

Waging War against the Woman's Body: Limitations of the Laws of Armed Conflict and Post-War Justice Mechanisms

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Abstract

The following work shall critique the bodies of the law regarding to armed conflict and international criminal law for their inadequacy in addressing wartime sexual assault through failure to define, incorporate, and progressively interpret international statute to encompass sexual assault as a global crime. In order to illustrate this point, this essay will provide a socio-historic examination of the international legal development of sexual assault and an analysis of what makes it a 'gendered' crime. The second section shall then critically assess attempts to prohibit sexual assault in the Geneva Conventions, and how its recognition and prosecution under 'grave breaches' can be problematic. The third section then examines the decisions made at the ICTY and ICTR to define rape under "greater" crimes such as genocide and crimes against humanity. The overall evaluation of the above shall provide a socio-legal account of the woman's subordinate and decentralized status in international law by revealing its weaknesses in offering her protection against such a pervasive and heinous crime.

Introduction

In the past, international law managed to overlook growing tensions surrounding the occurrence of sexual assault against women during wartime.¹ It was not until the 1990s that global legal institutions started to work towards prioritizing and securing women's substantive justice.² This is evident in the proactive undertakings of International Humanitarian Law instruments and recent decisions made by the International Criminal Tribunals for the Former Yugoslavia and Rwanda. The judgments made in these tribunals have contributed to women's justice by attempting to define, incorporate, and progressively interpret international statute to encompass sexual assault as a worldwide crime.³ Yet, for many women, sexual assault during armed conflict remains an ongoing reality⁴ despite these developments. Furthermore, it can be said that justice as defined by the law may not necessarily coincide with the justice women deserve. This work argues that despite the expansion of literature on wartime sexual assault, international law continues to fall short of protecting and providing redress to women. Furthermore, it decentralizes them as agents of their own experience due to the inadequacy in defining, incorporating, and prosecuting sexual assault as an international crime.

This work attempts to prove this by firstly providing a socio-historic examination of the legal development of sexual assault on an international scale. It also aims to analyse the role of gender in the enactment of this offence. The second section critically assesses articles within the Geneva conventions relating to the

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¹ David S. Mitchell, 'The Prohibition Of Rape In International Humanitarian Law As A Norm Of Jus Cogens: Clarifying The Doctrine' (2005) 15 *Duke Journal of Comparative & International Law* 223.

² Nicola Henry, 'The Fixation On Wartime Rape: Feminist Critique And International Criminal Law' (2013) 23(1) 93-111 *Social & Legal Studies*.

³ Kas Wachala, 'The Tools To Combat The War On Women's Bodies' (2012) 16:3 *The International Journal of Human Rights*.

⁴ *ibid* 149.

prohibition of sexual assault; particular attention shall be paid to the difficulties of encompassing this act within “grave breaches” of humanitarian law. In the third section, the decisions in *Akayesu*⁵, *Furundzija*⁶, and *Foča*⁷, are examined to critique the evolution of the definition of rape and the associated problems in its prosecution under “greater” crimes such as genocide and crimes against humanity. By the end, this work will provide an explanation as to why international measures to protect and provide justice for female sufferers of sexual assault fall short of their obligations. Within this essay the crime of sexual assault shall be termed interchangeably as “rape”.

Past Failures to Address Wartime Sexual assault

Sexual assault has proved itself to be an ongoing and therefore familiar narrative during armed conflict, which has caught the attention of feminist scholars and, later, the international community. It is a phenomenon that is pervasive, and arguably, gendered in nature, given that women are more often than not primary targets of this form of violence (which is not to ignore male victims, only to emphasize the element of gender discrimination inherent in this form of crime). To highlight this, one only needs to look towards the impartial presence of sexual assault against women, unconfined to appearing in times of war but also during times of peace.⁸ It is pervasive for the fact that it is widespread and systematically to further illustrate woman’s position in society as subordinate to man.⁹ Additionally, to contribute to its gendered aspect, according to Brownmiller, rape is a “conscious process of

⁵ *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T, 2 September 1998.

⁶ *Prosecutor v Furundzija* (Judgement) IT-95-17/1-T, 10 December 1998.

⁷ *Prosecutor v Kunarac, Kovac, & Vukovic* (Judgement) IT-96-23& IT-96-23/1-A, 12 June 2002.

⁸ Catharine A. MacKinnon, 'Creating International Law: Gender As A Leading Edge' (2013) 36 *Harvard Journal of Law & Gender*, 105.

⁹ Karima Bennoune, 'Do We Need International Law To Protect Women In Armed Conflict?' (2006) 38 *New International Law*, 365.

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dominance and intimidation in which all men keep all women in a constant state of fear...” done to “exert power and control over the female body”.¹⁰ Armed conflict therefore inspires a destructive podium¹¹ for misogynistic ideas to manifest, and it does on an amplified scale, which marks the crime’s opportunistic nature.¹²

Historically, it was a rare occurrence that wartime sexual assault against women was reported and thus under-represented in International Criminal Proceedings¹³ despite the prevalence of its occurrence. For example, the International Criminal Tribunal for the Far East failed to prosecute crimes committed against women sold into slavery to Japanese soldiers, namely those who have come to be known as ‘comfort women’.¹⁴ Horrors such as the “rape of Berlin”¹⁵ have too, been ignored. In each of these cases the international community preferred to view these situations in a peripheral sense to greater crimes. Conceptualized as a mere ‘by-product’¹⁶ of war, these atrocities against women did not carry the weight of international prosecution or responsibility. This begs the question: where is the woman in international law? This is certainly not the first instance in which she has been cast aside and ‘decentralized’, her suffering regarded as an inevitable ‘by-product’. During war, she is an entity that is not central to the narrative frequently told by man, reduced to the function of her reproductive system. As evidenced through past failures, the law had failed to suppress and compensate victims for these crimes.

¹⁰ Usta Kaitesi, *Genocidal Gender And Sexual Violence. The Legacy Of The ICTR, Rwanda's Ordinary Courts And Gacaca Courts* (Intersentia Publishing Ltd 2014), 104.

¹¹ Karima Bennoune (n 9) 368.

¹² Kaitesi (n 10) 116.

¹³ Anette Bringedal Houge, 'Sexualized War Violence. Knowledge Construction And Knowledge Gaps' (2015) 25 *Aggression and Violent Behavior*.

¹⁴ Fiona de Londras, 'Prosecuting Sexual Violence In The Ad Hoc International Criminal Tribunals For Rwanda And The Former Yugoslavia', *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (Routledge 2011).

¹⁵ *ibid.*

¹⁶ Henry (n 2) 95.

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It was not until the 1990s¹⁷, that significant change occurred for women in the area of gender justice. This can be attributed to the radical shift in perception of sexual assault not merely being a ‘by-product’ of war but, more accurately, used as a “weapon of war”.¹⁸¹⁹ Past understandings of wartime rape as inevitable occurrences were unreliable; this is because these beliefs denied the woman her bodily autonomy and cast her trauma in conflict as secondary—the woman a silent survivor of a crime unattended to²⁰. It can be argued that the ‘weapon of war’ rhetoric is more forward thinking as it denounces the conceptions of the crime as a passive atrocity, and concurrently shrugs off the understanding of rape as a normative act that women have suffered for centuries²¹. However, it is telling that the use of this newfound terminology asserts that rape is a ‘weapon’ against the enemy, because it demonstrates that the violence employed against women isn’t so much about the women than it is about ‘hurting’ the enemy.²²

This very idea was dealt with in the 1990’s during the ICTR and ICTY tribunals, which also contributed greatly to changes to the Geneva Conventions and whose judgments revolutionized the understanding of wartime sexual assault. It can be assumed that since these laws help shed light on woman’s suffering during wartime that notable improvements in the area of gender justice have been made; these progressions have been hailed furthermore as significant achievements in the

17 *ibid* 94.

18 UN Security Council Resolution 1820.

19 Kas Wachala (n 3) 535.

²⁰ “Despite its pervasiveness, gender-based violence is not “natural” or “inevitable”. Violence against women is an expression of historically and culturally specific values and standards.” *It’s In Our Hands. Stop Violence Against Women* (Amnesty International Publications 2004)
<<http://www.internationalhumanrightsexicon.org/hrdoc/docs/womenai2004.pdf>> accessed 4 January 2017.

²¹ Sexual violence is not a ‘new crime’. Charlotte Lindsey, ‘The Impact Of Armed Conflict On Women’, *Listening To the Silences: Women and War* (Martinus Nijhoff Publishers 2005) 25.

²² Fiona de Londras (n 14) 292.

war against impunity²³ towards women. Yet, critics claim that international law is still inadequate in addressing the woman's experience²⁴ in armed conflict, expressing that gaps in knowledge and protection²⁵ need to be confronted. To counter this, the ICRC maintains that the failure is not in the law itself but more so in the lack of its proper enforcement.²⁶ The Laws of Armed Conflict along with its relationship to International Criminal Law mechanisms need to be scrutinized in detail with regards to their relation to wartime gender based violence in order to determine the adequacy of international law in centralizing the woman in war. This shall be demonstrated below.

International Humanitarian Law

Coming into force after the Second World War, International Humanitarian Law has played an integral role in regulating the conduct of war, and has added to the protection of women against sexual assault through its attempts to prevent and condemn these actions during conflict.²⁷ The main bodies of law governing war are the Geneva Conventions, the fourth of which deals with the role of women as civilians in armed conflict. Prior to the incorporation of more specific laws pertaining to sexual assault into the statute, IHL claimed to grant unbiased protection towards women, boasting an interpretation of 'equality'²⁸ throughout the four Conventions and two Protocols. Due to laws already being in place for the safeguarding of

²³ Charlotte Lindsey (n 21).

²⁴ Judith Gardam, 'Women And Armed Conflict: The Response Of International Humanitarian Law', *Listening to the Silences: Women and War* (1st edn, Martinus Nijhoff Publishers 2005) 116.

²⁵ *ibid.*

²⁶ Charlotte Lindsey, *Women Facing War* (1st edn, International Committee of the Red Cross 2001) 22.

²⁷ Kas Wachala (n 3)

²⁸ Judith Gardam, 'Women And The Law Of Armed Conflict: Why The Silence?' (1997) 46 *International and Comparative Law Quarterly*. 58.

general civilian and combatant populations during armed conflict²⁹, why should new gender-centric laws be considered? In light of this question, academics have pointed out the discriminatory characteristics of international humanitarian law, stating that the framework clearly prioritizes male combatants while women are regarded as either victims or child-bearers.^{30 31} It is due to such prejudiced contextualization of women, along with weak attempts to ban and prioritize sexual assault as a crime that the protection of women is subject to obscurity in the Geneva Conventions.

'Honor' Talk and Victim Framing

Discriminatory examples of this legislation are most evident through the terminology used to protect women against the crime of sexual assault, which is addressed in the gendered language of 'chastity and modesty'³². For example, Article 27 of the Fourth Geneva Convention 1949 aims to prevent sexual assault against women through protecting her 'honor' in wartime. This is problematic due to its indirect means of prohibition³³ and outdated use of language.³⁴ Furthermore, in light of this, it is important to ask *whose* honor the law really protects—the woman's or her husband's?³⁵ This is relevant especially in relation to value-centric terms such as 'honor', which were not uncommon to public understanding of the role of women in the 1940s.³⁶ To further illustrate the troublesome framing of the woman through 'honor', one must ask if this is to say she is effectively 'dishonored' after being victim to sexual assault? If so, what does it speak for her place in society? Additionally, a

²⁹ *ibid.*

³⁰ Helen Durham and Katie O' Byrne, 'The Dialogue Of Difference: Gender Perspectives On International Humanitarian Law' (2010) 92 *International Review of the Red Cross*. 45.

³¹ *ibid* 34.

³² *ibid* 35.

³³ Kas Wachala (n 3) 537.

³⁴ Durham and Byrne (n 30) 35.

³⁵ Judith Gardam (n 28) 68.

³⁶ Durham and Byrne (n 34).

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more general protection for women through “Family Honor” is also mentioned in Article 46 of Geneva Conventions IV 1949; this proves the statute’s limited range of protection for women³⁷ as it regards her protection only through her role in the family which supports archaic societal perceptions of gender roles.

A contradiction exists in the Law of Armed Conflict, as it aims to uplift the woman, but in so doing it only perpetuates restricted narratives of her as a victim or mother. The problem of centrality once again appears in this analysis, as the woman, although proposed in the above cases as a subject of law, is treated as more of an object and appears in the line of protection as a mere afterthought. Limited as a subject to her archetypal role in the family and encompassed by vague, outdated statutes that nurture societal expectations of her gender, protection for the woman in war is severely limited. However, following the implementation of the Additional Protocols 1970, rape is explicitly mentioned as a crime against women during conflict while the language of honor is left behind:

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.³⁸

While it can be seen as a positive development that law recognizes women’s vulnerability during war, it is disadvantageous on the other to assume that this vulnerability exists solely on account of a women’s sexual or child-bearing

³⁷ Kas Wachala (n 3) 53.

³⁸ Additional Protocol 1 1970 Article 76.

functions.³⁹ It can be said that the Geneva Conventions are insufficient as they fail to uphold a truer universal reality of sexual assault against women during wartime.⁴⁰

‘Grave Breaches’: Feeble Attempts to Prioritize Women

Another way in which international humanitarian law falls short of providing effective protection measures for women is the omission and prioritization of rape as an element of ‘grave breaches’. Defined as *serious* violations of international humanitarian law, contravention of such measures shall be punishable under universal jurisdiction.⁴¹ Outlined throughout the four conventions and Protocol I, these violations mark the Geneva Convention’s relationship with International Criminal Law through its potential and ability to prosecute and punish crimes at international criminal courts and tribunals. Nevertheless, this road to redress is arguably of no help to women as women’s rights experts protest the failure to include gender-based crimes such as rape in the mention of grave breaches, which list just “...willful killing, torture or inhumane treatment, including biological experiments, willfully causing suffering or serious injury to body or health...”⁴² as examples. In recent developments, however, attempts to progressively interpret grave breaches clauses to include wartime rape and other instances of gender-based violence have been made, though it has proved difficult to successfully do so. In defense of the absence of an outright prohibition, Khushalani argued that the grave breaches of “torture or inhuman treatment” and “willful causing of suffering or serious injury of

³⁹ Judith Gardam (n 24) 119.

⁴⁰ Judith Gardam (n 28).

⁴¹ Kas Wachala (n 3) 536.

⁴² Geneva Convention IV, Article 147.

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body or health” could be progressively interpreted to include rape against women as a violation.⁴³

The above is evidenced through the *Celebici* case, held at the ICTY where three members of the Bosnian armed forces, Mucić, Delić, and Landžo, were charged with grave breaches against Bosnian-Serb civilians held in the Celebici prison camp in Central Bosnia and Herzegovina⁴⁴. It was imparted by witnesses at the trial that the civilians were “tortured, beaten to death by guards wielding baseball bats, set on fire, and raped.”⁴⁵ It was the indictment of Hazim Delić, more specifically, which dealt with rape constituting the offense of torture under grave breaches of international humanitarian law:

...the violence suffered by Ms. Cecez in the form of rape, was inflicted upon her by Delić because she is a woman... this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.⁴⁶

Consequently, rape was rendered a violation of grave breaches through the progressive interpretation of international humanitarian law despite of its lack of direct prohibition under the Geneva Conventions. Proponents of this progressive interpretation have commended the contributions it has made to the agenda of protecting women during wartime, stating that though dated, the Geneva Conventions should be read in the light of today’s world, and therefore principles

⁴³ Yougindra Khushalani, *Dignity and Honor of Women as Basic and Fundamental Human Rights* (Martinus Nijhoff Publishers 1982). 44.

⁴⁴ International Criminal Tribunal for the Former Yugoslavia, 'Sentencing Judgement In The "Celebici Case" (2001) <<http://www.icty.org/en/press/sentencing-judgement-celebici-case>> accessed 4 January 2017.

⁴⁵ Amnesty International Publications 2004 (n 20).

⁴⁶ *Prosecutor v Delalic, Mucic, Delic, & Landzo*, (Judgement) IT-96-21-T, [941] .

harnessed from existing statute can be used to combat newer crimes.⁴⁷ However, this notion has received backlash with sceptics stating a strong preference for explicit, rather than implied prohibitions of wartime rape.⁴⁸ This lack of outright prohibition speaks levels as to international law's lack of will to prioritize and centralize women in armed conflict. The above case demonstrates that though law will bend over backwards to interpret existing statute to cater for female victims of wartime rape, it is reluctant to establish rape as a crime beyond doubt, which furthers the opinion that the laws meant to protect women ultimately fail them.

Post-War Justice Mechanisms

Ad hoc criminal tribunals for Rwanda and the Former Yugoslavia have been instrumental in addressing sexual assault against women. Established by the UN to prosecute war crimes, crimes against humanity, and genocide⁴⁹ in the respective areas, both tribunals have made advances in additionally encompassing wartime rape within the more serious crimes of genocide and crimes against humanity. This has effectively widened the potential for rape to be prosecuted as an international crime, for perpetrators to be held individually responsible, and for victims to be justly compensated.⁵⁰ It is suggested that this can fill in the gaps left by the Geneva Conventions in defining the crime of sexual assault, given that international criminal courts have the authority to "promote progressive, creative interpretation of IHL'S key texts."⁵¹ Moreno furthermore considers recent developments in this area to mark a 'new era' in international law to "protect the victims; to end gender crimes"

⁴⁷ Karima Bennoune (n 9).

⁴⁸ *ibid.*

⁴⁹ Kelly D, 'The Jurisprudence Of International War Crimes Tribunals: Securing Gender Justice For Some Survivors', *Listening to the Silences: Women and War* (1st edn, Martinus Nijhoff Publishers 2005).

⁵⁰ *ibid.*

⁵¹ Karima Bennoune (n 9).

and “to ensure that peace and justice work hand in hand.”⁵². However it also rings true that despite these improvements in structuring and refining sexual assault within the ad hoc criminal statutes, sentencing of offenders remains scarce and lenient.⁵³ Adding to this, others have drawn attention to the problem of sentencing rape *under* ‘greater’ crimes, which introduces questions of whether in prosecuting rape under genocide or crimes against humanity that rape, as a singular act, is trivialized in comparison, thus ridding the crime of its true gravity.⁵⁴ This being said, the full range of consequences that stem from women’s suffering is not entirely taken into account. Wartime rape is still wrongly categorized as will be shown through the imperfect construction of its definition and failure to legitimize it as an international crime in and of itself.

Defining Rape at the ICTR and ICTY

Hailed as a groundbreaking landmark judgment⁵⁵ in the writings on wartime sexual assault, *Prosecutor v. Akayesu*⁵⁶ presents to be the very first case to consider the *definition* of rape within the context of international law.⁵⁷ While this was a positive step in the direction of recognizing women’s adversity in wartime, less-than-progressive decisions at the ICTY have since followed, notably in the cases *Furundzija* and *Foča*.

Akayesu criticized domestic law definitions of rape, claiming that they put too much emphasis on factors such as the type of penetration and consent⁵⁸, and thus

⁵² Luis Moreno-Ocampo, Statement By Mr. Luis Moreno-Ocampo, Prosecutor Of The International Criminal Court', *Review Conference of the Rome Statute* (2010).

⁵³ Estelle Zinsstag, 'Sexual Violence Against Women In Armed Conflicts: Standard Responses And New Ideas' (2005) 5:1 Social Policy & Society.

⁵⁴ Fiona de Londras (n 14).

⁵⁵ Kas Wachala (n 3).

⁵⁶ *Prosecutor v Akayesu* (n 5).

⁵⁷ Fiona de Londras (n 14).

⁵⁸ *ibid*.

rejected them in order to build a more victim-oriented approach. The Trial Chamber emphasized that wartime rape could not be adequately captured in the narrative of “objects and body parts”⁵⁹ and therefore attempted to make it so that non-consent on the victim’s part is readily assumed in the context of coercive circumstances (which war often necessitates). It was therefore held that rape is to be defined as a “physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”⁶⁰ It is a victory for women that this definition is deliberately broad since it has potential to include a wider array of sexual harms against the person so long as coercion is proved. This definition of rape has been championed by feminist legal theorists⁶¹ who have expressed that sexual assault is finally reflected in the law as it occurs in life. It can also be said to promote international awareness of the woman in law as a multi-dimensional⁶² figure, as she is handled still on the national level through familiar and restrictive ‘objects and body parts’ rhetoric in relation to sexual assault.

⁵⁹ Kas Wachala (n 3).

⁶⁰ *Prosecutor v Akayesu* (n 5) [598].

⁶¹ Fiona de Londras (n 14).

⁶² *ibid* .

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However, similar sentiments failed to be endorsed in *Furundzija*, a case heard at the ICTY concerning the use of sexual assault in interrogations, which adopted a more mechanical approach to defining rape. Where *Akayesu* was broad and considerate of outside circumstances involving consent and force, *Furundzija* signaled a backward step in the international attempt to define sexual assault.⁶³ The objective elements laid out in *Furundzija* are as follows:

- (i) the sexual penetration, however slight
 - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.⁶⁴

It was argued in *Furundzija* that the definition found in *Akayesu* was not built upon any customary agreement as to what is considered sexual assault and was therefore not worthy of international consolidation.⁶⁵ This is yet another example of international law failing to view the woman as a whole, focusing instead on the need for “force” or “threat of force”, which ultimately limits sexual assault to taking place solely when coercive circumstances are judged as forceful or threatening. The “body parts” narrative rears its ugly head again in this case, eliminating any chance for the victim’s agency or lack thereof in determining the crime.

The ICTY then tried to create balance between the definitions in *Akayesu* and *Furundzija*⁶⁶ in its attempt to bring the judgments closer together in *Foča*. While trial

⁶³ *ibid.*

⁶⁴ *Prosecutor v Furundzija* (n 6).

⁶⁵ *ibid.*

⁶⁶ *Fiona de Londras* (n 14).

judges agreed that the definition in *Akayesu* was too broad, it was also revealed that *Furundzija*, although appropriate in the sense that the first article defining rape may constitute the *actus reus* of the crime, was excessively narrow in its approach towards “force” or “threat of force” with regards to coercive measures.⁶⁷ Further, it took a similar position to that in *Akayesu* by confirming that given the circumstances of conflict in nurturing coercive situations, consent would be near impossible on the part of the victim.⁶⁸ It is evident that in defining sexual assault, *Foča* tried to revive *Akayesu*’s legacy by expanding the definition of rape with special regard to the victims consent. The determinant of the *actus reus* of rape was therefore “sexual penetration, however slight” which “occurs without the consent of the victim”. The *mens rea* was consequently the intention to carry out sexual penetration with the knowledge that the victim has not voluntarily consented.⁶⁹

The consent-oriented approach centralizes the female victim compared to the *Furundzija* definition, which conversely reduces her to mere fragments of her body. While still garnering inspiration from *Furundzija* in developing a formula-based approach to the *actus reus* of rape, semblances of *Akayesu* are also tied into *Foča*’s conception of rape. This is shown through its consideration for the woman’s inability to voluntarily consent in conflict-ridden situations. It can be said that international criminal law has positively developed the jurisprudence surrounding rape because more attention has been paid to women and the importance of translating their experience of conflict into the law, despite a few setbacks.⁷⁰ However, it is important to note that although this move forward signals a small triumph for women, international criminal law still fails to offer an adequate definition as it still aligns itself

⁶⁷ *Prosecutor v Kunarac, Kovac, & Vukovic* (n 7) [438].

⁶⁸ *ibid* [130].

⁶⁹ *ibid* [460].

⁷⁰ Fiona de Londras (n 14).

with domestic conceptions of rape. The approach to prosecuting rape is still too mechanical to consider this a clear victory for women. Once again, too much gravity is placed on the material elements and not enough leeway is given for consideration of broader circumstances. For that reason, it comes as no surprise that rape is still not given the weight it deserves in the international sphere and is not prosecuted nearly enough to provide redress for women.

As it stands, *Akayesu* may still be considered to be the leading definition for rape in international criminal law as it is the most progressive of the definitions in terms of its wide scope for development in international criminal justice.⁷¹ *Akayesu* carries with it the hope for women's justice because it extends its conceptual definition to encompass a vast array of circumstances where non-consensual penetration is involved.

Rape as Constitutive Acts of Genocide and Crimes against Humanity

Looking towards the prosecution of rape under 'greater' crimes, the cases of *Akayesu* and *Foča* must be critically reviewed to showcase international law's failure to centralize woman. Charged with genocide at the ICTR, *Akayesu* marks a massive step forward in international law with regards to the recognition of the crimes of rape and sexual violence as constitutive acts of genocide and crimes against humanity. Although the accused had not personally committed acts of rape, his case was used as a platform to confer responsibility onto him as superior leader of the armed militia/police, whom under his direction took hundreds of Tutsi women and carried out sexual violations against them.⁷² In linking rape to genocide in *Akayesu*, the tribunal had to be creative in carving this link out of existing law on genocide, which

⁷¹ Olga Jurasz, 'About Justice That Is Yet To Come: A Few Remarks About The International Pursuit Of Post-Conflict Gender Justice' (2013) 24:1, *Journal of Gender Studies*.

⁷² Fiona de Londras (n 14).

requires the act to be carried out with the “intent to destroy, in whole or in part, a national, ethnical, racial and religious group,” with particular attention to ‘causing serious bodily or mental harm’ or ‘imposing measures intended to prevent births’ in the targeted group.⁷³ It was later agreed that rape and other forms of sexual violence fell within the scope of Article 2 section (b), stating that “rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims... resulted in physical and psychological destruction of Tutsi women...”⁷⁴. The Trial Chamber also pointed out the integral nature of rape in the accused’s aim of specific destruction of Tutsi women and specifically contributing not only to their destruction but also to the group as a whole.^{75 76} This has made it so that should specific intent be proven in future armed conflicts where sexual assault has taken place, that rape can be prosecutable as an international offense. But what if specific intent cannot be proven and thus rendering rape unable to be charged through genocide? This brings us back to the centrality narrative brought up in the document. The crime of rape is only as good as the ‘larger’ crime being presented—the woman is yet again displaced as secondary in her suffering under sexual assault.

Another crime under which rape is recognized in international criminal law to be a violation is Crimes Against Humanity. The *Foča* case, aside from being notable for its attempts at providing further clarity in the definition of rape in international law, is also a leading decision as it marks history as the first case of its kind to solely prosecute for the crimes of sexual assault against women.⁷⁷ The accused, three Bosnian Serb commanders: Kunarac, Kovac, and Vukovic, were found guilty of

⁷³ Article 2 of ICTR statute.

⁷⁴ *Prosecutor v Akayesu* (n 5).

⁷⁵ *Kaitesi* (n 10).

⁷⁶ *Prosecutor v Akayesu* (n 5).

⁷⁷ Julie Mertus, 'Shouting From The Bottom Of The Well The Impact Of International Trials For Wartime Rape On Women's Agency' (2004) 6:1 International Feminist Journal of Politics.

crimes against humanity and international humanitarian law. The crimes of rape, enslavement, torture and outrages against personal dignity were also considered under these charges.⁷⁸ The three accused had a role in organizing and maintaining the rape camp in the eastern Bosnian town of Foča. As mentioned previously, the definition of rape in this case which tried to bridge *Akayesu's* conceptual approach and *Furundzija's* more mechanical outlook has aided in rape's position within crimes against humanity. It was interpreted that the crime of rape (which also constitutes sexual slavery) that took place in *Foča* is regarded as forming part of a widespread and systematic attack against the population in *Foča* with regards to Article 5 of ICTY's statute. However, as with genocide, the main problem that arises from prosecuting rape under other provisions such as torture or Crimes Against Humanity is that it ultimately serves to obscure the sexual nature of the crime itself.⁷⁹ This may produce positive or negative effects depending on the woman survivor and how they wish to frame their own narrative.⁸⁰

Prosecution Matters: Redress for the Woman?

The issue of prosecuting under 'greater' crimes adds to the perception that justice for women is an underwhelming phenomenon.⁸¹ Gender crimes are only made exceptional and prosecutable at an international criminal level *because* they are frequently done in the contexts of more acknowledged crimes such as genocide or crimes against humanity⁸², which makes the issue seem secondary and not as grave as the crime under which it is prosecuted. In such cases, it is argued that international law's primary focus is on catching the male perpetrator instead of

⁷⁸ *Prosecutor v Kunarac, Kovac, & Vukovic* (n 7).

⁷⁹ Kelly D (n 49).

⁸⁰ Catharine A. MacKinnon (n 8).

⁸¹ *ibid.*

⁸² Kelly D (n 49).

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providing justice to the female victim.⁸³ This renders the indirect means of prosecution for rape seemingly sufficient enough for international acceptance, in that prosecution under readily existing crimes will do. This is a disservice not only to the decentralized woman in war but also to the international legal order in that the law is trying to stretch the definitions existing crimes to support a crime that was previously not even considered to be a bona fide international violation.

This quasi-representation through implied incorporation, in effect, minimizes the violence of the act and also takes away the its gendered quality. Rape is understood as an attack against women (which in most cases is the reality), a group violation, due to the fact that she is a woman and that she is constructed by the society around her to be subjected and targeted for that very reason.⁸⁴ This makes it all the more troubling to know that this form of gendered violence is not adequately handled on an international level, as demonstrated through the cases provided above. In relation to rape's definition under international law, one argues that a more holistic approach, one that considers the victim's experience of wartime rape and every circumstance eliciting non-voluntary consent, should be endorsed. Much like the definition in *Akayesu*, the law needs to find a way to place the woman in the center and provide her with adequate protection and redress measures in order to truly cater for the needs of the international female populace.

⁸³ Vesna Nikolic-Ristanovic, 'Sexual Violence, International Law And Restorative Justice', *International Law: Modern Feminist Approaches* (1st edn, Hart Publishing 2005).

⁸⁴ Catharine A. MacKinnon (n 8).

Conclusion

Taking all aspects into consideration, it is evident that while the Geneva Conventions and International Criminal Law mechanisms are steadily working towards defining, incorporating, and prosecuting the offense of sexual assault, these progresses are hindered by the failure of these institutions to do so successfully. The underlying problem in each of the cases presented above is the gross underrepresentation of the primary victim of the crime of wartime rape—the woman. Had the women's experiences been central in determining constituents and elements of the crime, perhaps the development of this violation within the laws of armed conflict and international criminal tribunals would have already made significant progress in today's world. It is known that women as a majority still fall victim to these heinous crimes worldwide. International Law needs to start centralizing women's experiences in order to fulfill its international legal obligations to protect them and safeguard their interests for justice. Perhaps only through this will International Law start to redefine and readdress sexual assault in a way that benefits and centralizes the woman.