention of 1907, and” expected those involved in conflict to “conduct their operations in accordance with the laws and customs of war⁸⁶ that, *sub silencio*, prohibited all conventional war crimes, including rape. In Section III, the Regulations to the IV Hague Convention of 1907, Article 46 states that during periods of military occupation,” “family honor ... must be respected.” “12 In the decade after World War I, the drafters of the 1929 Geneva Convention provided in Article 3, that,” “Prisoners of war have the right to have their person and their honor respected. Women shall be treated with all the regard due to their sex,”⁸⁷ “a genteel phrasing of a prohibition against sexual violence including rapes. However, the Geneva Convention of” 1907 was deemed to be inadequate to deal with the scale of atrocities experienced in the 2nd World War, they were amended in 1949 resulting into four conventions.

2.3.3. Geneva Conventions of 1949

Civilians form the largest number of casualties in modern day conflicts.⁸⁸ Although men and women are exposed to similar violence such as torture, murder, displacement, imprisonment and slave labor. Women and girls are subjected to gender violence (forced impregnation, forced

⁸⁴ “US Army Code of Conduct”.

⁸⁵ “Articles 44 and 47, General Order 100, Instructions for the Government of the Armies of the United States by the Field by Order of the Secretary of War, 24 April 1863 (the Lieber Code)”.

⁸⁶ “Convention Respecting the Laws and Customs of War on Land, and Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land (Hague IV), The Hague, 18 October 1907, 3 Martens (3) 461, 36 Stat. 2277, T.S. No. 59 (Hague Convention IV), *reprinted in* AM. J. Int’l. 90 51908, Supp. (The IV Hague Convention of 1907).”

⁸⁷ “Article 46, The IV Hague Convention of 1907, Section III”.

⁸⁸ Askin *supra* note 8 at 297.”

abortion, rape among others). Illustrated by sexual slavery of “200,000 of so called “comfort women” during the Second World War by the Japanese military establishment.⁸⁹ In this context, sexual violence was used by male soldiers to improve their morale.⁹⁰ The codification of IHL after the 2nd World War led to the signing of the 4 Geneva Conventions of 1949”. Again the Conventions had a notable absence of prohibition of rape as a crime and gave breach of human rights. Out of the 4 conventions, only “Article 27 of the 4th Geneva Convention Against the Relative to Civilians under the prohibitions aimed at protecting civilians under enemy occupation. It stated, that,” “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault...”⁹¹

“Articles 12 of the 1st, and 2nd Geneva Conventions and Article 14 of 3rd Geneva Conventions reaffirmed the thrust of Article 3 prohibitions found in the 1929 Geneva Conventions which provided that”: “women shall be treated with all consideration due to their sex.”⁹² It is important to note that Article 3, found in 1st, 2nd 3rd and 4th Geneva Conventions of 1949 envisaged regulation of conflicts of a “non international nature using the phrase” “outrages upon personal dignity, in particular humiliating and degrading treatment”.⁹³ The drafting was deliberate as it sought to provide sufficient flexibility that would encompass future acts

⁸⁹ “Ibid”

⁹⁰ “Christine Chinkin, ‘Women’s International Tribunal on Japanese Military Sexual Slavery’, (2001) 95 *AM. J. INT’L L.* 335”.

⁹¹ “Article 27, IV Geneva Convention of 1949”: “the Conference listed as examples certain acts constituting an attack on women’s honour, and expressly mentioned rape, enforced prostitution, i.e. the forcing of a woman into immorality by violence or threats, and any form of indecent assault. These acts are and remain prohibited in all places and in all circumstances, and women, whatever their nationality, race, religious beliefs, age, marital status or social condition have an absolute right to respect for their honour and their modesty, in short, for their dignity as women.”;

⁹² “Article 12 of the First Geneva Convention Relative to Wounded on Land, Article 12 of the Second Convention relative to the Shipwrecked and Wounded at Sea, and Articles 13 and 14 of the Third Convention Relative to Prisoners of War.”

⁹³ “An organic relationship exists between common article 3 and article 27 of Geneva Convention IV. The Commentary to common article 3 notes that” “humane treatment” “must be understood within the meaning of article 27 of the Fourth Geneva Convention (COMMENTARY TO GENEVA IV, 38)”.

contemplated under the convention.⁹⁴ In 1992, after the “ratification of the Additional Protocol to Geneva Conventions, the International Committee of the Red Cross” (ICRC) “clarified the prohibition of rape pursuant to the Geneva” Convention “of 1949 through an *Aide Memoire*. In its understanding , grave breaches envisaged in Article 147 of the 4th Geneva Convention that touched on willfully causing great suffering or serious injury to the body or health covers rape any other attack on a woman’s dignity”.⁹⁵ This interpretation shed light and expounded on the scope of the legal breaches in 1st, 2nd, and 3rd Geneva Conventions of 1949.”

2.3.4. “Additional Protocol to the Geneva Conventions of 1949

The 1st and 2 Additional Protocol to the Geneva Conventions of 1949 established in 1977 not only complemented but expanded the grave breaches found in the Geneva Conventions. In more specific terms, the minimum standards of Article 3 of the 1st 2nd and 3rd Geneva Conventions prohibit rape in all forms of armed conflicts.”⁹⁶

Additional Protocol 1 regulates *jus in bello* in times of international armed conflicts. Article 75(2)(b), guarantees that civilians and military agents are not to inflict “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”.⁹⁷ Women are protected from “rape, forced prostitution and any other”

⁹⁴ “Ibid.”

⁹⁵ “International Committee of the Red Cross, *Aide-memoire*, December 1992, para. 2.”

⁹⁶ “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, done 8 June 1977, 1125 U.N.T.S. 3, entered into force 7 December 1978 (Additional Protocol I), *reprinted in* 16 I.L.M.1391 (1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, done 8 June 1977, 1125 U.N.T.S. 609, entered into force 7 December 1978 (Additional Protocol II), *reprinted in* 16 I.L.M.182 (1977).”

⁹⁷ “Article 75(2) (b) reiterate that Common Article 3 to the Geneva Conventions of 1949 and the prohibition of enforced prostitution and indecent assault, a particular form of outrages, applies to everyone, men, women and children.”

form of assault”⁹⁸. In Article 76 (1), children and girls in particular are protected against ‘indecent assault’⁹⁹ It must be remembered that Additional Protocol 1, forms part and parcel of “international customary law that is binding to all states.”¹⁰⁰

The 2nd “Additional Protocol of 1977 to the Geneva” Convention for non “international” armed conflict lists prohibitions contained in Article 4. Article 4 arose out of the expansion of Article 3 extended prohibitions to internal armed conflicts. The drawback has been that “Additional Protocol II of 1977 to Geneva Convention 1949 is not” accepted as customary international law, nevertheless, Article 3 that covers gender based violence has gained the status of international customary law.¹⁰¹

In conclusion the 1990s witnessed wide ranging prohibition of sexual violence on enemy civilians, “members of the armed forces, prisoners of war in” times of armed conflict.¹⁰² The prohibitions extended to those who are “no longer engaged in combat in non international armed conflict.”¹⁰³ Noticeably few prosecutions were conducted by national military codes and domestic laws to send a message that condemns sexual violence.¹⁰⁴ National military codes¹⁰⁵ and national legislations¹⁰⁶ have incorporated IHL to protect violations of sexual assaults. The

⁹⁸ “API, Article 76(1), entitled Protection of Women, underscores the special protection extended to women. It states”: “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault”.

⁹⁹ “API, Article 77(1), entitled Protection of Children states, *inter alia* in paragraph 1 that”, “children shall be the object of special respect and shall be protected against any form of indecent assault”.

¹⁰⁰ “Theodore Meron, *Human Rights and Humanitarian Norms as Customary Law*, 1989.”

¹⁰¹ “Sellers *supra* note 34 at 10”.

¹⁰² “Representing the combined protection of the four Geneva Conventions of 1949, inclusive of Common Article 3 and the two Additional Protocols of 1977 to the four Geneva Conventions”.

¹⁰³ “Ibid.”

¹⁰⁴ “US Court of Military Appeals, *John Schultz case*, Judgment 5 August 1952, wherein rape was held to be a crime universally recognized as properly punishable under the law of war”.

¹⁰⁵ “Henckaerts and Doswald-Beck (eds.), *Customary International Humanitarian Law*, Volume II: Practice, ICRC (Cambridge Pressg: Geneva, 2005) paras. 1586-1617: provisions of military manuals of Argentina, Australia, Canada, China, Dominican republic, El Salvador, France, Germany, Israel, Madagascar, Netherlands, New Zealand, Nicaragua, Nigeria, Peru, Senegal, Spain, Switzerland, Uganda, United Kingdom and United States.”

¹⁰⁶ “Ibid, paras. 1620-1660”

prohibition based on principles of human treatment “found in IHL is still found in customary international law and treaty law as well.”¹⁰⁷

2.4. Sexual Offences in International Human Rights Law (IHRL)

Sexual violence against women has also attracted attention of IHRL. After the massive human rights violations of the 2nd World War, the world came to a realization that existing legal frameworks were incapable of holding those who violate human rights to account. The international community recognized the need for people to live in dignity, the establishment of the “Universal Declaration of Human Rights (UDHR) in 1948” formed a consensus that human rights are inalienable, indivisible¹⁰⁸ and should be enjoyed without discrimination. The message of non discrimination was carried through even when the “International Convention of Civil and Political Rights (ICCPR) and International Convention of Social, Economic and Cultural Rights (ICSECR) were created in 1966 to deal with civil and political rights on one hand and social, economic and cultural rights on the other.¹⁰⁹ Other human rights instruments were created to deal with specific issues. For example, the Convention on the Elimination of Discrimination Against Women (CEDAW) had jurisdiction to deal with issues of discrimination against women in all aspects including sexual violence. This was a recognition that it is through discrimination that gender based violence festers denying women the opportunity to live in dignity”.

¹⁰⁷ “Theodore Meron, *Human Rights and Humanitarian Norms as Customary Law*, 1989, pp. 2-5.”

¹⁰⁸ “Preamble UDHR”

¹⁰⁹ “Sellers *supra* note 34.”

2.4.1. CEDAW

CEDAW was the first international legal document that addresses discrimination of women. Its creation came at an opportune moment when sexual violence was rife in the 1990s. The attention is reflected in the agenda of the UN World Conference in “Vienna, in 1993, Cairo in 1994 and Beijing in 1995 where violence against women began” receiving very serious attention.¹¹⁰ This recognition was critical in as far as issues of violence against women (VAW) and discrimination would be dealt with.¹¹¹

“...violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threat of such acts, coercion and other deprivations of liberty”.¹¹² VAW was thus at the time considered more or less equivalent to GBV. The 1993 UN General Assembly Declaration on the Elimination of Violence against Women (DEVAW) asserted this limited understanding of GBV and defined VAW as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering *to women*, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.¹¹³

CEDAW General Commentary No. 19 recognizes that gender based violence arising from discrimination limits the ability of women to enjoy fundamental “rights and freedoms in international and domestic law. CEDAW defines discrimination as” “the right to equal protection according to humanitarian norms in times of international or internal armed conflict”.¹¹⁴ From this definition, it is clear that equal protection includes the human rights of non discrimination echoed in IHL. That notwithstanding, General Comment 19, did not specify the actual humanitarian norms to be protected. However, the General Commentary 19 represents an

¹¹⁰ “Rehn and Sirleaf *supra* note 41at 91”.

¹¹¹ “Ibid.”

¹¹² “General Recommendation No. 19 (1992) of the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), UN Doc A/47/38, para. 6.”

¹¹³ “Article 1, Declaration on the Elimination of all Forms of Violence Against Women, UN Doc. A/RES/48/104, 20 December 1993”

¹¹⁴ “Paragraph 7(c) of the CEDAW Recommendation No. 19.”

authoritative interpretation of CEDAW which accords women and girls equal protection against discrimination and humanitarian safeguards during international and internal armed conflict.¹¹⁵ It also reaffirms that gender based violence contains a human rights element that should be protected.¹¹⁶

The Beijing Platform of 1995,¹¹⁷ “addressed the plight of women and girls in armed conflict noting that “massive violations of human rights, especially in the form of genocide, ethnic cleansing as a strategy of war and its consequences, and rape, ...are abhorrent practices...”¹¹⁸ It considered that sexual violence is committed in the context of genocide, war crimes and crimes against humanity which all constitute violations of human rights.¹¹⁹ The” Beijing Declaration was given impetus through recognition by the UNSC.¹²⁰

In 2000, Security Council Resolution 1325 on Women Peace and Security¹²¹ reaffirmed the Beijing Declaration’s prescience, and recognized the “need to implement fully, international humanitarian and human rights law that protects the rights of women and girls during and after conflicts” and called “upon all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse”.¹²² Security Council Resolution 1325, passed almost a decade after the CEDAW General Recommendation No. 19, specified the IHL basis of protection and the human rights law bases of rights to be extended to females during armed conflict and in the immediate aftermath of armed conflict. It moreover, cited the Rome Statute of the (then pre-operative) International Criminal Court.¹²³

¹¹⁵ “Sellers *supra* note 34 at 28”.

¹¹⁶ “Ibid.”

¹¹⁷ “Beijing Declaration and Platform for Action, Fourth World Conference, 15 September 1995, UN Doc. A/Conf.177/20 (1995), Section E, *Women and Armed Conflict*, para. 132-137”.

¹¹⁸ “Beijing Platform, para. 132”

¹¹⁹ “Sellers *supra* note 34 at 28”

¹²⁰ “Security Council Resolution, S/RES/1325, 31 October 2000 (SC Res. 1325).”

¹²¹ “Ibid”.

¹²² “Preamble and Paragraph 10 of SC Res.1325”.

¹²³ “Paragraph 9, of S. C. Res. 1325: Calls upon all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians, in particular the obligations applicable to them under the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977, the Refugee Convention of 1951 and the Protocol thereto of 1967, the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and the Optional Protocol thereto of 1999 and the United Nations Convention on the Rights of the Child of 1989 and the two Optional Protocols thereto of 25 May 2000, and to bear in mind the relevant provisions of the Rome Statute of the International Criminal Court.”

“In 2002, the Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences pointed out that sexual violence during conflict constitutes human rights violation and measures to redress it should be sought even when “committed in peacetime”¹²⁴. Furthermore the adoption of the African Charter of Human and Peoples Rights on the Rights of Women in Africa (African Protocol), defined gender violence as encompassing protection against acts of violence whether temporary or political in nature.”¹²⁵

“...that ‘violence against women’ means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life.”¹²⁶

The African Protocol considered that apart from gender based violence violating the rights of women, African states should take steps to safeguard the rights of women and girls through available human right frameworks regardless of the form it takes.¹²⁷ This position was supported by the SC Resolution stressing that those who are vulnerable are at greater risk and should be protected “whether occurring in public or private life”,¹²⁸ “to ensure the human rights’ protection of” “women and girls in situations of armed conflict, post armed conflict settings and refugee and internally displaced settings, where women are at greater risk of being targeted for violence...”¹²⁹

In 2008, the SC recognized “sexual violence as constituting a threat to peace and security¹³⁰ where women and girls are targeted” for sexual violence as “a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a”

¹²⁴ “Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights, available at <http://www.kituoahakatika.co.ug/cairo-arusha.htm> accessed on 20 April 2016.”

¹²⁵ “Article 1 (j), African Woman’s Protocol”

¹²⁶ “Ibid.”

¹²⁷ “Cardam *supra* note 12 at 148”.

¹²⁸ “GA Resolution 61/438, para. 3”.

¹²⁹ “GA Resolution 61/438, para. 3 and 8(o)”.

¹³⁰ UNSC Res. 1820 of 2008.

“community or ethnic group”. In addition, sexual violence exacerbates conflicts while undermining peace processes. The SC affirmed its readiness to deal with systemic sexual violence that target civilians.¹³¹

IHRL has approached sexual violence not as a standalone crime but one that is committed in furtherance of other “crimes such as genocide, war crimes and crimes against humanity. For that” reason, accountability for sexual offences is carried out in declarations, recommendations, resolutions, conventions, treaties and protocols at international and regional level. It acknowledges that redressing sexual violence should adhere to the doctrine of non discrimination found in the UDHR, ICCPR, ICSECR, CEDAW and Recommendation No. 19 of CEDAW. The principle of non discrimination has been imported into the “Rome Statute of the International Criminal Court.¹³² The provisions mandate the ICC to use” standards “the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and without any adverse distinction founded on grounds such as gender.”¹³³

2.5. “Sexual Violence in International Criminal Law (ICL)

The prohibition of sexual violence in IHL coincided with similar measures undertaken in international criminal law but first as a crime against humanity. Rape in particular gained acceptance as a crime against humanity through the incorporation of international crimes into national military codes and national legislation.¹³⁴ The recognition of rape in the statute of the international criminal court/statutes and” judicial interpretations demonstrated its increased

¹³¹ Sellers *supra* note 18 at 30.

¹³² “Article 21(3), Rome Statute of the International Criminal Court, opened for signature 17 July 1998, UN Doc. A/CONF.183/9 51998, 37 ILM 999 (1998), entered into force 1 July 2002 (hereafter Rome Statute of the ICC)”.

¹³³ Ibid.

¹³⁴ Meron *supra* note 106.

acceptance.¹³⁵ The declarations, UN resolutions, reports, commissions of “international criminal courts and tribunals that came up in the 90s provided the” requisite jurisdiction to try sexual offences. These were viewed as central violations of IHL and ICL in addition to crimes against humanity. “Governing statutes of the International Criminal Tribunal for the former Yugoslavia¹³⁶ and the International Criminal Tribunal for Rwanda¹³⁷ the Special Panels for Serious Crime,¹³⁸ the Special Court for Sierra Leone,¹³⁹ the International Criminal Court and the Extraordinary Court Chambers for Cambodia¹⁴⁰ list the crime of rape, together with other expressly named sex crimes such as trafficking and slavery, that are, on their face not of a sexual nature, but crimes whose *actus reus* could certainly include acts of sexual violence.”¹⁴¹

2.5.1. IMT at Nuremberg and IMTFE in Tokyo

The atrocities that were committed after the 2nd World War shattered illusions that the state could provide its people with “security and protection.”¹⁴² Men, women and children were not only killed but women and girls were singled out for rape, sexual slavery and other forms of sexual”

¹³⁵ Sellers *supra* note 34 at 11.

¹³⁶ Paragraph 2, ICTY.

¹³⁷ ICTR.

¹³⁸ “UNTAET/Reg/2000/15, *On the Establishment of Panels with the Exclusive Jurisdiction Over Serious Criminal Offences*, 6 June 2000 (hereafter SPSC).”

¹³⁹ “Statute of the Special Court for Sierra Leone, 16 January 2002, established by *Report of the Secretary-General on the Establishment of the Special Court for Sierra Leone, Annex- Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315*, 14 August 2000, UN Doc. S/2000/915 (hereinafter SCSL).”

¹⁴⁰ “Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period Democratic Kampuchea, 10 August 2001, NS/RKM/0801/12, I supplemented and superseded by the *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period Democratic Kampuchea*, 6 June 2003 (hereinafter ECCC).”

¹⁴¹ “Article 7(2) (c) of the Rome Statute states that enslavement entails the” “right to ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”

¹⁴² Askin *supra* note 8 at 300.

violence.¹⁴³ After the war, trials were held for those holding the highest degree of responsibility. Two tribunals were established to receive evidence and prosecute crimes against peace, war crimes and crimes against humanity.¹⁴⁴

The allied powers drew up the London and Tokyo Charters to punish Major Axis criminals in the IMT at Nuremberg¹⁴⁵ and IMT for the Far East in Tokyo.¹⁴⁶ The jurisdictions of the Charter were conventional war crimes such as “violations of the laws and customs of war”¹⁴⁷, crimes against humanity and crimes against peace. The tribunals received and heard evidence on matters of rape.¹⁴⁸ Notably the Nuremberg tribunal gave little attention to crimes of sexual violence.¹⁴⁹ The Tokyo Tribunal on the other hand indicted and convicted crimes of a sexual nature that were broadly categorized as “murder, rape, and other cruelties”¹⁵⁰. The prosecution did not prosecute with the same vigor the systemic and pervasive sexual offences committed on

¹⁴³ “Askin *supra* note 8.at 49-95: Some offenses, such as sexual mutilation, enforced sterilization, sexual humiliation, and forced nudity are also commonly committed against men, although women do tend to be subjected to these abuses more frequently and often for different reasons.”

¹⁴⁴ “John Murphy, Crimes Against Peace at the Nuremberg Trial, in *the Nuremberg Trial and International Law* 141 (George Ginsburg & V.N. Kudriavtsev eds., 1990).”

¹⁴⁵ “Charter of the International Military Tribunal, Annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 82 U.N.T.S. 59; 279 Stat. 1544 [hereinafter IMT Charter];”

¹⁴⁶ “Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevens 20. The Annex to the Special Proclamation contains the Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, 4 Bevens 21, *as amended* Apr. 26, 1946, 4 Bevens 27 [hereinafter IMTFE Charter].”

¹⁴⁷ “Art. 26, London Charter; Art. 17, Tokyo Charter”.

¹⁴⁸ “Trial of the Major War criminals Before the International Military Tribunal, 14 November 1945-1 October 1946, 542 Vols., 1947, at vol. 1, 43, 51-52. One specific example of sexual assault included occurred in the Stalingrad region where the mutilated bodies of women were found with their breasts sliced off; Tokyo trial documents reprinted in *The Tokyo War Crimes Trial: The Complete Transcript of the Proceedings of the International Military tribunal for the Far East*, 22 Vols., R. Pritchard and S. Zaide (eds.), 1981, IMTFE Docs, vol. 20 at 49 and 605”.

¹⁴⁹ “In the Nuremberg judgment the forced deportation of 500,000 females should have at least been examined as a gender-based crime of massive female enslavement, irrespective of any overt sexual component”.

¹⁵⁰ “IMTFE, vol. 1 at 1029”.

‘comfort women’ perpetrated by Japanese military personnel against thousands of Korean, Chinese, Indonesian and other women from regions captured by Japan.¹⁵¹

Sexual violence crimes in IMTFE were prosecuted as war crimes.¹⁵² In Europe, the “governing instrument of the subsequent trials, (1) (c) Control Council Law No. 10 retained jurisdiction under Article II (a) to prosecute rape as a crime against humanity”.¹⁵³ This was in contrast to Article II (a) which was specific to rape despite the fact that there existed confirmed cases of medical experiments in the concentration camps of a sexual nature such as sterilization, castration and fertility experiments against men and women attributed to the Nazi administration.¹⁵⁴ In the Nuremberg trials, sexual violence was recognized as torture.¹⁵⁵

The absence of numerous charges for sexual offences especially in the Far East against documented widespread and systemic sexual offences is an indictment on the effectiveness of the military tribunals. Besides the crimes were not institutionalized either by statute or charter, therefore addressing sexual crimes became difficult.¹⁵⁶

2.5.2. International Criminal Tribunals

¹⁵¹ “Civil society trial conducted to prosecute the perpetrators of military sexual slavery that rendered a substantive judgment evaluating criminal conduct and civil liability, Comfort Women Judgment, 4 December 2001, Women’s Caucus for Gender Justice, available at <http://www.icc.org/archive/tokyo/summary> accessed on 15 April 2016”.

¹⁵² “The Trial of General Tomoyuki Yamashita, IV Law Reports of Trials of War Criminals 1 (1946); the Trial of Takashi Sakai, Case No. 83, XIV Law Reports of Trials of War Criminals 1 (1946); and the Trial of Washio Awochi, XIII Law Reports of Trials of War Criminals 1 (1946)”.

¹⁵³ “Allied Control Council No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany”.

¹⁵⁴ “The Trial of Obersturmbannfuher Rudolf Franz Ferdinand Hoess, VII Law Reports of Trials of War Criminals 11, 1947 (crimes committed in the Auschwitz camp); The Trial of Joseph Krametz and II 44 Others, Law Reports of Trials of War Criminals I (crimes committed in Birkenau).”

¹⁵⁵ IMT Docs.

¹⁵⁶ John Prichard, *The “Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East with an Authoritative Commentary and Comprehensive Guide* (Edwin Mellen Press:” London, 2005) at 1155

The UN Charter was mandated to deal with conflicts that are likely to threaten international peace and security.¹⁵⁷ When conflict broke out in Yugoslavia in the 1990s, the UN after investigations found evidence of widespread and systematic rape in furtherance of “ethnic cleansing”. Consequently it established “an *Ad hoc* international war crimes tribunal known as International Criminal Tribunal for Yugoslavia (ICTY).”¹⁵⁸ Its mandate “was to prosecute” “Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.”¹⁵⁹ Similarly in 1994, as a result of the “genocide in Rwanda, the UN appointed a Special Rapporteur for Rwanda.”¹⁶⁰ Following reports of slaughter of over 1 million people, 250,000 women raped in less than 100 days, UNSC pursuant to “Chapter VII of the UN Charter established the International Criminal Tribunal for Rwanda (ICTR).”¹⁶¹ The” mandate of the ICTR was “Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994.”¹⁶² The UN appointed “Special Rapporteur for Rwanda confirming that” indeed “rape was the rule and its absence the exception,”¹⁶³ where many women who had been raped became pregnant.¹⁶⁴

¹⁵⁷ Chapter VII, UN Charter

¹⁵⁸ “S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 28, U.N. Doc. S/808/1993 (1993). S.C. Res. 808 endorsed the principle of establishing a tribunal”.

¹⁵⁹ “S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 29, U.N. Doc. S/827/1993 (1993). The Statute is contained in U.N. Doc. S/25704, Annex (1993) which is attached to the Report on the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808. [hereinafter ICTY Statute or Yugoslav Statute].”

¹⁶⁰ “Hum. Rts. Comm. Res. S-3/1.L, 3d.sp. Sess., U.N. Doc. E/CN.4/S-3/1.L (1994).”

¹⁶¹ “S.C. Res. 935, U.N. SCOR, 49th Sess., 3400th mtg. at 11-12, U.N. Doc. S/935/1994 (1994).”

¹⁶² “S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 15, U.N. Doc. S/INF/50 Annex (1994) [hereinafter ICTR Statute or Rwanda Statute].”

¹⁶³ “Report on the Situation of Human Rights in Rwanda by Rened Degni-Segui, *Special Rapporteur of the Commission on Human Rights*, at para. 16, U.N. Docs. E/CN.4/1996/68 (1996) & E/CN.4/1995/7 (1995).”

¹⁶⁴ Ibid.

2.5.3. Sexual Crimes in ICTY and ICTR Tribunals

Before the 1990s, sexual offences against women and girls received little attention; however, the ICTY and ICTR changed all that. This section reviews how cases decided by the 2 tribunals have developed the law on sexual crimes. Serious prosecution of sexual offences did not happen by accident, it is as a result of concerted advocacy and pressure exerted by women's rights groups and scholars.

The "ICTY was the first international war crimes tribunal established by the UN since Nuremberg and Tokyo tribunals after the Second World War. On the other hand, the ICTY and ICTR were the first international tribunals to" criminalize sex crimes in international law.¹⁶⁵ In effect they have set high standards through increased political awareness of gender crimes in armed conflicts. This is reflected in the UNSC Resolutions 1325 and 1888.¹⁶⁶ However the enforcement of criminal responsibility for gender crimes in international law still remains problematic owing to legal and evidentiary challenges of proving its existence.

One major weakness of the tribunals is that being *ad hoc*, they were created after the crimes were committed. Therefore, the charges required creativity on the part of the judges to interpret the elements recognized in treaties and customary international law. This meant that charges would reflect the context of Geneva Conventions of 1949. For example, prosecutors charged rape as 'torture' or 'inhuman acts'. It was only after the alternative charge of rape was substituted that the judges could determine whether it was contemplated in the Geneva Convention or it is

¹⁶⁵ Bergesmo *supra* note 64at IV.

¹⁶⁶ UNSC Resolution 1325, 31 October 2000, D/RES/1325; UNSC resolution 1888, 30 September 2009, UN, Doc. R/RES/1888.

encapsulated in international customary law.¹⁶⁷ The tribunals were further faced by the problem of defining the sexual crimes as international in *Akayesu*¹⁶⁸ and *Kunarac*.¹⁶⁹ Sadly they had no precedent to turn to as the scope of sexual crimes had not been determined in an international tribunal. Similarly, other tribunals suffered definitional challenges in delimiting other sexual offences like sexual enslavement, forced marriage and other forms of misconduct characterized as ‘other inhuman acts’ or ‘outrages upon personal dignity’. In *Akayesu* other challenges such as whether or not rape or torture is “a crime against humanity or” whether rape is a sufficient act upon which the crime genocide could be grounded. No doubt since decision in *Akayesu*, a rich debate has ensued in various tribunals and scholarly forums on the definition of a group of crimes that come under the rubric of sexual violence or ‘gender based crimes’.¹⁷⁰ The foremost drawback of the *ad hoc* tribunals is that due to their limited jurisdiction covering Yugoslavia, Croatia, Bosnia, Bosnia and Herzegovna, Kosovo and Macedonia. Due to this weakness, there was a need to create a truly global system that would have a broader mandate.

2.5.4. “Statute of the International Criminal Court

The ICC was established in 1998 to prosecute cases that could not be undertaken by national courts. “Article 5 of the Rome Statute lists the jurisdiction of the” ICC. The ICC however has benefited immensely from the ground work done “by the ICTY and ICTR in” elucidating the scope of sexual crimes.¹⁷¹ The ICC is the only permanent criminal court with jurisdiction to

¹⁶⁷ “Bergesmo *supra* note 64 at VI.”

¹⁶⁸ “*Prosecutor v. Jean Paul Akayesu*, Amended Indictment, ICTR-96-4-1, para. 12.”

¹⁶⁹ “*Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23-T and IT-96-23/1-T, 22 February 2000, convicted Kunarac and Kovac for enslavement under crimes against humanity.”

¹⁷⁰ Bergesmo *supra* note 64 at 13.

¹⁷¹ Ibid.

prosecute gender based crimes.¹⁷² This does not however minimize the role played by other tribunals such as “ICTY and ICTR and Special Court for Sierra Leone (SCSL)”.¹⁷³ Accountability for sexual offences was however invariably linked to means of enforcement of accountability measures. These tribunals form the bedrock of decided cases relied up on by the ICC on sexual crimes especially the ICTY¹⁷⁴ and ICTR.¹⁷⁵ Though modest by current standards, it is clear that the contribution of the ICTY and ICTR in substantive and procedural jurisprudence in international sexual offences is outstanding.

The establishment of international tribunals was designed to address treatment of women and girls through the desire to prosecute violation of sexual offences.¹⁷⁶ The UN on its part described rape occurring in former Yugoslavia as ‘massive, organized and systemic’¹⁷⁷ The mandate of the ICTY was to prosecute “serious violations” and expressed “grave concern” over “the treatment of Muslim women in former Yugoslavia”, in view of the UN, sexual offences deserved special attention.¹⁷⁸

The establishment of the ICC was a culmination of concerted international efforts that focused on women’s rights and protection of women in conflicts.¹⁷⁹ Commitment by UN members was shown by the “Declaration on the Elimination of Violence against Women in”

¹⁷² Ibid at 70

¹⁷³ S/RES./1315

¹⁷⁴ S/RES./808

¹⁷⁵ S/RES./955

¹⁷⁶ S/RES./808: noting grave concern over “the treatment of Muslim women in the former Yugoslavia.”

¹⁷⁷ UNSC Resolution 798, “18 December 1992, UN Doc. S/RES./798”

¹⁷⁸ Ibid.

¹⁷⁹ Bergesmo *supra* note 64 at 72.

1993.¹⁸⁰ This is in addition to UNSC resolutions that address women, peace and security: 1325, 1820, 1888, 1889 and 1960.¹⁸¹ UNSC 1325 focuses on women in conflict and:

“...calls on all parties to armed conflict to take special measures to protect women and girls from gender based violence, particularly rape and other forms of sexual abuse and all other forms of violence in situations of armed conflict and the responsibility of states to put an end to impunity and prosecute those responsible for genocide, crimes against humanity and war crimes including those relating to sexual and other violence against women and girls...”¹⁸²

UNSC Resolution 820, 1325, 1889 and 1960 addressed issues relating to sexual violence against women and holding perpetrators of sexual crimes accountable in international criminal law.¹⁸³

The ICC benefited from earlier efforts in IHL and *Ad hoc* tribunals to form a jurisprudence that was broad enough to cover sexual offences encapsulated in “genocide, crimes against humanity and war crimes. This was in addition to the ICC Rules of” Procedure and Evidence (RPE) are currently the most detailed with regard to sexual offences.¹⁸⁴ The Rome Statute further contains safeguards arising from ICTY and ICTR, Statute and RPE. This was in addition to articles and rules that over time identified and clarified the scope of sexual offences. However, the jurisdiction of the ICC is to those holding the highest degree of responsibility such as leaders,

¹⁸⁰ “United Nations General Assembly”, “Declaration on the Elimination of Violence against Women in 1993, 20 December 1993, UN Doc. A/RES/48/104”

¹⁸¹ “UNSC Resolution 1325, 31 October 2000, UN Doc. S/RES/1325”.

¹⁸² S/RES/1325

¹⁸³ “S/RES/1820: On acts of sexual violence against civilians in armed conflicts). The resolution calls up on member states to comply with their obligations for protecting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls have equal access to justice and the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth and national reconciliation; The UNSC passed S/RES/1888, to strengthen resolution 1820 requesting the appointment of special representatives to co-ordinate all UN efforts within its framework.”

¹⁸⁴ “Fatou Bensouda, Gender and Sexual Violence under the Rome Statute, in Emmanuel Decaux, *From Human Rights to International Criminal Law: Studies in Honour of Judge Laity Kama* (Martinus Nijhoff Publishers: Leiden, 2007) at 411.”

planners and organizers. Experience has shown that accountability for sexual offences in Kenya is still problematic especially for senior state officers.

2.6. Gender Mainstreaming of Sexual Offences

There is an argument that the ICC has mainstreamed gender offences especially to what has been seen to be failure by the international legal institutions to prosecute sexual crimes.¹⁸⁵ For example Article 54 of Rome Statute of ICC gives the prosecutor sufficient leeway to enable him/her investigate and prosecutes crimes under the court and “shall take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.”¹⁸⁶ The ICC is unique in its prohibition of sexual offences through express provisions rather than implied ones as determined by the ICTY and ICTR and earlier institutions.¹⁸⁷ This is a great departure from sexual crimes being described as crimes of honor in the Geneva Conventions.

2.7. Conclusion

Accountability for sexual offences in international law has taken three forms IHL, IHRL and ICL. Rules regulating the conduct of war and protection of civilian population in times of war have been in existence since 500BC. Accountability for violation of laws of customs of war in international law evolved from these humble beginnings into IHL meant to lessen harm to combatants and non combatants. This principle ostensibly ignores the context in which sexual violence is committed. International law governing armed conflict is the Hague Convention of

¹⁸⁵ Salonge Mauthaan, ‘University of Warwick Law School’, (2010) 17 *Legal Research Paper* 18-20.

¹⁸⁶ Article 54, ICC.

1907 and the 4 Geneva Convention, together with the Additional Protocols to the Geneva Convention. However, the protection of sexual offences by IHL was not couched in express terms as they referred to crimes of honor and dignity, thus concealing the scope of the crime.

After the massive human right violations and atrocities of the 2nd World War, 2 tribunals were formed namely: the IMT held in Nuremberg to prosecute German suspects and IMTFE held in Tokyo to try Japanese suspects. The 2 tribunals ignored sexual offences in spite of evidence of massive, widespread and systematic sexual atrocities. Since then a lot of progress has been made in redressing gender based violence against women by scholars, activists and practitioners both inside and outside the tribunals. Due to the difficulty of investigating sexual offences, there is a tendency to ignore them as the injuries are not visible. Failure to address them leads to silence, impunity and injustice.

The ICTY and ICTR took the lead in developing jurisprudence in sexual violence. First by defining the scope of sexual offences that form the basis of current prosecution of sexual offences at the ICC. However, the ICTY and ICTR were *ad hoc* tribunals were established for purposes of dealing with violations in specific regions (former Yugoslavia and Rwanda respectively) and limited period and therefore had a limited mandate. The need for a permanent court to deal with accountability of international crimes especially sexual offences became urgent. The ICC is the first international permanent court with jurisdiction to prosecute crimes against humanity, war crimes and genocide. Sexual offences constitute and form part and parcel of international crimes. However, although it has taken 21 centuries to recognize sexual offences as very serious human rights violations, the challenges of prosecuting the offence still exist especially where those with greatest degree of responsibility are highly placed or in leadership positions. However, it sends a message that sexual crimes would not be tolerated just as is the

case in domestic legal frameworks. The ICC has developed and defined sexual offences in its statute that could not be imagined 10 years ago. Chapter 2 makes an analyses the elements of sexual offences in the ICTY and ICTR.

CHAPTER THREE

POLICY AND LEGAL FRAMEWORK ADDRESSING SGBV IN KENYA

3.1. Introduction

Violence against women has increasingly gained recognition in international human rights law to the extent that many international legal instruments have provisions on the protection of women against any form of violence. These instruments can be divided into soft law and hard law provisions. This chapter makes an analysis of the legal and policy framework for the protection of women against sexually related offences. The chapter examines international and national legal framework in line with the domestication of international human rights instruments. The national legal framework is discussed in the context of policy framework, substantive law and procedural law. Much more importantly challenges of procedure in the Evidence Act, Civil Procedure Code and Civil Procedure Act that have made it difficult to get convictions in sexual offences are discussed.

3.2. International Legal Framework on Violence Against Women

International legal norms and standards have developed concern for women issues in the field of sexual violence in the face of increasing violence against women. The instruments begin with the passage of the Universal Declaration of Human Rights (UDHR) in 1948, ICCPR and ICESCR in 1966, CEDAW. This is followed by regional legal instruments, the African continent has developed standards for the protection of women against sexual violence. These include the African Union, African Charter on Human and Peoples Rights and the Maputo Protocol.

3.2.1. Universal Declaration of Human Rights

The legal framework for the protection of sexual violence against women under the UDHR begins at Article 1 which recognizes that women should be free, equal in dignity regarding the protection of rights. Article 2 of UDHR seeks to protect women against non discrimination provides that: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁸⁸

Article 5 prohibits any person to be subjected to torture or cruel or degrading treatment or punishment. Reading Article 2, 3 and 5 is clear that any form of violence against women can be construed as a threat to her life, liberty, or which constitutes torture or cruel, inhuman or degrading treatment is not in keeping with the spirit and purpose of the UDHR and becomes a violation of obligations under international law by member states.

3.2.2. ICCPR and ICESCR

¹⁸⁸ Article 2, UDHR

The International Covenant on Civil and Political Rights (ICCPR)¹⁸⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁹⁰ have prohibited violence against women. The non discrimination provision in Article 2 of ICCPR is similar to Article 2 of the UDHR. Further, Article 26 provides that “all persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as sex....” Read together with Article 6.1 of the ICCPR, that protects the right to life and Article 7 that protects everyone from torture or cruel and inhuman or degrading treatment or punishment and Article 9.1 that protects the right to liberty and servility of the person, the ICCPR can be said to cover issues that relate to violence against women.

Article 3 of the ICESCR guarantees the right to men and women to the enjoyment of all rights set out in the covenant and the aforementioned rights cannot be enjoyed in the event of widespread violence against women.¹⁹¹ This is illustrated by Article 7 which everyone the right to enjoyment of just and favourable conditions of work which would require women to be free from any form of violence especially sexual violence.

3.2.3. CEDAW

CEDAW is the most comprehensive instrument on the rights of women. As the Bill of Rights for women, it sets out practices that are considered discriminatory and prescribes action to remedy them.¹⁹² It is an international legal instrument that deals exclusively with the protection of the

¹⁸⁹ U.N.T.S. No. 14668, vol. 999 (1976) p. 171.

¹⁹⁰ G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49

¹⁹¹ Patricia Kamari-Mbote, *Violence Against Women in Kenya: An Analysis of Law, Policy and Institutions* (International Environmental Law Research Centre: Geneva, 2000) at 7.

¹⁹² Ibid

rights of women. It is described as an International Bill of Rights for women that enumerates practices the treaty considers discriminatory and in need for remedy.¹⁹³ However CEDAW fails to deal with issues of violence against women except those involving trafficking and prostitution.¹⁹⁴ Despite the fact that it does not deal explicitly with violence against women, its anti discrimination clauses therein provide a framework up on which the protection of violence against women can be anchored.¹⁹⁵ To cure this gap, the Committee of the Elimination of Discrimination against Women has further made binding recommendations that address gender based violence.¹⁹⁶

Under General Comment 12 adopted in 1989, states were requested by the Committee to include in their reports information touching on violence against women and measures to be taken to deal with it. The Recommendation elaborates on specific Articles of the CEDAW and how they relate to violence against women. Some of the issues that affect violence against women are mentioned as traditional attitudes, customs and practices, forms of traffic and exploitation of prostitution of women, violence and equality in employment, violence and health, rural women and family violence. These are practices considered by the Recommendation as being harmful to women as they propagate and make it normal violence against women. The prevalence of violence in the community like rape, sexual abuse, sexual harassment and intimidation at work, educational institutions occur because they are condoned by the state. The Recommendation has a broad definition of violence whose effect is to disempowering women

¹⁹³ Federation of Women Lawyers (FIDA) Kenya: *Gender-Based Domestic Violence in Kenya* (FIDA: Nairobi,) at 14.

¹⁹⁴ Article 6, CEDAW

¹⁹⁵ Mbote *supra* note 191 at 5

¹⁹⁶ FIDA *supra* note 193 at 14.

for fear of violence whether it originates from state or non state actors, the community, individuals or even from within the family.¹⁹⁷

General Recommendation 19 formulated in 1992 deals exclusively with violence against women. It states that discrimination has the effect of making women unable to exercise other rights and freedoms on the basis of equality with men. An important recommendation that it makes is that states should review their domestic laws and policies in line with it. The argument by Recommendation 19 is that the definition of discrimination in Article 1 of CEDAW should also include gender based violence.

“...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in their political, economic, social, cultural, civil or any other field.”¹⁹⁸

Gender-based violence is defined as violence directed against a woman because she is a woman or which affects women disproportionately. It includes physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. The definition of discrimination therefore necessarily includes gender based violence.¹⁹⁹

3.2.4. The Declaration on the Elimination of the Violence against Women (DEVAW)

The DEVAW is an international soft law legal instrument that deals exclusively with violence against women. Although the instrument sets out international norms and standards states recognize as being fundamental in line with eliminating all forms of violence against women, the declaration is not legally binding.²⁰⁰ The declaration defines violence against women as

¹⁹⁷ Mbote *supra* note 191 at 7.

¹⁹⁸ Article 1, CEDAW

¹⁹⁹ FIDA *supra* note 193 at 14.

²⁰⁰ *Ibid.*

consisting of physical, sexual psychological violence occurring in the family setting “any act of gender-based violence that results in, or is likely to result in: physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty whether owing in public or private life”.²⁰¹ The declaration has been reinforced by the adoption by 189 states of the Declaration and Platform for Action in Beijing in 1995 that reflects renewed international commitment to equality, development and peace for women.²⁰²

3.2.5. Vienna Declaration and Plan of Action

The Vienna Declaration and Plan of Action is an international legal instrument that was adopted at the World Conference on Human Rights in 1993. Article 1 (18) of the Declaration is clear that human rights of women and the girl child are unalienable, integral and indivisible part of the human rights. To that extent all forms of gender based violence is incompatible with the dignity and worth of human beings and therefore should be discarded. The Declaration and Plan of Action emphasizes that women rights are central and integral to the UN human right activities and therefore all human rights instruments belonging to women should be promoted. The Declaration and Plan of Action has urged governments and other organizations to integrate efforts that aim at promoting the rights of the girl child.

3.3. Regional Legal Instruments

²⁰¹ Article 1, DEVAW

²⁰² FIDA *supra* note 193 at 15.

At the regional level, the African Union (AU) in collaboration with the African Charter on Human and People's Rights (ACHPR)²⁰³ has urged states to ensure the elimination of all forms of discrimination against women and the child as enshrined in international human rights instruments. This section deals with provisions of the ACHPR and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

3.3.1. The African Charter on Human and People's Rights

Regional legal instruments such as the ACHPR have provisions for the protection of all forms of discrimination against women.²⁰⁴ Article 18 (3) mandates member states of the AU to promote programmes that facilitate in elimination of discrimination against women and especially practices such as violence against women.

3.3.2. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa or the Maputo Protocol²⁰⁵ was signed to deal with the gaps in the ACHPR pertaining to violence against women. According to the Protocol, member states have an obligation to combat and eliminate all forms of discrimination against women. Article 1 of the Protocol defines discrimination against women as any "distinction exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition,

²⁰³ Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

²⁰⁴ Article 18 (3), ACHPR

²⁰⁵ Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003

enjoyment or the exercise by women, regardless of their marital status or human rights and fundamental freedoms in all spheres of life.”²⁰⁶

The Protocol upholds the right to all human beings to dignity, recognition and protection of all human and legal rights pertaining to women.²⁰⁷ The obligation of the state is to establish measures that prevent all forms of exploitation and degradation of women. This is in addition to measures that would protect, respect the right of every woman and dignity and all forms of sexual and verbal abuse.²⁰⁸ “States Parties shall adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity, and protection of women from all forms of violence, particularly sexual and verbal violence.”²⁰⁹ Article 4 of the Protocol on the right to life, integrity and security of the person provides that States parties should enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public.

3.3.3. AU Solemn Declaration on Gender Equality

The AU Solemn Declaration on Gender Equality²¹⁰ is Africa’s commitment to gender equality pursuant to Article 4 (1) of the Constitutive Act of the AU.²¹¹ Member states made an undertaking to not only sign and ratify ACHPR but use its provisions to protect the rights of women. Article 4 further protects the right of women to life, integrity and security of the person. In particular, it prohibits all forms of exploitation, punishment or cruel treatment. As part of state

²⁰⁶ Article 1(f) of The Maputo Protocol.

²⁰⁷ Centre for Human Rights, Legislative Framework on Violence against Women: A Critical Analysis of the Gambia, Kenya and South Africa (Harvard Kennedy School: carr center, 2015).

²⁰⁸ Article 3(1) and article 26 (1) of the Maputo Protocol.

²⁰⁹ Article 3(4), Protocol.

²¹⁰ signed at the Heads of State and Government meeting in the 3rd Ordinary Session of the Assembly in Addis Ababa, Ethiopia from 6-8, July 2004

²¹¹ entered into force in May 2001.

obligations, states are asked to enact legislation that prohibits all forms of violence against women. This should be in addition to other legislative, administrative, socio, economic mechanisms necessary to eradicate, punish and prevent all forms of violence against women.²¹²

The Maputo Protocol concretizes provisions in the international human right standards that provide state duties to prohibit the totality of harmful practices with a negative impact on the rights of women. Member states are further mandated to establish programmes that support post-violence victims with basic services like health services, legal and judicial support as well as emotional and psycho-social counseling.²¹³ It is worth noting that in light of the definition of VAW as set out in article (1) (j) of the Maputo Protocol, which include all acts perpetrated against women which cause or could cause them physical, sexual, psychological and economic harm including the threat to take such acts, the Government of Kenya noted that the prohibition of FGM has resulted in it going underground and adult women from communities that practice it being pressurized to undergo the rite once they achieve adulthood.

Kenya has ratified these international human rights legal instruments and therefore has an obligation to promote, protect, fulfill and respect the provisions of the instruments. In that respect all persons within the Republic have a right to protection and freedoms without discrimination on grounds of race, colour, sex, language, religion, political, national, social or any other ground.

3.4. Kenya National Policy Framework on Gender Violence

A number of policies have been set up to deal with issues of sexual violence against women.

Some of these policies address issues of reporting sexual violence, the procedure of doing so and

²¹² Article 4 and article 26 (1) of the Maputo Protocol.

²¹³ Article 26(1) of the Maputo Protocol.

how to deal with post violence and treatment. In this section two policies will be discussed namely the National Framework towards Response and Prevention of Gender based violence in Kenya²¹⁴ and the National Guidelines on the Management of Sexual Violence.²¹⁵

3.4.1. National Framework towards Response and Prevention of Gender based violence in Kenya

This is a policy framework designed to coordinate both state and non state actors to respond to gender violence in Kenya. The framework arose out of a realization that gender based violence involves both actors that are uncoordinated.²¹⁶ The framework guides and coordinates various government and nongovernmental mechanisms, the police, civil society whose aim is to strengthen and enhance intervention in combating violence against women. To achieve its objectives, the framework has been aligned to international human rights legal instruments more specifically CEDAW. It creates an environment that facilitates the understanding of violence against women by highlighting various forms of sexual and gender based violence in Kenya. This is done through the analysis of existing legislative and policy responses, community interventions, their efficacy and weaknesses in dealing with sexual violence.²¹⁷

3.4.2. The National Guidelines on the Management of Sexual Violence

The National Guidelines on the Management of Sexual Violence provides a post sexual violence mechanism for dealing with or managing the effects of sexual violence by recognition that sexual

²¹⁴ National Framework toward Response and Prevention of Gender Based Violence in Kenya 2nd Edition 2009.

²¹⁵ Ministry of Public Health & Sanitation Ministry of Medical Services 'National Guidelines on the Management of Sexual Violence' (2009) 2nd edition.

²¹⁶ National Framework toward Response and Prevention of Gender Based Violence in Kenya 2nd Edition 2009.

²¹⁷ Ibid at 8.

violence constitutes a violation of human rights. It is a process of government response to the devastating negative effects of sexual violence and the desire to treat the survivors with dignity and respect as a form of mitigating the aforementioned effects.²¹⁸ The guidelines are important as they provide information on how to manage sexual violence. Aspects of information provided include the treatment of survivors of sexual violence²¹⁹ such as psycho-social support and other health related issues of sexual violence.²²⁰ The progressive nature of the guidelines has improved the documentation of evidence gathering in sexual offences that is not only friendly but comprehensive as well.²²¹

3.5. Substantive Law on Sexual Violence

A number substantive law has been passed to address issues of sexual violence against women. The instruments include the Constitution, Sexual Offences Act,²²² the Penal Code,²²³ the Prohibition of FGM Act 2011 and the Children Act.²²⁴

3.5.1. The Constitution of Kenya

The Constitution is the most important source of rights for all, the Bill of Rights protects fundamental rights and freedoms for all persons. It is the foundation up on which all laws derive their legal force, including international law. The Constitutional of Kenya encapsulates certain general principles that are critical to the protection of women against violence. Article 10 (2)(b) for example has laid down national values and principles of governance such as human dignity,

²¹⁸ Ibid.

²¹⁹ Ministry of Public Health & Sanitation at 8.

²²⁰ Ibid. at 22-24.

²²¹ Ibid. at 24

²²² Cap 62A of the Laws of Kenya

²²³ Cap 63 of the Laws of Kenya

²²⁴ Cap 141 of the Laws of Kenya

equity, equality, social justice, non discrimination, human rights and protection of the marginalized. Article 27 is important in as far as it touches on issues of equality and freedom from discrimination which would be used to protect women against sexual violence.

Article 28 of the Constitution has underscored the inherent right of every human being to dignity which should be respected and protected. Article 29 further protects freedom and security of the person such as the right not to be subjected to torture or punished in a cruel, inhuman or degrading manner.

3.5.2. The Penal Code

Most offences including sexual ones are prosecuted under the penal code. However, the penal code is inadequate in as far as addressing offences of a sexual nature, for example it is lenient and fails to appreciate the import of sexual offences and the effect it has on the victims.

3.5.3. Sexual Offences Act

The Sexual Offences Act was passed by Parliament in 2006 in response to increasing sexual offences. A major objective of the Act was to create offences, create and enhance sentences against sexual offences. The Act covers gaps in the Penal Code.

3.6. Procedural Law on Sexual Violence

3.6.1. The Evidence Act

The Evidence Act governs the collection and submission of evidence in all cases that involve violence against women. This happens where a person wishes to access and redress the violence through a legal process. It must be realized that some of the rules of evidence would make it difficult for women to prove acts of sexual violence such as rape. For example in certain

circumstances, consent to sex can be vitiated by alcohol or administration of drugs.²²⁵ This defense can be used to bring into question the morality of the woman.²²⁶ This is critical in conservative societies like Kenya's where discussion about sex is considered taboo.²²⁷ Therefore a woman who takes alcohol finds it difficult to prove rape pursuant to section 163 (1)(d) which provides grounds for impeaching the credibility of the witness. In other words the fact that a woman has taken or takes alcohol would lead to a presumption of immorality.²²⁸

Rules of evidence that relate to sexual offences are hostile to victims and at times reduce a charge of rape to indecent assault. At a philosophical level the justice system assumes that women and girls are liars in respect of sexual offences. That explains why courts demand for corroborated evidence in sexual offences. In *Maina v. R*, CJ Mwenda, is quoted to have told magistrates that "girls and women do tell an entirely false story which is very easy to fabricate but extremely difficult to refute". The view expressed in this case is still binding as it has never been challenged. The existence of cases like this make it difficult to successfully convict sexual violence cases in circumstances where reliance on corroborated evidence is expected. It even becomes difficult if the witness is a child whose evidence would require corroboration for a conviction to be sustained in sexual offences.²²⁹ The Evidence Act is not clear on what a child offender of tender age constitutes. However in *Oloo s/o Gai v. R*²³⁰ the court suggested that the threshold is 14 years. The need for corroboration implies that there is a general lack of trust by the system of complainants if they happen to be female.

²²⁵ Mbote *supra* note 191 at 7.

²²⁶ Section 163, Evidence Act

²²⁷ Mbote *supra* note 191 at 8.

²²⁸ Ibid.

²²⁹ Section 124, Evidence Act

²³⁰ [1960] EALR 86.

Other than issues of corroboration and lack of trust attributed to women and girl witnesses, other challenges militate against the prosecution of sexual violent perpetrators in Kenya's legal framework. First, the standard of proof in criminal cases is always beyond reasonable doubt. This standard is considered too high in violent sexual cases by putting complainants at a disadvantage thus affording assailants a chance to escape justice.²³¹ Second is the burden of proof both legal and evidential also comes into question. The prosecution bears the burden of proof while the party adducing evidence bears the evidential burden.²³² Third is the nature of prosecution which is conducted by the state. It has been largely observed that the prosecution arm is incompetent because it fails to get the best prosecutors since government pay is not competitive among other reasons.²³³ As a result the prosecution fails to discharge its burden. All these factors make proof of violent sexual offences very difficult.

The fourth challenge relates to the rules that govern admissibility of evidence. The legality of the prosecution case in sexual offences depends on how the evidence is acquired. Illegally obtained evidence makes it difficult to obtain a conviction in a court of law. However, at times it may well be true that the only available evidence is illegally obtained since sexual offences occurs in unusual circumstances. Lastly the rules of confession and admissibility maybe problematic despite the existence rules to identify perpetrators in a parade and judges' rules being designed to facilitate fair identification and admissibility of evidence. These rules are not however alive to the reality that victims could have been in shock when the crime was committed. A witness under such circumstances may find it hard to identify the perpetrator thus providing a window for suspects to escape prosecution.

²³¹ Mbote *supra* note 191 at 9

²³² Section 107-109, Evidence Act

²³³ Mbote *supra* note 191 at 10

3.6.2. Criminal Procedure Code

The Criminal Procedure Code,²³⁴ plays a big role in the prosecution of sexual offences. It deals with issues of arrest of suspects, search, place of trial, commencement of proceedings and drawing documentation process of bail. However, the observation has been that courts are not as strict and swift in dealing with violent sexual offences in the same way as they deal with other offences. The result is that perpetrators of sexual violence have opportunities to interfere with evidence making it even harder to obtain convictions.²³⁵

3.6.3. Civil Procedure Act

The Civil Procedure Act²³⁶ is resorted to when individuals who have suffered damage wish to institute civil proceedings for purposes of getting a remedy in damages and compensation against perpetrators of violent sexual violence. The documentation to be used is outlined under the Civil Procedure Act. A claimant who fails to adhere to the rules of the Act will fail in court. The civil procedure route is not only technical but costly as well. A victim of sexual violence who desires to get compensation will need to hire a lawyer to draw up a plaint and present the case in a court of law which is an expensive exercise. It is also in public knowledge that civil suits in Kenya are usually delayed due to backlog of cases and personnel constraints.

3.7. Conclusion

²³⁴ Cap 75 of the Laws of Kenya.

²³⁵ Mbote *supra* note 13 at 10.

²³⁶ Cap 21 of the Laws of Kenya

In conclusion it is clear that Kenya's legal framework in dealing with violent sexual crimes is clearly defined in law. This is provided for in international human rights law (both soft and hard law) and the national legal framework. Whereas the international legal framework provides the norms and standards of how to deal with sexual offences, the national law deals with the operationalization of the norms. Notwithstanding the clear provisions, the procedure taken to convict sexual offences leaves a lot to be desired. This is exacerbated by the legal challenges that make it difficult to convict violent sexual offenders. The legal framework especially regarding procedure is not friendly (Evidence Act, Civil Procedure Code and the Civil Procedure Act) for purposes of prosecuting sexual offences. Chapter four analyzes some of the international best practices and lessons Kenya can learn in dealing with violent sexual crimes.

CHAPTER FOUR

BEST PRACTICES IN CREATING ACCOUNTABILITY FOR SEXUAL OFFENCES

4.1. Introduction

The international criminal justice system has spectacularly failed to address sexual offences in two critical ways. By the promotion of a pro-prosecution model designed to end impunity without seeking to understand the logistical, emotional and psychological inhibitions that make it difficult to prosecute sexual offences. Secondly, presenting conflict prone regions as pathologically incapable of coming up with measures that can ensure accountability models for violent sexual offenders. These models do not give enough recognition to community participation in seeking answers to accountability for violent sexual offences.

This chapter highlights strategies established in redressing challenges in seeking accountability mechanisms for sexual offences both at national and international level articulated in chapter 3. The mechanisms must begin by the creation of awareness about sexual violence, establishment of mobile courts, training focused at sexual offences and establishment of gender desks at police stations. Innovations at international level can be replicated at the national level

such as increased use of gender experts, better co-ordination between prosecutors and investigators and the protection of witnesses during trial. It is however realized that these measures are not possible without political will and resource allocation for the victims in enabling them access justice. For purposes of sustainability, all these measures need to move together and it is here that many countries including Kenya are struggling.

4.2. Complementarity

Accountability for sexual crimes has always been the domain of national courts till the creation of *ad hoc* tribunals of the ICTY and ICTR in the 1990s.²³⁷ The two tribunals introduced innovative methods for trying sexual offences.²³⁸ The *Akayesu* trial in particular made a firm finding that rape and other forms of sexual violence could amount to genocide.²³⁹ Other innovative models were introduced such as superior responsibility, joint criminal enterprise (JCE), that liability could attach to a superior who is in command.²⁴⁰ This was in addition to the introduction of new rules and procedures such as witness protection that were later incorporated into the Rome Statute of the ICC.²⁴¹ The ICC was established as a permanent international crime to take over from *ad hoc* tribunals that had limited jurisdiction.

²³⁷ Catherine MacKinnon, *Are Women Human? And Other International Dialogues* (Cambridge: Harvard University Press, 2006).

²³⁸ *Ibid.*

²³⁹ *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber Judgment, International Criminal Tribunal for Rwanda, ICTR-96-4-T, 731 (Sept. 2, 1998).

²⁴⁰ *Prosecutor v. Delalic*, Trial Chamber Judgment, International Criminal Tribunal for the Former Yugoslavia, IT-96-21-T (Nov. 16, 1998).

²⁴¹ Rome Statute of the International Criminal Court, adopted July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (entered into force July 1, 2002) (“Rome Statute”).

As was shown in the Kenyan cases where the ICC could not sufficiently investigate sexual offences, the courts could not replace the role of national courts as having primacy in prosecuting sexual offences. Under the principle of complementarity, each state is responsible for the investigation and prosecution of international crimes within its jurisdiction. For that matter, the ICC become a court of last recourse and as such investigation do not absolve nations from the responsibility to investigate and prosecute.²⁴² The ICC only prosecutes perpetrators those with the highest degree of responsibility. Prosecution at a lower level remains at the national level. Third and more importantly other crimes of a sexual nature such as sexual harassment, trafficking and gang rape are still under the purview of national criminal justice systems.²⁴³

In many jurisdictions the Rome Statute has been domesticated, others have used domestic legislation to implement legal obligations under the Rome Statute. In Kenya, the International Crimes Act has conferred on Kenyan court's jurisdiction over international crimes committed in Kenya.²⁴⁴ The Act has increased the scope of sexual crimes that can be prosecuted in Kenyan Courts. The expansion of the jurisdiction means that national courts can prosecute most of the sexual offences. In spite of this, it is noted by civil societies groups that 95% of sexual offences go unreported.²⁴⁵

4.3. Redressing Challenges Related to Accessing the Justice System

²⁴² Article 1 of the Rome Statute states that the ICC

²⁴³ Article 5, Rome Statute: Crimes within the jurisdiction of the Court

²⁴⁴ Section 8, International Crimes Act (2008).

²⁴⁵ Kenya, Coalition on Violence Against Women, and International Justice Mission (Nairobi, Kenya), October 2010.

Victims of sexual violence have difficulty not only in accessing the justice system but availing medical evidence and the legal system. A number of strategies have been put in place such as those that are highlighted in this section.

(1) the pre-investigation stage, when victims must decide if, and how, they will seek accountability for the crime committed against them; (2) the investigation and prosecution phase, when investigators must explore the often intimate factual aspects of an assault and prosecutors must formulate a coherent and gender-sensitive strategy to prove the charged offenses; (3) the trial phase, during which victims are called on to revisit painful memories, often in front of skeptical judges, harassing defense attorneys and the perpetrator of the crime; and, finally, (4) the post-trial phase, when courts must determine appropriate sentences and review appeals. At each phase of this “life-cycle,” the paper considers both the distinct challenges that arise during sexual violence prosecutions as well as some programs and practices that have been (and could be) used to address them.²⁴⁶

4.3.1. Co-ordination between Medical and Legal Sectors

In jurisdictions characterized by lack of confidence in the enforcements or judiciary, victims of sexual violence are likely to seek medical care rather than go to the police or seek legal aid.²⁴⁷

Strengthened links between hospitals with the legal system can increase reporting of sexual offences as they provide an entry point into the justice system for those who seek medical attention. This should come under an integrated model of medical and legal services, “The ideal is that the medico-legal and the health services are provided simultaneously; that is to say, at the same time, in the same location, and by the same health practitioner.”²⁴⁸

Kenya has established a medical-legal unit where medical legal services are provided under one roof. The health personnel can also refer rape victims for legal assistance. The integration of medical and legal portents several benefits, it enables outreach about legal system,

²⁴⁶ Kim Thuy Seelinger et al, *The Investigation and Prosecution of Sexual Violence: Sexual Violence & Accountability Project Working Paper Series*. A Working Paper of the Sexual Violence and Accountability Project Human Rights Center, University of California, Berkeley, May, 2011 at 6.

²⁴⁷ Lauren Harris and Julie Freccero, *Sexual Violence: Medical and Psychosocial Support* (Berkeley: Human Rights Center, 2011)

²⁴⁸ World Health Organization. *Guidelines for Medico-Legal Care for Victims of Domestic Violence* (Geneva: World Health Organization, 2003).

victims are provided with emotional and psychological support and practical assistance into the legal system. The system also facilitates proper gathering of evidence.²⁴⁹

Access to justice can further be enhanced through properly trained individuals that work with health care systems. The Sexual Assault Nurse Examiner (SANE) who is trained professional in health care system in jurisdictions such as Canada, USA and Kenya.²⁵⁰ SANE are trained professionals who provide first response medical care to patients of sexual violence, who are also facilitated in the collection of evidence for purposes of prosecution, entry into the criminal justice system. Victims can also get advice on how to file claims and receive legal aid.²⁵¹

4.3.2. Creation of Additional Access to Criminal Justice Systems

Access to criminal justice systems in rural areas is always challenging for victims of sexual violence. The creation of legal clinics has particularly made tremendous contribution through pro bono legal services for victims of sexual violence.²⁵² The lawyers receive medical documents take victims and witness statements for onward transmission to police and make a follow up. When investigations are complete case files are transmitted to court for purposes of filing and record keeping. This greatly helps in accessing the criminal justice system which has helped increase convictions in jurisdictions like the Democratic Republic of Congo (DRC).²⁵³

The establishment of mobile courts by the American Bar Association (ABA) in the DRC for purposes of improving access to justice system enables judges, prosecutors, magistrates and

²⁴⁹ Seelinger *supra* note 245 at 13.

²⁵⁰ Nancy B. Cabelus and Gary T. Sheridan, "Forensic Investigation of Sex Crimes in Colombia", (2007) 3 *Journal of Forensic Nursing* 112–116.

²⁵¹ Harris, *Sexual Violence: Medical and Psychosocial Support*.

²⁵² Seelinger *supra* note 246 at 7

²⁵³ American Bar Association, Rule of Law Initiative, Mobile Courts Program in Eastern Democratic Republic of the Congo, 2.

stenographers that are usually based in urban areas to travel to remote areas to hear sexual offence cases. Other than mobile court serving educational value to villagers, they provide the first time such communities have had access to formal court structures.²⁵⁴ Between 2009 and 2010, ABA made it possible for the establishment of seven mobile legal clinics in South Kivu where 86 trials were conducted out of which 70 were convictions.²⁵⁵ Mobile courts in developing countries help in filling the gap of broken legal systems, allows access to justice systems, however the sustainability is in question due to foreign funding.²⁵⁶

4.3.3. Police Sensitivity

Victims of sexual violence are intimidated by a police system that is not sensitive to the plight of sexual offences. Two models are employed to increase reporting of sexual offences. First, is to increase the number of police officers with special training in sexual offences. This will make female victims feel comfortable in reporting sexual offences by changing police culture with the presence of female officers in their ranks. Second, is the creation of special gender unit that are better equipped to handle sexual offences.²⁵⁷

Female representatives in law enforcement have traditionally been poor which has over time affected investigation of sexual offences. In the Balkans for example, the Organization for Security and Co-operation in Europe (OSCE) has prioritized the recruitment of women.²⁵⁸ Women are participating more in UN peace keeping missions with a positive impact.²⁵⁹ In the year 2007, India send an all female peace keeping force to Liberia as part of the UN missions,

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Seelinger *supra* note 246 at 15.

²⁵⁸ UNODC, *Handbook on effective police responses*, 43.

²⁵⁹ UNSCR 1325

this enabled Liberian women to report cases of sexual violence.²⁶⁰ Other than increasing the presence of women in police forces, increased gender mainstreaming has increased sensitivity to sexual offences.

Gender desks have also been established to improve police treatment of sexual violence. Gender desks are manned by specially trained units of female officers, investigators and counselors.²⁶¹ Kenya has followed suit with gender desks in all police stations. However desks still suffer from corruption, are under-funded and understaffed as well.²⁶²

4.4. Standardizing Investigating and Training Guidelines

Standardizing investigating and training guidelines brings many benefits in seeking accountability for sexual offences. First it meets the expectations of sensitivity and professionalism on sexual violence by providing opportunities to relook at particular gender biases held by the investigating team. Secondly it provides the victims with a gender sensitive experience. Thirdly, it increases chances of getting information even for inexperienced investigators in support of the prosecution case. Fourth, investigators in the process help the victim in the journey towards justice. However even the best guidelines do not replace interviewee experience and his/her ability to ask responsive follow up questions.²⁶³

Therefore training for investigators and prosecutors for sexual offence crimes becomes critical for the specialized units of investigators like those established in the UK, Canada and the

²⁶⁰ UNODC, *Handbook on effective police responses*, 9.

²⁶¹ Seeling *supra* note 246 at 15

²⁶² Kenya Institute of Economic Affairs, *Status of Gender Desks*, 26

²⁶³ Ibid

USA.²⁶⁴ The ICTR tribunal in Rwanda has recommended that specialized teams should at the minimum include prosecutors, counselors, investigators, doctors, nurses, interpreters and witness assistants all of whom must be trained or know how to handle sexual violence victims and witnesses.²⁶⁵

Benefits of mainstreaming gender in sexual violence training includes enabling investigators use skills learned in other forums that review investigation, ability to detect sexual violence while investigating other crimes, shows the seriousness of sexual violence crimes as other traditional crimes. In addition, it is particularly critical in resource constrained jurisdictions. The Rwandan example highlighted the need for continuous training to equip investigators with adequate skills that would enable them deal with sexual offences.²⁶⁶

4.4.1. Diversifying the Investigative Team

Diversification in the gender investigative team is important as it enables victims more comfortable and confident. This can be accomplished by creating a pool of trained investigators from which individual tailor made teams can be made for each witness.²⁶⁷ There is however the need to be conscious not to create a specialized female investigative police prosecutor/judge that would be marginalized under the assumption that they only handle softer gender roles. It may have the negative consequence of creating gender imbalance excluded from those considered tough assignments like those prosecuting murder among other crimes.²⁶⁸

²⁶⁴ Ibid.

²⁶⁵ *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict: Lessons from the International Criminal Tribunal for Rwanda 2008*, Arusha: International Criminal Court for Rwanda, 2008: 4-6.

²⁶⁶ Ibid.

²⁶⁷ Sellers *supra* note 34.

²⁶⁸ Ibid.

4.5. Using Preliminary Assessments

The need to make preliminary assessment before the actual investigation commences allows investigators gather basic information that would be useful in ascertaining whether the victim is at risk or suspect has access to legal aid or victim needs medical attention, or the potential loss of evidence/destruction of evidence and the extent to which the suspect is known.²⁶⁹ Sensitivity to the needs of the witness can be increased through preliminary assessment before the actual interviewing begins. With the security of the victim addressed, investigators can inquire about the identity (for assailants unknown to the witness) or consent (where witness and victim were in some previous relationship).²⁷⁰ An interview may make a follow up to clarify or expand on issues that were initially given in evidence.

4.5.1. ICC Preliminary Assessment

The ICC has a pre-investigative process where process where screening of ICC sexual violence victims to avoid over exposure to ICC staff. This happens before witnesses are involved in investigative process to assess their evidential value, personal security risks, mental and physical aptitude for purposes of investigation and prosecution.²⁷¹ At this stage, witnesses would be ruled out, others would be passed over if proceedings to investigate pose mental health risks, may lead

²⁶⁹ *Guidelines for Sexual Assault Investigation*, California Commission on Peace Officer Standards and Training (1999): 4.

²⁷⁰ "Model Guidelines and Sex Crimes Investigation Manual for Illinois Law Enforcement," Illinois Law enforcement and Standards Training Board (1996): Chapter 5.

²⁷¹ Dianne Luping, "Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court", (2009) 17 *American University Journal of Gender, Social Policy & the Law* 486.

to investigators and prosecutors not to pursue such witnesses. Witnesses found suitable would be taken through an interview to ascertain their personal needs. Some of the needs will relate to preferences as to location, child care, presence of support personnel and gender investigators,²⁷² which is then included in the interview plan. The psychologist helps the investigator in asking difficult questions that are useful in monitoring the mental health of the victim.²⁷³

The decision on whether to make a witness testify or not is ridden with danger of one being labeled a collaboration and even worse if it involves foreign investigators could bring harm to an investigator.²⁷⁴

4.6. Psychological Support for Witnesses and Investigators

The two parties to the investigating team need psychological protection from mental harm during and after the trial.²⁷⁵ The long term mental health of all those working with sexual violence victims need to be taken care of, for example the ICC provides counseling services to staff who desire to relive their experiences in the field.²⁷⁶ Best practices show that it is desirable to take care of mental health of all those involved in violent situations.²⁷⁷ Witnesses, suffer ethical dilemmas for those who offer psychological support especially if he/she needs to continue with such support even after the completion of the process should the need arise.²⁷⁸

4.6.1. Vetting of Interpreters

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Harris, *Sexual Violence: Medical and Psychosocial Support*.

²⁷⁶ Andrew P. Levin & Scott Greisberg, 'Vicarious Trauma in Attorneys', (2003) 24 *Pace Law Review* 245.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

The ethical aspect of investigating is that interpreters who are not vetted may pose a risk to communication and confidentiality. The Queensland Legal Aid in Australia, has made recommendations on how to work with interpreters in sexual assault interviews:

- Check out with the client whether the interpreter is appropriate or not. In some small community groups, there may be issues about maintaining the client's confidentiality and the interpreter being associated with all the parties involved.
- Check to see if a client from a non-English-speaking background is comfortable to proceed without an interpreter. Organize a telephone interpreter if required.
- Consider asking for an interpreter of the same gender as the client. Check whether the client has any gender preference for the interpreter.
- Consider asking for an interpreter of the same gender as the client. Check whether the client has any gender preference for the interpreter.
- Ensure the client feels comfortable with the interpreter and that there are no gender, religious, political, or privacy concerns. Ensure the interpreter speaks the same first language or dialect as the client.
- Make every effort to have the same interpreter for each interview if the client agrees with this.
- Allow double time for the interview if you are using an interpreter.²⁷⁹

In highly ethicized communities, interpreters need to be screened incase their ethnic background and political affiliations could cause unease to the witness.²⁸⁰

4.6.2. Increasing Capacity of the Prosecutors

Prosecuting sexual offences is challenging as it suffers from limited staffing and resource allocation.²⁸¹ A number of strategies have been put in place to facilitate better litigation. The success of prosecuting sexual offences depends largely on the capacity of the prosecution to undertake the exercise. They can also be assisted by a paralegal team in the process which allows advocates to do work that requires training. For example, in the DRC, the ABA has helped

²⁷⁹ Queensland Legal Aid guidance re: working with interpreters: available at <http://www.legalaid.qld.gov.au/publications/Practitioners-service-providers/best-practiceguidelines/Pages/Best-practice-guidelines-for-lawyers-working-with-clients-who-haveexperienced-sexual-violence.aspx>. accessed on 3 August 2016

²⁸⁰ Ibid.

²⁸¹ Ibid.

establish a team that trained local women do legal work at the local level. Similar structures have been established in Kenya through the training of rural communities by civil society organizations like the Coalition on Violence Against Women (COVAW). They provide basic legal support in guiding victims of sexual and gender based violence in addressing the legal, health and law enforcement aspects of sexual violence. They are supervised by practicing advocates based in Nairobi and other experts in their response to gender based violence in communities.²⁸² The Open Society Justice initiative has developed a practitioner's guide as a blue print to community based para-legal programme.²⁸³

4.6.3. Establishment of *Pro bono* Services

Promoting *pro bono* services has capacity to alleviate and reduce the case load of sexual offences. *Pro bono* services are organized by courts with advocates having specific skills to volunteer to represent those who cannot afford legal services.²⁸⁴ Technical assistance for pro bono services in countries such as Russia, China and Czechoslovakia have been provided by public interest law institute based in New York.²⁸⁵ In some jurisdictions like Nigeria, law students below 30 years spent one year serving the public in pro bono services programme.

4.6.4. Safety and Ethical Considerations while Investigating Sexual Crimes

The WHO has created an eight point guidelines to regulate investigations of gender crimes of a sexual nature

²⁸² Seelinger *supra* note 246 at 40

²⁸³ Open Society Justice Initiative, available at http://www.soros.org/initiatives/justice/focus/legal_capacity/articles_publications/publications/pa-raregals-manual-20101208, accessed on 12 December 2016.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

- The benefits to respondents or communities of documenting sexual violence must be greater than the risks to respondents and communities.
- Information gathering and documentation must be done in a manner that presents the least risk to respondents, is methodologically sound, and builds on current experience and good practice.
- Basic care and support for survivors/victims must be available locally before commencing any activity that may involve individuals disclosing information about their experiences of sexual violence.
- The safety and security of all those involved in information gathering about sexual violence is of paramount concern and should be continuously monitored, especially in emergency settings.
- The confidentiality of individuals who provide information about sexual violence must be protected at all times.
- Anyone providing information about sexual violence must give informed consent before participating in the data-gathering activity.
- All members of the data collection team must be carefully selected and receive relevant and sufficient specialized training and ongoing support.
- Additional safeguards must be put into place if children (i.e. those under 18 years) are the subject of information gathering.²⁸⁶

4.7. Alternatives to Prosecution

The structure of the criminal justice system pursued by prosecutors, judges and investigators is meant to support the charges. This is followed by trial, however in many countries prosecution and the defense have other alternatives like guilty plea in lieu of trial and in exchange for lighter punishment.

4.7.1. Plea Bargaining

Plea Bargaining has been developed in common and civil law jurisdictions where the defendant agrees to plead guilty in exchange for “...drop one of the charged offenses (called charge-bargaining) or (2) recommend a reduced sentence (called sentence bargaining), or both.”²⁸⁷ Plea bargaining is useful in jurisdictions having limited judicial is useful in jurisdictions with limited

²⁸⁶ World Health Organization, *WHO ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies* (Geneva: WHO, 2007) at 9.

²⁸⁷ Seelenger *supra* note 246 at 42.

judicial infrastructure and where prosecution would put much pressure on the judicial system, it therefore becomes the preferred mode of prosecution. Defendants may also prefer it where sentencing or mandatory sentencing to bargain for lighter sentences. Some have justified it as a model of sparing victims from trauma associated with giving evidence in international tribunals and as a way of encouraging national reconciliation.²⁸⁸

Plea bargaining presents many challenges as it has been associated with making prosecutors lazy, who fail to take the offence seriously therefore compromising investigations as they become assured of plea bargaining as a remedy. For example in Rwanda and former Yugoslavia, plea bargaining mostly involved sexual offences and not murder or any other crime for that matter.²⁸⁹ Plea bargaining for sexual offences has negative consequences, first it robs the victims the opportunity to have the crime recognized and acknowledged by failing to say what exactly happened.²⁹⁰ Secondly plea bargaining leads to light sentences leaving the victims thoroughly dissatisfied. Plea bargaining also distorts the historical record of the scope of sexual violence during the conflict.²⁹¹ For example, plea bargaining robs the trial of getting to know what happened, it does not contribute to peace building as the truth never comes out thus leaving sexual violence victims unacknowledged.

4.7.2. Establishing User Friendly Courtroom

In many courtrooms, the trial process discourages women from testifying which further traumatizes them. According to some studies

²⁸⁸ Michael P. Scharf, 'Trading Justice for Efficiency: Plea-Bargaining and International Tribunals', (2004) 2 *Journal of International Criminal Justice* 1076.

²⁸⁹ Van Schaack, "Obstacles on the Road to Gender Justice," 395

²⁹⁰ Ibid.

²⁹¹ Ibid.

More often than not, courts are reluctant to admit their own responsibility in the numerous cases where survivors of sexualized violence refuse to testify. Instead of analyzing why [victims decline to testify] . . . courts turn to convenient stereotypes blaming the women themselves or society as a whole.²⁹²

Courts have developed measures to institute friendlier courtrooms, these are classified into measures to institute confidentiality, privacy and victim support. Confidentiality protects the victim from a prying public and press. This includes:

Removing any identifying information such as names and addresses from the court's public records and withholding them from media and the public and in exceptional cases also from the accused; using a pseudonym for a victim; prohibiting the disclosure of the identity of the victim (or identifying information) to a third party; permitting victims to testify behind screens or through electronic or other special methods; allowing any part of the trial to be held *in camera*, i.e., excluding the public from part or all of the victim's testimony. These "closed sessions" would mean not only excluding the public from hearing the victim's testimony but also removing her testimony from all public records.²⁹³

Victim support measures are meant to ease the experiences of testimony in the courts. Victims of sexual violence suffer from immense trauma and their psychological and emotional status during trial needs to be protected. Victim support measures comprise of: "Permitting the victim to testify in a manner that allows her to avoid seeing the accused; limiting the frequency, manner and length of questioning; permitting a support person such as a family member or friend to attend the trial with the victim."²⁹⁴ Other protective measures include revising national statutes on the procedure of gathering evidence and the standard of proof. In the process, simple methods that are not costly can be used such as temporary screens to protect the victim from the defendant.²⁹⁵

²⁹² Mischkowski and Mlinarevic, *The Trouble with Rape Trials*, 6.

²⁹³ Anne-Marie De Brouwer, *Supranational Criminal Prosecution of Sexual Violence* (Antwerp: Intersentia, 2005) at 238-48.

²⁹⁴ *Ibid.*, 260-69

²⁹⁵ *Ibid.* at 238.

4.7.3. Preparing Witnesses for Trial

Testifying in a court of law for sexual violence victims is always intimidating for witnesses who are not familiar with the criminal justice system. Emotional vulnerability of the victims is particularly traumatic as deterrence to testifying.²⁹⁶ Victims of sexual violence need to prepare emotionally for an effective trial process. Courts have developed mechanisms to make this possible through witness trial preparation for witness proofing.²⁹⁷ It includes helping the witness to testify with full understanding of court procedures as well as recognizing the witnesses' lack of familiarity with the trial process therefore making witnesses more comfortable and gain confidence that enhances truth finding. This is done through:

Giving the victim a chance to meet the trial lawyer who will examine him/her in court; familiarizing the victim with the courtroom, the court staff, and all aspects of the court proceedings (for example, explaining the process of examination and cross-examination); familiarizing the witness with the roles and responsibilities of all participants in the court proceedings; familiarizing the witness with her own role, rights and responsibilities (for example, her obligation to tell the truth when testifying); discussing matters related to the victim's security and safety, in order to determine the need for protective measures.²⁹⁸

Witness preparation also helps the witness in recollection, recognition that the witness needs help in testifying, presentation and refreshing of his/her memory. This is because international prosecutions take a long time and victims are expected to testify over multiple incidences that took place a long time ago.²⁹⁹ This is accomplished through:

Allowing the victim to review her prior statements before she testifies in order to refresh her memory and to identify deficiencies and inconsistencies in them; having the prosecutor ask the victim the questions the prosecutor intends to ask her during trial and/or show the victim potential exhibits about which she will be asked during trial.³⁰⁰

²⁹⁶ Ibid., 9.

²⁹⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Case No. ICC-01/04-01/06 (November 30, 2007).

²⁹⁸ Seelinger *supra* note 246 at 45.

²⁹⁹ Mischkowski and Mlinarevic, *The Trouble with Rape Trials*, chap. 5.

³⁰⁰ Ibid.

Preparing witnesses for trial is helpful in making them ready for truth finding, however this is contested in civil law jurisdictions who view it as witness coaching.³⁰¹

Witnesses can also be prepared by familiarizing them with courtroom and trial processes through court visitation, discussions on the process such as examination.³⁰² This process was introduced in 2007 by Trial Chamber 1 of the ICC and is considered by victims and witness unit.³⁰³ The review witness statements after familiarization, meetings between witness and lawyers are prohibited outside the precincts of the courtroom.³⁰⁴

4.8. The Role of the Judge

Judges play a critical role in the trial of sexual violence perpetrators and the way they manage cases can either support or undermine the process. Similar with other court officials, they are uncomfortable with trying sexual offences.³⁰⁵ Being at the apex of the court, their conduct towards victims should be geared towards success in the trial process, such as gender biases should be left out of courtroom as it may affect the outcome.³⁰⁶

Three solutions are useful in containing this problem: first is assigning female judges to sexual violence offences to create a hospitable environment for prosecution.³⁰⁷ Women judges are more sensitive to vulnerable witnesses as compared to their male counterparts.³⁰⁸ Second is the need for special training for judges handling sexual offences for example the victim's exhibit

³⁰¹ Ibid.

³⁰² In *Prosecutor v. Lubanga*, para. 34: The Court argued that “witnesses are not attributable to parties, but rather are witnesses of the Court.”

³⁰³ Ibid.

³⁰⁴ Ibid., para. 53-57.

³⁰⁵ Mischkowski *supra* note 299 at 41.

³⁰⁶ Susana SáCouto, “The Importance of Effective Investigation of Sexual Violence,” 353-58

³⁰⁷ Ibid.

³⁰⁸ Rhonda Copelon, ‘Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law’, (2000) 46 *McGill Law Journal* 228.

trauma that needs special management.³⁰⁹ Judges particularly need training on how to handle emotional and psychological aspects of sexual violence, how to recognize trauma and how to assist victims experiencing trauma.³¹⁰ Thirdly, judges need to be more pro-active in protecting victims from being harassed by the defense teams.³¹¹ This is notwithstanding the right to cross examination, judges should be prepared to intervene if and when necessary. In civil jurisdictions, judges have been given a more active role to play in the trial process.³¹² For better results, common law jurisdictions would need to change and a starting point would be the Rules of Procedure and Evidence of the Yugoslavia Tribunal.³¹³

4.9. Conclusion

The process of seeking accountability for sexual offences is challenging for everybody involved in the trial process. This is because they experience emotional and psychological strain arising from having to repeat the events that happened. They endure this process due to deeply entrenched gender stereotypes that are pervasive in the criminal justice system. This is exacerbated by the absence of linkage between medical and legal systems, resource constraints, poor forensic analysis and co-ordination between investigators and prosecutors, weaknesses in evidence and general insensitivity in the trial process. On the other hand, investigators and prosecutors face numerous challenges due to the private nature of the crime which makes it difficult to gather evidence, positive identity of the perpetrators and biases. Proving sexual offences in international law is even harder since investigations are faced with the task of

³⁰⁹ Women's Initiative for Gender Justice, which has provided training to the judges at the Special Court for Sierra Leone and the ICC, available at www.iccwomen.org/whatwedo/training/index.php. accessed on 6 September 2016.

³¹⁰ *2008 Rwanda Tribunal Best Practices Guide*, 63- 64.

³¹¹ Mischkowski *supra* note 299 at 95.

³¹² *Ibid.*, 66.

³¹³ Rule 75 (d), ICTY Rules of Procedure and Evidence.

proving a crime committed to thousands of women over a long period of time. However, alternatives to criminal prosecutions exist such as plea bargaining that have been tried in some jurisdictions

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.1. Conclusion

This study set out with three main objectives: to analyze challenges of prosecuting sexual offences to analyze the adequacy of Kenya's legal framework in terms of creating accountability for sexual offence and thirdly to make recommendations on the way forward. It was established that the greatest challenge in the prosecution of sexual crimes is not the law but social inhibitions. Patriarchy has played a very important part of it where criminal justice institutions in Kenya and globally view accountability for sexual offences in the lenses of male superiority where sexual offences are treated lightly. This is despite the fact that Kenya has robust legal framework on sexual violence comprising the Sexual Offences Act, the Penal Code and the International Crimes Act. However, the implementation and enforcement of these pieces of legislation has been problematic due to poor skills and lack of experience by investigators, prosecutors and even judges. Recommendations that seek to address accountability issues in offences of a sexual nature will have to address skills up scaling, patriarchy and reduction of the standard of proof for sexual offences.

Sexual offences are among the most serious crimes known to men both in domestic and international law. For example, in international criminal law sexual offences constitute genocide, crimes against humanity and war crimes. The prosecution of sexual offences is hampered by

numerous challenges from lack of strategy, skills, shortage of financial and logistical resources and the systemic problems of patriarchy.

The study examined accountability for sexual offences in international law which has taken three forms IHL, IHRL and ICL. Rules regulating the conduct of war and protection of civilian population in times of war have been in existence since 500BC. Accountability for violation of laws of customs of war in international law evolved from these humble beginnings into IHL meant to lessen harm to combatants and non combatants. This principle ostensibly ignores the context in which sexual violence is committed. International law governing armed conflict is The Hague Convention of 1907 and the 4 Geneva Convention, together with the Additional Protocols to the Geneva Convention. However, the protection of sexual offences by IHL was not couched in express terms as they referred to crimes of honor and dignity, thus concealing the scope of the crime.

After the massive human right violations and atrocities of the 2nd World War, 2 tribunals were formed namely: the IMT held in Nuremberg to prosecute German suspects and IMTFE held in Tokyo to try Japanese suspects. The 2 tribunals ignored sexual offences in spite of evidence of massive, widespread and systematic sexual atrocities. Since then a lot of progress has been made in redressing gender based violence against women by scholars, activists and practitioners both inside and outside the tribunals. Due to the difficulty of investigating sexual offences, there is a tendency to ignore them as the injuries are not visible. Failure to address them leads to silence, impunity and injustice.

The ICTY and ICTR took the lead in developing jurisprudence in sexual violence. The 2 tribunals took the lead in defining the scope of sexual offences such as rape that form the basis of

current prosecution of sexual offences at the ICC. However, the ICTY and ICTR were *ad hoc* tribunals were established for purposes of dealing with violations in specific regions (former Yugoslavia and Rwanda respectively) and limited period and therefore had a limited mandate.

The need for a permanent court to deal with accountability of international crimes especially sexual offences became urgent. The ICC is the first international permanent court with jurisdiction to prosecute crimes against humanity, war crimes and genocide. Sexual offences constitute and form part and parcel of international crimes. However, although it has taken 21 centuries to recognize sexual offences as very serious human rights violations, the challenges of prosecuting still exist especially where those with greatest degree of responsibility are highly placed in leadership positions. However, it sends a message that sexual crimes would not be tolerated just as is the case in domestic legal frameworks. The ICC has developed and defined sexual offences in its statute that could not be imagined 10 years ago. Chapter 2 analyzes the elements of sexual offences in the ICTY and ICTR.

In chapter three, the study examined Kenya's legal framework in dealing with violent sexual crimes. This is provided for in international human rights law (both soft and hard law) and the national legal framework. Whereas the international legal framework provides the norms and standards of how to deal with sexual offences, the national law deals with the operationalization of the norms. Notwithstanding the clear provisions, the procedure taken to convict sexual offences leaves a lot to be desired. This is exacerbated by the legal challenges that make it difficult to convict violent sexual offenders. The legal framework especially regarding procedure is not friendly (Evidence Act, Civil Procedure Code and the Civil Procedure Act) for purposes of prosecuting sexual offences.

Chapter four examined the challenges experiences in seeking accountability for sexual offences is for everybody involved in the trial process since they experience emotional and psychological strain arising from having to repeat the events that happened. They endure this process due to deeply entrenched gender stereotypes that are pervasive in the criminal justice system. This is exacerbated by the absence of linkage between medical and legal systems, resource constrains, poor forensic analysis and co-ordination between investigators and prosecutors, weaknesses in evidence and general insensitivity in the trial process. On the other hand, investigators and prosecutors face numerous challenges due to the private nature of the crime which makes it difficult to gather evidence, positive identity of the perpetrators and biases. Proving sexual offences in international law is even harder since investigations are faced with the task of proving a crime committed to thousands of women over a long period of time. However, alternatives to criminal prosecutions exist such as plea bargaining that have been tried in some jurisdictions.

5.2. Recommendations

5.2.1. Addressing Causes of Conflicts

It is recommended that the causes of conflict should be addressed because massive crimes of a sexual nature like the post election violence in Kenya, genocide in former Yugoslavia and Rwanda came out of moments of conflict.³¹⁴ In Kenya and other parts of Africa poor electoral systems have been found to aggravate conflict. For example, the electoral system where the winner takes it all in majority elections in Africa is a recipe for conflict because it leaves behind wounded communities. In Kenya it only allows big tribes to form political parties that have a

³¹⁴ A Reynolds, 'Elections, Electoral Systems, and Conflict in Africa', (2009) 16 (1) *Brown Journal of World Affairs* 79.

higher chance of winning an election thereby denying the rest an opportunity however qualified they are. A mixed electoral system would allow for more representation of women, the young and minorities and thus gives everyone an opportunity for expression.

The need to build strong institutions that are independent cannot be over-emphasized. This is especially true for institutions directly concerned with promoting electoral fairness such as the electoral commission and the judiciary. Providing these institutions with independence and autonomy in fact and in law would ensure that they are not unduly interfered with by any interested party including the government.³¹⁵ For example if Kenya had such institutions, the post election violence could not have happened. The causes of the violence in 2007/8 are associated with the perception by ODM that these institutions were incapable of fairness in the ensuing elections.³¹⁶

5.2.2. Strengthening of the Investigative and Prosecutorial Capacity of the ICC

It is recommended that the investigative and prosecutorial division of the ICC should be enhanced to ensure thorough investigations that would lead to a more robust prosecution process that would offer more protection for victims of sexual violence. This comes in the wake of the reality that prosecuting sexual offences at the international level is a few decades old as the first conviction was handed down to *Akayesu*³¹⁷ at the ICTR in 1998. Further, during conflict, two scenarios are presented, the first one is a physical conflict that is accompanied by a second invisible one where sexual violence is perpetrated. The latter one has received little attention in

³¹⁵ Ibid.

³¹⁶ Ibid.

³¹⁷ *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber Judgment, International Criminal Tribunal for Rwanda, ICTR-96-4-T, 731 (Sept. 2, 1998).

spite of overwhelming evidence to the contrary. For example in the two Kenyan cases, massive and documented cases of sexual violence occurred in places like Kibera but the ICC found insufficient evidence to prosecute.³¹⁸ This explains systemic challenges in prosecuting sexual offences being viewed as falling within the domestic jurisdiction. This is however no longer the case as illustrated by the cases of *Akayesu*³¹⁹ and *Tadic*³²⁰ in ICTR and ICTY respectively, that found that sexual offences could constitute very serious international offences namely genocide, crimes against humanity and/or even war crimes when committed to a scale provided for in the statute. Therefore, strengthening the investigative and prosecution arm of the ICC would help correct the challenge of weak evidence.

5.3.3. Improving Gender Representation

It is recommended that all stages of sexual violence should be handled by female officers from investigation, medical checkup, prosecution and even the trial process. Even with the brightest judges assembled for the ICTY and ICTR tribunals, the trial of sexual offences never experienced phenomenon success due to lack of gender representation.³²¹ It is clear that men do not understand what women go through during sexual violence. This is partly due to the socialization process and concerns about patriarchy. For example, in some community's sexual violence against women is not viewed as a crime.

³¹⁸ Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence* (Final Report) (Nairobi: Kenya National Commission on Human Rights 2008) at 5.

³¹⁹ *Akayesu Case*

³²⁰ *Prosecutor v. Dusko Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, IT-94-1-AR72, 2 October 1995, para. 94.

³²¹ Patricia Wildermuth and Petra Kneuer, Addressing the Challenges to the Prosecution of Sexual Violence Crimes before International Tribunals and Courts, in Mortem Bergsmo, *Understanding and Proving Sexual Crimes* (Torke Opsahl Academic E Publishing: Beijing, 2012) at 140

The appointment of female officers is guaranteed to make inroads into this challenge, for example appointing Judge Pillay at the ICTY was instrumental in ensuring that *Tadic* was convicted.³²² The *Tadic* case set the foundation and broke ground for the filling of gaps in the establishment of a definition of sexual violence and rape in international criminal law. The issue of gender representation is a critical one that should continue to be pursued because even after the completion of the mandate of *ad hoc* tribunals, gender representation has been relaxed.

5.2.4. Access to Justice

The biggest challenge facing sexual violence victims is a justice infrastructure that is not friendly to the victims thus making it difficult to access justice. There is a need to increase access to points of justice for victims of sexual violence. This is especially critical in rural areas where judicial infrastructure is poor. This can be solved by facilitating the establishment of mobile courts where judges, prosecutors, magistrates and even clerks can periodically visit and dispense justice. Given these bottlenecks, a number of recommendations are made below that would ensure better access to justice.

5.2.4.1. Establishment of Automatic Friendly Courts

It is recommended that an automatic access to the courts should be provided for victims of sexual violence irrespective of the age of the victim. This is because sexual violence is not selective on who to traumatize and who not to. When the accused finally goes to court measures should be put in place to close off the perpetrator from the victim to avoid further traumatization.

³²² *Prosecutor v. Dusko Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, IT-94-1-AR72, 2 October 1995, para. 94.

5.2.4.2. Training, Sensitization and Public Awareness Campaigns

The need for training of all law enforcement officers (investigators, prosecutors, clerks, nurses and policemen) on how to handle sexual violence victims cannot be over-emphasized. It constitutes the single most important factor in the success of prosecution and accountability for sexual offences. This should however be accompanied by sourcing of additional funding to enhance logistical support such as the provision of vehicles, special rooms, stationary, fuel, financial resources that are critical for the implementation of efficient governance of sexual offences. The law may even be inadequate if enough gender sensitization to increase public awareness of sexual offences and educating the public on moral values is not done. Public awareness and education needs to focus on morality, human rights and dignity for women as encapsulated in the UDHR, CEDAW and other international and national human rights instruments. This would bridge the existing gap where victims of gender violence are ignorant of the law.

5.2.4.3. Sensitivity to Sexual Crimes

The starting point of the legal process can be very intimidating to sexual violence victims. It could prove meaningless if law enforcement officers are insensitive to victims. Therefore, there is need to improve sensitivity to victims of sexual violence to prevent further traumatization especially if those they are reporting to are men. To improve the experience of reporting sexual offences, two things will have to be done: first is to increase the number of female officers. This is a strategy to provide a pool of female officers so as to assist female victims of sexual violence

who are more comfortable reporting the offence to a female officer. Second is the creation of gender units within the existing police force. This strategy is based on the belief that specialized units trained in gender violence issues are better equipped to address crimes of a sexual nature.³²³

5.2.5. Improving Coordination between Medical and Legal Services

The other recommendation is the strengthening of coordination between medical and legal services that are currently not harmonized. This has capacity to enhance the gathering and collection of evidence thus more accountability, prosecution and convictions for sexual crimes. This is particularly true of communities where confidence in law enforcement and judiciary has collapsed. In such communities, victims would rather seek medical care than report to the police or seek legal redress.³²⁴ The importance of obtaining medical and psychosocial care immediately after a sexual attack is particularly critical for purposes of preserving evidence. Increasing linkages between legal systems and medical clinics increases the number of victims getting to courts and prosecution as well. They establish an entry point into the legal process and hence accountability for sexual offences.

³²³ Seelinger *supra* note 192 at 25.

³²⁴ Lauren Harris and Julie Freccero, *Sexual Violence: Medical and Psychosocial Support* (Berkeley: Human Rights Center, 2011) at 15.

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