



Gender Crimes: An Emerging Category of International Crimes

- From Mass Atrocity to Recognition -

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Executive summary

International prosecutions of gender-based violence have attracted heightened interest during the last two decades. The hideous and ongoing mass violence committed against women during warfare had finally drawn the spotlight of a wider international community, and brought about a change of prosecutorial attitudes towards charging and trying perpetrators for crimes that seemed non-punishable for a very long time.

The mainstreaming of gender-related concerns by a wider international community - and even more importantly within the emerging International Criminal Law regime - helped catalyze a seemingly genuine paradigm shift in apprehending gendered atrocities committed during armed conflict. However, on a second glance it might be rightly said that the international criminal law did not manage to fully grasp women's wartime experiences in a manner which would reconcile the need for both retribution and recognition of female victims.

The argument of my work goes to the very heart of these concerns by asserting that the corpus of International Criminal Law partly failed to embrace wholly the essence of gender-based crimes committed in times of mass atrocity. Therefore, oddly enough, international criminal justice does not always serve the best interest of the victims or the victimized group.

The present research features a critical perspective on recent developments in International Criminal Law in respect to gender issues, and further questions whether international criminal justice has been able to thoroughly become cognizant of those particularities which represent the very essence of the distinctiveness of gendered atrocities. Further on, the work shall engage in pinpointing why exactly is it important to include sexual crimes specifically among the other charges, even in cases where notorious war criminals may

be convicted for mass atrocity based on other grounds, without including gender-related crimes. The work also engages in a theoretical discussion about the sinister nature of mass atrocities in general in order to illustrate how these features play out for mass assaults including a ‘gender’ element.

Therefore, the research represents an attempt to highlight those features which exactly make the crimes of sexual violence different in comparison to other types of mass violence without a gender element. After pinpointing these hallmarks, the usage of the concept of ‘gender’ in the jurisprudence of three international tribunals (the ICTY, ICTR and the ICC) shall be compared in order to draw some conclusions about the advantages and limitations of their approaches. Thus, the research ought to draw a conclusion and give further recommendations for a more gender-sensitive approach which would then appreciate a gender-oriented recognition. Finally, the thesis shall draw on a theory of recognition for victims of gender-based violence, in order to suggest how international criminal law could become a catalyst for a meaningful societal acknowledgement of wrongdoings.

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Introduction

International criminal law is a “gendered regime.”¹ Historically, it offered impunity to the perpetrators of atrocities committed against women by not recognizing sexual violence as international crimes.² However, things have significantly changed over time. In the last two decades the international community - and moreover the jurisprudence of the two UN *ad hoc* Tribunals - have shown due respect to the importance of hearing the voices of thousands of victims out there who suffered wartime sexual violence. Therefore, it is now the responsibility and duty of the International Criminal Court to build on the legacy of the Tribunals and develop sophisticated legal solutions which could then fully live up to the delicate nature of gender-based crime prosecution in future.

The beginnings of wartime rape and sexual violence prosecutions go back to the mid-1990’s when, due to serious political impetus within the UN Security Council, the institutional and procedural underpinnings of two truly international criminal tribunals had been created. The establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), enabled international criminal law to develop a heightened interest for international gender-based prosecutions as well. The institutional basis for charging and trying sexual crimes had been provided by the *ad hoc* UN Tribunals, while the *modus operandi* of these *fora* has been given in the Statutes of the ICTY and ICTR, respectively. These instruments contain definitions

¹ Michelle Jarvis, *An Emerging Gender Perspective on International Crimes* in Gideon Boas & William A.Schabas, *International Criminal Law Development in the Case Law of the ICTY* (ed.), Mertinus Nijhoff Publishers, Leiden/Boston, 2003, p.157

² Ibidem, p. 157

which covered partly and somewhat inadequately the emerging forms of sexual crimes.³ Thus, it rightly can be said that international trials of wartime rape relied strongly on the lenient judicial activism towards a proactive gender-based prosecution.⁴

Today after the establishment of the permanent International Criminal Court (ICC), gender-based prosecutions continue, hence the academia anxiously awaits the relevant ICC jurisprudence. The Rome Statute came up with unique solutions regarding the crimes under which rape and other forms of sexual crimes can be tried, nevertheless it also included a provision on the meaning of the term ‘gender’. Therefore, Chapter One shall map contemporary approaches towards the prosecution of gender-based violence, and more generally towards the understanding of the term ‘gender’ under the current international criminal law regime. Firstly, the research concentrates on the non-inclusiveness of the definition of ‘gender’ in the Rome Statute under article 7(3) due to a number of reasons, including: the disregard of comprehending ‘gender’ as a social construct; efforts to downplay and equate ‘gender’ with biological sex; ignoring and leaving out crimes oriented against sexual orientation as gender-based crimes. Therefore, the Rome Statute offers an ambiguous pairing of a more complex catalogue of specific gender crimes covered by the Court’s jurisdiction⁵, while at the same time obscuring the definition of ‘gender’ in international

³ The crime of ‘rape’ was the only gender-related crime covered by ICL in the beginning: rape had been specifically incriminated only in Article 5(g) of the Statute of the ICTY and Article 3(g) of the Statute of the ICTR

⁴ This led to trials of gender-based crimes in the form of charging the crimes of “willful killing”, “torture or inhumane treatment” or “willfully causing great suffering or serious injury to body and health” as ‘grave breaches of the Geneva Conventions’ (Article 2 of the ICTY Statute). Sexual crimes have been also prosecuted under article 3 of the ICTR Statute as ‘violations of laws and customs of war’ which also does not mention any sex-crime at all. Finally, rape has been also tried under the provision regarding ‘genocide’, even though the ad hoc Tribunal’s definition of genocide does not encompass belonging to a certain ‘gender’ group/role specifically as a ground for its commission.

⁵ Article 7(1)(g) broadens the list of specific gender-related crimes and lists “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” as crimes against humanity. Also, these crimes may be charged under Article 8(2)(b)(xxii) or Article 8(2)(e)(vi) as ‘grave breaches of the Geneva Convention’ or ‘serious violations of common article 3 of the Geneva Conventions’, respectively.

criminal law.⁶ The task of Chapter One is to illuminate why is it of utmost importance to underline the inherent features of ‘gender’ in connection to international proceedings.

Chapter Two ought to engage in illuminating the extraordinary nature of mass atrocities, and particularly gender-related ones. Therefore, the section seeks to clarify why is it important not to oversee the extreme malevolence that sexual crimes pose to humanity by downgrading them. Such downplay of rape and other sex crimes usually takes a form of paying no respect to the strands of socially constructed notion of ‘gender’. Further on, the chapter also seeks to propose an alternative role for international criminal law in initiating societal remorse for the gender crimes allowed to happen by the respective society. Such feelings of apology on behalf of the society could bring about a compelling and significant societal recognition of the wartime experiences of the victims (as suggested later in Chapter Four). This way international law could, arguably, become a catalyst for making possible not only the legal recognition in the form of sufficient ‘gender’-related provisions and subsequent prosecutions, but also would allow for societal recognition and healing.

Chapter Three is an attempt to scrutinize the jurisprudence of three international tribunals – the ICTY’s, ICTR’s and the ICC’s, - in a way to compare their understandings and treatment of the ‘gender’ element in cases they pursued. Such comparative method is deployed in order to clarify the use of the notion of ‘gender’ before the international penal courts, thus enabling to compare and contrast the advancement and boundaries of the tribunals. Arguably, despite the positive and proactive attitude towards taking up the prosecution of gender-related cases from the mid-90’s, it is argued that the rapid spread of the concept resulted in stripping off gender mainstreaming within international trials of any real bite. Thus, by becoming and staying on a more rhetorical level, gender-based prosecutions by

⁶ Article 7(3) of the Rome Statute reads: “For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.”

far and large did not convey such a compelling and powerful message to the victims - as they were expected to, - due to the flaws in recognizing the uniqueness of the 'gender' element and the extraordinary nature of mass crimes. International prosecutions often transmitted an impression that the actual gender-component of utterly horrific crimes got 'lost during the translation' into a criminal charge. Therefore, the main argument of this thesis asserts that the existing international criminal law solutions do not fully allow for a meaningful prosecution, closure and recognition for the victimized societies from a gender perspective due to its inability to grasp the essential distinctiveness of rape and gender-related atrocities.

Ultimately, Chapter Four is to point out that fact that after the completion of these international trials the actual victims lack a sense of real recognition. Justice, in general, still remains elusive to a number of victims of gender crimes. Factor such as, stigmatization and ostracization by their own communities and the feeling of disengagement and remoteness from criminal processes, play out in a way that leaves victimized groups without due acknowledgment.

What more, it seems that through the recognition of the harm caused to the victimized group, international criminal law could actually gain more legitimacy in apprehending women's wartime experience, rather than instrumentalizing victims of sex-crimes for its own ends. Of course, it would seem frivolous to expect international criminal justice to create collective stories and historic truth(s), since it is the establishment of individual responsibility that criminal justice is developed for. However, the potential of international criminal jurisprudence for promoting healthier relations between adversary groups in post-conflict situations should not be easily dismissed. In this sense, the present work calls for the need for international criminal law becoming the arena which offers primarily legal recognition to victims, thus becomes an important stage for a further overarching societal healing.

CHAPTER 1 – Gender and Its Understandings: An Introduction

“We must ask the question that will force us to rethink the boundaries: how are apparently natural dichotomies gendered?; why is the category ‘woman’ so limited in international law?; ...international law has both regulative and symbolic functions. We should use its regulative aspects where we can to respond to particular harms done to women, and harness its symbolic force to reshape the way women’s lives are understood in an international context, thus altering the boundaries of international law.”⁷

As long as human kind has resorted to conflict, wartime rape and other sex-crimes have stayed relatively unaddressed “side effects of war,”⁸ both legally and historically. The deployment of gender-based violence has been usually, but not exclusively, used as a weapon against the female members of confronted parties in war. For example, according to some estimation, only during the Yugoslav wars in the period between 1992-1995, approximately 20.000-50.000 persons became victims of war-time sexual violence.⁹ An even more diminishing number of rapes and other gender-related crimes has occurred during the conflict in 1994 in Rwanda, leaving behind nearly 500.000 female victims.¹⁰ Sadly, the victim figures do not indicate a dropping tendency; what more, new conflicts continuously employ the same conduct for achieving political goals.

⁷ Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Juris Publishing (2000), p.336-337

⁸ Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Fawcett Columbine, (1975.) at pg.7

⁹ Data of the UN Office for the Coordination of the Humanitarian Affairs. Most of the victims were Muslim women, however sexual violence has also been committed against persons of Croat and Serb nationality as well.

¹⁰ Data recorded by of the ‘Women for Women’ international organization, available at <http://www.womenforwomen.org/global-initiatives-helping-women/help-women-rwanda.php> (last accessed 07.11.2011.)

Although rape and other gender-based atrocities have been included among the crimes which the international community heavily condoned, and enlisted as crimes which are to be prosecuted under international criminal law provisions, a specific additional ‘gender’ element to these crimes makes them fundamentally differential to other mass atrocities lacking such “gendered” features.

One might, however, ask what exactly makes wartime gender-based crimes distinctive from ‘regular’ international crimes? Why should these crimes in particular be treated differently? Does the additional ‘gender’ element make such a big difference in comparison to other equally grave international crimes? Why is a certain definition in international criminal law more appropriate for prosecuting these crimes than the other? Does it make a difference at all if sexual crimes are included among the charges and are tried, when notorious war criminals may be convicted for mass atrocity based on other grounds, even without including gender-related crimes? Moreover, is there a distinct category of crimes against gender, which would deploy violence based on gender to enhance totalitarian control over society? Could ‘gender’ become a means of biological domination?

In seeking a meaningful answer to the questions above, one must start off the journey by shedding some light on what the term ‘gender’ actually ought to cover and why is there a salient need to recognize the particularities of it. Just as all of us are mainly familiar with the “usual” discriminatory grounds deployed during wartime, such as nationality, ethnicity, race or religion, ‘gender’ (most commonly in connection with some of the aforementioned grounds) often becomes a basis for criminal activity. To take this assumption further, it can be said that wars are often fought in a way to additionally take advantage of the adversary society’s gender features as well, besides a wider sweeping goal of annihilating the enemy based on national, ethnic, racial or religious exclusiveness.

Nevertheless, in the past little attention had been dedicated to concerns of ‘gender’ and impunity for gender-based crimes in conflict situations. Today though, international criminal law allocates considerable scrutiny towards these issues. Thus, the present thesis represents an attempt to critically assess the developments, tendencies and suitability of international gender-crimes prosecution of nowadays, as well as the direction in which it might be heading in the near future under the auspices of the International Criminal Court.

Since, it is of utmost importance to clarify the usage of the concept of gender in the jurisprudence of international tribunals, in order to draw some conclusions about the appropriateness and the manner of ongoing prosecution of gender-based assault, this Chapter has the task to familiarize the reader with some of the theoretical underpinnings of ‘gender’ in International Law and its understandings.

The section shall start off with a short discussion about the definition of ‘gender’, followed by the social underpinnings of sexuality, gender-based crimes and bodily autonomy which should help the reader conceive the hypothesis from a more sociological perspective. Subsequently, the chapter shall continue with exploring the phenomena of ‘gender mainstreaming’ from the mid-1970s onwards. Finally, the last section shall be dedicated to the development and appropriateness of a pro-gender oriented approach within the agendas of the existing international penal fora today.

1.1 The Body, Sexuality, Gender and War

Before starting off the discussion on the understandings of gender, let us firstly get acquainted and make a brief note on the concept of ‘gender’ and what it entails to. According to the Oxford Dictionary ‘gender’ represents “the state of being male or female typically used with reference to social and cultural differences rather than biological ones.”¹¹

¹¹ Oxford Dictionary, available at <http://oxforddictionaries.com/definition/gender>, last accessed [25th November, 2011]

Therefore, the first seemingly obvious apprehension is that ‘gender’ represents a strictly social notion, although in common use it is often interchanged with the term ‘sex’ which refers to the biological sexes. Gender could simply be ascribed as the values and roles which are allocated by the society as either ‘masculine’ or ‘feminine’. Thus, it would be wrong to equate the concept of ‘gender’ as a socially constructed notion, with ‘sex’, as a biological concept. This basic distinction is essential and forms the cornerstone of the present thesis, since it is assumed that international criminal law somewhat obscures the concept of ‘gender’ in an unconstructive way.

‘Gender’ as such, did not occupy much interest in academia until a few decades ago. Occurrences of rape and other forms of sexual crimes during conflicts date back to the beginnings of the human fight for power, however there was no actual scholarly discussion on the role of ‘gender’ in these conflicts till the heyday of the feminist movement in the mid-70’s. Humiliation and demoralization by the victors in war used to be achieved through scrupulous atrocities affecting one of the most sacred spheres of an individual: one’s bodily and sexual integrity. As a matter of fact, wars have been often fought by brutalizing the enemies’ body and misusing their sexuality in order not only to annihilate the adversary group but also to inflict various severe consequences of biological and psychological nature as well.

Interestingly enough, today’s wars are waged against a particular distinctive group, not exclusively to prolong the “juridical existence of sovereignty”¹² but also in order to defend the continuation of a particular group. This commonly is done by “the mobilization of an entire population for the purpose of wholesale slaughter in the name of life necessity”¹³, thus

¹² Michel Foucault, *The History of Sexuality, Vol. I: An Introduction* (Vintage Books. 1990) at pg.137

¹³ Id. at 137

making “massacres become vital due to the biological existence of a population being at stake.”¹⁴

Michel Foucault in his *The History of Sexuality* insightfully noted that “if genocide is indeed the dream of modern powers, this is not because of recent return of the ancient right to kill; it is because *power* is situated and exercised at the level of life, the species, the race, and the large-scale phenomena of population.”¹⁵ Therefore, it is the *administration of biological power* during and after a conflict which serves as an impetus for taking advantage of the victims’ sexuality through forced manipulation with ‘the symbolic of blood.’

Foucault arguments delineate a shift from „classical biopower to modern biopolitics.”¹⁶ While biopower in a classical sense represent the power of the sovereign to ‘take life or let live’, modern biopolitics tend to encompass ‘the power to make and let die.’¹⁷ Thus, he writes:

„The old power of death that symbolized sovereign power was now supplanted by the administration of bodies and the calculated management of life. [...]Hence, there was an explosion of numerous and diverse techniques for achieving the subjugation of bodies and the control of populations, marking the beginning of an era of biopower.”¹⁸

On the other hand, Giorgio Agamben took Foucault’s thought a step further by claiming the degradation of the Foucaultian biopolitics into thanatopolitics, the modern totalitarian state’s desire to outcast unwanted groups.¹⁹ Namely the myth about the ‘purity of the blood’ stimulated and conflated many conflicts to the point they received the form

¹⁴ Id. at 137

¹⁵ Michel Foucault, *The History of Sexuality, Vol. I: An Introduction* (Vintage Books. 1990) at pg.137 [emphasis added]

¹⁶ Stuart J. Murray, Thanatopolitics: Reading in Agamben a Rejoinder to Biopolitical Life, *Communication and Critical/Cultural Studies*, Vol. 5, No. 2 (2008) at 205

¹⁷ Michel Foucault, *The History of Sexuality, Vol. I: An Introduction* (Vintage Books. 1990) at pg.139-140

¹⁸ Id. at 140

¹⁹ Stuart J. Murray, Thanatopolitics: Reading in Agamben a Rejoinder to Biopolitical Life, *Communication and Critical/Cultural Studies*, Vol. 5, No. 2 (2008) at 205

of an ill-founded ideology. Foucault argues that, for example, “the thematic of blood was sometimes called on to lend its entire historical weight toward revitalizing the type of political power that was exercised throughout the devices of sexuality.”²⁰ He then goes on to concluding that

“[Nazism] was doubtless the most cunning and the most naïve combination of blood and the paradoxisms of disciplinary power. A eugenic ordering of society, with all that implied in the way of extension and intensification of micro-powers, in the guise of an unrestricted state control, was accompanied by the oneiric exaltation of a superior blood; the latter implied both the systematic genocide of the others and the risk of exposing oneself to a total sacrifice. It is an irony of history that the blood myth was transformed into the greatest blood bath in recent memory.”²¹

The mindset of modern time belligerents is not much different from the above described Nazi one: the biological prolongation of a particular national, ethnic or religious group has served as a justification for sexual offence committed over non-combatant female civilians. The idea of shaming the enemy by making the enemy’s female population continue the opponent’s bloodline reflects the underlying graveness of gender-motivated crimes.

It is the *systematic practice* of these crimes towards a total annihilation of the adversary group creating a grotesque situation where the destruction of a certain entity is being conducted through a “sinful conception.” For example, the commonly deployed strategy of “ethnic cleansing” during the Yugoslav wars operated on exactly this motive: the impregnation of Bosniak Muslim women by the Serbs bore a significant symbolism.²²

“In connection to the policy of ethnic cleansing through forced impregnation in order to ensure the ‘bond of blood’, many feminist writers noted that it represented a “direct launch of systematic and organized attempt to destroy the whole Muslim population by targeting its

²⁰ Id. at 149

²¹ Id. at 149-150

²² This was due to the widespread common belief, that Islam got passed on according to the father’s religion.

cultural, traditional and religious integrity”²³ through the discontinuation of Muslim paternity. Even though, the Bosnian Muslim society used to be, indeed, a fairly open and modern religious milieu before the war, however this sort of attacks on Muslim women could simply not be tolerated by the Bosnian Muslim society as whole: the general “respect of the commandment of virginity”,²⁴ as one of the fundamental values of these women was heavily encroached upon.

The understanding of the sanctity and sexual pureness of the female body in a certain culture or religion differ from one social setting to another. In this sense might a particularly closed and patriarchal society become a factor which also needs to be taken into consideration when determining the harm suffered by the victims. Going back to the above mentioned example, even though Bosniak Muslim women had been becoming more and more emancipated and unleashed of religious dogma during the Yugoslav socialist era, nevertheless they “never fully forgot their traditions”²⁵ that commended chastity before marriage as one an important female values. Therefore, it is clear that the Serbian policy intentionally inflicted these crimes particularly in regard to the socially accepted gender role of Muslim women.

On the other hand, the sweeping measure imposed by the Serbian policy of rape and enforced impregnations triggered a chain of social stigma affecting not only Muslim women/wives but Muslim man/husbands as well by targeting the social coherence of a rather traditional society: men were defeated by means of degradation of their spouses’/women’s sexual autonomy. Cases have been reported, where women raped during the war could never marry after out of these considerations.²⁶ Thus, in this case again the socially constructed gender role of a Muslim man – typically a man being able to protect his family and asserting

²³ Susan Brownmiller, *Making Female Bodies a Battlefield in Mass Rape: The War against Women in Bosnia-Herzegovina*, Stiglmeier ed. 1994, University of Nebraska Press, Lincoln and London, 1994, pg.181

²⁴ Azra Zalihić-Kaurin, *Muslim Women in Mass Rape: The War against Women in Bosnia-Herzegovina*, Stiglmeier ed. 1994, University of Nebraska Press, Lincoln and London, 1994, pg. 172

²⁵ Ibidem, pg. 172

²⁶ VHS material found in the OSA. OSA HU 304-0-16:14:15:16 *Rapes in Bosnia*

an exclusive right over the sexual intercourse with his wife - and a Muslim women – typically the one who should defend her dignity and chastity by acting modest - should be taken into consideration as an aggravating circumstance in respect of that given society.”²⁷

This example somewhat illustrates notions of the body, sexuality, sex and gender in wartime atrocities, and their interaction with each other. It is to be noted that ‘gender’ as a social construction ascribing “the behavioral, cultural, or psychological traits typically associated with one of the biological sexes”²⁸ in conjunction with other grounds (such as race, religion, ethnicity, nationality, etc.) frequently serves as a motive for the brutalization of wartime victims. Therefore, it is not simply women being affected by gender-based violence, even though usually it is them being the direct subjects of the crimes. Men also become victimized, usually indirectly²⁹, through not being able to fit in into a male gender cluster of the given society. What more, recent investigations by the ICC’s Prosecutor, followed by charges highlighted that gender-based violence and sexual crimes are not only female-exclusive assaults, thus recognizing that men and boys also may be victims of such atrocities. However, in general it must be noticed that international criminal justice is still rather underdeveloped in its understanding of gender-based violence affecting the male population.³⁰

²⁷ Part of the author’s essay from a OSA research paper (Following the paper trail: Reconstruction of a human rights violation case based on documents from the OSA Archive’s relevant holdings: *The Foca rapes* at pg. 10-12

²⁸ Merriam-Webster Dictionary at <http://www.merriam-webster.com/dictionary/gender>, [last accessed at 2011.11.18]

²⁹ However, sometimes men also get directly harmed by being forced to conduct homosexual intercourse in war camps. In these cases, they also bare stigmatization due to the fact that they, though unintentionally, overstepped the boundaries of a socially constructed male role.

³⁰ Nevertheless there is a real chance for advancement through the *Kenyan case*/the *Mbarushimana case of the ICC*.

1.2 Mainstreaming Gender

In general, existing patriarchal structures in most conflict zones did not allow for greater legal repercussions in the history of wars, since in most cases these hideous crimes tended to affect by far and large the female population.

This is why the sudden shift in the perception of gender-based crimes came rather abruptly during the mid-90's. The switch from sexual violence once seen as "personal humiliation and dishonor" of women towards a view where gender assaults surely represent the most egregious crimes in international law had been seen as a surprise. Such a paradigm shift, however, may be attributed to a variety of factors comprising a joint push towards a change.³¹

Many authors name a strong feminist movement and feminist lobby groups as the strongest engine of the positive advancements; the efforts of various women's organizations had been highly valued as a powerful push in favor of the recognition of the importance of prosecutions for these crimes. While, such efforts surely had a huge impact on international criminal justice sphere, the strength of other factors should not be easily dismissed.

Namely, the defeating fiasco of the international community and the United Nations peace-keeping presence in the two most striking warzones of the 1990's (in Rwanda and in Srebrenica, ex-Yugoslavia³²), surely contributed towards a more embrative stand – in a sense, a remedial action for the negligence of the UN troops – on an international level. Thus, a

³¹ See e.g. Galina Nelaeva, *Prosecution of Rape and Sexual Assaults as International Crimes. Explaining Variation*

(CEU.2007.), The author considers various factors which were capable of bringing about such a shift, such as the Transnational Advocacy Networks, the Epistemic Community surrounding the tribunals, asymmetrical power distribution between the states and the interest of the great powers, or maybe the heinousness of the crimes committed during the war in the Balkans ('Serbian warfare').

³² The UN Security Council refrained from authorizing and broadening the mandate of the already established UNAMIR (United Nations Assistance Mission for Rwanda). Due to the lack of a stronger involvement and ultimately because of the withdrawal of the Belgian UN troops, the genocide in Rwanda took approximately 800.000 lives. Similarly, the genocide committed in Srebrenica(Bosnia) in 1995 took place while the region of Srebrenica had been declared a "safe area" under the administration of the UNPROFOR (United Nations Protection Force). The Dutch UN battalion was

unique motive to cure the wrong paired with a strong judicial activism, partly stemming from a stronger gender representation of women judges in the *ad hoc* Tribunals, offered a “unique opportunity to reconceptualize human rights by recognizing that gender-based crimes are as grave as any crime motivated by race ethnic origin or religion.”³³

The advancements of the past 15 years regarding wartime rape and sex-crimes prosecutions in international penal law could rightly be described at least as partisan and gender-mainstreaming. Usually, it would be characterized as the thorny journey from an era where sexual assaults committed by belligerents would be seen as common and socially accepted “spoils of war.”³⁴

However, the actual beginnings of the ‘gender mainstreaming movement’ date back almost half a decade. The 1970s brought about a new phenomenon in both international law and feminist circles: ‘gender’ slowly crept into the vocabulary and focus of the United Nation’s agenda for promoting sexual equality. Initially, the term “gender mainstreaming” started to be used more and more from the mid ‘70s onwards, as a result of strong-impact lobbying against institutional sidelining of women in various segments of society.

The primary need for “gender mainstreaming”, in fact, had been formulated under the UN Decade for Women project launched in 1975 which made efforts towards a gender-inclusive development. Nevertheless, even the very first approaches of the movement were, so to tell, biased in an inherent way. Namely, the primary concepts of the project were more directed towards “the encouragement of the integration of women into the existing structures

³³ Brook Sari Moshan, *Women, War, and Words: The gender Component in the Permanent International Criminal Court’s Definition of Crimes Against Humanity*, 22 Fordham International Law Journal (1998) at pg.155

³⁴ Christin B.Coan, *Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal tribunal for the Former Yugoslavia*, 26 North Carolina Journal of International and Commercial Regulation (2000) at pg. 184

of development,”³⁵ instead of the recognition of unfavorable gender predispositions governing the existing structures.

Soon enough, however, a new approach towards gender mainstreaming emerged, which focused on “the impact of relations between women and men on development policies.”³⁶ Therefore, the 1985 Third World Conference on Women held in Nairobi already adopted the *Forward Looking Strategies for the Advancement of Women*³⁷ which sent out a clear message that gender issues – had the actual understanding of ‘gender’ at the time be, nevertheless, quite obviously blurry and controversial – are in fact an advancement that needed to be followed at the highest levels, such as the United Nation’s.

By the time the *Beijing Declaration and Platform for Action*³⁸ had been adopted in 1995 during the Fourth World Conference on Women, the proliferation of ‘gender mainstreaming’ did get solidly based in the agendas of stakeholders.³⁹ Thus, the following years had been remembered by an overarching and omnipresent tendency to ‘mainstream’ gender within the international legal sphere. Terms like ‘gender balance’ and ‘gender training’ had become inevitable throughout the United Nations system itself.

A step further was taken by the UN Commission on the Status of Women, the UN Economic and Social Council and the UN Secretary-General through their efforts to

³⁵ Hilary Charlesworth, *Not Waiving But Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 Harvard Human Rights Journal 1 (2005) at pg. 2

³⁶ *Id.* at pg.2

³⁷ *The Nairobi Forward Looking Strategies for the Advancement of Women* adopted at the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women (1985)

³⁸ Report of the Fourth World Conference on Women, Beijing (4-5 September 1995), *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20/REV.1, U.N. Sales No.96.IV.13 (1996)

³⁹ The topics which got included into the *Declaration and Platform for Action* were all directed to address women’s non-discrimination in areas of concern. The Beijing Platform especially highlighted that: “Governments and other actors should promote an active and visible policy of *mainstreaming a gender perspective in all policies and programs*, so that, before decisions are taken, an analysis is made of the effects of women and men, respectively.”[emphasis added]

mainstream gender. Finally, the UN Economic and Social Council welcomed and urged the “promotion of an active and visible policy of mainstreaming a gender perspective.”⁴⁰

One of the most well-respected and knowledgeable legal/feminist thinkers of our time, Hilary Charlesworth argues that “the term ‘gender mainstreaming’ has become a mantra in international institutions as a technique for responding to inequalities between men and women.”⁴¹ Is it really so? Does the anticipated ‘mainstreaming’ entail to nothing else that a superficial remedy of a deeply-rooted, acute problem? Or is there a genuine willingness to respond to a centuries long marginalization and lack of understanding towards gender disparity?

The idea of ‘gender’ had been unfortunately deployed in a rather limited way because it detracted attention from the inherent gender inequalities through the *pro forma* gender mainstreaming. In support Charlesworth also emphasized that “the strategy of gender mainstreaming [...] has allowed the mainstream to tame and deradicalize claims to equality , [and] has made issues of inequality between women and men harder to identify and deal with.”⁴² She further notes that “the rapid spread of the concept may also suggest its ambiguities, weaknesses, and lack of bite”⁴³, therefore minimizing the impact of the whole movement to a rhetorical one. Well said, the “feminist concept of ‘gender’ had been stripped of any radical or political potential”⁴⁴ - concludes Charlesworth.

In my view, the most obvious deficiency of the gender mainstreaming movement had been the fact that it rested on a fundamentally wrong assumption about the ‘equality of gender

⁴⁰ Report of the Economic and Social Council (1997), U.N. GAOR, 52nd Session, Sess. Supp. No.3 at U.N. Doc A/53/3/Rev.1 (1997), pg. 24

⁴¹ Hilary Charlesworth, *Not Waiving But Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 Harvard Human Rights Journal 1 (2005) at pg. 1

⁴² Hilary Charlesworth, *Not Waiving But Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 Harvard Human Rights Journal 1 (2005) at pg. 2

⁴³ Id. at 16

⁴⁴ Id. at 16

positions' among men and women. The presupposed equilibrium between the gender roles is a clear sign that not much attention been dedicated to the notions of social, economical and power relations by which gender initially had been established and kept up existing. What more, gender mainstreaming in its form up till today, implies that the actual cause for action was more likely only limited to fight for women's non-discrimination issues, rather than drawing attention to socially constructed gender identities. Thus, gender mainstreaming had rarely become a trivialized version of the equal opportunity program, featuring "a head count of women in particular positions."⁴⁵

Bizarrely enough, gender mainstreaming *per se*, does in fact support the on-going inherent gender bias through the policy of replicating fundamentally wrong assumptions about the equality of positions between men and women into the body of international criminal law. By this I mean that the conception of 'gender mainstreaming' is constructed in a fashion which does not address the miscellaneous way in which 'gender' is brought to life and keeps on exists due to various social and power related factors.⁴⁶

Therefore, the numerical increase of female institutional participation won't necessarily result in a revision or change of central agendas within a particular institutional framework, even though it does affect the operation of these institutions to a certain degree. For example, the increase in the number of female judges appointed to international tribunals did make a difference in a sense that those courts dedicated more attention to the prosecution of war time rape and other sexual assaults, however this did not mean that there had been a

⁴⁵ Id. at 13

⁴⁶ Hilary Charlesworth notes in a very insightful way: "Treating women and men as though they face similar obstacles will only perpetuate existing disparities between them; and treating women and men as if their interests are always in sharp confrontation offers an impoverished account of relations between the sexes. In some accounts of gender mainstreaming, the strategy has become a head count of women in particular positions, a modest variation on the 'equal opportunity' agenda." (Hilary Charlesworth, *Not Waiving But Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 Harvard Human Rights Journal 1 (2005) at pg. 13)

paradigm shift among these *fora* related to reconceptualizing the influence of the ‘gender’ element of these crimes.

Today every single UN body or agency embraced and operates under the formal auspices of “a gender mainstreamed vocabulary.”⁴⁷ More to the point, International Criminal Law has gradually also come under the influence of such impulses. Firstly, the UN *ad hoc* Tribunals for Rwanda and Yugoslavia – being formed under Chapter VII of the UN Charter by Security Council Resolutions⁴⁸ and conducting their work under the support and authority of the United Nations – were practically bound by the official UN gender policies. While the initial texts of the Statute for the International Criminal Tribunal for Rwanda and of the Statute for the International Criminal Tribunal for the Former Yugoslavia incorporated quite laconic provisions on gender-based crime prosecution, the Rome Statute of the International Criminal Court mentions the term “gender” in nine different places within the text.

Nevertheless, it must be said that even under extremely scarce statutory underpinnings and no particularly gender-conscious provisions, it was the work and jurisprudence of the two aforementioned *ad hoc* Tribunals that brought about a real change in the mindset of warfare gender-violence trials in the first place. Subsequently, the drafters of the Rome Statute – cognizant of the need for a more detailed set of rules - had strategically and deliberately adopted more gender-aware and gender-mainstreaming approaches during the course of the lengthy negotiations preceding the adoption.

For example, articles 42(9) and 44(2) give mention to the gender criteria relevant when hiring at the Prosecutor’s office (“the Prosecutor shall appoint advisers with legal expertise on specific issues, including sexual and gender violence and violence against

⁴⁷ Hilary Charlesworth, *Not Waiving But Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 Harvard Human Rights Journal 1 (2005) at pg. 5

⁴⁸ The ICTR had been founded by SC Resolution 955 (1994), S/RES/955, 8 November 1994, while the ICTY had been formed by SC Resolution 827, S/RES/827 adopted on 25 May 1993.

women”⁴⁹), also when hiring members of the staff.⁵⁰ Article 36(8)(b) also requires that the appointed judges to the ICC acquired some expertise regarding violence against women and children. On the other hand, article 54(1)(b) prescribes the duty of the Prosecutor to take into consideration the “nature of the crime, in particular where it involves sexual violence, gender violence or violence against children”⁵¹ in order to guarantee an effective investigation and prosecution of crimes. Finally, article 68(1) pledges that “appropriate measures shall be taken by the Court to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”⁵² especially in regard to all relevant factors, such as age, *gender* – as defined in Article 7(3) of the Statute, - the nature of the crime where the crime involves sexual or gender violence or violence against children.

This takes us to Article 7(3) and the related provision on crimes which include certain forms of gender-based violence over which the ICC may exercise its jurisdiction.⁵³ It is the task of the following section to explain in more detail how contemporary international criminal law classifies rape and other kind of sexual crimes, as well as to elaborate on the actual understanding(s) of ‘gender’ in the documents of the international penal tribunals.

1.3 International Penal Law and Gender

The adoption of the Rome Statute was a prelude to a whole new era in international law where the term ‘gender’ had been applied and defined for the very first time in the history of international criminal law.⁵⁴ It was one of the great compromises made during the drafting

⁴⁹ Article 42(9) of the Rome Statute

⁵⁰ Article 44(2) of the Rome Statute

⁵¹ Article 54(1)(b) of the Rome Statute

⁵² Article 68(1) of the Rome Statute

⁵³ Articles 7(1)(g), 7(3), 8(2)(b)(xxii) and 8(2)(e)(vi)

⁵⁴ The Rome Statute makes mention of the term ‘gender’ in nine different places, and explicitly defines the term ‘gender’ in Article 7(3).

procedure of the Rome Statute that brought about an actual definition of the term ‘gender’ in international criminal justice.

Article 7(3) of the Rome Statute, therefore, reads:

“For the purposes of this Statute, it is understood that the term ‘gender’ refers to the *two sexes, male and female, within the context of society*. The Term ‘gender’ does not indicate any meaning different from the above.”

While some referred to such definition of gender as to a construct which “elides the notions of ‘gender and ‘sex,’”⁵⁵ others claimed that it equates the meaning of ‘gender’ and ‘sex’, thus does not pinpoint that “gender is a constructed and contingent set of assumptions about female and male roles.”⁵⁶ Nevertheless, it is self-evident that provision like this carries multiple implications for future cases before the ICC.

Truly, most of the criticism is directed towards, the equation and confusion of two seemingly similar terms, that is of ‘sex’ and ‘gender’. Defining ‘gender’ in the way it has been done in the Rome Statute, testifies of a fundamental misunderstanding of the term itself. However, after reading Commentaries⁵⁷ of the ICC Statute it becomes clear that the above definition is an imperfect result of the compromises made by various stakeholders during the sessions of the UN Preparatory Committee. Thus, maybe one of the biggest opportunities for remapping gender’s understanding in international law had become collateral in the sake of reaching a consensus.

Previously a number of definitions pertaining to gender had been adopted by the UN. These basically altered between two endpoints: a *more minimalist approach* which deduced

⁵⁵ Hilary Charlesworth, *Feminist Methods in International Law*, 93 Am. J. Int’l. L. 379 (1999), at 394

⁵⁶ Hilary Charlesworth, *Feminist Methods in International Law*, 93 Am. J. Int’l. L. (1999), at 394

⁵⁷ See William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press. 2010.); *The Rome Statute of the International Criminal Court: A Commentary*, eds. Antonio Cassese, Paola Gaeta & John Jones (Oxford: OUP. 2002); Knut Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press. 2003.)

and apprehended ‘gender’ in its “ordinary, generally accepted usage which carried no indication of any new meaning or connotation of the term, different from the accepted prior usage,”⁵⁸ and a more *advanced* use of the term. Valerie Oosterveld notes that the second, more advanced stream of understanding gender showed a few similar points, such as comprehending gender as: a socially constructed concept; influenced by culture; socially not innate.⁵⁹

As a matter of fact almost all UN generated definitions underline that ‘gender’ indeed is a social construct, heavily influenced by the culture in which it is constructed.⁶⁰ Existing cultural patterns shape the roles that man and women are expected to play in a given society/culture. Subsequently, these cultural clusters also direct the relationship among these roles, together with the value which society allocates onto the roles.

The term ‘gender’ often gets associated or interchanged with the term ‘sex’ in colloquial language. However, including a provision which clearly states that “gender refers to the *two sexes, male and female*, within the context of society” limits the definitions transformative edge, as feared by most of the academia.⁶¹ Thus, watering down the reconstructive potential of international penal law based on by the lack of recognition of the uniqueness of wartime atrocities through international prosecutions before the ICC.

⁵⁸ Beijing Conference Addendum, Annex IV, U.N. Doc. A/CONF.177/20/Rev.1, U.N. Sales No.96.IV.13. (1996)

⁵⁹ Valerie Oosterveld, *The Definition of ‘Gender’ in the Rome Statute of the International Criminal Court: A Step Forward or Back for International criminal Justice?*, 18 Harvard Human Rights Journal at 67

⁶⁰ See for example the Commission on Human Rights’ Special Rapporteur on Violence Against Women defined gender as “the socially constructed roles of women and men ascribed to them on the basis of their sex.” Further on developments in refugee law brought about the following understanding of ‘gender’ by the High Commissioner for Refugees: “the relationship between women and men based on socially or culturally constructed and defined identities, statuses, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over the time.”

⁶¹ See e.g. Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press. 2000) at 335

It seems that the drafter once again resorted to a ‘constructive ambiguity’ by leaving leeway for “positive and precedent-setting approach by the judiciary”⁶², however also running a risk of misconceptualizing the understandings of gender for the future. Nevertheless, this thesis will look into the treatment of ‘gender’ and its meanings by the international tribunals in Chapter 3 in more detail.

In addition, article 7(3) of the Rome Statute carries other flaws as well for a gender-sensitive prosecution. The phrase “gender refers to the two sexes, male and female, *within the context of society*” indicates another limitation on the true meaning of ‘gender.’ Such a formulation could basically affect and paralyze the Court’s deliberation of the wholesale factors usually affecting the social formation of gender. As Oosterveld puts it, “the ICC might not be able to examine certain factors related to how society constructs gender, such as a strong cultural emphasis on marriage and the female virginity at marriage, or societal vilification of gay men.”⁶³ She then goes a step further and notes that “if the ICC cannot examine these factors, then it will not be able to understand and evaluate adequately the effects of rape on female victim who is deemed unmarriageable by her society, or a man raped by another man in a homophobic society.”⁶⁴ Chapter 3 of this research shall dedicate more space to the particular jurisprudence of the international Tribunals where such dilemma has arisen.

Lastly, it is also important to note that article 7(3) of the Rome Statute also contains deficiency regarding the exclusion of sexual orientation from falling under the meaning of gender. Delegates such as the representatives of the Holy See and of other conservative states (mostly Christian and Islamic countries) expressed their unease with the possible

⁶² Valerie Oosterveld, *The Definition of ‘Gender’ in the Rome Statute of the International Criminal Court: A Step Forward or Back for International criminal Justice?*, 18 Harvard Human Rights Journal at 58

⁶³ Id. at 74

⁶⁴ Id. at 74

interpretation of gender as anything more than the two biological sexes. Therefore, the price of a consensus among the delegates had been paid through adopting a rather circular and under-inclusive definition of gender – at least when it comes to sexual orientation.

In this manner, chapter three shall be dedicated to the exploration of the above identified drawbacks of the definition of ‘gender’, as given in article 7(3) of the ICC Statute. The former understandings of ‘gender’ in the case-law of the ad hoc Tribunals should therefore be compared to the comprehensions of gender in the ICC Statute (the lack of the ICC’s case law limits the research only to analyzing the normative framework). Nevertheless, such a comparative study would seem somewhat less consequential without scrutinizing first the nature of responsibility for gender-related mass crimes in international criminal justice regimes. In this vein, chapter two shall proceed to this problematic.

CHAPTER 2 – Gendered in the Era of Mass Atrocity

“Pinpointing responsibility for mass atrocities on particular individuals – as the criminal law demands – is an elusive and perilous enterprise. Genocide, war crimes and crimes against humanity occur in the havoc of civil strife, in teeming prison camps, and in the muck and messiness of heated combat. The victims are either dead or, if willing to testify, ‘unlikely to have been taking contemporaneous notes.’ There are the anonymity of mass graves, the gaps and uncertainties in forensic evidence, the complexity of long testimony covering several places and periods, years ago. There is also the fluidity of influence by leaders over followers and of equals in rank over one another, as well as the uncertain measures of freedom from others – both superiors and peers – enjoyed by all. The central question become:

How does mass atrocity happen?

How should criminal law respond?”⁶⁵

⁶⁵ Mark Osiel, *MAKING SENSE OF MASS ATROCITY* (Cambridge: Cambridge University Press. 2009), at vi

This Chapter tackles the issue of *en masse* wartime assaults (including gender-based crimes as well) being normalized through the course of international prosecutions. It is the goal of this section to pinpoint how deceptive it is to try to fit the various notions of mass brutality under the realm of ordinary legal mechanisms ultimately created for dealing with ordinary (domestic, non mass related) criminal law. Even more to the topic of this work is the fact, how an additional gender element plays out in international prosecutions of international crimes which simply go beyond the sphere of individual deviance.

The chapter starts off with a line of thought pertaining to the debate about the ordinary/extraordinary nature of grave human rights violations and especially gender crimes, followed by a part dedicated to the societal acceptance of those on a moral level. Drawing on Honneth's theory of recognition, it is argued in Chapter Four that due recognition of gender victims is only possible if *legal recognition* goes hand in hand with societal *acknowledgment of the disrespect caused to the victims*.⁶⁶ However, legal recognition in the form of appropriate gender-based prosecutions based on a correct legislative framework in regard to the understandings of 'gender', represents a prerequisite for bringing about societal recognition of the humiliation evoked to victims. Thus, it is only by expanding notions of societal responsibility of masses - who were neither perpetrator nor victims but were still bystanders - for mass atrocities that can generate a full, meaningful and honest social recognition due to feelings of shame or being complicit in "injuries of something fundamental to being human."⁶⁷ As David Luban would frame it, crimes against humanity "assault one particular aspect of humanity, namely our character as political animals;" "they are

⁶⁶ Axel Honneth, Recognition and Justice: *Outline of a Plural Theory of Justice*, Acta Sociologica Vol. 47(4), 2004

⁶⁷ David Luban, *Theories of Crimes Against Humanity*, 29 Yale J. Int'l L. (2004) at 90

simultaneously offenses against humankind and injuries to humanness [...] they are so universally odious that they make the criminal *hostis humani generis*”⁶⁸

Thus, it is suggested that criminal law should take up a role to become a catalyst for emphasizing the moral spotlessness of wider societal masses in order to stimulate, foster and quicken societal recognition based on the sense of moral blameworthiness of each member of the society. The aim of this chapter, however, is not to explore collective responsibility issues in the sense of collective perpetration theories⁶⁹ but to shed some light onto the moral answerability of the members of society – of the so-called bystanders, - whose inaction allowed for the mass atrocities to take place in the first place. Because the position of bystanders in bloodsheds is tightly intertwined with the notion of the ‘extraordinariness’ of mass crimes, the present thesis refers to a philosophical discussion about the layering of responsibility for mass assaults within the perpetrator’s societies, due to which justice to victims of gender violence might not be so easily served.

It is the goal of this work to set up a comprehensive and workable framework which would allow international penal law and the international tribunals to accomplish the first phase on the way to a complete recognition of victimhood. Therefore, the primarily step that should be the development by ICL, is a sophisticated legal statutory and jurisprudential basis in connection to gender-related prosecution (as suggested further on in Chapter 3). Only afterwards might an overarching societal recognition take place. However, for a meaningful societal recognition to become reality, international criminal law must inevitably initiate a dialogue between the victims and the bystander society of mass crimes. It should act so through the language of its jurisprudence by deploying a more sophisticated way to clarify the notion of ‘bystanderhood’ and the moral responsibility connected to it. This way the

⁶⁸ Id. at 90

⁶⁹ Such as *indirect perpetration* and *joint co-perpetration* strands. See Article 25 of the Rome Statute.

overabundance of the criminal tribunals could be eradicated in a concise way without overloading the criminal justice system with ‘writing of history’ or establishing historic truth.⁷⁰ Ultimately, such efforts of the criminal fora will arguably trigger sentiments of shame and remorse on behalf of a wider society, thus enhancing the processes of social recognition of the victims’ sufferings.

As said before, this work shall be limited to recommending a workable framework based on recognition, and give recommendation for further improvement of the current body of international law regarding gender crimes and the pertinent jurisprudence. Modalities on how international criminal courts could reform the language of their own judgments, in order to maximize their own potential in the promotion of societal healing, exceeds the limits of this research, therefore represent a valuable starting point for further scholarly work in this field of law.

2.1 More than ‘Ordinary Rape’?

In conceptualizing the questions which this thesis ought to be elaborating upon, I always tended to return to the question of: what makes the international crime of rape different from understanding the crime of rape in domestic jurisdictions? Is there a qualitative or a quantitative difference between the two categories? Why is it so important to develop authentic gender-conscious devices unique to international criminal law, and not simply copying legal solutions from domestic legal systems?

At least a few dozen cases included rape or sexual-violence charges since the establishment of the *ad hoc* Tribunals up till today. However, it is only very few of them that

⁷⁰ See in general Mirjan Damaska’s criticism about the overabundance of international criminal tribunals with ‘writing history’ as an additional task in *What is the Point of International Criminal Justice?*, Chicago-Kent Law Review, Vol. 83:1 (2006).

succeeded to appropriately live up to the tasks that these trials encountered. Vast amount of criticism was directed towards the non-exhaustive and non-inclusive statutory bases of modern international criminal justice which incriminates wartime sexual violence, mostly due to the fact that initially the Statutes of the ICTY and the ICTR included the crime of ‘rape’ explicitly only as crimes against humanity.⁷¹ Secondly, the manner in which the Court dealt with the victims and witnesses of these crimes had been also heavily disapproved.⁷² Thirdly, the character of totalitarian gender-based violence has not been delineated properly from so-called ‘ordinary crimes’ of sexual violence, thus basically leaving them on a level of ‘common crimes’.⁷³

Continuing the line of thought along the lastly mentioned criticism strand related towards the ‘ordinariness’ of atrocity crimes, one must immediately note that quite a lot has been already written about the topic. This may not necessarily be said in relation to the exploration of the nature of the evil that wartime sexual violence poses. Thus, the present section shall be outlining some thoughts in this vein by drawing on the already written scholarly work.

Some of the most influential thinkers of our time reported on the nature of mass atrocity. Hannah Arendt’s notion of the Holocaust as ‘radical evil’ during her work on Nazi crimes and their relation with totalitarianism, gave a fresh impulse to scholarly work on

⁷¹ Article 5(g) of the ICTY Statute and article 3(g) of the ICTR Statute mentions the crime of rape as crimes against humanity. True, the Statute of the ICTR also makes mention of enforced prostitution in Article 4(g) as violations of common Article 3 of the Geneva Conventions and of Additional Protocol II

⁷² See e.g. Marie Benedicte Dembour and Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EJIL (2004) at 151-177

⁷³ Such ‘misunderstandings’ of the features of mass rapes could have had some practical consequences as well. Due to these considerations the ICTY for example introduced Rule 96 in February 1994, as follows: Rule 96-Evidence in Cases of Sexual Assault, In cases of sexual assault: (i) *no corroboration of the victim's testimony shall be required*; (ii) *consent shall not be allowed as a defence* if the victim (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear; (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;(iv) *prior sexual conduct of the victim shall not be admitted in evidence*. [emphasis added]

totalitarianism ever since. Even though, the idea of ‘radical evil’ had been framed earlier by Kant,⁷⁴ it was Arendt who used it to intrinsically describe the origins and the features of modern-time mass assaults.⁷⁵ Her findings place out of business the suitability of an average ‘normal’ moral judgment for such crimes, since they tend to emerge so aberrant for ‘normal’ reasoning.⁷⁶ However, Arendt also noticed that it is exactly the portrayal of the radical evil as nothing more nor special, than any other random crime, that creates it equitable with the average ordinary crime.⁷⁷ Nevertheless, it was Arendt herself who underlined that “the extreme, radical evil “exploded the limits of law.”⁷⁸

This notion, on the other hand, did not necessarily mean that extreme evil could be condemned by the means of law. It was Jaspers’s correspondence addressed to Arendt about the ‘total banality’ and ‘prosaic triviality’ of the crimes of the Holocaust that served as a basis and gave an impetus to Arendt’s insightful thesis about the ‘banality of evil’,⁷⁹ which deems unnecessary to characterize perpetrators of mass crimes as the ultimate source of evil. Moreover, talking about Adolf Eichmann in *Eichmann in Jerusalem* she comes to the conclusion that he [Eichmann] was just surprisingly normal.⁸⁰ Thus, Arendt admits that her account of evil is ‘banal’ in a way that it has no motives conceivable by humans and being superficial, although still belonging to the realm of ‘radical’ due to the fact that it is aimed at annihilating human spontaneity and making the human superfluous.⁸¹

It is at this point that the above listed arguments come into play when emphasizing cautiousness in dealing with ‘radical evil’- it is the normalization of the ultimate evil through

⁷⁴ Immanuel Kant, *Religion Within the Limits of Reason Alone* (1960) at pg. 31-32

⁷⁵ Hannah Arendt, *The Human Condition* (1958) at 241

⁷⁶ Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich. 1973.) at the Chapter 12: Totalitarianism in Power, 435-459

⁷⁷ Hannah Arendt, *The Human Condition* (1958) at 241

⁷⁸ *Hannah Arendt; Karl Jasper: Correspondance 1926-1969*, Letter from Hannah Arendt to Karl Jaspers (August 18, 1946) at pg. 54 (Kohler and Saner ed. 1992.)

⁷⁹ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of the Evil* (Penguin Books. 1994.)

⁸⁰ Id. at 373

⁸¹ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of the Evil* (Penguin Books. 1994.)

ascribing it as a ‘simple crime’, that challenges the limits of law. Furthermore, it creates a sense of unease to completely put aside the fact most of the crimes which contemporary international criminal law recognizes represent gross violations ‘sponsored’ by the society.⁸² Further on, David Luban asserts that crimes against humanity always stand out as crimes committed by the State itself.⁸³ Moreover, taking Luban’s arguments a step further, one might claim that these gender atrocities, by affecting the sphere of the victims’ human rights and becoming gross human rights violations, might be projected as an exercise of totalitarian control over the society through the use of gender-based classification aiming at ordering society.

The nature of gender-crimes arguably is even more egregious if one draws upon David Luban’s thesis that “crimes against humanity are not only committed against groups or populations, they are also committed *by groups-by states or state-like organizations*.”⁸⁴ Luban understands ‘crimes against humanity’ as the “violation of the individual’s nature as political animal,”⁸⁵ who has indeed no alternative to living in a social group, thus argues that these crimes represent ‘politics gone cancerous.’⁸⁶

In this vein, gender-based atrocities are gross human rights violations imposed by a totalitarian control over society through the use of gender categories to create the sense of ‘normalization’ and order the society. In this sense are gender-based crimes as crimes against humanity seriously pernicious, since they represent the state’s wrongdoings rather than ordinary crimes.

⁸² This claim applies by far and large to genocide and crimes against humanity.

⁸³ See David Luban, *A Theory of Crimes Against Humanity*, 29 Yale Journal of International Law (2004) at

⁸⁴ David Luban, *A Theory of Crimes Against Humanity*, 29 Yale J. Int’l L. (2004), at 117

⁸⁵ Id. at 117

⁸⁶ Id. at 116-118. Luban notes that: “For a state to attack individuals and their groups solely because the groups exist and the individuals belong to them transforms politics from the art of managing our unsociable sociability into a lethal threat. Criminal politics bears the precise relationship to healthy politics that cancer bears to healthy tissue.”

Modern international law rests on an assumption that radical evil is qualitatively and quantitatively different than ordinary crimes due to their ‘seriousness.’ Thus, the idea of ‘extraordinary international criminality’ emerged, with the perpetrator(s) of such crimes as the ‘enemy of humankind.’⁸⁷ In this vein, Mark Drumbl underlines that the feature of “extraordinariness” of gross human rights violations might be noted in the “conduct – planned, systematized and organized – that targets large numbers of individuals based on their actual or perceived membership in a particular group that has become selected as a target on discriminatory grounds.”⁸⁸

If one accepts Drumbl’s thesis as correct, that would inevitably imply that the recognition of rape and other forms of sexual violence committed in the times of mass turbulence is due to the membership in a certain group which had been targeted on a discriminatory basis. However, in the case of gender crimes, it is seemingly very rare that a group had been targeted or persecuted simply on that ground. Ergo, gender related assaults are usually connected to another discriminatory ground, such as nationality, ethnicity, race or religion. This, however, may not exactly explain and excuse why ‘gender’ as discriminatory ground still remains hidden for international penal law.

Taking this argument a step further, one might draw a conclusion from the above said that gender may not even represent a ground which deserves to become enlisted among the prohibited grounds for the most serious crime of international law, the crime of genocide. As it has already been pointed out above, genocide solely based on the ground of belonging to a social construction of a specific ‘gender’ role or even according to purely biological sex, is hardly believable. Nevertheless, if one leaves behind the constraints of the consciously

⁸⁷ David Luban, *A Theory of Crimes Against Humanity*, 29 Yale Journal of International Law (2004) at 90. See also the distinction that Luban makes in relation to crimes against humanity as “crimes against humanness” or as “crimes against humankind.”

⁸⁸ Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, 2007.) at 4

constructed notion of gender as defined in Article 7(3) of the Rome Statute, and starts thinking about the meaning of ‘gender’ not only as socially constructed female and male roles, but also in terms of social roles assigned to the queer population⁸⁹, a hypothetical situation of future genocide might become very likely.

As already reported by NGOs, several states commenced an institutionalized persecution, or sometimes even extermination, according to gender grounds, namely because of belonging to homosexual/ lesbian, gay, bisexual or transsexual (LGBT) population.⁹⁰ Partial or full extermination due to being a member of a gender group *per se* would indicate the crime of genocide, however since the international crime does not recognize ‘gender’ as a ground for genocide, prosecution would be impossible (or at least under genocide charges). Nevertheless, gender-based annihilation might be tried as the crime of persecution as crimes against humanity, though a major obstacle arises here as well. Particularly, the wording of Article 7(1)(h) of the Rome Statute pertaining to persecution lists gender as a protected group, however it also precludes that that the term ‘gender’ may mean anything beside “the two sexes, male and female, within the context of society.”⁹¹ Thus, maybe the only permissible way to charge gender-persecution, would be to try perpetrator under Article 7(1)(h) of the ICC Statute as ‘persecution against any other grounds that are universally recognized as impermissible under international law.’

As the this example vividly demonstrates, the gender element of serious international crimes gets downplayed by the fact that the definition of ‘gender’ given in international penal

⁸⁹ Here I mean LGBT (lesbian, gay, bisexual, transsexual), or commonly just ‘queer’ population.

⁹⁰ See e.g. *Iran’s crimes Against Humanity* at

http://www.advocate.com/Politics/Commentary/Irans_Crimes_Against_Humanity/ [last accessed on the 21st November 2011], Human Rights Watch: Iran- Discrimination and Violence Against Sexual Minorities at <http://www.hrw.org/news/2010/12/15/iran-discrimination-and-violence-against-sexual-minorities> [last accessed on 21st November 2011], The Guardian: Uganda considers death sentence for gay <http://www.guardian.co.uk/world/2009/nov/29/uganda-death-sentence-gay-sex> [last accessed on 21st November 2011]

⁹¹ Article 7(3) of the Rome Statute

law left sexual orientation and perpetrators of those violations on that ground untouchable. Therefore, it would be certainly sensible to argue for an exact category of crimes against gender which deploy gender-base prejudice and violence to enhance control over society, since ‘gender’ is easily employable as a tool of control or domination through “the myth about the purity of blood”⁹², due to its existence as a social construct.

Finally, it would be favorable to highlight one other strand of Drumbl’s concerns pertaining to the nature of mass crimes: the relative unease with mass atrocities being deducted to the level of ordinary crimes.⁹³ Exonerating mass atrocities by representing them as ordinary crimes poses a risk of creating an illusion that they are of less gravity than they actually are, thus loosing the Arendtian ‘radical’ edge.

In connection to gender-violence spectrum, such trivialization of sexual crimes could seriously endanger the notion of modern biopolitics, seen as the “the power to ‘make’ live and ‘let’ die.”⁹⁴ In this vein, Stuart J. Murray argues that

“[d]eath becomes a consequence - a necessary part - of living. Such death is too easily elided and dismissed. Nobody is killed, at least not directly, and nobody’s hands are bloodied, at least not that we can see; the crimes are outsourced to penal colonies, through “extraordinary rendition” become ordinary, obfuscated by State bureaucracy, and covered up by one media spectacle after another. These deaths are never “caused” as such; officially, they are merely “allowed,” a passive event, collateral damage. But biopolitical logic requires them. In order that “we” may live, live well and live fully, “they” must die, the distinction between the virtuous citizen and the other excluded as bare life, disposable life.”⁹⁵

⁹² See in general Michel Foucault, *The History of Sexuality, Vol. I: An Introduction* (Vintage Books. 1990)

⁹³ Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press.2007.) at 30-33

⁹⁴ Michel Foucault, “‘Society Must Be Defended’”: Lectures at the College de France, 1975-1976, (New York: Picador, 2003), at 241

⁹⁵ Stuart J Murray, *Thanatopolitics: Reading in Agamben a Rejoinder to Biopolitical Life*, Communication and Critical/Cultural Studies Vol. 5, No. 2, June 2008, at 204

Thus, eschewing the fact that gendered evil represent more than a simple, common deviance of individuals is hazardous since it may water down gender atrocities in a direction of “normalization” and numbness towards the real jeopardy that they pose.

2.2 Individual versus Societal Moral Responsibility: Struggle for Recognition?

In the aftermath of the Second World War, during the Nuremberg trials, the course of modern international criminal justice had been sealed. Since then the following line became the alpha and omega of contemporary international penal law by accentuating individual liability to the fullest when concluding that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁹⁶

Since then all of the later established penal tribunals eschewed the notion of collective responsibility away, and accepted individual responsibility as default when it comes to international criminal prosecutions. In this vein, Article 7 of the Statute of the ICTY and Article 6 of the Statute of the ICTR underscored that the Tribunals shall follow the path of their predecessors by operating under an individual responsibility centered prosecutorial regime. In addition the International Criminal Court accepted the primacy of individual responsibility and liability for punishment,⁹⁷ as well as adhered to the principle of non-prejudice in relation to individual responsibility affecting the responsibility of States. Therefore, no State shall bare any repercussions for the individual criminal liability of natural persons.

⁹⁶ Trial of the Major War Criminal Before the International Military Tribunal, Nuremberg, 14 November 1954 – 1 October 1946, Volume I, published in Nuremberg (1947) at pg. 223 (Nuremberg, 1947). Judgment - Chief Justice Stone

⁹⁷ Article 25(1) of the Rome Statute

Nevertheless, the view that gross human rights violations completely omit any connection to a wider notion of society tends to create some unease. Namely, the nature of the crimes coming under the jurisdiction of international criminal courts *per definitionem* are to a certain degree *collective in nature* and *linked to a particular community*. Thus, it would be hardly conceivable to identify an international crime – and here we talk about crimes against humanity, genocide and war crimes - which wouldn't be somewhat inherently related to a collective entity due to the fundamental features of these mass crimes.

For example, seldom could the crime of genocide be perpetrated in a form of a 'lonely act' since rarely can genocide be committed without a genocidal policy/plan or a specific genocidal intent.⁹⁸ Besides the 'lone *genocidaire*' scenario, crimes against humanity also fall into the category of crimes which barely could have been committed without a wider support of the community.⁹⁹ George P. Fletcher argues that in general these types of crimes are "deeds that by their very nature are committed by groups and typically against individuals as members of groups."¹⁰⁰ He then goes on to noting that still "the liberal bias toward individual criminal responsibility obscures basic truths about the crimes that now constitute the core of international criminal law."¹⁰¹

Therefore, in most situations where crimes - of such gravity as international crimes are - were committed it becomes clear that these deeds would have been impossible without the explicit or tacit approval of the state and express support from the society itself as a bystander. Still persecuting individuals stands as both an advancement and standard of contemporary international criminal justice.

⁹⁸ Nevertheless, the AC of the ICTY held in *Jelisić* that the "existence of a plan or policy is not a legal ingredient of the crime, however it may facilitate proof of the crime." (*Prosecutor v Jelisić*, Appeal Judgment, IT-9510-A, at para.48)

⁹⁹ The definition of crimes against humanity set out the requirement that the crimes need to be committed "as a part of *widespread or systematic attack*."

¹⁰⁰ George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 *Yale Law Journal* (2002) at 1514

¹⁰¹ *Id.* at 1514

Collective responsibility as opposed to individual responsibility is usually seen as a leftover from the past, an archaic form of responsibility, most probably due to the fact that starting from the ancient times, all religions of the Book (Christianity, Islam, Judaism) recognize collective responsibility as a legitimate form of liability. Today, collective complicities have been perceived as one of the ‘great moments of Romanticism’.¹⁰²

George P. Fletcher argues that “the individual may be given either a liberal or Romantic interpretation”¹⁰³, where *liberal individualism* is more keen on grasping responsibility for human deeds as ‘parsimonious’, while the *Romantic* sees responsibility in a complex constellation of ‘a rich ontology’.¹⁰⁴ In this vein Fletcher sets individual responsibility closer to the realm of a liberal-individualistic paradigm, as opposed to collective responsibility which sides more towards the Romantic ideal. This dichotomy is mostly due to the fact that liberal individualism is often paired with a Kantian accentuation of individual freedom, while upholding the so-called Romantic view would diminishes the individual’s autonomy and would presuppose homogeneity of morality.

Despite the above said, seeing individual and the surrounding society’s moral responsibility as two completely different, non-interacting spheres, might not be a very well suited solution because these two notions do indeed overlap in a certain domain. In most cases, the responsibility of individuals found liable for egregious international crimes watered down the responsibility of the societies which they belong to, and which is partly also responsible for the tacit approval of grave human rights violations deployed. Therefore making it harder for wide masses to get a sense of moral answerability; implicitly preventing

¹⁰² See George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 Yale Law Journal (2002) at 1501-1510 The author notes : “The Romantic conception of the individual as an expandable source of spirit explains the easy transition in Romantic thinking from the individual self to the nation. The nation bears the characteristics that constitute each individual—the language, the history, the culture, the bond between geography and self. As the extrapolation from the Romantic self, the nation forms intentions, acts, achieves greatness, suffers defeat, commits crimes, and bears guilt for its wrongdoing.”

¹⁰³ Id. at 1510

¹⁰⁴ Id. at 1510

societies to instigate feelings of being morally blameworthy and feelings of remorse which could bring about purification through societal recognition of the disrespect caused to victims.

The phenomena of “the distortion of perceptions on war responsibility and war guilt”¹⁰⁵ takes place, through a general trend of exonerating the whole collective entity within the same respective society or nation after international criminal prosecutions had been conducted. It is in this sense that international proceedings may make “the issue of responsibility more complex.”¹⁰⁶ Therefore, the deployment of international trials certainly is a desirable ‘tool’, however one needs to be extremely cautious about the goals that they may achieve by overemphasizing the individual responsibility strand and understating the underlying wider responsibility strand of these crimes, thus harming more than helping societies to move beyond their own past.¹⁰⁷

At this point, I would like to jump back in time and explore a paradigm defined by Karl Jaspers in his *The Question of German Guilt*. Jaspers perceptively acknowledged several levels of guilt which all exist.¹⁰⁸ Among these he identifies criminal, moral, political and metaphysical layers of guilt. He suggests that all of these four distinct types of guilt can be may be addressed by appropriate means on various levels¹⁰⁹: “criminal guilt by criminal trials before a court of law; moral guilt by a moral judgment about the personal responsibility of each German on the level of individual conscientiousness; political guilt by a condemnation of past abusive political structures by the victors; and finally, the metaphysical guilt in a sense

¹⁰⁵ Madoka Futamura, *Individual and Collective Guilt: Post-War Japan and the Tokyo War Crimes Tribunal*, *European Review*, Vol.14/4 9 (2006) at 475. Futamura very insightfully describes the detachment of the Japanese nation from the perpetrators and the crimes committed as well, which resulted in a total apathy towards the importance and significance of the Tokyo Tribunal. This, however, is also very typical of the Serbian society’s attitude towards the ICTY. The biggest percentage of the population feels relieved from the moral blameworthiness for upholding the Milosevic regime for years and years by means of election.

¹⁰⁶ *Ibidem* at 480

¹⁰⁷ See e.g. Laurel E. Fletcher, *From Difference to Engagement: Bystanders and International Criminal Justice*, 26 *Michigan Journal of International Law* (2005) at 1013-1092

¹⁰⁸ See in general Karl Jaspers, *The Question of German Guilt* (Fordham University Press. 2001.) (1947) at 31-32 and 73-74

¹⁰⁹ See generally the book: Karl Jaspers, *The Question of German Guilt*, (Fordham University Press. 2001) (1974).

of collective feeling for injustice for each and every abuse occurred to the representative of mankind, since we all belong to the same human entity, judged by only God.”¹¹⁰

This further on implies that criminal guilt affects those who took part in mass atrocity by executing the crimes directly or giving orders. On the other hand, moral guilt encompasses those who “conveniently closed their eyes to events, or permitted themselves to be intoxicated, seduced or bought with personal advantages or who obeyed from fear.”¹¹¹ Finally metaphysically guilty includes those who did nothing in order to prevent the moral decadency discharged in heinous war crimes.

Thus, some sort of a “*layering of guilt*”, as described in Jaspers’ work, might guide the envisaging of the different spheres of guilt, therefore assisting us to apprehend individual responsibility and wider societal responsibility not as strict dichotomies but rather overlapping categories. Nevertheless, the fact that international trials do not and are not designed to cover the aforementioned layers of moral and metaphysical guilt, should not exclusively mean that wider societal answerability should get dismissed. In this manner Laurel Fletcher and Weinstein underlined that “in periods of collective guilt, the focus on individual crimes has been used by many to claim collective innocence.”¹¹² It is exactly, the steep and complex ‘complicity cascade’, as suggested by Drumbl, which plays a very serious role in times of mass atrocities, thus wider societal contribution towards the realization of mass crimes should not easily be dismissed.

¹¹⁰ Cited from the work: Imola Soros, *Coping with the Past through International Criminal Justice: International Criminal Prosecutions and their Transitional Role* (CEU.2011.) an essay paper submitted for the subject ‘Transitional Justice’.

¹¹¹ Karl Jaspers, *The Question of German Guilt*, (Fordham University Press. 2001) (1974) at 73-74

¹¹² Laurel Fletcher & Harvey Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, Human Rights Quarterly, Volume 24, Number 3 (2002), at pp. 580

In fact, it is the setting of an “agentic state”¹¹³ that takes over in periods of totalitarianism where “persons are drained of their personal responsibility in the sense that they become agents of duty expected of them by authority figures.”¹¹⁴ What more, according to Drumbl’s findings it is “collectivization, diffusion and conformity whittling down the scope of individual choice and creating a group phenomena that intersects brusquely with legal systems based on the primacy of individual agency.”¹¹⁵ Moreover, he argues that “perpetrators of mass atrocity are qualitatively different than the perpetrators of ordinary crime”¹¹⁶ due to the influential “organic groupthink making individual participation therein less deviant and, in fact more a matter of conforming to social norms.”¹¹⁷

In the light of gender-related mass crimes, it could be said that by taking advantage of individual-fitted legal schemes, the moral responsibility of a certain percentage of the surrounding society gets diminished, this way also curtailing the importance of the egregious administration of biological power through gendered mass atrocities of various echelons of society. As a matter of fact, these considerations form a serious concern in regard to the justness and appropriateness of individual responsibility when it comes to wartime sexual violence as well. Therefore, it might be advisable to try to deal with the notions of ‘agentic state’ and of the monochrome rendered by totalitarianism during the course of dealing with the past. In this direction, does this work offer a possible solution to set up a comprehensive and workable framework which would allow international penal law and the international tribunals to accomplish the first phase on the way to a complete recognition of victimhood. Therefore, the primary step that should be the development by ICL, is a sophisticated legal statutory and jurisprudential basis in connection to gender-related prosecution (as suggested

¹¹³ Stanley Milgram, *Obedience to Authority: An Experimental View* (1974) at 133

¹¹⁴ Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press.2007.) at 31

¹¹⁵ *Id.* at 31

¹¹⁶ *Id.* at 32

¹¹⁷ *Id.* at 32

further on in Chapter 3), in order to achieve the legal recognition of victims as ‘equal bearers of legal rights.’ Only afterwards might an overarching societal recognition take place.

However, for a full fledged societal recognition to become reality, international criminal law must inevitably initiate a dialogue between the victims and the bystander society of mass crimes. It should act so through the language of its jurisprudence by deploying a more sophisticated way to clarify the notion of ‘bystanderhood’ and the moral responsibility connected to it. This way the overabundance of the criminal tribunals could be eradicated in a concise way without overloading the criminal justice system with ‘writing of history’ or establishing historic truth.¹¹⁸ Ultimately, such efforts of the criminal fora will arguably trigger sentiments of shame and remorse on behalf of a wider society, thus enhancing the processes of social recognition of the victims’ sufferings.

CHAPTER 3 – International Prosecution of Gender-Based Violence

Rape has been long treated as the “least condemned war crime.”¹¹⁹ Notwithstanding, sexual violence had been and is still very often used as an unscrupulous and effective means of warfare.¹²⁰ From the Ancient Period throughout the Middle Ages rape was perceived as a “property crime, a crime committed against the man who ‘owned’ the woman, not a crime

¹¹⁸ See in general Mirjan Damaska’s criticism about the overabundance of international criminal tribunals with ‘writing history’ as an additional task in *What is the Point of International Criminal Justice?*, Chicago-Kent Law Review, Vol. 83:1 (2006).

¹¹⁹ Human Rights Watch & Fédération Internationale Des Ligues Des Droits De L’Homme, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath 1* (1996), available at www.hrw.org/reports/1996/Rwanda.htm (last visited September 14th, 2011). A quote of Radhika Coomaraswamy, the U.N. Special Rapporteur on Violence Against Women.

¹²⁰ See generally e.g. Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia. 2005.) at pg.4-9; Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (M. Nijhoff. 1997); Amnesty International, *Human Rights are Women’s Rights* 18-20 (1995) The text highlights that mass-rape is nothing new to our time but has a rather long ‘tradition’ starting even from the times of the Crusaders (12th century) up till today.

against the woman herself.”¹²¹ Brownmiller notes that sexual-violence had been usually seen as “socially acceptable behavior well within the rules of warfare, an act without a stigma for warriors who viewed the women they conquered legitimate booty, useful as wives, concubines, slave labor or battle-camp trophy”¹²² during the Antique times.

The commonly accepted view that rape of the conquered by the victors was an act of reward and not a crime punishable under international law, had remained pretty much unchallenged until the 1907 Hague Convention.¹²³ In spite of the fact that the history of wartime sexual assaults dates back even to the early armed conflicts of human kind, international criminal justice recognized and asserted its charging and prosecution only since two decades ago.¹²⁴

In this manner, in the early ‘90s the international community identified the importance of the legal articulation of the conflict generated suffering of women¹²⁵, bringing about legal rules and prosecutorial policies which had been designed accordingly and adjusted in a fashion which allowed for a commencement of gender-based crime prosecution. This meant

¹²¹ Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia. 2005.) at pg.4

¹²² Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Fawcett Columbine, 1975.) at pg.33

¹²³ It is true though, that some vague form of protection had been guaranteed to women and children by the 1785 Treaty of Amity and Commerce and the 1874 Declaration of Brussels. These documents used the expressions like: “women and children [...] shall not be molested in their person” or “honor and rights of the family should be respected.”

¹²⁴ Nevertheless, the Article 27 of the IV Geneva Convention (1949) already notes that “women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault,” while Article 75(2)(b) of the I Additional Protocol (1977) talks about “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any other forms of indecent assault.” The text of Article 76(1) of the same document also guarantees that “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.”

¹²⁵ Such recognition of the importance of taking into account the horrific experience of women who suffered sexual assault both on the territory of the former Yugoslavia and Rwanda was mostly due to the so-called Bassiouni-report (UN Commission of Experts’ Final Report (S/1994/674) of 27.05.1994). The UN Commission of Experts was established by the Security Council’s Resolution No. 780 of 6 October 1992 to investigate the violations of humanitarian law committed during the Yugoslav conflict, and was led by the prominent professor Cherif Bassiouni.

The UN Commission of Experts dedicated a whole section to its findings on rape cases and other forms of sexual assault cases (Chapter IV, Section F of the Final Report). Actually, the Bassiouni-report’s findings proved to be one of the crucial indicators of the need for sexual violence prosecution before the ICTY.

that the Statutes of the two *ad hoc* Tribunals, the ICTY's and the ICTR's, needed to incorporate a minimum threshold for successful prosecution of wartime rape and other sexual assaults committed during the conflicts. As a matter of fact, the *ad hoc* Tribunal's Statutes served as a base for further the further development of International Criminal Law towards a more holistic understanding of the 'gender' component of mass crimes, resulting in specific articles dedicated to gender-based crimes, victim and witness protection and gender balance within the Rome Statute.

Certainly, the Rome Statute did bring about novelty and new approaches in dealing with 'gender' issues in international penal law, however the advances achieved should also carefully be scrutinized. While it is surely true that 'gender' related topics did get considerable attention – during the sessions of the UN Preparatory Committee and in the final text of the Rome Statute, - it is also valid that states resorted to 'constructive ambiguity' during the international negotiations in order to reach a minimum common denominator.¹²⁶

Basically, the purpose of the present chapter is to pinpoint the provisions pertaining to gender-motivated crimes coming under the *ratione materiae* jurisdiction of three purely international criminal tribunals (the ICTY, ICTR and the ICC), and to critically evaluate whether prosecuting them under these categories is better or worse suited for the actual victims of these abhorrent assaults. Namely, various sex crimes have already been tried as either genocide, crimes against humanity or war crimes during the operation of the two *ad hoc*. Hence, the unique features of each crime category sometimes do not allow for the most effective prosecution of gender-based violence because of the very nature of these crimes.

¹²⁶ Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press. 2000) at pg.187. The author notes that due to the immense pressures the negotiating states resort to the use of so-called 'constructive ambiguity'. He also writes: "For multilateral treaties, the greater the number of negotiating states, the greater is the need for imaginative and subtle drafting to satisfy competing interests. The process inevitably produces wording which is unclear or ambiguous."

In this vein, the question that shall be elaborated on is, whether certain definition is well suited to cover situations it targets, that is whether it plays out for better or worse for the assaulted victims? Why is a particular legal rationale more preferable to others?

The present chapter is therefore an attempt to elucidate the pros and cons of gender crimes definitions within the Statutes of the ICTY and ICTR, as well as in the Rome Statute. Further on the chapter shall also elaborate on the deficiencies of the definition of ‘gender’ in the Rome Statute and try to highlight how it could be improved. Basing my findings on the repercussions of these courts’ case law, the ultimate aim of this section is to indicate what it means and which implications it carries for courts and policymakers to incline towards any such definition in practice.

3.1 Three fora and Their Jurisdictions

Nowadays several international and internationalized criminal *fora* operate under various jurisdictional regimes. Still, this section was meant to offer a short overview about the creation, mandate and jurisdiction of the three exclusively *international* criminal courts. Since the interest of this thesis is restricted to the *modus operandi* of *international* criminal tribunals in cases regarding gender based violence, the study shall be restricted to the ICTY, ICTR and the ICC, as tribunals which operate under an authentic international criminal regime, as opposed to the hybrid (internationalized) type of criminal tribunals existing under mixed – national and international – criminal law systems.

In 1992, in the height of the Yugoslav war activities a UN Security Council Resolution denounced for the very first time the routine of using wartime rape as a means of fighting a

war.¹²⁷ This meant that the international community led by the United Nations finally recognized the detrimental and sweeping manner of the “massive, organized and systematic detention and rape” being committed in the region of the former Yugoslavia. Shortly after, a special U.N. Commission of Experts – led by M. Cherif Bassiouni - had been formed to investigate the breaches of international humanitarian law (among which sexual atrocities were indeed fairly highly rated) in the Balkans.

The conclusions of the Commission’s Report regarding rape and other forms of sexual assault stated that

“patterns strongly suggest that a *systematic rape policy* existed in certain areas, but it remains to be proven whether such an overall policy existed which was to apply to all non-Serbs. It is clear that some level of organization and *group activity* was required to carry out many of the alleged rapes. Furthermore, rape and sexual assault should be examined in the context of the practice of “ethnic cleansing” [...] When viewed in these contexts, it is clear that grave breaches of the Geneva Conventions occurred, as did other violations of international humanitarian law.”¹²⁸

Due to the findings of the Bassiouni Commission, it had become perfectly clear that something needed to be done in order to punish the perpetrators of these hideous crimes committed in the heart of Europe. Therefore, Security Council Resolution 827 followed, which established the International Criminal Tribunal for the Former Yugoslavia,¹²⁹ as a unique UN body, with “the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law” in the ex-Yugoslavia.¹³⁰

¹²⁷ Security Council Resolution 798, U.N. SCOR, 47th Session, U.N. Doc. S /INF/48 (1992)

¹²⁸ Final Report of the UN Commission of Experts established Pursuant to Security Council Resolution 780 (1992), Annex IX, Part F on ‘Rape and Other Forms of Sexual Assault’, S/1994/674 - 27 May 1994

¹²⁹ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter International Criminal Tribunal for the Former Yugoslavia – ICTY)

¹³⁰ Security Council Resolution 798, U.N. SCOR, 48th Session, U.N. Doc. S /INF/49 (1993)

Subsequently, only a year later, the Security Council, acting under Chapter VII powers of the UN Charter, formed a parallel International Criminal Tribunal for Rwanda¹³¹ to try perpetrators of crimes in the Rwandan conflict committed between the period from the 1st January 1994 to 31st December 1994. So said, the Security Council created two *ad hoc* criminal Tribunals with a specific mandate to charge and prosecute serious violations of international humanitarian law, and thus dedicated subject matter jurisdiction accordingly to these judicial bodies of the UN.

Therefore, the ICTY's jurisdiction includes: grave breaches of the Geneva Conventions of 1949 (Article 2 of the ICTY Statute), violations of the laws or customs of war (Article 3 of the ICTY Statute), genocide (Article 4 of the ICTY Statute) and crimes against humanity (Article 5 of the ICTY Statute). However, not a whole lot had been explicitly dedicated towards the prosecution of sex crimes in particular by the basic text of the ICTY Statute. Only the wording of Article 5(g) on crimes against humanity included unequivocally "rape" as a crime that had a gender element. Despite of that, sex crimes had been indeed tried under the ICTY Statute also as crimes against humanity as torture (Article 5(f)), as violations of the laws or customs of war under Article 2 or grave breaches of the Geneva Conventions of 1949 under Article 2.

Arguably, this practically may indicated that the ICTY overstepped its limited jurisdiction due to the judicial activism exercised by the ICTY, since the UN Secretary General's report explicitly warned the ICTY to refrain from creating new law, and confine itself on the application of international humanitarian law.¹³² Due to the elementary *nullum crimen sine lege* principle of criminal justice, only assaults recognized by international law

¹³¹ International Criminal Tribunal for the 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 such violations committed in the territory of neighbouring States (hereinafter International Criminal Tribunal for Rwanda - ICTR)

¹³² Report of the Secretary General Pursuant to Paragraph 2 of Security Council Res. 808, U.N. Doc. S/25704 (1993)

could have been tried before the ICTY. This threshold, however, had at sometimes been surpassed in order to prosecute crimes of gender-based violence in spite of the legal gap within the ICTY Statute pertaining to the punishment of these crimes.¹³³

Christin B. Coan, further argues that “rape prosecutions conflict with the Security Council’s mandate on a fundamental level since, although rape is recognized under an amalgam of both customary and conventional international law, no clear cut definition of rape existed under international law prior to the genesis of the ICTY.”¹³⁴ In other words, the controversy around sex crime trials was directed by far and large at the efforts of the ICTY to consolidate the Tribunal’s mandate - which would clearly bar it from applying anything other than the accepted definitions of international law – with the aspirations to offer legal recognition to the crime of rape and other forms of gender-based assaults. Coan, thus, comes to the conclusion that “the ICTY’s interpretation of the legal gray are occupied by rape under international humanitarian law cannot help but it in what some would call a legislative role.”¹³⁵

In comparison to the ICTY, the ICTR’s role was not much different, or to say it was almost identical. The ICTR Statute grants *ratione materiae* jurisdiction over Genocide (Article 2 of the ICTR Statute), crimes against humanity (Article 3 of the ICTR Statute), violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 4 of the ICTR Statute), with the crime of “rape” being explicitly mentioned as a crime against humanity (Article 3(g) of the ICTR Statute) and as a violation of Common Article 3 (Article 4(e)) of the ICTR Statute). In addition, the ICTR Statutes qualifies the crime of

¹³³ Article 5(g) spelled out that the ICTY had *ratione materiae* jurisdiction over the crime of rape as crime against humanity, however other articles dealing with subject matter jurisdiction did not explicitly give mandate over the prosecution of other forms of sexual violence.

¹³⁴ Christin B. Coan, *Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia*, 26 North Carolina Journal of International Law and Commercial Regulation (2000) at 195

¹³⁵ *Id.* at 195

“enforced prostitution” also as a violation of Common Article 3 (Article 4(e) of the ICTR Statute).

The ICTR faced pretty much the same rare challenge and dilemma as did the ICTY: a partisan role needed to be embarked upon by both of the *ad hoc* Tribunals if they really wished to do justice to victims of the Yugoslav and Rwandan conflict and respond by prosecuting sex crimes which constituted a significant number of assaults committed in these wars. Thus, the ICTR’s work sent off a very similar message as did the ICTY’s: it tried prosecutors of sex crimes under provisions which initially weren’t unequivocally designed to suit gender-based crimes but came handy during the course of the trials.

Since one of the underlying themes of this thesis is to argue for the need to charge gender-based crimes as distinct crimes against gender in the future, it must be pointed out that there is a urging need to include gender crime charges as well among other charges. This need is fuelled by considerations mentioned in the first and second chapters regarding the unique nature of ‘gender.’

Finally, let us now turn now to the youngest international court, the International Criminal Court. In comparison to the above mentioned UN *ad hoc* Tribunals, the ICC is a treaty based court established by the Rome Statute. Given the lessons of the ICTY and the ICTR, the state parties to the Rome Statute came up with a u full-fledged set of substantive and procedural rules on international criminal law. However, due to the fact that the Rome Statute is a multilateral treaty, the solutions endorsed by it needed to be adjusted and acceptable to a variety of jurisdictions. That is why, some of its provisions only represent a baseline consensus on some issues in order to be a appealing for most signatory states - Article 7(3) on the definition of ‘gender’ certainly is one of these forced consensuses.

This particularly is true about the Rome Treaty's gender related articles. Namely, the ICC may exercise its subject matter jurisdiction over genocide (Article 6 of the Rome Statute), crimes against humanity (Article 7) and war crimes (Article 8). Among these, article 7(1)(g) prescribes that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence constitute crimes against humanity. On the other hand, article 8(2)(e)(vi) envisages that all these crimes mentioned in article 7(1)(g) may also constitute a serious violation of article 3 to the four Geneva Conventions. In addition article 8(2)(b)(xxii) contemplates that all the sexual crimes earlier described in article 7(1)(g) might also entail to grave breaches of the Geneva Conventions.

Finally, article 7(3) of the Rome Statute makes a spells out that "the term 'gender' refers to the two sexes, male and female, within the context of society, and also that it does not indicate any meaning different from the this."¹³⁶ This formulation however, raises highly controversial issues mentioned in detail in Chapter 1, therefore those considerations inevitably need to be taken into account when assessing the suitability of the Rome Statute's provisions for conducting an effective and meaningful prosecution of gender-based crimes.

The following sections shall engage in a detailed analysis of the manner in which rape and other forms of gender-based violence had been charged and tried before theses tribunals. The ultimate question goes to the very heart of the dilemma: whether charging gender-based under the existing frameworks of the ICC and the ad hoc tribunals might downplay the importance of gender-motivated prosecution? Is the current legislative basis enough for international prosecution of crimes with a "gender" element or is there a need for an alternative approach in order to legally live up to the task?

¹³⁶ Article 7(3) of the Rome Statute

The suitability of charging and trying sexual crimes under any of the existing broad categories of international crimes, shall be tested by taking into consideration the factors identify earlier as crucial for sexual assault prosecution: the existence of the element of ‘gender’ and the nature of gender-based mass violence.

3.2 Prosecuting Gender Crimes

The following sub-sections are aimed at scrutinizing the jurisprudence of three international tribunals – the ICTY’s, ICTR’s and the ICC’s, - in a way to compare their understandings and treatment of the ‘gender’ element in cases they pursued. Such comparative method is deployed in order to clarify the use of the notion of ‘gender’ before the international penal courts, thus enabling to compare and contrast the advancement and boundaries of these tribunals in the light of the legislative basis under which each of them operates.

3.2.1 Gender Crimes as Crimes Against Humanity

It has been under the crimes against humanity category that the crime of rape – as the most common gender-based crime - had been initially incorporated into the text of the ICTY and ICTR Statute.¹³⁷ Although the text of these Statutes did not contain any other direct inference about what other gender-related crimes could be punishable as crimes against humanity, the ad hoc Tribunals found their way about to try perpetrators of hideous sexual crimes under these provisions. For example, the decision to categorize sexual assault as ‘torture’ proved to be a very convenient prosecutorial tool and has been used in several

¹³⁷ Article 5(g) of the ICTY Statute and Article 3(g) of the ICTR Statute

cases.¹³⁸ Nevertheless, the present chapter shall come back to the question of repercussions of charging gender-based violence as ‘torture’ later on.

Antonio Cassese writes that crimes against humanity represent “a particularly odious offence in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more persons.”¹³⁹ It is their cruelty towards civilians or towards the persons who do not actively participate in the armed conflict that makes them a distinct group.

Further on, a necessary feature of these crimes is always the large-scale or massive nature of these assaults. Therefore, it might be clearly inferred from the list of crimes they usually cover that these crimes “are not sporadic or isolated events in any case but are part of a widespread and systematic practice of atrocities that either form a part of a governmental policy or are tolerated, condoned, or acquiesced in by a government or a *de facto* authority.”¹⁴⁰ Actually, the threshold for a crime to be charged under these provisions surely represents the requirement for the crime to be “part of a pattern of misconduct,”¹⁴¹ in a sense that that a certain crime must be “an instance of a repetition of similar crimes or a part of a string of such crimes or that it is a manifestation of a policy or plan of violence worked out by state authorities, leading officials or an organized political group.”¹⁴²

Therefore, ‘rape’ as a crime found its way into the Statutes under the provisions on ‘crimes against humanity’¹⁴³ and ‘as violations of Common Article 3 Common to the Geneva Conventions and of Additional Protocol II.’¹⁴⁴ Since never before has rape or sexual violence committed during armed conflicts been prosecuted as a separate crime before any of the

¹³⁸ The most well-know, at least in terms of connectivity with gender-based prosecution, are the *Furundzija case* and the *Celebici case*(ICTY), as well as the *Akayesu case* (ICTR)

¹³⁹ Antonio Cassese, *International Criminal Law*, 2nd ed. (Oxford University Press. 2008) at pg.98

¹⁴⁰ *Id.* at pg. 98

¹⁴¹ *Id.* at pg. 100

¹⁴² *Id.* at pg. 98

¹⁴³ Article 5(g) of the ICTY Statute and Article 3(g)

¹⁴⁴ Article 4(e)

international criminal *fora*, it was clear that very little and very malleable substantial and procedural law existed on the subject matter. In fact, rape has been only prohibited by the early codifications on the laws and customs of war¹⁴⁵, however it has never been envisaged by any definition of ‘crimes against humanity’ till the point when the Tribunals’ Statutes got adopted.¹⁴⁶

The drafters of the Statutes of the *ad hoc* Tribunals took the case of sexual assault victims’ a step further: ‘rape’, as such, has been singled out to a separate crime under the articles dedicated to crimes against humanity,¹⁴⁷ thus granting exclusive power to prosecute the perpetrators of crimes against humanity by enumerating rape separately in the same articles.

Moreover, today the most recent international criminal law instrument, the Rome Statute, also lists ‘rape’ as a ‘crime against humanity.’¹⁴⁸ However, not only does it place ‘rape’ separately, but it also features crimes, such as ‘sexual slavery’, ‘enforced prostitution’, ‘forced pregnancy’, ‘enforced sterilization’ and ‘other forms of sexual violence of comparable gravity’ also as crimes against humanity.¹⁴⁹

Nonetheless, this is not to say that sexual violence has only been and still is charged only as ‘rape’¹⁵⁰ or as specific sexual violence crimes (other than rape).¹⁵¹ As a matter of fact, acts involving sexual assault had been frequently tried as crimes against humanity other than these:¹⁵² as ‘enslavement’, ‘torture’, ‘persecution on ground of gender’ or as ‘inhumane acts’.

¹⁴⁵ See the 1863 Lieber Code (Articles 44 and 47); Control Council Law No.10; the Fourth Geneva Convention (Article 27); Protocol I (Article 76(1)) and Protocol II (Article 4(2)(e))

¹⁴⁶ Though, the only exception to this rule is to be noticed in the text of the Control Council Law No.10 which has specifically listed rape among crimes against humanity by saying that it entails to: Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, *rape*, or other inhumane acts committed against any civilian population, or persecution on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

¹⁴⁷ Article 5 of the ICTY Statute and Article 3 of the ICTR Statute

¹⁴⁸ Article 7(1)(g) of the Rome Statute of the International Criminal Court

¹⁴⁹ Article 7(1)(g) of the Rome Statute of the International Criminal Court

¹⁵⁰ Under Article 5(g) of the ICTY, Article 3(g) of the ICTR Statute or Article 7(1)(g) of the Rome Statute

¹⁵¹ Under Article 7(1)(g) of the Rome Statute

¹⁵² This will be demonstrated in the present Chapter by referencing to the jurisprudence of these *fora*.

This is mostly due to the fact that the area of international criminal law on sexual violence has just started to emerge in the opening days of the Tribunals, therefore the true challenges of charging perpetrators of sexual crimes could not be fully grasped. Nevertheless, it soon became quite evident, that the scale and variety of atrocities with a sexual connotation call out for a more complex and “mature” legal basis. This was more or less achieved by the text of the Rome Statute, having introduced provisions including a variety of sexual crimes as ‘crimes against humanity.’¹⁵³

In order to fully comprehend the underlying motives for broadening the catalogue of crimes against humanity by new forms of specific sexual crimes within the Rome Statute, one must revisit the jurisprudence of the *ad hoc* Tribunals first. Indeed, it is inevitable to understand the legal logic which underlies international prosecution of rape and of other sexual assaults under the Tribunals’ regime, and therefore, why the introduction of new crimes into the ICC’s Statute was a logical step forward.

Besides this, the present Chapter shall also argue that it might be reasonable to consider the possibility of revisiting the present provision on crimes against humanity, in order to try sexual violence in a more effective and according manner by placing emphasis on the delicate nature of gender crimes.¹⁵⁴

The catalog of specific sexual violence in the area of international law which has faced the most dramatic change since the establishment of the *ad hoc* Tribunals: crimes other than rape have been also recognized as violent crimes in the Rome Statute, and have been incorporated in the text of this international instrument. Article 7(1)(g) of the Rome Statute enumerates the amended list of sexual crimes as “rape, sexual slavery, enforced prostitution,

¹⁵³ Article 7(1) of the Rome Statute

¹⁵⁴ See in general Susana SaCouto and Katherin Cleary, The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court, 17 AMUJGSPL, pg.337-359

forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”

This, however, meant that the drafters recognized the immense importance of singling out these categories as separate crimes under crimes against humanity. Such “epiphany” is due to the jurisprudence of the ICTY and the ICTR. Therefore, now we encountered a situation where rape is not comprehended anymore merely as an attack on women’s honor, reputation or dignity,¹⁵⁵ but has faced a gradual change of being recognized explicitly as a crime against humanity in both of the Statutes of the UN Tribunals.¹⁵⁶ What more, since the adoption of the Rome Statute, not only has the crime of ‘rape’ been given recognition as a crime against humanity¹⁵⁷, but other sexually violent acts as well.

Although, much of this appreciation towards the issue of sexual assault has been accomplished thanks to the intensive advocacy and lobby of various women’s organizations,¹⁵⁸ the Statute of the ICC still means “a partial victory to gender justice.”¹⁵⁹ Notwithstanding the recognition of such “intersection of gender issues with human rights law,” and its subsequent legal transposition into the Rome Statute’s text, such inclusion might still not be sufficient for addressing and ensuring gender justice in the international criminal arena.

¹⁵⁵ See Article 27 of the IV Geneva Convention (1949) saying that “women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault,” while Article 75(2)(b) of the I Additional Protocol (1977) talks about “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any other forms of indecent assault.” The text of Article 76(1) of the same document also guarantees that “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.”

¹⁵⁶ The ICTY Statute lists rape as crimes against humanity in Article 5(g), while the ICTR Statute lists it also as a crime against humanity (Article 3(g)). The ICTR’s Statute also lists rape and prostitution as an “outrage upon personal dignity” prohibited under Common Article 3 of the 1949 Geneva Convention and the 1977 Additional Protocol II.

¹⁵⁷ Rape is also listed as a war crime in the Rome Statute under Article 8(2)(b)(xxii)

¹⁵⁸ The biggest efforts contributed came from the part of Women’s Caucus for Gender Justice, however other grass root organization from the war shed territories also gave their share to the cause.

¹⁵⁹ Brook Sari Moshan, Women, War and Words: The Gender Component ion the Permanent International Criminal Court’s Definition of Crimes Against Humanity, 22 *FDMILJ*, November 1998, pg. 155

For example, the consecutive exclusion of gender-related crimes from the charges poses a threat to the recognition of women's wartime experiences. Prosecutors often leave out the specific rape or other sexual assault crimes because of their calculation dictates that other non-gender related charges will perform equally well for retributive reason. As a matter of fact in the *Lubanga case*¹⁶⁰ the prosecutor avoided including rape charges in the indictment. Despite the fact that perpetrators in the *Bemba-Gombo* and *Katanga cases* are being presently tried for atrocities including rape as a crime against humanity, the ICC still showed a mixed attitude towards the investigation and prosecution of rape and sexual violence.

Therefore, the Court's attitude could be apprehended as fairly positive towards charging and holding perpetrators accountable for rape and other specific sex crimes, however it is way too early to draw meaningful conclusion about the impact of the ICC's case law due to the lack of the same. Nevertheless, the determination of the Court to prosecute gender crimes has been show by: the rape allegations brought in respect of the Darfur situation;¹⁶¹ the charges of rape and sexual slavery in connection to the Ugandan situation¹⁶² and the situation in the Democratic Republic of Congo;¹⁶³ the charges of 'rape' as crimes against humanity and charges for forcible circumcision in the Kenyan situation,¹⁶⁴ and the war charges in the Bemba-Gombo (Central African Republic) trial.¹⁶⁵

Notwithstanding such prosecutorial policy, in the *Lubanga case* the OTP did not pursue any action for trying the perpetration of rape or of other sexual assaults. As a matter of

¹⁶⁰ Prosecutor v Lubanga

¹⁶¹ Situation in Darfur, Sudan, Case No. ICC-02/05-157; The Prosecutor v Harun and Kushayb, Case No. ICC-02/05-01/07, Arrest Warrant for Ahmad Harun and Arrest Warrant for Ali Kushayb of 27 April 2007

¹⁶² The Prosecutor v Kony, Lukwiya, Odhiambo and Ongweny, Case No. ICC-02/04-01/05, Arrest Warrant for Joseph Kony

¹⁶³ The Prosecutor v Katanga and Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008

¹⁶⁴ The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11

¹⁶⁵ The prosecutor v Bemba-Gombo, Case No. ICC-01/05-01/08, Decision on the confirmation of the charges, Case No. ICC-01/05-01/08 of 15 June 2009

fact, in spite of the allegations and joint action of numerous NGOs,¹⁶⁶ the ICC Prosecutor “has failed to include sexual violence charges in the indictment against Thomas Lubanga Dylio”¹⁶⁷ for rape and sexual slavery as crimes against humanity.

Among all the crimes listed in Article 7(1)(g), only rape has been recognized by previous legal instruments.¹⁶⁸ Yet none of the legal document has given a hard and fast definition on rape.¹⁶⁹ Not until, the first rulings of the ICTR and the ICTY did one know exactly what ‘rape’ entails to. The Tribunals themselves were forced to conclude that “no definition of rape existed in international law”,¹⁷⁰ however due to the their later jurisprudence, the Tribunals came up with not less than three different definitions of it.¹⁷¹

Talking about rape as a crime against humanity in the ICC’s case law is almost impossible without discussing the jurisprudence of the *ad hoc* Tribunal’s first, which actually laid down the landmarks for the prosecution of rape in modern international criminal law.

Therefore, firstly it is to be pointed out that the Tribunal’s rulings led to the emergence of two distinct ways of interpreting the essence of the crime of rape. While the ICTR had struck a stand in favor of a *conceptual definition* of rape in *Akayesu*, the ICTY has put forward a *mechanical definition* of it in the *Furundzija* and the *Kunarac* cases. Such

¹⁶⁶ Joint letter from Avocats Sans Frontiers and Other Organizations to Mr Luis Moreno Okampo, Chief Prosecutor of the ICC, accessible at <http://www.hrw.org/en/news/2006/07/31/dr-congo-icc-charges-raise-concern> (last accessed 22.03.2011.)

¹⁶⁷ Susana SaCouto, Katherine Cleary, The Importance of Effective Investigation of Sexual Violence and gender-Based Crimes at the International Criminal Court, 17 AMUJGSPL, pg.341

¹⁶⁸ See *supra* 15 and 16

¹⁶⁹ Even the UN Commission of Experts’ Final Report, UN Doc. S/1994/674/Add.2, Vol. I, Annex II, paragraph 2 notes that “unlike the majority of codified penal law, rape is not precisely defined in international humanitarian law. As a consequence there is at present, every reason to interpret this concept broadly as encompassing other sexual assaults.”

¹⁷⁰ Anne-Marie L.M. de Brouwer, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: The ICC and the Practice of the ICTY and the ICTY, Intersentia: Antwerpen-Oxford, 2005, pg.103

¹⁷¹ See definitions of rape in *Akayesu*, *Furundzija* and *Kunarac* et al.

divergence was mainly caused by the view that national definitions on rape should or should not be taken into account.¹⁷²

Chronologically, the definition formulated in *Akayesu* featured first. Here the Trial Chamber concluded the following:

[...rape is] a *physical invasion of sexual nature*, committed on a person under circumstances which are *coercive*. The Tribunal considers sexual violence, which 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 human body and may include *acts which do not involve penetration or even physical contact*.¹⁷³

Therefore the ICTR took a stand that an exclusively mechanical definition requiring penetration/physical contact by body parts or other object, as ‘rape’ is usually forwarded by national criminal codes, could be too narrow and “would not provide full protection of vulnerable persons in situations of mass violence.”¹⁷⁴ What more, it also would be unable to encompass the unfortunate variety of sexual mistreatments masterminded by the perpetrators.

In addition, the Tribunal also made another about the reluctance of the victims suffering sexual abuses to openly discuss and testify atrocities that have happened to them, due to cultural sensitiveness of the issue.¹⁷⁵ For example, during the Yugoslav wars it were mostly the Bosnian Muslim women who suffered sexual assaults from the Serbian military or paramilitary troops, however, these women still were ashamed to take their stand and fight for the punishment of their perpetrators exactly because of religious or cultural reasons.¹⁷⁶ The

¹⁷² In Furundzija (para 178) the ICTY noted that “basic principles” or “common denominators” in all legal systems shall be identified which could then “embody the principles which must be adopted in the international context.”

¹⁷³ *Akayesu* at 598 and 688 [emphasis added]

¹⁷⁴ Anne-Marie L.M. de Brouwer, *SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: The ICC and the Practice of the ICTY and the ICTY*, Intersentia: Antwerpen-Oxford, 2005, pg.106

¹⁷⁵ *Ibidem*, at 107

¹⁷⁶ See in general Alexandra Stieglmayer, *Mass Rape: The War against Women in Bosnia-Herzegovina* (Stieglmayer ed. 1994), University of Nebraska Press, Lincoln and London, 1994 and Kelly Dawn Askin, *WAR*

same pattern was noted in Rwanda, so the Trial Chamber draw a conclusion on “cultural sensitivities involved in public discussion of intimate matters which recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured.”¹⁷⁷ Out of these reasons the ICTR forwarded the conceptual definition of rape in order to “preclude situations which may be culturally unacceptable or even forbidden.”¹⁷⁸ Such approach also resembles as more gender-sensitive, therefore it would be desirable if the ICC’s future jurisprudence on the matter followed this path.

On the other hand, the rape definition formulated in *Akayesu* did not insist on the ‘lack of consent’ on the side of the victim. This, though, is only the logical conclusion of thinking in terms of an actual war or conflict situation: it would be quite absurd to insisting on the lack of consent in situations where women were daily gang raped or kept in rape camps for several month or weeks.¹⁷⁹

In my point of view the *Akayesu* judgment grasped the very essence of war time rape, and accordingly demonstrated a good understanding of where the focus shall be directed when determining the elements of the crime: on the physical invasion of sexual nature. The language of such definition (‘invasion’) actually pinpoints the most crucial feature of the crime of rape. It does so by shifting the spotlight from the perpetrator onto the victim, thus it would be desirable if future case law of the ICC advanced a definition which gives due attention to “the victim being invaded,”¹⁸⁰ rather than on a definition which insists on the

CRIMES AGAINST WOMEN, Prosecution in International Criminal Tribunals, Martinus Nijhoff Publishers, the Hague, 1997.

¹⁷⁷ *Akayesu* at 687

¹⁷⁸ Anne-Marie L.M. de Brouwer, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: The ICC and the Practice of the ICTY and the ICTY, Intersentia: Antwerpen-Oxford, 2005, pg.107

¹⁷⁹ See Kelly Dawn Askin, WAR CRIMES AGAINST WOMEN, Prosecution in International Criminal Tribunals, Martinus Nijhoff Publishers, the Hague, 1997, pg.344-379

¹⁸⁰ K. Boon, Rape and Forced Pregnancy under the ICC Statute, Human Dignity, Autonomy and Consent, Columbia Human Rights Law Review, Vol. 32, 2001, pg. 649

“perpetrator’s penetration” of the victims. As Boon argues, by limiting rape only to ‘penetration’, the crime of rape might totally disregard the victim.¹⁸¹

The ICTY and ICTY did consequently follow the *Akayesu* definition and upheld it¹⁸² until the *Furundzija* judgment¹⁸³ was rendered in 1998. The *Furundzija* judgment resulted in the formulation of the second cardinal definition of rape in the history of supranational prosecution.

In the *Furundzija* judgment the ICTY has articulated the existence of rape as ‘the most serious manifestation of sexual assault.’¹⁸⁴ According to that, other minor forms of sexual assault are to be prosecuted as “other inhumane acts (ICTY Statute Article 5(i)).”¹⁸⁵ However, this stand of the ICTY might send out a notion that only the crime of ‘rape’ represents an assault of serious gravity, while other gender-related crimes – that do not include ‘sexual penetration’- do not live up to the threshold to be considered under specific gender-related provision, but fall under a catch-all category of less serious crimes. Although such solutions had been required most probably due to the non-existence of an adequate normative basis for charging other types of gender-related crimes in a more sophisticated way, it is clear that a genuine lack of an advanced typology of specific gender crimes downplays the value and importance of the notion of ‘gender’.

By looking into the national legal systems in its search for “principles of criminal law common to the major legal systems of the world,”¹⁸⁶ the ICTY tried to make the *Akayesu*

¹⁸¹ Ibidem, pg. 649

¹⁸² In the cases *Celebici*, *Musema*, *Niyitegaka* and *Muhimana*.

¹⁸³ *Prosecutor v Anto Furundzija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998

¹⁸⁴ *Furundzija* at 175

¹⁸⁵ Ibidem, at 175. Article number added.

¹⁸⁶ Ibidem, at 177

definition of rape more narrow and specific, as well as aimed to achieve that the new definition does not violate the principle of legality.¹⁸⁷

Therefore the Trial Chamber finally arrived to the following elements of the crime:

- (i) 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.¹⁸⁸

As it can be inferred, this definition was mainly concerned with the requirement of ‘penetration’ while excluding less grave forms of sexual assault from being qualified as rape. On the other hand, it also, introduced the notion of oral sex entailing to rape. It is rather remarkable how the Trial Chamber resorted to the concept of human dignity to be able to include fellatio as an element of the crime of rape.¹⁸⁹

In conclusion to the *Furundzija* judgment, one might notice the paradigmatic shift from a broader, conceptual definition towards a considerably narrow, mechanical one. De Brouwer, however, argues that the *Furundzija* judgment also had some positive sides as well, such as its gender neutrality.¹⁹⁰ The use of the words ‘victim’ and ‘perpetrator’ allowed it to cover both male and female victims and perpetrator as well.¹⁹¹

¹⁸⁷ The definition of rape in Akayesu was alleged to be too broad and in violation with the principle of legality.

¹⁸⁸ *Furundzija* at 180 and 185

¹⁸⁹ It did so, in paragraph 183 of the *Furundzija* judgment, by noting that: “[...] forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international law as well as human rights law lies in the prosecution of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.”

¹⁹⁰ Anne-Marie L.M. de Brouwer, *SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: The ICC and the Practice of the ICTY and the ICTY*, Intersentia: Antwerpen-Oxford, 2005, pg.115

¹⁹¹ *Ibidem*, pg. 115

Finally, in 2001 the *Kunarac et al.* ruling has been rendered, and the third definition of rape has been reached by the ICTY. This case was of huge importance for the jurisprudence of the Tribunals and for the further development of international criminal law pertaining to sexual violence, as well. In fact the, *Kunarac* case was the first case where all the charges against the perpetrators were brought for sexual violence under crimes against humanity (Article 3), however not only exclusively as ‘rape’, but also as ‘torture’ and ‘enslavement.’

The Trial Chamber again embarked on an expedition to reveal ‘the true common denominator’ of national laws on rape. However, this time they revisited the survey conducted in the *Furundzija* case, and came to a conclusion that the underlying principle of domestic penal laws on rape was the “violation of sexual autonomy.”¹⁹²

As one can ultimately expect, the word ‘autonomy’ resembled of the notion of consent. Ergo this is how ‘consent’ has been incorporated into the third version of definition on rape. Thus, one of the following circumstances must be established for the act to be qualified as a crime of rape:

- (i) the sexual activity is accompanied by force or threat of force to the victim of a third party;
- (ii) the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated the ability to make an informed refusal; or
- (iii) the sexual activity occurs without the consent of the victim.¹⁹³

Therefore, the new definition reads:

[rape is] the sexual penetration, however slight:

- (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
- (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs *without the consent of the victim*. Consent for this purpose

¹⁹² Kunarac et al. at 440

¹⁹³ Ibidem, at 443-456

must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.

The *mens rea* is the intention to effect this sexual penetration, and *the knowledge that it occurs without the consent of the victim*.¹⁹⁴

It is to be noted that such definition of rape endorsed by the *Kunarac* judgment was contested on appeal by the defense. The perpetrators disputed exactly "the victim's continuous or genuine resistance"¹⁹⁵ and "the force or threat of force" which, according to the defense has not been showed. Nevertheless, the Appeals Chamber upheld the Trial Chamber's finding, although rendering a reasoning which showed no genuine need for introducing the element of 'non-consent' – the Appeals Chamber actually concluded that "the *coercive nature* of the various facilities, where the accused held their victims, led to the conclusion that the consent to the rapes could not be presupposed,"¹⁹⁶ whereas 'coercion' has already been an integral part of the definition of rape given in *Furundzija*.

As to the Rome Statute, it is more forward-looking thus "specifies the elements of the crime of rape in a minute detail,"¹⁹⁷ since the judgments of the Tribunals were heavily criticized for violating the legality principle because they "created definitions in the final phase of the judicial process."¹⁹⁸ Thus, the Element of Crimes states that rape constitutes of the following Elements:

- (1) The perpetrator invaded* the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
- (2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive power, against such person or another person,

¹⁹⁴ Ibidem, at 460 [emphasis added]

¹⁹⁵ Kunarac et al., Case No. IT-96-23-A and IT-96-23/1-A, Appeal Judgment at 125

¹⁹⁶ Anne-Marie L.M. de Brouwer, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: The ICC and the Practice of the ICTY and the ICTY, Intersentia: Antwerpen-Oxford, 2005, pg.119 [emphasis added]

¹⁹⁷ Ibidem, pg.104

¹⁹⁸ Ibidem, pg.104

or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.**

*Footnote 15: The concept of ‘invasion’ is intended to be broad enough to be gender-neutral.

**Footnote 16: It is understood that a person may be incapable of giving a genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of Article 7(1)(g) 3,5 and 6.

At first glance it becomes evident that the wording of the ICC rape definition represents a certain mixture of the available jurisprudence of the ICTY and the ICTR up to the point of the Rome Statute’s process of drafting. Thus, the stand taken in *Akayesu* and *Furundzija* were the ones influencing the drafting procedure, inasmuch the mechanical definition of the *Furundzija* case has been given priority.

As to the first part of Element 1, it covers a wide variety of situations involving penetration,¹⁹⁹ however situations which do not include it (such as touching the victim’s body in a sexual way) are unfortunately excluded.²⁰⁰

Even though, the legality principle concern raised in *Akayesu* has been satisfied with the clear definition on rape in the Rome Statute, other drawbacks of it still exist. For example, the wording of Element 1 is at times confusing and leaves room for assumptions about what the real intention of the drafters was. Namely, the fuzzy wording of Element 1 leaves the reader doubtful about the actual sense of the provision, whereas it only meant to subsume situations where “persons are compelled to perform sexual acts on the compeller himself or on others.”²⁰¹

By paying a closer look to the first Element of the *actus reus* of rape, one might notice that cases of forced masturbation of the victim or the compeller or sexual mutilation might fall

¹⁹⁹ Anal, vaginal and penetration of the mouth by the penis and by other objects or part of the body are covered.

²⁰⁰ Anne-Marie L.M. de Brouwer, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: The ICC and the Practice of the ICTY and the ICTY, Intersentia: Antwerpen-Oxford, 2005, pg.132

²⁰¹ Ibidem, pg. 132

short of this definition since they do not include penetration by nature.²⁰² De Brouwer argues that exactly the power to embrace the aforementioned situations was the strongest point of the definition of rape as advanced in *Akayesu*.²⁰³

Concerning the second Element of the *actus reus* of rape, it is to be understood that the crime might be committed not only by the use of raw force or threat of the same, but also by coercion. That, in fact, means that this provision is all inclusive, as it compiles all the 3 solutions adopted by the *ad hoc* Tribunals, respectively, in *Akayesu*, *Furundzija* and *Kunarac* cases. In addition, coercion need not always result in physical force, as noted in *Prosecutor v Jean Pierre Bemba-Gombo*: "threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence."²⁰⁴

Furthermore, the *means rea* requirement, as formulated in Article 30 of the Rome Statute, applies to both elements of rape. Yet the perpetrator need to "intended and had knowledge"²⁰⁵ about the commission of the elements of the crime of rape. As the Pre-Trial Chamber has noted in *Katanga* that the subjective element of crimes against humanity of rape requiring the perpetrator's intent to invade another person's body "with a sexual organ, or the anal or genital opening of the victim with any object or any other part of the body by force or threat of force or coercion. Thus, this offence encompasses, first and foremost, cases of *dolus directus* of the first and second degree."²⁰⁶

²⁰² See for example Anne-Marie L.M. de Brouwer, *SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: The ICC and the Practice of the ICTY and the ICTY*, Intersentia: Antwerpen-Oxford, 2005, pg.132

²⁰³ Rape as a "physical invasion of sexual nature committed on a person under circumstances which are coercive."

²⁰⁴ *Prosecutor v Jean Pierre Bemba Gombo*, "Decision on the charges of the Prosecutor" ICC-01/05-01/08 of 15 June 2009, para 162 and *Prosecutor v Katanga Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the confirmation of charges", ICC-01/04-01/07 of 30 September 2008, para 440

²⁰⁵ See *Bemba-Gombo* at 187

²⁰⁶ *Katanga* at 443

3.2.2 Gender Crimes as Torture

As I have argued earlier rape cases and other sexual assaults have been prosecuted as various crimes under crimes against humanity before the *ad hoc* Tribunals (also as ‘torture’ among others). Actually, the Tribunals case law²⁰⁷ has shown that sexual violence may amount to torture as crimes against humanity and war crimes, as well.

Even though, torture has already been listed among crimes against humanity in the ICTY Statute (Article 5(f)) and in the ICTR Statute (Article 3(f)), there still has been no definition given in any of them.²⁰⁸ The Rome Statute also contains a provision on torture as crimes against humanity,²⁰⁹ defined in Article 7(2)(e) such as

[...] intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.²¹⁰

Elements of torture are given in the Elements of Crimes, almost copied verbatim from the Rome Statute, follow as

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.²¹¹

²⁰⁷ Kunarac et al., IT-96-23-T and IT-96-23/1, 22 February 2001; Semanza, ICTR-97-20-T, 15 May 2003; Simic, IT-95-9/2-S, 17 October 2002

²⁰⁸ As a matter of fact torture as a crimes against humanity has been explicitly mentioned in the CCL No.10 as well, in its Article II(1)(c), still without a definition on the crime

²⁰⁹ Article 7(1)(f)

²¹⁰ Ibidem.

²¹¹ Elements of Crimes, Article 7(1)(f)

The prosecution of sexual mistreatment as torture under crimes against humanity had absolutely no precedent. Even so, in the opening days of the UN Tribunals the elements of torture have been quite malleable, and have been considerably shaped due to the later jurisprudence.

Since torture had not been steadily circumscribed in international humanitarian law, the ICTY's Trial Chamber "had to take recourse to human rights law"²¹² in order to determine the elements of crime."²¹³ Nevertheless, it still concluded that "the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law"²¹⁴- while international humanitarian law is designed to "place restraints on the conduct of warfare so as to diminish its effects on the victims thereof"²¹⁵, international human rights law (and the 1984 Torture Convention, as a part of it) is aimed to "be applied on an inter-state level."²¹⁶

Even though, the Tribunals did take recourse to the 1984 Torture Convention's text, the interpretation of the Convention in the international criminal law sphere did differ a bit because of the above mentioned reasons. Two key features of the crime of torture as crimes against humanity have been noted thanks to the jurisprudence of the *ad hoc* Tribunals. These were later also reflected in the Rome Statute. Firstly, as Footnote 14 of the Elements of

²¹² The 1984 Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment has been deployed. The Convention reads (Article 1(1)): "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person *for such purposes* as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a *public official* or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." [emphasis added]

²¹³ Anne-Marie L.M. de Brouwer, *SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: The ICC and the Practice of the ICTY and the ICTY*, Intersentia: Antwerpen-Oxford, 2005, pg.97

²¹⁴ Kunarac et al. at 495-496

²¹⁵ Kunarac at 470

²¹⁶ Kunarac, at 470

Crimes also spells it out, “no specific purpose for this crime needs to be shown.”²¹⁷ Secondly, the “official capacity” of the perpetrator committing the crime, as formulated in the 1984 Torture Convention, does not constitute an element of the crime.

This practically means that the real heart of torture as a crime against humanity is all about the “severe physical or mental pain or suffering.”²¹⁸ Yet the *Kunarac* judgment has already stated that sexual violence can indeed amount to torture, since it inflicts both severe physical and mental pain or suffering.²¹⁹ However, such wording of the provision raises the question, how high is the threshold for the pain or suffering inflicted by the perpetrator? Or to put it in other words, to how much suffering or pain does the word “severe” entail to, and are sexual crimes capable of falling into that category?

The answer to such question is somewhat ambivalent. If one followed the *Kunarac* case’s ruling, sexual crimes would surely surpass the threshold for qualifying as torture, however in the *Bemba-Gombo* case the Pre-Trial Chamber declined to confirm Count 3 (“inflicting severe physical or mental pain or suffering through *acts of rape or other forms of sexual violence*”) of torture as a crime against humanity within the meaning of Article 7(1)(f).²²⁰ It did so because of the Pre-Trial Chamber’s approach²²¹ to reject cumulative charging of the Prosecutor concerning acts of rape and other forms of sexual violence.²²²

²¹⁷ While, on the other hand, the element of ‘purpose’ need to be present for the establishment of the crime of torture as a war crime under Article 8 of the Rome Statute.

²¹⁸ Anne-Marie L.M. de Brouwer, *SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: The ICC and the Practice of the ICTY and the ICTY*, Intersentia: Antwerpen-Oxford, 2005, pg.100

²¹⁹ *Kunarac* at 149 and 150

²²⁰ *Bemba-Gombo* case at 190

²²¹ *Ibidem*, at 201 which reads: “The Chamber deems it necessary to recall paragraph 25 of the Decision of 10 June 2008 in which the following was clearly stated: (...) the Prosecutor appears on occasion to have presented the same facts under different legal characterizations. [The Chamber] wishes to make it clear that the Prosecutor should choose the most appropriate characterization. The Chamber considers that the Prosecutor is risking subjecting the Defence to the burden of responding to multiple charges for the same facts and at the same time delaying the proceedings. It is for the Chamber to characterize the facts put forward by the Prosecutor. The Chamber will revisit this issue in light of the evidence submitted to it by the Prosecutor during the period prior to the confirmation of charges, having regard to the rights of the Defence and to the need to ensure the fair and expeditious conduct of the proceedings.”

²²² *Ibidem* at 190

The Pre-Trial Chamber noted that on the part pertaining to ‘acts of rape’ as torture, cumulative charging should be avoided, since they are subsumed by the count of rape under Article 7(1)(g),²²³ and represent “an undue burden on the Defence.”²²⁴ Further on, the Chamber remained that the „ICC legal framework differs from that of the ad hoc tribunals, since under regulation 55 of the Regulations, the Trial Chamber may re-characterise a crime to give it the most appropriate legal characterisation.”²²⁵

On the other hand, in connection to part in on „other forms of sexual violence”, the ICC noted that „the Amended DCC fails to specify as to which other facts of torture the Prosecutor relies upon,”²²⁶ therefore the Pre-Trial Chamber declined to confirm this count.

In conclusion, I would only like to add a few remarks to Elements 2 and 3 of the crime of torture. As to Element 2, requiring the victim being in ‘custody’ or ‘under the control of the accused’, it shall be understood as including situations of sexual mistreatment where victims weren’t detained in a physical sense, but still had nowhere safe to go even if they left the place where the sex crimes amounting to torture were inflicted upon them.²²⁷

Finally, Element 3 points out that lawful sanctions shall not constitute torture, however „sexual violence will never qualify as a lawful sanction since it is prohibited by the international law.”²²⁸

To sum up the deficiencies of charging gender crimes as torture, it should definitely be pointed out that torture charges may subsume rape charges, in a way diminishing the importance of sex crime’s bodily injury. This could indicate that gender-related charges stand lower in on imaginary scale of gravity according to the severity of bodily injury than torture,

²²³ In the Bemba-Gombo case the Pre-Trial Chamber has confirmed the charge of rape (paras 159-189)

²²⁴ Bemba-Gombo at 202

²²⁵ Ibidem at 203

²²⁶ Ibidem at 206

²²⁷ This was the exactly the situation in the Kunarac et al. case before the ICTY.

²²⁸ Anne-Marie L.M. de Brouwer, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: The ICC and the Practice of the ICTY and the ICTY, Intersentia: Antwerpen-Oxford, 2005, pg.101

thus present a step forward on the road towards the recognition of the importance of gender-cased prosecutions.

3.2.3 Gender Crimes as War Crimes

The Statutes of the ICTY did not include rape or other sexual crimes as war crimes, while the ICTR implemented a provision on ‘outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault’ as violations of common Article 3 of the Geneva Conventions. Nevertheless, sexual assault had been tried under both Statutes under this category.

It has been the very first case before the ICTY, the *Nikolic case*²²⁹ where gender crimes had been charged as war crimes. Actually, it was Judge Odio Benito who called upon the Prosecution to “review its indictment to add gender crimes, either as a crime against humanity or as a grave breach or war crime.”²³⁰ Richard Goldstone, the first Prosecutor of the ICTY then created history since “[r]ape was not traditionally regarded as a war crime on its own, and . . . was never included amongst the . . . [grave breaches].”²³¹

Despite the historic moment for gender justice in *Nikolic*, such acts of the Prosecutor marked a beginning of an era: an era where gender crimes were prosecuted as war crimes. The Prosecution became more and more willing to bring cases which included a gender dimension under the articles dedicated to war crimes before the *ad hoc* Tribunals. It seemed that articles on ‘violations of laws and customs of war’ proved to be catch-all provisions and helpful tools

²²⁹ *The Prosecutor v. Dragan Nikolic (IT-94-2)*

²³⁰ Dianne Luping, *INVESTIGATION AND PROSECUTION OF SEXUAL AND GENDER-BASED CRIMES BEFORE THE INTERNATIONAL CRIMINAL COURT*, 17 American University Journal of Gender, Social Policy and the Law (2009), at pg. 431

²³¹ Dianne Luping, *INVESTIGATION AND PROSECUTION OF SEXUAL AND GENDER-BASED CRIMES BEFORE THE INTERNATIONAL CRIMINAL COURT*, 17 American University Journal of Gender, Social Policy and the Law (2009), at pg. 431

for facilitating rape charges which otherwise might not even be tried.²³² However, such practices before the *ad hoc* Tribunals seemed to downplay the distinctiveness and graveness of gender-crimes since within the typology of international crimes, war crimes are known to require the least serious threshold of proof. In comparison, the proof required for prosecuting rape as crimes against humanity would encompass, among other requirements, proving that sexual crimes happened on a mass scale or systematic basis. Therefore, the requirement of a very high and severe burden of proof with ‘rape’ charges as crimes against humanity, “may have chilled prosecutorial zeal”²³³ to indict rape accordingly.

In fact, it seems that the international court’s preference over direct evidence in cases involving sex crimes, effected heavily the Prosecutions decision to abandon ‘crimes against humanity charges’ in favor of ‘war crimes’ charges. In a number of cases the international courts required an indeed high level of proof when ruling on gender-based crimes. The courts gave preference to the application of a higher threshold of evidentiary standard in these cases, even though pattern or circumstantial evidence had been enough in some of the other non-gender related cases to draw clear and significant inferences²³⁴ and establish that a particular accused ordered the commission of the crimes.

For example, in the *Kjelijeli case* the Trial Chamber held that there had been no sufficient evidence for a conviction, since the prosecution did not prove that the accused knew or had to know about the multiple sex assaults committed by the accused’s subordinates,²³⁵ despite the finding of numerous rapes and sexual mutilation. Further on, in the *Gacumbisi case* the on appeal the Appeals Chamber required a proof of a tighter connection between the

²³² Christin B. Coan, Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal tribunal for the Former Yugoslavi, 26 NCJILCR (2000) at 201

²³³ *Id.* at 203

²³⁴ See e.g. *the Prosecutor v. Galic case* (IT-98-28)

²³⁵ *The Prosecutor v. Kajelijeli*, ICTR-98-44A-T at para. 677-683, 918-922

accused's acts of instigation and the direct perpetrator's criminal acts.²³⁶ These views of the ad hoc Tribunals clearly illustrate that in gender-relevant cases the courts stood on a position which failed to acknowledge that "sexual violence represents an integral part of the organized war, rather than a mere effort of 'incidental' or 'opportunistic' incidents."²³⁷ Therefore, it is to be hoped that such unfortunate misinterpretations about the nature of wartime sex crimes shall not be repeated in the jurisprudence of the ICC. Notwithstanding, dilemmas have already came up in the *Katanga and Ngudjolo case* during the confirmation of charges when one of the dissenting judges expressed her preference for direct evidence for linking the accused with the commission of sexual slavery and rape.²³⁸

Back to the question of charging gender crimes either as 'war crimes' instead of 'crimes against humanity', it must be pointed out that such diversion in a sense *downgraded* the significance of the recognition of the criminal use of biological power by perpetrators. Thus, does not represent the most favorable for the cause of gender crimes: it serves as a handy tool for discouraging the prosecution to push for charges of sex crimes under crimes against humanity, which arguably reflect a more accurate description of the criminal policies perpetrators. It is exactly, the mass scale and systematic traits of gender-discriminative policies that evade punishment by not being charged as crimes against humanity.

The Rome Statute includes gender-related crimes both as 'grave breaches' (Article 8(2)(b)(xxii) and as 'serious violations of common article 3' (Article 8(2)(e)(vi). Besides the earlier mentioned charges, the *Callixte Mbarushimana case*²³⁹ is anticipated to finally shed some light on the ICC understanding of the definition of 'gender' and of the crime of 'rape', since rape charges had been brought against him both under Articles 7 and 8 of the Rome

²³⁶ *The Prosecutor v. Gacumbisi*, ICTR-2001-64-T at para. 137-138

²³⁷ Susana SaCouto & Katherine Cleary, *The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 AMUJGSPL (2008) at 358

²³⁸ See Judge Usacka dissenting in *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges (30th September, 2008) at para. 14,19,21

²³⁹ *The Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10

Statute. In addition, the *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*²⁴⁰ Kenyan case might also serve as guidance for the ICC's future gender policies.²⁴¹ Ergo, it is still anxiously anticipated whether the ICC will keep going on with the ambiguous "evading policy" or will embark on a journey which will primarily offer recognition to victims by acknowledging the gravity of crimes against humanity.

3.2.4 Gender Crimes as Genocide

Gender as such had not been envisaged as a ground for genocide in neither of the ad hoc tribunals' statutes. Despite that, charging sexual assaults as genocide stands out as a revolutionary advancement of the *Akayesu* case, which established that sexual assaults could amount to genocide, thus representing an influential push forward regarding gender crimes and recognition of female wartime experiences. Although, none of the definitions of 'genocide' include 'gender' as a genocidal ground, the *Akayesu* judgment's groundbreaking impact still remains recognized over and over again mostly due to its advancement of the 'conceptual rape definition' (as mentioned in section 3.1).

Besides *Akayesu*, an important judgment for gender-justice has been delivered in the *Krstic*²⁴² case as well. Namely, the case involved maybe the most advanced elaboration on the impact of the social milieu in which gender-crimes had been committed. In *Krstic* the ICTY Trial Chamber engaged in observing the Bosniak Muslim society and the impact of the distribution of gender roles within such a patriarchal setting. Subsequently, it noted that the

²⁴⁰ The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11

²⁴¹ It is expected that by mid-January, 2012 the Pre-Trial Chamber will rule whether the 6 Kenyans will face full trial for the post-election violence including gender violence as well.

²⁴² Prosecutor v. Radoslav Krstic, IT-98-33-T

Srebrenica massacre could “result in the physical disappearance of the Bosnian Muslim population of Srebrenica” due to the fact that the spouses of the missing men would be heavily stricken – in the light of the dominant social caveat these women would be unable to remarry, thus also becoming unable to prolong the group’s biological existence.²⁴³ Moreover the Appeals Chamber also concluded that “the physical destruction of the men [...] had severe procreative implications for the community.”²⁴⁴ Therefore, in *Krstic* the ICTY came close to the Foucaultian notion of the ‘administration of biological power’ through gender-based domination and control by acknowledging the weight attached to emphasizing the social background within which the crime had been committed.

3.3 Gender in the Light of Article 7(3) of the Rome Statute

Today in the closing days of the *ad hoc* Tribunals and the opening days of the ICC, it is quite uncertain to predict what promises does gender-based prosecution hold for the future. It is to be seen whether the ICC will follow the path of this valuable precedent-like analysis of the roles of women and men²⁴⁵ as the ICTY did in *Krstic*. The language of Article 7(3) of the Rome Statute understands ‘gender’ as “two sexes, male and female, within the context of society.” Such definition, however, deliberately confuses and interchanges the term ‘gender’ and ‘sex’, thus creating an equilibrium of the two, where as they stand for two different notions. Hilary Charlesworth noted that the wording of the Rome Statute’s definition of ‘gender’ “fails to communicate that gender is a socially constructed set of assumptions regarding the roles of males and females”²⁴⁶, thus suggesting a limited transformative edge of

²⁴³ *Prosecutor v. Krstic*, IT-98-33-T at para. 193,196, 595

²⁴⁴ *Prosecutor v. Krstic*, IT-98-33-A at para. 30

²⁴⁵ *Prosecutor v. Krstic*, IT-98-33-T at para. 193,196

²⁴⁶ Hilary Charlesworth, *Feminist Methods in International Law*, 93 *American Journal of International Law* (1999) at 379

the definition. Portraying the term ‘gender’ as a biological construct represents a missed opportunity to redefine the boundaries of ‘gender’ as a set of socially constructed typical roles and values ascribed to men and women in the respective society, as either a ‘male’ or a ‘female’ role.

Understandings of the gender roles varies from one society to another, and is determined by a variety of factors affecting the social milieu (e.g. traditions and customs, religion, etc.). Accordingly, crimes involving gender carry various repercussions for a particular society, depending on the society’s understanding of the gender roles. For example, for traditionally patriarchal values such as fidelity and chastity would represent an important female gender role; subsequently, crimes which diminish these values would result in the *stigmatization and ostracization* of the victims by the their own communities on one side, and in facing *economic and legal challenges* on the other side because of the loss of the ‘head of the family’, due to the fact these women are not expected to remarry again. Therefore, if the language of the Rome Statute mentioning ‘gender’ meant nothing more than ‘the two sexes’, the ICC would become paralyzed to conduct meaningful and significant analysis of the female and male gender roles in the affected society. In this sense, is the reduction of ‘gender’ to ‘sex’ in the wording of Article 7(3) of the Rome Statute ambiguous.

Further on, language of Article 7(3) also prescribes that gender should be seen through the ‘context of society’. As described in chapter 1, it is was the need for reconciling different interest groups and states during the drafting procedure of the Rome Statute which lead to this unfortunate legal construct. Nevertheless, strictly speaking such language of the Rome Statute might pose a possible leeway for the accused “to rely on state- or society-supported

misogynist or homophobic reasoning to excuse his actions.”²⁴⁷ Therefore, it would have been more fortunate to avoid such wording of Article 7(3) in the Rome Statute.

Moreover, in relation to the above said the definition of ‘gender’ in the ICC Statute bears an additional flaw: it does not encompass sexual orientation. By determining that ‘gender’ is to be understood as the ‘*two sexes, male and female*’, sexual identity falls short from being taken into consideration nevertheless being an important aspect and strand in the social construction of gender. Marginalized groups bearing a gay, lesbian, bisexual or transsexual sexual identity could not enjoy the protection under such a definition. Valerie Oosterveld insightfully notes that “gender and sexual orientation are inextricably linked”²⁴⁸ since “violence against women or men based on cultural definitions of ‘appropriate maleness’ or ‘femaleness’ is intimately intertwined with violence against individuals based on sexual orientation.”²⁴⁹ Therefore, in the light of the current homophobic policies dominating in quite a few African and Asian countries, it would be rather inappropriate - in possible future cases – if any defence strategy attempted to base its arguments on such interpretations of Article 7(3).

As a final point, it should be emphasized also what implications could inadequate perceptions of ‘gender’ in international criminal justice hold for the future in regard to post-conflict societies. Due to misinterpretations of the term, there is a real risk that the visible or latent gender exclusions will be repeated later during the course of transitions, in some patriarchal societies. In cases where international criminal courts did not take up the partisan role to expand and clarify the social repercussions of the existing gender setting in a given society, it is justified to fear that victims will simply remain marginalized. Existing

²⁴⁷ Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 Harvard Human Rights Journal (2005) at 75

²⁴⁸ Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 Harvard Human Rights Journal (2005) at 78

²⁴⁹ *Id.* at 78

masculinities and patriarchies might remain unchallenged if “experiences and needs of women are marked absent or silenced by the general discourse of accounting for the past.”²⁵⁰ This way, women remain structurally excluded from societal reconstruction processes.

Post-conflict environments are often concentrated on the maintenance of masculinity. Therefore, the male power systems might easily become copied onto the post-conflict society struggling with an identity formation. Thus, a proactive attitude towards wartime gender crimes on an international level should arguably help not to replicate inherent gender inequalities in the aftermath of a conflict.

To sum up, after identifying the implications of the advantages and shortcomings of the present body of international criminal law pertinent to the prosecutions of gender-based violence, it is the task of the next chapter to draw some recommendations for a more concise and consequential understanding of the ‘gender’ element’s distinctiveness in international trials. In this vein, should chapter four present an attempt to show why is it important to base further developments in international penal law on the theory of recognition, in order to grant a meaningful and respective appreciation towards the victims of gender atrocities and reduce the tensions overwhelming post-conflict societies.

²⁵⁰ Fionnuala Ni Aolain, *Women, Security and the Patriarchy of Internationalized Transitional Justice*, 31 *Human Rights Quarterly* (2009) at 1056

CHAPTER 4 –Recognition: Avenues of Improvement²⁵¹

“Due recognition is not just a courtesy we owe people. It is a vital human need.”²⁵²

(Charles Taylor)

“Post-conflict societies are puzzled communities. Placing, ideally, “the quest for justice” as their imminent goal, successor governments and the international community need to maneuver agilely between “bringing justice to the past, at the same time demonstrating a commitment that justice will form the bedrock of a governance in the present and future.”²⁵³ In these uneasy transitional moments, “questions of justice appear to be at the same time inevitably both backward and forward looking.”²⁵⁴ However, what does justice mean for victims and victimized societies?”²⁵⁵ Does it entail *per se* to justice in a legal sense, including lengthy legal trials and retributive claims towards individual perpetrators? Or does it also include claims of affirmation for the harm cause to a particular gender during the bloodshed?

“Justice is an utterly complex notion - “morally, legally, philosophically, even emotionally speaking,”²⁵⁶ as well. Ultimately, the role of justice, as such, highly is elevated by the aspirations of the community undergoing changes. It is anticipated to bring both retribution and restoration; both punishment and healing; redistribution and recognition.

²⁵¹ Note: The present chapter represents an attempt to develop further the author’s earlier essay about the need for recognition originally written for the course “Critical Perspectives on Human Rights”, taught by Prof. Michael Hamilton at the Central European University, Academic year 2010/2011 (submitted on the 28th February, 2011 via Turnitin system), which results in the incorporation of various parts of the original essay into this chapter.

²⁵² Charles Taylor, Multiculturalism and ‘the Politics of Recognition’ in Amy Gutmann (ed.), *The Politics of Recognition*, Princeton University Press, 1992, p.26

²⁵³ Katherine M. Franke, *Gendered Subjects of Transitional Justice*, 15 Colum. J. Gender & L., 2006, pg. 813

²⁵⁴ Ibidem, pg. 813

²⁵⁵ Imola Soros, Critical Perspectives on Human Rights Essay, CEU (2011) at 1

²⁵⁶ Katherine M. Franke, *Gendered Subjects of Transitional Justice*, 15 Colum. J. Gender & L., 2006, at pg. 814

These high hopes - though obviously antithetical apprehensions - need to be reconciled by the ideal of justice.”²⁵⁷

Since their establishment, the International Criminal Court, as well as the ICTY and the ICTR, certainly represent alleys which *remedy impunity*. Although, serving as penal tribunals, these Courts inherently serve retributive and deterrence aims, however do not encompass other ways of societal healing such as reconciliation, apologies or reparations (in the form of restitution, compensation, rehabilitation, satisfaction or guarantees of non-recurrence, as argued by Pablo de Greiff²⁵⁸). This is not to say that these tribunals should satisfy all of these ends but to point out that due to their role and authority they might influence and determine further repercussions among other transitional tools. In this vein, this work suggests that (mis)understandings of ‘gender’ before international *fora* may carry future implications for a wider context as well. Niamh Reilly formulated these concerns as “the significance of feminist engagement with international law as a mode of transformative praxis.”²⁵⁹

On the other hand, as argued before, the perception about the gravity of gender-based violence as means of totalitarian bio-control of societies heavily depends also on the manner in which international prosecutions send out a message about the harm cause to a certain victim or victimized group. Thus the question remains, how should these communities cope with their dark past?²⁶⁰

²⁵⁷ Imola Soros, Critical Perspectives on Human Rights Essay, CEU (2011) at 2

²⁵⁸ Pablo de Greiff, *Justice and Reparations*, in Miller & Kumar (eds.) *Reparations; Interdisciplinary Inquiries* (Oxford University Press.2007) at 153-175

²⁵⁹ Niamh Reilly, Seeking gender justice in post-conflict transitions: towards a transformative women's human rights approach, 3 Int. J.L.C. (2007), at 156

²⁶⁰ Frank Haldemann, *Another Kind of Justice: Transitional Justice as Recognition*, 41 Cornell Int'l L.J., 2008, pg. 676

Post-conflict societies face a troublesome process of “confronting legacies of widespread and systematic human rights abuses”²⁶¹ as they move from the repressive past towards a more just, peaceful present.²⁶² Often it is the international community and international criminal tribunals, as their long arms, which are seen rather negatively. Thus these institutions, which should have been perceived as a step towards a holistic regeneration of a whole society’s mass deviance by prosecuting individuals, that bear the burden of “replacing violence with dialogue, terror with respect”²⁶³ and “steering a path between too much memory and too much forgetting.”²⁶⁴

“Over the last two decades a handful of mechanisms²⁶⁵ were designed with the goal to “undertake transitional justice.”²⁶⁶ Aspirations of the community undergoing transition anticipated that these brought both retribution and restoration; punishment and both healing; redistribution and recognition. However, here I would like to refer to a more altruistic and sensitive notion of justice, a justice as recognition.”²⁶⁷ What this work is to suggest is the notion of justice in the sense of giving due recognition to the victims of gender-related crimes, could become a reality if international trials primarily endorsed and upheld their acknowledgment on an international penal level. Or to wrap it as Frank Haldemann did: this is the kind of justice that “involved giving due recognition to the pain and humiliation experienced by victims of collective violence.”²⁶⁸

In this sense, my work will resort to borrowing and drawing upon Axel Honneth’s vision of justice as recognition in order to argue for the ultimate need for recognition of a

²⁶¹ Ibidem, pg. 676

²⁶² Imola Soros, Critical Perspectives on Human Rights Essay, CEU (2011) at 1-2

²⁶³ Ibidem, pg. 676

²⁶⁴ Katherine M. Franke, *Gendered Subjects of Transitional Justice*, 15 Colum. J. Gender & L., 2006, pg. 813

²⁶⁵ Katherine M. Franke mentions the following ones in *Gendered Subjects of Transitional Justice*: criminal Prosecutions (at domestic and international level), truth and reconciliation commissions, lustration, public access to records, public apology, compensation or reparation to victims or their families.

²⁶⁶ Ibidem, pg. 813

²⁶⁷ Imola Soros, Critical Perspectives on Human Rights Essay, CEU (2011) at 3

²⁶⁸ Frank Haldemann, *Another Kind of Justice: Transitional Justice as Recognition*, 41 Cornell Int’l L.J., 2008, pg. 678

distinct category of crimes against gender, directed at enhancing totalitarian control over society. Partly but not exclusively aimed at the direct annihilation of the adversary group, these crimes against gender indirectly still present a widespread and systematic extermination-policy based on bodily politics executed on the Agambenian *homo sacer*,²⁶⁹ where one represents only a “‘bare life’ stripped of all recognition, rights and comity.”²⁷⁰

Building on Foucault’s observations, Agamben’s notion of “biopolitics,” represents the „readiness of the modern state to treat undesired people simply as so many undifferentiated, biological units, which has inspired totalitarian states to de-certify the unwelcome and thus outlaw them from the body politic.” Thus, it is not the day-to-day paralysing inhumanity based on gender prejudice that is striking, but the targeting and misuse of whole groups out of biological reasons. This is why gender-related crimes - placing ‘gender’ as means of domination or control in focus - may prove to be of critical importance for the future of international criminal law.

Moreover, the second strand of my argument concerns the ultimate need for the recognition of victims who suffered gender-based assaults through the incentives of the international fora. The impulse for future integration of former victims should be based on the simple factual basis that most echelons of the society did in some way contribute morally towards the commitment of the atrocities. Such recommendations touch upon the notion of what Arendt once called as a „positive statement of intentions addressed to the victims.”²⁷¹ Therefore, it is to be argued that the impulse for such proactive alleys of improvement should be in a sense motivated by the international criminal law’s response towards gender-crimes,

²⁶⁹ See in general, Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*. (Stanford: Stanford University Press, 1998.)

²⁷⁰ James Tunstead Buertchaell, *Homo Sacer: Sovereign Power and Bare Life* by Giorgio Agamben, 62 *The Review of Politics* (2000), pp. 626

²⁷¹ Kohler & Saner, Hannah Arendt- Karl Jaspers: Correspondence 1929-1969 (Harcourt Brace Jovanovich, 1993) at 53

and later implemented on the level of society through subsidiary transitional mechanisms designed to convey such an intention.

The following section shall present Axel Honneth's theory of recognition so that the reader gets acquainted with the underlying logic of his proposal, while further on this research wishes to take these arguments a step further by applying it to the problematic of gender recognition.

4.1 Gender and the 'Struggle for Recognition'

Axel Honneth's *Struggle for Recognition* offers some answers for addressing 'experiences of disrespect' experienced by victims of mass atrocity. His work also suggest applicable methods for a meaningful addressing of international criminal law's deficiencies in relation to its current understanding and definition of 'gender'.

"Axel Honneth's theory of recognition maps a tripartite matrix of three different modes or recognition, namely love, rights and solidarity, paired to three basic relations to self (self-confidence, self-respect and self-esteem).²⁷² These form the basis for his "formal conception of ethical life."²⁷³ In addition, Honneth introduces three corresponding types of disrespect or humiliation: abuse and rape, denial of rights and denigration or insult.²⁷⁴ These negative experiences are strongly articulated in his work because of their potential social driving power, and their importance for the recognition debate."²⁷⁵

²⁷² Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, MIT Press: Cambridge, Massachusetts, pg. 129, figure 2

²⁷³ Ibidem, pg. 172-175

²⁷⁴ Ibidem, pg. 129

²⁷⁵ Imola Soros, *Critical Perspectives on Human Rights Essay*, CEU (2011) at 6

The main essence of Honneth's "struggle for recognition" is the *human need for relations of mutual recognition* as a prerequisite for reaching a sense of self-realization.²⁷⁶ Therefore, this work suggest that the alleys of improvement for legal responses regarding 'gender' deficiencies should be based on the recognition of both the gender-roles as societal constructs on one side, and the wrongdoings of the individual perpetrators in conjunction to the tacitly supportive society's flaw, on the other hand. "Honneth's thory immensely emphasizes the importance of social interaction for one to experience self-worth and self-trust."²⁷⁷ Honneth argues that the way to achieving self-realization leads through experiencing mutual recognition from others, inter-subjectively."²⁷⁸

According to the author, self-realization of the individual is based on the notions of self-confidence, self-respect and self-esteem.²⁷⁹ All of these stages bear relevance for recognition. Thus, the first basic level is seen in "*the trust in self*" or "*self-confidence*."²⁸⁰

"On the other hand, the second form of relating to oneself, is articulated in the notion of self-respect. However, Honneth here thinks of self-respect as "one's sense of being a morally responsible agent capable of acting autonomously."²⁸¹ Thus, at this point Honneth establishes the link between having self-respect and being a morally responsible agent as a bearer of legal rights.²⁸² This is the stage, in the typology of attitudes toward oneself, that actually introduces legal recognition as a notion which has undergone radical evolution from

²⁷⁶ Frank Haldemann, *Another Kind of Justice: Transitional Justice as Recognition*, 41 Cornell Int'l L.J., 2008, pg. 683

²⁷⁷ Ibidem, pg. 684

²⁷⁸ Imola Soros, *Critical Perspectives on Human Rights Essay*, CEU (2011) at 6

²⁷⁹ Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, MIT Press: Cambridge, Massachusetts, 1995, pg. 76

²⁸⁰ Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, MIT Press: Cambridge, Massachusetts, 1995, pg. 107

²⁸¹ Notices Frank Haldemann in *Another Kind of Justice: Transitional Justice as Recognition*, 41 Cornell Int'l L.J., 2008, pg. 685

²⁸² Ibidem, also Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, MIT Press: Cambridge, Massachusetts, 1995, pg. 107-121

the beginnings of modern law.²⁸³ In this sense, could the introduction of an adequate and well-suited definition of ‘gender’, with improvements suggested in Chapter Three, allow for a meaningful realization of victims, as ‘bearers of legal rights’.

Thus, this second strand of Honneth’s recognition theory is of particular interest, since it somehow explains how legal recognition and self-realization connect to each other. For the purposes of illustration, the author leads us to Joel Feinberg’s Nowheresville, a society without socially constructed rights²⁸⁴ which wouldn’t allow one’s self-respect to fully develop. The disability of accomplishing the second strand of one’s self-realization in a world without individual rights, direct us to the conclusion that individual rights are exactly the crucial component on one’s way towards social justice. As Feinberg underlines the following, we might get a sense what rights ought to be and what the value of rights explicitly is:

”Having rights enables us to ‘stand up like men’, and to look others in the eye, and to feel in some fundamental way the equal of anyone. To think of oneself as the holder of rights is not to be unduly but properly proud, to have minimal self-respect that is necessary to be worthy of the love and esteem of others. Indeed, respect for persons ... may simply be respect for their rights, so that there cannot be one without the other. And that is called ‘human dignity’ may simply be recognizable capacity to assert claims.”²⁸⁵

Finally, Honneth introduces the third stage of the relation to oneself, nevertheless equally central to identity formation, through the idea of self-esteem, as a notion of one’s perception of his/her life as meaningful²⁸⁶ or significant.²⁸⁷ Therefore, the notion of defining, understanding and prosecuting gender-based crimes in line with the best interest of the

²⁸³ Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, MIT Press: Cambridge, Massachusetts, 1995, pg. 117

²⁸⁴ Ibidem, pg. 119

²⁸⁵ Joel Feinberg, ‘The Nature and Values of Rights’ in Joel Feinberg, *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy*, Princeton University Press, 1980, p. 12 of the Reader

²⁸⁶ Ibidem, pg. xvi.

²⁸⁷ Imola Soros, *Critical Perspectives on Human Rights Essay*, CEU (2011) at 7-8

victims affected by such crimes carries a much deeper significance, as does the acknowledgement of the spotlessness of the society whose inaction allowed for these crimes to happen, as well. This way, the notion of victims' 'self-esteem' could present a crucial stage of full recognition.

"In Honneth's theory of social justice, "recognition concerns self-realization"²⁸⁸ – there is no self-realization without *the establishment of relations of recognition in society.*"²⁸⁹ This means that without actual regret on the side of the society which allowed for mass crimes to happen, there could be no significant recognition on its side - in a sense of full reestablishment of meaningful societal dialogue. It is the sense of minimizing and trivializing of sexual crimes through the evasion of societal responsibility onto individuals that is striking, and creates some unease due to notions of gender-crimes as strategies of biological power. However, this thesis does not advocate for criminal collective responsibility of nations in any case, but for a legal opportunity to offer avenues of societal healing through the course of recognition of the moral responsibility of the society which allowed for the commission of gender-related assaults. While other mechanisms of transitional justice certainly represent a better way of serving direct, on-ground reconciliatory means (e.g. Truth and Reconciliation Commissions) or offering so-called 'justice from below' solutions (e.g. Gacaca courts in Rwanda), international penal law holds the promise to be able to maximize its potential and initiate societal recognition from 'the bench'.

Apart from this, "according to Honneth's vision, a society's justness is resting on the "degree of its ability to secure conditions of mutual recognition in which personal identity

²⁸⁸ Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange*, Verso: London, new York, 2003, pg. 28

²⁸⁹ Imola Soros, *Critical Perspectives on Human Rights Essay*, CEU (2011) at 8

formation, and hence individual self-realization, can proceed sufficiently well.”²⁹⁰ Thus, in this sense, he further underlines that”²⁹¹

“[...] every human subject is dependant, in an elementary way on a context of social forms of interaction that are regulated by normative principles of mutual recognition; and the absence of such recognition relations will be followed by the *experience of disrespect or humiliation* that *cannot be without damaging consequences* for the single individual’s identity formation.”²⁹²

Building on Honneth’s theory Frank Haldemann further argues about the negative moral concepts of humiliation and injustice:

“ [...] This “realistic” approach to morality [...] is a powerful and relevant one, particularly in the context of reckoning with past wrongs. Indeed, one can specify the very notion of justice negatively, as primarily concerned with the eradication or minimization of intolerable (radical) social evils perpetrated on a massive scale. If we think of the most extreme and radical forms of evil – genocides, massacres, mass rape and death camps – as efforts to undermine the very idea of shared community (the foundation of morality itself), then it seems adequate to put negative phenomena at the start of our moral reflection. Without, this change in perspective, we might miss the “negative essence” of those nightmarish episodes from which transitional societies try to recover.”²⁹³

Therefore, for Haldemann the need to “focus on negative morality and gaining a deeper understanding of the positive notions of dignity, integrity and respect, in order to be able to avoid distorted moral priorities”²⁹⁴ presents one of the key roles of international criminal law.

²⁹⁰ Axel Honneth, Recognition and Justice: *Outline of a Plural Theory of Justice*, Acta Sociologica Vol. 47(4), 2004, pg. 354

²⁹¹ Imola Soros, Critical Perspectives on Human Rights Essay, CEU (2011) at 8

²⁹² Axel Honneth, Recognition and Justice: *Outline of a Plural Theory of Justice*, Acta Sociologica Vol. 47(4), 2004, pg. 354, emphasis added

²⁹³ Frank Haldemann, *Another Kind of Justice: Transitional Justice as Recognition*, 41 Cornell Int’l L.J., 2008, pg. 690

²⁹⁴ Ibidem, pg. 690

To sum up, it is the ‘human need for relations of mutual recognition’ that fuels victims’ struggles for acknowledgment, since “one cannot realize himself in isolation – only by mutual interaction (recognition) can one get a real sense who he/she really is.”²⁹⁵ It is the aim of this thesis, to draw some conclusions and provide some recommendations in the light of the presented alternative theory of recognition. Thus, it is suggested that international criminal law treat gender-related issues in a direction to eradicate feelings of disrespect. Building on Honneth’s marking “the recognition of human dignity as a central principle of justice”²⁹⁶ it can be concluded that “the victim’s need for recognition, as equal bearers of legal rights, is a more fundamental, inner wish.”²⁹⁷

4.2 Recommendations

All in all, one may conclude without doubt that international gender-based prosecutions came a long way. With the ad hoc Tribunals starting from scratch, through an expansive era of proactive judicial approach towards gender-related prosecutions, to the kick off of the International Criminal Court, trials involving gender crimes represent one of the most flourishing areas of international criminal justice. Only a few decades ago, the fact that the crime of ‘rape’ today represents a serious international crime would have been totally unconceivable. Nevertheless, today it is reality, backed with dozens of legal precedent drawn from the work of international criminal *fora*.

Most of the existing gender-related jurisprudence came about due to the immense diligence and devotion of the *ad hoc Tribunal’s* initial Prosecution and judiciary. In respect to

²⁹⁵ Imola Soros, Critical Perspectives on Human Rights Essay, CEU (2011) at 7

²⁹⁶ Frank Haldemann, *Another Kind of Justice: Transitional Justice as Recognition*, 41 Cornell Int’l L.J., 2008,, at pg. 352

²⁹⁷ Imola Soros, Critical Perspectives on Human Rights Essay, CEU (2011) at 11

the ICC, it is for the future to see what stand will it adopt towards gender crimes in its first judgments. Nevertheless, it must be pointed out that these criminal courts are certainly not end for themselves, therefore should embrace a more sensible path towards ‘ending impunity’ of gender assaults: a path embedded with criticism and progress.

In this vein, it is certainly true that the Rome Statute’s provisions pertinent to the crime of ‘rape’ and other specific gender crimes are a huge step forward,²⁹⁸ particularly if one considers that beforehand even less provisions of the *ad hoc* Tribunal’s Statute had been dedicated to ‘rape’.²⁹⁹ Today on the contrary, a whole range of gender-related crimes found its way into the text of the Rome Statute both under ‘crimes against humanity’ and ‘war crimes.’ Therefore, it is anxiously anticipated what advancements the ICC will pursue.

While it is clear that the two UN tribunals sometimes just lacked the statutory basis for charging crimes, it is hoped that the ICC will not follow such practice in respect of being equipped with a rather comprehensive apparatus (in terms of subject matter jurisdiction) for the successful prosecution of gender crimes. Notwithstanding the practice of the *ad hoc* Tribunals, the ICC will hopefully push for specific gender-related charges in cases where heinous gender assault had been committed, without downplaying the importance of prosecution for those counts. Therefore, it is certainly one of the most important recommendations of this thesis to aspire for gender specific charging without watering down the significance of gender and sex crimes in international criminal justice.

What more, futuristic aspirations of having a specific category of crimes against gender might become reality in the future, in case the newly emerging jurisprudence of the ICC creates a push for singling out gender-related crimes into a distinct group of crimes - due

²⁹⁸ Articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi) of the Rome Statute

²⁹⁹ Article 3(g) and 4(e) of the ICTR Statute, Article 5(g) of the ICTY Statute

to the fact that they involve violence to amplify totalitarian biocontrol over society by using gender-based prejudice for these ends.

Moreover, speaking more specifically about the definition of ‘gender’ as such within the Rome Statute, the author’s feelings get less enthusiastic about it. The wording of Article 7(3), as argued before in Chapter 3, in a way obscures the concept of ‘gender’. It is restrictive, in multiple ways. As argued before, it disregards the notion that ‘gender’ is a social construct of roles and values, commonly ascribed to men and women as either ‘male’ or ‘female’ roles. The wording of Article 7(3) simply prevents taking into consideration of such manner since it defines gender as “the two sexes, male and female, within the context of society.” Such definition has several flaws, including the disrespect towards ‘gender’ being socially constructed in each and every society for distinctively. Secondly, the Court might get circumscribed by the phrase of ‘within the context of society,’ which may not allow for the examination of some determinants related to the notion how the respective society builds up its own gender roles. Finally, the present definition of ‘gender’ paralyzes the Court to pursue prosecutions in cases where crimes motivated by sexual orientation would be at stake. The current wording of Article 7(3) ties back the ICC’s hands since its language suggest a strict exclusion of the LGBT population – the equation of the notions of ‘gender and sex’, where ‘gender’ is actually understood as the male and female biological sexes certainly is a unhelpful, discriminatory and badly designed framework to operate within. Such heteronormativity represents a huge flaw, since totalitarian practices and persecutions against sexual minorities unfortunately became more and more common place in some jurisdictions.

In this vein, it would be important to recommend a more square focus on the meaning of the term ‘gender,’ in order to avoid obscuring the concept in the future. This probably could be done by resorting to the meanings and understandings of ‘gender’ in

international law or international refugee law³⁰⁰ which recognize ‘gender’ to stand for the socially constructed roles of men and women distributed by taking into consideration their biological sexes.

On the other hand, it could be concluded that legal recognition of the concept of ‘gender’ is somewhere half way through. There is a sufficient legal basis for pursuing gender trials paired with a genuine willingness on the behalf of the ICC’s Prosecution, however cardinal deficiencies (such as Article 7(3) for instance) might render gender-based trials meaningless for the victims of these crimes unless the judiciary gives an appropriate interpretation of this term.

Moving on to recommendations pertinent to legal and social recognition of gender victims, it should be pointed out that the above suggested framing device holds a strong promise for international criminal tribunals and their gender-sensitive jurisprudence to become an impetus for a wider societal remorse resulting in a meaningful societal recognition as well. Thus, international trials should prepare a platform for further avenues of societal healing and reconstruction, through dialogue and with the help of other restorative transitional mechanisms (e.g. truth and reconciliation commissions, reparations, apologies, etc.).

Nevertheless, there is a genuine need for further research in regard to means which might be the most effective for allowing the judiciary to become an initiator for feeling of shame and apology among a wider societal network. It would definitely exceed the boundaries of this work to engage in elaborating the operative modalities on how such a desirable end might be achieved to maximize the legal opportunities offered by international trials to promote a holistic societal healing through the jurisprudence of international trials.

³⁰⁰ See e.g. the *Report of the Expert Group Meeting on the Development of the Guidelines for the Integration of Gender Perspectives into UN Human Rights Activities and Programs*, UN Doc. E/CN.4/1996/105 (1995) or the *Guidelines on the International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, UN High Commissioner for Refugees, UN Doc. HCR/GIP/02/01 (2002)

Nevertheless, some of the suggestions could encompass the possibilities of upgrading and sophisticating the language of international judgments in order to explicate the character of bystanders during war operations³⁰¹ in a way which would encourage the society to take part in a societal reconciliation with the members of the former enemy group.

Finally, led by the *summum ius summa iniuria strict*³⁰² logic, the greatest scrutiny in the enforcement of international penal law might result in the greatest injustice for victims if their voices still remain unheard after the trials are concluded. This is why it is suggested that a victim oriented recognition coming from the former adversary society would reasonably reduce sentiments of unrecognition on behalf of the victims, thus lessening the disconnect and the abstractness of international trials, and allowing for a rational utilization of the potential that international criminal justice possesses.

CONCLUSION

The current thesis explored the underlying deficiencies of gender-based prosecution on an international level. Due to the fact that gender-based prosecutions represent an emerging category, it had been assumed that there are certain flaws which deserve in-depth research. This work is the result of such attempts. It seeks to explore the concept of ‘gender’ within the contemporary body of international criminal law.

³⁰¹ See e.g. the *Prosecutor v. Simic et. al.* (IT-95-9/2) where the Court made a detour to frame the role of the so-called bystanders and the notion of their responsibility. Available at http://www.icty.org/case/milan_simic/4 [last accessed 26th November 2011]

³⁰² The proverb means that spells out that the utmost enforcement of law leads to the greatest injustice, or that it is quite seldom that extreme right can be administered without the danger of doing injustice.

Considering wartime sex-crimes prosecutions in the light of present substantive and procedural safeguards, most of my research questions developed from a genuine concern about the (in)adequacy and (in)sufficiency of provisions for covering serious gender-based atrocities which they really ought to be targeting. Secondly, the definition of ‘gender’ within the Rome Statute presented a challenge for itself to be uncovered.

The research, ultimately, seeks to elucidate a more sensible approach towards dealing with serious sexual violence within the sphere of international criminal justice. In order to purport these claims, the study shall present the possibilities and limitations of the ICTY’s, ICTR’s and ICC’s jurisprudence, therefore testing the suitability of the existing legislative structures for achieving a maximum protection for the actual victims of these crimes.

Firstly, Chapter One served with theoretical underpinnings for understanding what the concept of gender means and what do gender-based atrocities entail to. It is highlighted why do gender-crimes play out in a particularly egregious way and what could international law do for remedying these crimes. Due to the collective feature of mass crimes against gender, the Second Chapter tried shed some light on the nature of mass atrocities, particularly in respect to the distinct ‘gender’ element in these crimes. Further on, it also the aim of Chapter Two to draw attention to the acknowledgment of bystanders and wider societal responsibility for gender-related mass crimes, however it does so only in order to suggest the need for future research in this area which. Chapter Three, then proceeded to compare the possibilities and limitations of the ICTY’s, ICTR’s and ICC’s jurisprudence, and critically asses the advantages and shortcoming of the definition of ‘gender’ given in Article 7(3) of the Rome Statute. While Chapter Four, thickening Axel Honneth’s theory of recognition, offered a framework for conceptualizing legal and societal strands of victim recognition by a wider society. Therefore, the chapter echoes calls for international criminal law to become means for advancing societal healing in post-conflict societies by utilizing its capacities to amplify

the wording of international judgments in order to clarify the role of bystanders of mass assaults that included totalitarian regimes taking use of prejudice based on gender to control societies.

To sum up, the advancements of the groundbreaking decisions of the *ad hoc* Tribunals may not be overseen in any case for sure, nevertheless the definition of ‘gender’ included into the Rome Statute presents a missed opportunity to reconceptualize the boundaries and meaning of the term. It is also contested that the current international criminal regime did not fully use its potential to become a significant aggregate in promoting and rethinking of the concept of ‘gender’ in international criminal law, therefore hindering the societal reconstruction for victimized communities affected by gender crimes. In this light, would it be advisable that the International Criminal Court took a firm stand and embarked on a journey of interpreting the concept of ‘gender’ in a way which could open avenues of principal changes in regard to the recognition of wartime gender victims. Accordingly, I would like to conclude my work with Cherif Bassiouni’s insightful words noting that “there is nothing inherently incompatible between politically oriented goals and the achievement of the higher value of justice for the purpose of advancing the common good and, in particular cases, advancing goals pertaining to other positive outcomes, such as peace and reconciliation.”³⁰³

³⁰³ Cherif Bassiouni, Perspectives on International Criminal justice, 50 Virginia Journal of International Law (2010), at pg. 293

BIBLIOGRAPHY

BOOKS

AMY GUTMANN (ed.), *The Politics of Recognition* (Princeton University Press, 1992)

ANNE-MARIE L.M. DE BROUWER, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia. 2005).

ANTHONY AUST, *Modern Treaty Law and Practice* (Cambridge University Press. 2000)

ANTONIO CASSESE, *International Criminal Law* (Oxford University Press. 2003).

ANTONIO CASSESE, PAOLA GAETA & JOHN JONES, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP. 2002);

AXEL HONNETH, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (MIT Press: Cambridge, Massachusetts, 1995)

AZRA ZAHIC-KAURIN, *Muslim Women in Mass Rape: The War against Women in Bosnia-Herzegovina*, Stiglmyer ed. 1994, (University of Nebraska Press, Lincoln and London, 1994)

CLAIR DE THAN & EDWIN SHORTS, *International Criminal Law and Human Rights* (Sweet & Maxwell. 2003).

CHRISTINE CHINKIN, *Gender Related Violence and International Criminal Law and Justice* in The Oxford Companion to International Criminal Justice (Antonio Cassese ed., 2009).

GALINA NELAEVA, *Prosecution of Rape and Sexual Assaults as International Crimes.Explaining Variation* (CEU.2007.)

GEORGE P. FLETCHER, *The American Grammar of Criminal Law: American, Comparative, and International; Volume One: Foundations* (Oxford University Press. 2007).

GIDEON BOAS & WILLIAM A.SCHABAS, *International Criminal Law Development in the Case Law of the ICTY* (ed.), (Martinus Nijhoff Publishers, Leiden/Boston. 2003)

GIORGIO AGAMBEN, *Homo Sacer: Sovereign Power and Bare Life*. (Stanford: Stanford University Press, 1998.)

HILARY CHARLESWORTH & CHRISTINE CHINKIN, *The Boundaries of International Law – A Feminist Analysis* (Juris Publishing Inc. 2000).

HANNAH ARENDT, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich. 1973).

HANNAH ARENDT, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books. 1994).

HANNAH ARENDT, *The Human Condition* (Chicago: University of Chicago Press, 1958)

IMMANUEL KANT, *Religion Within the Limits of Reason Alone* (New York: Harper & Brothers, 1960)

JOEL FEINBERG, *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press, 1980)

JONATHAN DOAK, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing. 2008).

KELLY DAWN ASKIN, *Women's Issues in International Criminal Law: Recent Developments and Potential Contribution of the ICC in International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Dinah Shelton ed., 1997)

KARL JASPERS, *The Question of German Guilt*, (Fordham University Press. 2001)
(1974)

KOHLER & SANER (eds.), *Hannah Arendt; Karl Jasper: Correspondence 1926-1969*,
(New York: Harcourt Brace Jovanovich, 1992)

KNUT DÖRMANN, *Elements of War Crimes under the Rome Statute of the International
Criminal Court* (Cambridge: Cambridge University Press. 2003)

MICHEL FOUCAULT, *The History of Sexuality. Volume I: An Introduction* (Vintage
Books. 1990).

MICHELLE JARVIS, *An Emerging Gender Perspective on International Crimes in
International Criminal Law Developments in the Case Law of the ICTY* (Gideon Boas &
William A.Schabas, eds., 2003).

MARK A.DRUMBL, *Atrocity, Punishment and International Law* (Cambridge University
Press. 2007).

MARK OSIEL, *Making Sense of Mass Atrocity* (Cambridge University Press.2009)

NANCY FRASER & AXEL HONNETH, *Redistribution or Recognition? A Political-
Philosophical Exchange* (Verso: London, new York, 2003)

ROBERT CRYER et al., *An Introduction to International Criminal Law and Procedure*
(Cambridge University Press. 2010).

STANLEY MILGRAM, *Obedience to Authority: An Experimental View* (1974)

SUSAN BROWNMILLER, *Against Our Will: Men, Women and Rape* (New York: Fawcett
Columbine, 1975.)

SUSAN BROWNMILLER, *Making Female Bodies a Battlefield in Mass Rape: The War against Women in Bosnia-Herzegovina*, Stiglmyer ed. 1994, (University of Nebraska Press, Lincoln and London, 1994)

WILLIAM SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press. 2010.);

ARTICLES AND PERIODICAL MATERIALS

AXEL HONNET, Recognition and Justice: *Outline of a Plural Theory of Justice*, Acta Sociologica Vol. 47(4), 2004

BOON K., Rape and Forced Pregnancy under the ICC Statute, Human Dignity, Autonomy and Consent, 32 Columbia Human Rights Law Review (2001)

BROOK SARI MOSHAN, *Women, war, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity*, 22 Fordham University Law Journal 154 (1998).

CHERIF BASSIOUNI, Perspectives on International Criminal justice, 50 Virginia Journal of International Law (2010)

CHRISTIN B. COAN, *Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia*, 26 North Carolina Journal of International Law and Commercial regulation 183 (2000).

DAVID LUBAN, *Theories of Crimes Against Humanity*, 29 Yale J. Int'l L. 85 (2004)

FIONNUALA NI AOLAIN, *Women, Security, and the Patriarchy of Internationalized Transitional Justice*, 31 Human Rights Quarterly 1055 (2009).

FIONNUALA NI AOLAIN & MICHAEL HAMILTON, *Gender and the Rule of Law in Transitional Societies*, 18 Minnesota Journal of International Law 380 (2009).

FRANK HALDEMANN, *Another Kind of Justice: Transitional Justice as Recognition*, 41 Cornell International Law Journal 675 (2008).

GEORGE P. FLATCHER, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 Yale Law Journal 1499 (2002)

HILARY CHARLESWORTH, *Not Waiving But Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 Harvard Human Rights Journal 1 (2005)

HILARY CHARLESWORTH, *Feminist Methods in International Law*, 93 Am. J. Int'l. L. 379 (1999)

IMOLA SOROS, *Coping with the Past through International Criminal Justice: International Criminal Prosecutions and their Transitional Role* (CEU.2011.)

IMOLA SOROS, *Critical Perspectives on Human Rights Essay*, (CEU. 2011)

JAMES T. BUERTCHAELL, *Homo Sacer: Sovereign Power and Bare Life* by Giorgio Agamben, 62 The Review of Politics (2000), pp. 626

KATHERINE M. FRANKE, *Gendered Subjects of Transitional Justice*, 15 Columbia Journal of Gender and Law 813 (2006).

LAUREL E. FLETCHER, *From Difference to Engagement: Bystanders and International Criminal Justice*, 26 Michigan Journal of International Law 1013 (2005)

Laurel Fletcher & Harvey Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, Human Rights Quarterly, Volume 24, Number 3 (2002)

MADOKA FUTAMURA, *Individual and Collective Guilt: Post-War Japan and the Tokyo War Crimes Tribunal*, European Review, Vol.14/4 9 (2006)

MARIE BENEDICTE BEBOUR & EMILY HASLAM, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EJIL (2004)

MICHAEL FOUCAULT, “Society Must Be Defended”: Lectures at the College de France, 1975-1976, (New York: Picador, 2003)

MIRJAN DAMASKA, *What is the Point of International Criminal Justice?*, Chicago-Kent Law Review, Vol. 83:1 (2006)

SUSANA SACOUTO & KATHERINE CLEARY, *The Importance of Effective Investigations of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 American University Journal of Gender, Social Policy and the Law 337 (2009).

STUART J. MURRAY, *Thanatopolitics: Reading in Agamben a Rejoinder to Biopolitical Life*, Communication and Critical/Cultural Studies, Vol. 5, No. 2 (2008)

VALERIE OOSTERVELD, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 Harvard Human Rights Journal 55 (2005).

TABLE OF CASES

Nuremberg

Trial of the Major War Criminal Before the International Military Tribunal, Nuremberg, 14 November 1954 – 1 October 1946, Volume I, published in Nuremberg (1947) - Judgment

ICTY

1. *The Prosecutor v Anto Furundzija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998 (hereinafter Furundzija case)
2. *The Prosecutor v Dragoljub Kunarac*, Radomir Kovac and Zoran Vukovic, Judgment, Case No. IT-96-23 and IT-96-23/1, 22 February 2001 (hereinafter Kunarac et al. case)
3. *The Prosecutor v Galic*, Judgment, Case No. IT-98-28, 30 November 2006 (hereinafter the Galic case)
4. *Prosecutor v Jelisic*, Appeals Judgment, IT-95-10-A, (hereinafter Jelisic case)
5. *The Prosecutor v Krstic*, Judgment, Case No. IT-98-33, 2 August 2001 and IT-98-33-A Appeals Judgment, 19 April 2004 (hereinafter Krstic case)
6. *The Prosecutor v Milan Simic*, Sentencing Judgment, Case No. IT-95-9/2-S, 17 October 2002 (hereinafter Simic case)
7. *The Prosecutor v Mucic et. al. (Celebici case)*, Judgment, Case No. IT-96-21-T, 16 November 1998 and Appeals Judgment IT-96-21-A, 20 February 2001
8. *The Prosecutor v Nikolic*, Judgment, Case No. IT-94-2, 18 December 2003

ICTR

1. *The Prosecutor v Jean-Paul Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998 (hereinafter Akayesu case)
2. *The Prosecutor v Alfred Musema*, Judgment and Sentencing, Case No. ICTR-95-1B-T, 28 April 2005 (hereinafter Musema case)
3. *The Prosecutor v Eliezer Niyitegeka*, Judgment and Sentencing, Case No. ICTR-96-14-T, 16 May 2003 (hereinafter Niyitegeka case)
4. *The Prosecutor v Semanza*, Judgment, Case No. ICTR-97-20-T, 15 May 2003 (hereinafter Semanza case)

5. *The Prosecutor v Gacumbisi*, Case No. ICTR-01-64, Judgment, 17 Jun 2004 and Appeals Judgment 7 July 2006
6. *The Prosecutor v Kajelijeli*, Case No. ICTR-98-44A

ICC

1. *The Prosecutor v Jean Pierre Bemba-Gombo*, Decision on the confirmation of the charges, Case No. ICC-01/05-01/08 of 15 June 2009 (hereinafter Bemba-Gombo case)
2. *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, Case No. ICC-01/04-01/07 of 30 September 2008 (hereinafter Katanga case)
3. *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the confirmation of charges, No.: ICC-01/04-01/06, 29 January 2007 (hereinafter Lubanga case)
4. *The Prosecutor v Harun and Kushayb*, Case No. ICC-02/05-01/07, Arrest Warrant for Ahmad Harun and Arrest Warrant for Ali Kushayb of 27 April 2007
5. *The Prosecutor v Kony, Lukwiya, Odhiambo and Ongweny*, Case No. ICC-02/04-01/05, Arrest Warrant for Joseph Kony
6. *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11
7. *The Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10

INTERNATIONAL TREATIES

1. Rome Statute of the International Criminal Court, 218 U.N.T.S. 90; I.L.M. 1002 (1998)
2. ICC, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000)

3. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (International Tribunal for the Former Yugoslavia), Adopted by Security Council resolution 827 (1993) of 25 May 1993 , Amended by Security Council resolutions 1166 (1998) of 13 May 1998, 1329 (2000) of 30 November 2000, 1411 (2002) of 17 May 2002 and 1431 (2002) of 14 August 2002

4. Statute of the International Criminal Tribunal for the 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 Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, Adopted by Security Council resolution 955 (1994) of 8 November 1994, Amended by Security Council resolutions 1165 (1998) of 30 April 1998 , 1329 (2000) of 30 November 2000, 1411 (2002) of 17 May 2002 and 1431 (2002) of 14 August 2002

RESOLUTIONS

1. SC Resolution 955 (1994), S/RES/955, 8 November 1994,
2. SC Resolution 827 (1993), S/RES/827 adopted on 25 May 1993
3. Security Council Resolution 798, U.N. SCOR, 48th Session, U.N. Doc. S /INF/49 (1993)

NGO REPORTS

1. Human Rights Watch: Iran- Discrimination and Violence Against Sexual Minorities at <http://www.hrw.org/news/2010/12/15/iran-discrimination-and-violence-against-sexual-minorities> [last accessed on 21st November 2011]

2. Iran's crimes Against Humanity at http://www.advocate.com/Politics/Commentary/Irans_Crimes_Against_Humanity/ [last accessed on the 21st November 2011]
3. Human Rights Watch & Fédération Internationale Des Ligues Des Droits De L'Homme: *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath I* (1996), available at www.hrw.org/reports/1996/Rwanda.htm [last visited September 14th, 2011]
3. Joint letter from Avocats Sans Frontiers and Other Organizations to Mr Luis Moreno Okampo, Chief Prosecutor of the ICC, accessible at <http://www.hrw.org/en/news/2006/07/31/dr-congo-icc-charges-raise-concern> [last accessed 22.03.2011.]

Other documents

1. *The Nairobi Forward Looking Strategies for the Advancement of Women* (adopted at the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women (1985)
2. Report of the Fourth Work Conference on Women, Beijing (4-5 September 1995), *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONE177/20/REV.1, U.N. Sales No.96.IV.13 (1996)
3. Report of the Economic and Social Council (1997), U.N. GAOR, 52nd Session, Sess. Supp. No.3 at U.N. Doc A/53/3/Rev.1 (1997)
4. UN Commission of Experts' Final Report (S/1994/674) of 27.05.1994

5. Report of the Secretary General Pursuant to Paragraph 2 of Security Council Res. 808, U.N. Doc. S/25704 (1993)
6. Report of the Expert Group Meeting on the Development of the Guidelines for the Integration of Gender Perspectives into UN Human Rights Activities and Programs, UN Doc. E/CN.4/1996/105 (1995)
7. Guidelines on the International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, UN High Commissioner for Refugees, UN Doc. HCR/GIP/02/01 (2002)