

**POST CONFLICT PROSECUTION OF GENDER-BASED
VIOLENCE: A COMPARATIVE ANALYSIS OF THE
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR),
THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER
YUGOSLAVIA (ICTY) AND THE SPECIAL COURT FOR SIERRA
LEONE (SCSL)**

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DECLARATION

I, EMILY NYIVA KINAMA declare that the work presented in this dissertation is original. It has never been presented in any other university or institution. Where other people's works have been used, references have been duly provided. It is in this regard that I declare this work original. It is hereby submitted in partial fulfilment of the requirements for the award of the LLM Degree in International law.

Signed.....

Date.....

Supervisor: Prof Christo Botha

Signature.....

Date.....

DEDICATION

To my father Dr Josiah Kinama and my mother Mrs Esther Kinama for the sacrifices you have made the moral support and from whom I have learned the value of hard work and my brothers Mumo and Mutuma, thank you for the much needed support.

To the women who were victims of war and whose voices have never been heard.

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LIST OF ABBREVIATIONS

AP I	Additional Protocol I to the four Geneva Conventions
AP II	Additional Protocol II to the four Geneva Conventions
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
GBV	Gender-based Violence
GC IV	The four Geneva Conventions
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
OTP	Office of the Prosecutor
RHRC	Reproductive Health Response in Conflict
SCSL	Special Court for Sierra Leone
SGBV	Sexual gender-based violence
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund

ABSTRACT

Gender-based violence (GBV) has been used as a tool of instilling fear, hatred and persecution during conflict situations. It is a fact that GBV takes place pre-conflict situations. Moreover, conflicts and wars only accelerate the rate at which GBV is committed. In the 1990s and early 2000s, there was conflict in the Former Yugoslavia, Rwanda and Sierra Leone. These conflicts went down in history as conflicts where horrendous crimes were committed. As a result of the atrocities committed and the magnitude of victims, the international community with the assistance of the United Nations formed the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone.

These international tribunals were given the task of prosecuting the perpetrators of these crimes. Prior to the formation of these tribunals, the international community had experienced other wars whereby international tribunals were also formed to deal with the atrocities committed. However, this research only aims at comparatively analysing the ICTY, TCTR and the SCSL because these new tribunals were the first in experiencing the development of the prosecution of GBV. The former international tribunals did not effectively deal with gendered crimes therefore there was no precedent set in international law regarding the prosecutions of these crimes.

The conflicts that occurred in the Former Yugoslavia, Rwanda and Sierra Leone also saw the introduction of more brutal forms of GBV. These forms of GBV that developed forced the tribunals to change the way they prosecuted gender-based crimes because the nature and the magnitude at which the crimes were committed was massive. Forms of GBV that were earlier recognised such as rape and sexual violence were now being used as a means through which the perpetrators committed war crimes, crimes against humanity and genocide.

The comparative analysis between the ICTR, the ICTY and the SCSL also aims at showing how the different challenges and hurdles that these courts faced when prosecuting these crimes. The pitfalls that the tribunals experienced at the pre-trial phase are also investigated and critically analysed with the aim of drawing lessons about mistakes that should not be repeated in newer international tribunals. A comparative analysis will also be done on the different precedents that were set by the cases that were heard in these tribunals with the aim of showing how these tribunals have indeed contributed to the development of the prosecution of these types of crimes.

Finally, recommendations will be made regarding how future international tribunals better deal with these crimes. The research paper also aims at creating awareness that these types of crimes must be treated differently and with caution because the effects that the victims suffer from last way after the conflicts and trials are over. Lessons must be carried from past prosecutions in order to correct and better improve the way in which the prosecutions are carried out and also the way in which the different victims are treated even after the prosecutions have been completed.



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CHAPTER 1: RESEARCH PROPOSAL

1.1 Introduction

This research aims to evaluate the developments that have occurred through history of how gender-based violence (GBV) has been prosecuted in international tribunals. In order to do this analysis, a comparison will be given between the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL). This study strictly analyses GBV that has taken place in war and conflict situations. Since time immemorial, GBV has been considered a part of war and conflict. However, when it comes to the perpetrators of international crimes being prosecuted or tried in various tribunals and courts, GBV has not been accorded the same treatment with other crimes.

Several factors can be attributed to this notion. One major factor is that GBV has been associated with crimes committed against women. For most of the male adjudicators and judges, dealing with sensitive issues such as sexual violence and rape against women, was not a matter that could be discussed in public.¹ This not only hindered the development of the prosecution of these crimes but also left the victims voiceless and helpless.

1.2. Historical background

GBV especially that directed towards women has been taking place for hundreds if not thousands of years. Roman mythology has illustrated the rape of Sabine women during war and in Biblical times when war occurred women were captured by the enemy and referred to as the 'spoils of war'.² It clearly showed

¹ Kennedy-Pipe & Stanley (2001) 68 as quoted in Booth (ed) *The Kosovo tragedy: the human rights dimension*.

² As above

that the representation of women as objects was similar to that representation women were given legally as being property.³ This objectification did not stop here. Later in 1746 during the Battle of Culloden, Scottish women were raped by the English.⁴ However, it was not until the First World War where these stories of GBV, especially rape became documented consistently.⁵ Nevertheless, due to reasons such as politics for example Belgium and France seeking sympathy for their war aims, these crimes of sexual violence were not accurately documented and it was stated that official sources also distorted some accounts of rape given by the victims.⁶ After World War II, there were two major tribunals that dealt with the crimes that took place; the International Military Tribunal for the Far East (Tokyo tribunal) and the International Tribunal for Nuremberg (Nuremberg tribunal).

The Nuremberg tribunal dealt with the crimes that occurred in Europe during World War II including the Holocaust. Its aim was to carry out trials against those who committed atrocities against others. These atrocities were considered to be of such a nature as to disturb the international peace and security of other nations. The international crimes included crimes such as genocide. In his opening address to the tribunal, Judge Robert Jackson stated the following:

“ there was a need to address crimes that were so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.”⁷

Even though there was widespread sexual violence against women during World War II, the Nuremberg Trial’s Charter did not have express reference to crimes of

³ (n 1 above).

⁴ Booth (ed) *The Kosovo tragedy: The human rights dimensions* (2001) 69.

⁵ As above.

⁶ As above.

⁷ Gardam & Jarvis (2001) 204.

sexual violence; therefore these crimes were not given much consideration.⁸ The Tokyo Charter was similar to the Nuremberg Charter when it came to referring to crimes of sexual violence. However, unlike the Nuremberg trials, rape was charged in the Tokyo indictments but the approach used in these trials was that rape and other forms of sexual violence were used to support charges of crimes against humanity.⁹

In 1990, after the invasion of Kuwait by Iraq there were also reports of sexual violence said to have occurred. The 1990s also saw the inception of two new tribunals developed as a result of war and armed conflict that took place in the Former Yugoslavia and Rwanda. The UN Security Council¹⁰ passed two resolutions in order to form the ICTY and the ICTR to deal with the atrocities that occurred.¹¹ In the ICTY, the Office of the Prosecutor saw the need to prosecute sexual violence.¹² However, during the first trial, these crimes were not mentioned in the indictments and only after uproar from civil society did the prosecutor include rape and sexual violence to the indictments.¹³ Notably, the court made history by being the first court to hear testimony regarding rape during wartime at an international level.¹⁴

⁸ Gardam et al (n 7 above) 205.

⁹ Gardam et al (n 7 above) 207.

¹⁰ Article 24 states that 'the UN Security Council has primary responsibility for the maintenance and the restoration of international peace and security.....'

¹¹ At <<http://www.icty.org/sections/AbouttheICTY>> (accessed on 20th May 2010) it is stated that the ICTY was founded by the UN Security Council on 25 May 1993 by Resolution 827 and at <<http://liveunictr.altmansolutions.com/Legal/SecurityCouncilResolutions/tabid/93/Default.aspx>> (accessed on 20th May 2010) states that the ICTR was founded by the UN Security Council on 8 November 1994 by Resolution 955.

¹² Gardam et al (n 7 above) 210.

¹³ *Prosecutor v Nikolic*, Indictment, Case IT-94-2.

¹⁴ *Prosecutor v Tadic*, Case IT-94-1-T.

The other international tribunal that will be discussed is the SCSL. The SCSL is a hybrid court that was founded with the help of the Sierra Leonean government and the United Nations to deal with the crimes that were committed during Sierra Leone's eleven year civil war.¹⁵ It is different from the ICTY and the ICTR due to the fact that the latter courts are internationalised courts. The ICTY and ICTR are internationalized courts because firstly, the judges are appointed from all over the world. Secondly, national rules and laws do not bind the tribunals and also the detention facilities are international in nature. Lastly the host state does not control or supervise the detention of the defendants.¹⁶ The SCSL is a hybrid court as it uses both the national law of Sierra Leone and international law as binding law in the court and the judges of the court are appointed by both the government and the United Nations.¹⁷ The other difference between the SCSL, the ICTR and the ICTY is that the scope of those being prosecuted for crimes committed in the conflict is wider in the latter courts than in the SCSL. The SCSL has the powers to prosecute 'persons most responsible for serious violations of international humanitarian law and Sierra Leonean law'¹⁸ whereas the ICTR and the ICTY has the powers to prosecute 'persons responsible' for the crimes committed.¹⁹

¹⁵ According to the preamble of the Statute for the Special court of Sierra Leone, the court was established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000. See also at < <http://www.scsl.org/MOREINFO/tabid/75/Default.aspx>> (accessed on the 20th May 2010).

¹⁶ United Nations General Assembly Security Council, 29th August 1994, the 49th Session: 'Report of the prosecution of persons responsible for the violations of International humanitarian law committed in the territory of the former Yugoslavia since 1994' par 10.

¹⁷ Article 1 and 2, of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone. See also at < <http://www.scsl.org/DOCUMENTS/tabid/176/Default.aspx>> (accessed on the 20th May 2010).

¹⁸ Article 1 of the Statute of the Special Court of Sierra Leone.

¹⁹ Article 1 of the Statutes of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

In both the ICTR and ICTY statute, there is express recognition of the crime of rape and article 4 of the former statute refers to some types of sexual violence. The *Akayesu*²⁰ case was of most importance in the prosecution of GBV. At first the case had some problems because the original indictment did not contain the charge of sexual violence. However, after this charge was rectified, the case gave a landmark decision in the prosecution of GBV because rape was considered a crime against humanity and a form of genocide. With regard to the SCSL, the court looked into GBV and the forms of GBV that were prevalent and unique to the civil war. Here the court dealt with the charges of forced marriage and sexual slavery.²¹ This was the first decision held in an international tribunal where forced marriage was held to be a crime against humanity.²²

1.3. Statement of the problem

It is evident that GBV is one of the many consequences that arise as a result of conflict. Effective prosecution of this crime at an international level would be a means through which the victims of these crimes receive justice. The ICTY, ICTR and the SCSL have dealt with this issue in their own unique way. However, this is not to say that the prosecution has taken place effectively. This study will aim at critically analysing how the prosecution has been carried out and the pros and cons of the process. The main reason for this analysis is to evaluate whether or not these international tribunals have effectively prosecuted crimes of GBV as international crimes and also to see whether there are lessons to be learned from the cases that have already been carried out with an aim of contributing to the development of the prosecution of GBV crimes.

²⁰ *Prosecutor v Akayesu*, Case ICTR-96-4-T.

²¹ *Prosecutor v. Brima, Kamara and Kanu* SCSL-04-16-T.

²² (n 17 above).

1.4. Objectives of the study

The objectives of this study are to; firstly, give a broad description of the various ways and forms in which GBV takes place during armed conflicts. Secondly, to critically analyse how developments with regards to the prosecution GBV after conflicts have taken place. Thirdly to evaluate whether international law adequately provides for the protection of both men and especially women who have been victims of GBV in armed conflicts. Fourthly, to analyse case law that has arisen in the ICTY, ICTR and the SCSL. Fifthly, to evaluate ways in which the tribunals deal with the victims of these crimes both during and after the prosecutions have occurred, especially the ways in which they have been compensated and supported. Finally to identify the positive and negative aspects of the lessons from the above mentioned prosecutions in order to ensure that upcoming and current international tribunals and courts such as the Special Chambers of Cambodia and the International Criminal Court (ICC) can use to effectively deal with such crimes.

1.5. Research questions

- i. Has GBV been effectively prosecuted in the ICTY, ICTR and the SCSL?
- ii. Is international law, specifically international humanitarian law, adequately and expressly protecting the victims of GBV during and after conflict situations?
- iii. What can current international tribunals learn from the case law of previous international tribunals?
- iv. What are the ways through which international law can provide for the protection of victims and witnesses of these crimes even after prosecution has taken place with the aim of making their lives simpler?

1.6. Scope of study

This research will deal with the various forms of GBV according to the way they were committed and reported in the Former Yugoslavia, Rwanda and in Sierra Leone. The reason for this is that each of the conflicts dealt with different forms of GBV and therefore the prosecution of these crimes differed between each tribunal. It must be noted that when GBV is mentioned, it generally refers to violence committed against both males and females. This research will however specifically deal with violence against women. This study will also strictly be limited to the ICTY, ICTR and the SCSL. The International Criminal Court (ICC) will only be mentioned briefly but not discussed in depth. This dissertation will only deal with sexual and physical violence that occurs during conflict.

1.7. Methodology

Due to the fact that the research will be done wholly in South Africa, the desktop method of research will be applied. The research will rely mostly on books, journal articles, country reports and internet websites that are well recognised in the international law field. No field study will be carried out.

1.8. Synopsis of Chapters

The first chapter is the research proposal and it includes the introduction, a historical and current background study and finally the justification for carrying out the study. The second chapter deals with the definition of GBV, the classifications of the different crimes or the different forms of GBV, the reasons why the perpetrator commits such crimes, the types of conflicts according to IHL and what conflict will be dealt with and finally the history and examples of GBV in conflict situations. The third chapter deals with the legal framework in international law dealing with GBV in conflict situations. This chapter will also examine how international law has and is developing with regards to dealing with

the issue of GBV in conflict situations. The fourth chapter deals with the legal developments in the prosecution of GBV in ICTY, ICTR and the SCSL, the different forms of GBV in relation to the different conflicts in each of the tribunals and the court and finally and most importantly a critical analysis of the various important case law in each of the courts dealing with GBV. The final chapter, chapter 5, will deal wholly with recommendations. The lessons, both positive and negative that have been identified with regards to the protection and compensation of victims after prosecution will be discussed and recommendations will be given as to how improvements can be made in this field of law.

CHAPTER 2: CONCEPTUAL FRAMEWORK

2.1 Introduction

As indicated in chapter 1, this chapter will discuss the conceptual framework with regards to how GBV is defined and treated in international law. This is because the main aim of this research is to outline how GBV has been prosecuted after conflict situations and this entails defining and understanding how GBV is defined and used at the international level. This chapter will also define and discuss the various types of armed conflicts and what the conflicts in Rwanda, the Former Yugoslavia and Sierra Leone can be classified as. International Humanitarian Law (IHL) provides that the different types of armed conflicts are regulated by different international law treaties. The difference in the types of international treaties being applied to the different types of conflicts means that the international crimes are defined and prohibited in unique ways depending on what the provisions of the specific treaty are.

2.2 Definitions

2.2.1 Definition of Gender

Gender is defined as;

“The state of being male or female (typically used with reference to social and cultural differences rather than biological ones).”²³

Different factors contribute to the social characteristics attached to both the male and the female gender.²⁴ These factors are; nationality, religion, age, ethnicity

²³ Definition according to the S. Wehmeier (ed) *Oxford Advanced Learner's Dictionary of Current English*, (2001) 492. Also see A. El Jack who states that ‘gender’ refers to the perceptions of appropriate behaviour, appearance and attitude for women and men that arise from social and cultural expectations available at <<http://www.ids.ac.uk/bridge/>> (accessed on 29th March 2010).

and social origin.²⁵ During conflicts a new form of warfare developed whereby women, girls, men and boys were targeted systematically because of their societal roles and their cultures.²⁶ This shows that GBV during conflict situations does not only affect males but it also affects women too. However, as mentioned earlier, this research will only deal with GBV against women.

It must be borne in mind that gender inequalities have existed during pre-conflict situations. However, it is important to note that armed conflict accelerates the gender inequalities that exist prior to the conflict erupting and this exerts a strain on gender relations.²⁷ Though gender inequalities exist between men and women, both parties are affected negatively during armed conflicts. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)²⁸ committee states that GBV occurs when violence is directed against a person on the basis of his or her sex or gender. However, there is not yet consensus amongst international organisations on what constitutes GBV.

The United Nations High Commissioner for Refugees (UNHCR) for example, uses the phrasing 'sexual and gender based violence'.²⁹ In the UNHCR guidelines it is stated that the term sexual and gender based violence is used

²⁴ The UNHCR 'Guidelines for prevention and response: Sexual and gender based violence against refugees, returnees and internally displaced persons' (2003) 12, available at <<http://www.unicef.org/violencestudy/pdf/UNHCR%20-%20SGBV.pdf>> (accessed on 25th March 2010).

²⁵ As above.

²⁶ D. Mazurana & S. Mc Kay (eds) *Women and Peace Building* (2005) 2.

²⁷ A. El Jack (n 23 above).

²⁸ Herein after referred to as CEDAW. It was adopted in 1979.

²⁹ J. Ward 'Gender based violence among conflict-affected populations' in H. Durham & T. Gurd (eds) *Listening to the silences: women and war* (2005) 68. Also see the 'UNHCR Guidelines for prevention and response: Sexual and gender based violence against refugees, returnees and internally displaced persons' (2003) 18, available at <<http://www.unicef.org/violencestudy/pdf/UNHCR%20-%20SGBV.pdf>> (accessed on 25th March 2010).

because the United Nations recognizes that “although most of the victims are women or children, it must also noted that men or boys are also victims of sexual and gender-based violence.”³⁰

2.2.2 Definition of Violence

Violence is a means of control and oppression that can include emotional, social or economic force, coercion or pressure as well as physical harm.³¹ Since the aim of this paper is to concentrate on GBV directed against women, the definition of violence against women must be given. In 1993, the United Nations offered the first official definition of violence against women in the Declaration on the Elimination of Violence against Women.³² It defines violence against women as:

“Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or private life.”³³

The General Assembly also stated that it recognizes that:

“Violence against women is a manifestation of historically unequal power relations between women by men and to the prevention of the full advancement of women is one of the crucial mechanisms by which women are forced into a subordinate position compared with men.”³⁴

³⁰ (n 24 above) 10.

³¹ (n 24 above).

³² General Assembly resolution 48/104 of 20 December 1993, available at <<http://www.un.org/documents/ga/res/48/a48r104.htm>> (accessed on 2nd April 2010).

³³ Article 1, available at <<http://www.un.org/documents/ga/res/48/a48r104.htm>> (accessed on 2nd April 2010).

³⁴ ‘United Nations Declaration on the Elimination of Violence against Women A/RES/48/104 of 23 February 1994’, available at

2.2.3 Definition of gender-based violence

GBV has been described as the umbrella term for,

“Any harmful act that is perpetrated against a person’s will and that is based on socially ascribed gender differences between males and females.”³⁵

The guidelines of the Reproductive Health Response in Conflict (RHRC) Consortium further states that by using the term GBV, one has to consider the practical implications of this term. When viewed theoretically, the term not only examines the societal and relational aspects in which GBV occurs against women and girls but it also supports the inclusion of men and boys in order to reduce this violence.³⁶ GBV is linked to how society today views the position of women as compared to men; that is the unequal powers, and although men are also affected when it comes to GBV, they are also the most common perpetrators of violence against women and girls in the family and in the

<[http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.res.48.104.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.res.48.104.en)> (accessed on 2nd April 2010).

³⁵ ‘Guidelines for gender-based violence interventions in humanitarian settings’ (2005) 7, available at <<http://www.humanitarianinfo.org/iasc/publications/asp>> (accessed on 1st March 2010). Also see K. Barnes, P. Altrecht & M. Olson ‘Addressing gender based violence in Sierra Leone: Mapping challenges, response and future entry points’ (2007) 8 that states that gender based violence refers to ‘the violence that targets individuals or groups of individuals on the basis of their particular gender,’ available at

<http://www.international-alert.org/pdf/Addressing_Gender-based_Violence_in_Sierra_L.pdf>

(accessed on 10th March 2010).

³⁶ J. Ward *If not now, when? Addressing gender-based violence in refugee, internally displaced, and post-conflict settings* (2002) 69. See also K. Barnes, P. Albrecht & M Olson ‘Addressing gender based violence in Sierra Leone: Mapping challenges, response and future entry points’ (2007) 8-9, available at

<http://www.international-alert.org/pdf/Addressing_Gender-based_Violence_in_Sierra_L.pdf>

(accessed on 10th March 2010).

community in general.³⁷ GBV against men and boys comes in the form of forced recruitment into fighting and diamond mining as was in the case of the Sierra Leonean conflict situation.³⁸ These examples do not rule out the fact that men have also faced sexual violence during armed conflict. However, research of male victims remains a big problem and an obstacle when dealing with GBV that affects the male gender.³⁹

2.3 Forms of gender- based violence

Clark states that when dealing with GBV ‘the parameters of gender-based violence are more clearly defined for women and usually against women.’⁴⁰

CEDAW states that GBV is a form of discrimination. An example will be that during armed conflict rarely do the men suffer as ‘forced wives’. The amount of work and the type of work when women and girls are forced into the marriages and the aggression faced is often directed towards those of the female gender because of their lack of physical strength to defend themselves and the social stereotypes of what women should be doing in the community.

The United Nations High Commissioner on Refugees (UNHCR) in its guidelines has classified GBV into five categories as follows⁴¹:

- i. Sexual violence

³⁷V. Oosterveld ‘Lessons from the Special Court of Sierra Leone’ 17 *American University Journals on Gender Social Policy and the Law* 407.

³⁸As above.

³⁹ C. Clark ‘Working Paper #17: Gender Based violence research initiatives in refugee, internally displaced and post conflict settings: Lessons learned’ (2003) 6, available at <http://web.mit.edu/cis/www/migration/pubs/rrwp/17_lessons.pdf > (accessed 28th February 2010).

⁴⁰ As above.

⁴¹ ‘UNHCR Guidelines for prevention and response: Sexual and gender based violence against refugees, returnees and internally displaced persons’ 12, available at <http://www.unhcr.org> (accessed on 8th March 2010).

- ii. Physical violence
- iii. Emotional and psychological violence
- iv. Harmful and traditional practices
- v. Socio economic violence.

This categorisation of the different ways in which GBV occurs is broad. In recent developments in international criminal law, the definitions of the different forms of GBV that are international crimes have been provided for in the Elements of Crime of the ICC. This is one of the two supplementary documents to the Rome Statute that was drafted with the aim of assisting in the interpretation of the Rome Statute.⁴² Its main aim is to help in defining the various types of international crimes.⁴³ However, this document is not binding but merely advisory in nature.⁴⁴ This document has aided in the development of the prosecution of GBV at the international level and has been used in recent internationalized tribunals such as the SCSL and the Special Panel of East Timor.⁴⁵

The following are some of the crimes that are committed during and after armed conflict that are considered to constitute GBV⁴⁶; forced pregnancy, forced impregnation, forced sterilization, sexual mutilation, sexual humiliation, medical experimentation on women's sexual and reproductive organs, forced abortion, forced prostitution, forced marriages or cohabitation and trafficking in women.

⁴² The Assembly of states of the Rome statute adopted the two supplementary documents after the adoption of the Rome Statute. The other document is the Rules of Procedure and Evidence.

⁴³ According to article 9 (1) of the Rome Statute, the elements of crime helps in defining the crimes mentioned as constituting genocide, crimes against humanity and war crimes. See also at <<http://www.amnesty.org/en/library/info/IO40/007/2005>> (accessed on 20th March 2010).

⁴⁴ Article 9 (3) of the Rome Statute.

⁴⁵ As above.

⁴⁶ S. Gardam & M. Jarvis *Women, armed conflict and International law* (2001) 25-26. See also D. Mazurana & S. Mc Kay (eds) *Women and Peace Building* (2005) 4.

From this list it can be noted that GBV is not only limited to crimes that are sexual in nature but non-sexual related crimes also form part of GBV.⁴⁷ This means that the women and girls that are part of non military support for war suffer a form of GBV. An example of this is where women and girls are used to cook and clean (as forced wives) and also to act as messengers and porters for the combatants.⁴⁸ This shows the multilayered and complex nature of this type of international crime.⁴⁹

2.4 Causes of GBV in armed conflicts

When this type of violence takes place, it usually has political and symbolic meanings especially during wartime.⁵⁰ GBV and sexual violence have increasingly become weapons of warfare and characteristic in defining armed conflicts.⁵¹ Many authors have given various reasons as to why GBV against women occurs during and after armed conflicts. It has been reiterated that it is a fact that the status of women in societies is strongly linked to how they are treated in armed conflicts.⁵² Some have blamed the patriarchy system in society where the men are considered superior to women whereas others see sexual violence such as rape occurring as means in which men communicate amongst each other.⁵³ This is because the men from one group rape the women who belong to the enemy group as means of passing on a message of control over

⁴⁷ Oosterveld (n 37 above).

⁴⁸ 'Women, Peace and Security': Study submitted by the Secretary- General pursuant to the United Nations Security Council Resolution 1325 (2000) 2 available at <<http://www.un.org/womenwatch/daw/public/eWPS.pdf>> (accessed on 27th March 2010).

⁴⁹ (n 46 above).

⁵⁰ D. Mazurana & S. Mc Kay (eds) *Women and Peace Building* (2005) 4.

⁵¹ D. Mazurana et al (n 50 above) 3.

⁵² Beijing Declaration and Platform for Action, Para 135.

⁵³ H. Durham & T. Gurd (eds) *Listening to the Silences: Women and War* (2005) 54 as quoted in S. Brownmiller *Against our will: men, women, rape* (1975) 11.

those women.⁵⁴ Also, when these wars break out the women are often left to fend for themselves. In the course of the women looking for food and water for the rest of the family, they expose themselves in harm's way as some rebels or enemy groups capture them and commit horrendous crimes against them because their men are not there to protect them. An example of this is the report of the Janjaweed group raping women who go looking for firewood and water in the Darfur region of Sudan.⁵⁵

In Latin America, feminists argued that in order for the combatants to permanently separate themselves from the civilians, their superiors create a male bond amongst each combatant and harden the combatants by making them commit horrendous crimes such as rape, murder and other forms of sexual violence.⁵⁶ In Haiti and East Timor, the crime of 'political rape' occurred. This form of rape was aimed at conveying a message to the politicians who were in power and being opposed as their wives and daughters were raped.⁵⁷ Rape has also been used as a means of interrogation for female combatants that are held as prisoners of war.

Finally another argument for one of the causes of sexual and GBV is that it arises when the sexual violence is in relation to ethnic related conflicts or wars. This has been experienced in the conflicts in Rwanda and Bosnia. It has been held that during these wars sexual violence 'is a means of asserting and making

⁵⁴ As above.

⁵⁵ 'The effects of conflict on health and well being of women and girls in Darfur': A situational analysis report: Communications with the community by UNICEF pg 20, available at <<http://www.cmi.no/sudan/doc/?id=1081>> (accessed on 17th April 2010).

⁵⁶ H. Durham & T. Gurd (eds) *Listening to the Silences: Women and War* (2005) 54.

⁵⁷ H. Durham et al (eds) (2005) 54 as quoted in the Report of the Special Rapporteur on violence against women, its causes and consequences, Report on the Mission to Haiti, 56 UN ESCOR, UN Doc E/CN.4/2000/68/Add.3 (2000) and the Mission to Haiti and Indonesia and East Timor on the Issue of Violence against women, 55 UN ESCOR UN Doc E/CN.4/1999/68/Add.3 (1999) Mission to Indonesia and East Timor.

boundaries between ethnic groups.’ In the war in the former Yugoslavia conflict research showed that when an attack that was sexual in nature being conducted against the women was considered as an attack to the woman’s ‘honour.’⁵⁸

2.5 Definition of armed conflict

International humanitarian law (IHL) is a part of public international law and contains rules that regulate and deal with what happens during armed conflicts. IHL comprises the rules which, in times of armed conflict, seek to protect people who are not or are no longer taking part in the hostilities, and to restrict the methods and means of warfare employed.⁵⁹ The main rule is that parties to a conflict must distinguish between combatants and civilians when the war is taking place. Combatants are not permitted to attack any civilian population or individuals or their property.⁶⁰

Armed conflicts are divided into two types; international armed conflict and non-international armed conflict. These types of conflicts are regulated by the Fourth Geneva Conventions of 1949 and Additional Protocol I and II to the latter treaty respectively. All the four Geneva Conventions were adopted in order to protect the category of people who are not or are no longer taking part in any hostilities.⁶¹ International humanitarian law can be summarized into the following fundamental principles:

- i. “Persons who are not, or are no longer, taking part in hostilities shall be respected, protected and treated humanely.

⁵⁸ H.Durham et al (n 56 above) 55.

⁵⁹ ‘What are the essential rules of international humanitarian law?’ (31st October 2002) 1, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/5KZF5N> (accessed on 2nd April 2010).

⁶⁰ As above.

⁶¹ (n 59 above) 2.

- ii. Captured combatants and other persons and other persons whose freedom has been restricted shall be treated humanely.
- iii. The right of parties to an armed conflict to choose methods of warfare is not unlimited.
- iv. In order to spare the civilian population, armed forces shall at all times distinguish between the civilian population and civilian objects on the one hand, and military objectives on the other.”

2.5.1 International armed conflicts

This type of conflict occurs between states. The four Geneva Conventions of 1949 and Additional Protocol I provides for the rules to be followed when this type of conflict occurs. Another type of conflict that falls under this category as provided for in Additional Protocol I is wars of ‘national liberation’. This type of war occurs when there is a group of people fighting against a colonial power for independence or self determination.⁶²

2.5.2 Non-international armed conflicts

This type of conflict is regulated by common article 3 to the four Geneva Conventions of 1949 (GC IV) and Additional Protocol II (AP II). Common article 3 creates an obligation for the parties that are part of a non- international conflict to respect and safeguard the basic principles of humanitarian behaviour.⁶³ Common article 3 has a broader scope of application whereas AP II actually gives a narrower scope of application. In addition to Common Article 3, AP II provides more specific provisions to deal with this type of conflict.⁶⁴ It must be noted that with Common Article 3 both insurgents and government officials are bound by the rules without them receiving any special status. Therefore there is

⁶² (n 59 above) 4.

⁶³ As above.

⁶⁴ As above.

no form of discrimination between the two. In recent times there has been an increasing need to obey the rules that govern this type of conflict as there has been a frequent and increase in guerrilla warfare that is related to civil wars in a particular country.⁶⁵ When the civil war takes place and there is warfare then there is a need to protect the victims of such conflicts.

2.6 Conclusion

In conclusion, this chapter has illustrated how our past can and does in fact influence our present and future. This is evident because research has shown that where GBV existed against women pre-conflict, then when conflict occurs, the rate at which GBV take place increases. Various reasons have been given as to why this is so. Most of the reasons evolve around the fact that women are considered to be inferior to men in society. Another reason that is important to consider is the fact that women often take the place of men as the providers of their families as expected by the community out of necessity when conflict breaks out. This is because the men have gone out to fight and the women are the only ones left to fend for the rest of the family and this usually exposes the women to violence in war ridden regions and areas. It is also evident that GBV is linked to societal and other factors. The GBV therefore takes place as means of communication from one enemy group to another with the intended effect of degrading the women, men and the community in general, not only during the conflict but also after the conflict has taken place. An example of this will be illustrated in the other chapters discussing the reasons why GBV was committed as a genocidal crime in Rwanda and also in the Former Yugoslavia. Having all the above in mind including the fact that this paper is dealing specifically with the conflicts that took place in Rwanda, the Former Yugoslavia and Sierra Leone, the chapters that will follow will deal with the legal framework of how these international crimes can be dealt with.

⁶⁵ (n 59 above) 3.

CHAPTER 3: LEGAL FRAMEWORK

3.1 Prosecution of GBV prior to the ICTR, ICTY and SCSL

Prior to the establishment of the ICTR, ICTY and the SCSL, there was law that governed the prosecution of GBV committed in conflict situations. These laws were customary international law, international humanitarian law and international human rights law. When the Nuremberg and Tokyo tribunals were formed, these were the laws that were in force. Articles 6 and 5 respectively of the Charters to the Nuremberg and Tokyo tribunals prohibited crimes against humanity, war crimes and crimes against peace. A brief description of the development of the prosecution of GBV using the three types of law will be illustrated through the Nuremberg and Tokyo tribunals.

Customary international law is different from treaty law in that it is not written. It is established through state practice and the recognition by states in the international sphere that such a practice should be upheld amongst states.⁶⁶ It must also be noted that “practice” entails both official state practice and formal statements that states have issued.⁶⁷

International humanitarian law (IHL) on the other hand, has its origin in the customary practices of armies. IHL has traditionally been called the ‘laws or customs of war’.⁶⁸ However, not all the laws or customs were applied by the armies belonging to the different states. One of the main practices that these armies maintained was the differentiation between the combatants and the

⁶⁶ At <<http://www.icrc.org/eng/customary-law>> (accessed on 6th August 2010).

⁶⁷ As above.

⁶⁸ J. Henckaerts & L Doswald-Beck, *Customary international humanitarian law: Volume 1, Rules*, ICRC, (2005) xxxi. See also article 48 of AP I, which provides that “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”

civilians as a way of maintaining the honour of the soldiers.⁶⁹ One of the many aims of IHL is to safeguard the safety and personal well being of civilians during armed conflict.⁷⁰ There are two principal ways through which IHL is able to achieve this. Firstly, it regulates the methods and means of warfare to protect the civilian population when the hostilities are taking place.⁷¹ Secondly, specific acts of violence are prohibited by parties to the conflict.⁷²

In 1474, the first documentation of sexual violence in international criminal law occurred during the trial of Sir Hagenbach who was convicted for the rape that his troops committed.⁷³ This trial was unique in that the rape was only stated as being against the law because the war had been 'undeclared'. This therefore meant that any acts committed when the war occurred automatically became illegal.⁷⁴ Later on in the Tokyo tribunals, GBV was prosecuted in the instances where there was rape of civilian women and medical personnel and the crime was categorised as, ill-treatment, inhumane treatment and failure to respect family honour and rights.⁷⁵ The Nuremberg charter did not expressly prohibit any form of GBV.⁷⁶ The crime of rape was however implicitly included in both the Nuremberg and Tokyo Charters as 'other inhumane acts' under crimes against humanity and as 'ill treatment' under war crimes.⁷⁷

⁶⁹ As above.

⁷⁰ C. Lindsey *Women facing war*, (2001) 45.

⁷¹ As above.

⁷² Lindsey (n 70 above).

⁷³ D. Luping, 'Investigation and prosecution of sexual and gender based crimes before the International Criminal Court' *American University Journal of Gender, Social Policy and the Law*, Volume 17, Issue 2 (2009) 437.

⁷⁴ K. Askin *War crimes against women: Prosecution in international war crimes tribunals* (1997) 4.

⁷⁵ Luping (n 73 above) 437.

⁷⁶ The crimes as stated in articles 6 a-c of the Nuremberg Charter do not mention any form of GBV.

⁷⁷ Articles 5 b & c of the Tokyo Charter and articles 6 b & c of the Nuremberg Charter.

In 1948, the Batavia Military Tribunal was the centre of the first international prosecution of the crime of ‘forced prostitution’ when Japanese defendants were convicted of forcibly abducting and raping Dutch women in the former Dutch Indonesia.⁷⁸ The crime of enforced sterilization⁷⁹ was also prosecuted in the Nuremberg tribunal by countries such as the United States of America,⁸⁰ China and Poland.

In 1974, the U.N General Assembly Resolution 3318, called on states to make “all efforts.....to spare women and children from ravages of war,” proclaiming that “ all forms of repression and cruel and inhuman treatment of women and children....committed by belligerents in the course of military operations or in occupied territories shall be considered criminal.”⁸¹

GBV is also prohibited in regional and international human rights instruments such as the 2003/2004 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of women in Africa,⁸² 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women,⁸³ the 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict,⁸⁴ the 1979 Convention on the Elimination of all Forms of

⁷⁸ Askin (n 74 above) 85.

⁷⁹ These crimes were punished when the tribunal dealt with the crimes related to the medical experiments that were conducted against prisoners in concentration camps.

⁸⁰ *U.S Military Tribunal 1, K. Brandt et al.* (Medical case, Case No. 1) 1946.

⁸¹ Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res. 3318, U.N. Doc. A/9631 (Dec 14, 1974).

⁸² Articles 3, 4, 5, 14 & 24 all deal with the prohibition of violence against women and protection of women in society.

⁸³ Articles 3 & 6 prohibits against violence against and article 7 states the duties that states have to condemn all forms of violence against women.

⁸⁴ Articles 1-6 provide for the protection of women and children during hostilities and place a duty on states to observe their protection. Article 3 also provides for the protection against the violations of GC IV.

Discrimination against Women⁸⁵ and the 1993 UN Declaration on the Elimination of Violence against Women.⁸⁶ However, despite the many treaties prohibiting GBV, there are limited references to sexual violence. The African Commission tried to remedy this problem by passing the Resolution on the right to a remedy and Reparation for Women and Girls victims of Sexual Violence in 2007.

In examining how IHL, international human rights law and customary international law creates a framework for the protection from GBV, the protection of personal safety and the prohibition against sexual violence will be discussed in the paragraphs that follow.

3.1.1 Protection of personal safety

The protection of personal safety when hostilities are taking place is broad enough to cover most if not all the forms of GBV that occurs during conflict situations. Personal safety, in the context of GBV, is defined as “safety from dangers, acts of violence or threats against members of the civilian population not taking an active part as well as no longer taking an active part in the hostilities.”⁸⁷ Other forms of acts against the personal safety of the civilian population include ethnic cleansing, slavery (including sexual slavery), trafficking, harassment, discrimination, abduction and the deliberate spread of HIV/AIDs as a means of warfare.⁸⁸ Another form of GBV that takes place is the use of nuclear or biological weapons of warfare. This is a form of GBV as it can sometimes be

⁸⁵ Article 2 places a duty on state parties to ensure that women do not suffer any form of discrimination and article 3 places another duty on state parties to ensure that the human rights of women are upheld through their development in the political, social, economic and cultural field.

⁸⁶ Articles 1-4 specifically deal with the definition of GBV and how it must be prohibited by the state parties.

⁸⁷ Common article 3 of GC IV.

⁸⁸ Lindsey (n 70 above).

used as a means through which both men and women's reproductive health and physical health is damaged.⁸⁹

When dealing with IHL, one must bear in mind the principle of distinction.⁹⁰ This principle states that when hostilities are taking place, the combatants must make sure that they differentiate between their fellow combatants and the civilian population. However, when warfare takes place, this is not the case and most of the time the combatants want to spread terror amongst the civilian population belonging to the enemy group. This is because most of the times the civilian population is helpless and cannot fight back. There are specific articles in international treaties that have been drafted in order to protect women in situations of hostilities.

One of the most significant provisions dealing with the protection of women is contained in GC IV. It states that "women shall be specifically protected against any attack on their honour, in particular against rape, enforced prostitution or any other form of indecent assault."⁹¹ Other rules provided for in the GC IV that protect the safety of persons including women include the prohibition of the use of physical and moral coercion to obtain information from a protected group of persons⁹² and the prohibition of the taking of hostages.⁹³ In cases of international armed conflicts, article 75 of AP I set out the prohibited acts under IHL as follows:

"The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: (a) violence to

⁸⁹ Lindsey (n 70 above) 43. Lindsey continues to state that genetic damage and malformations can also occur when these biological, chemical and nuclear weapons of warfare are used.

⁹⁰ Articles 48 & 51 of the Additional Protocol I. Article 51 (2), prohibits acts or threats of violence whose purpose is to spread terror amongst the civilian population.

⁹¹ Article 27 of GC IV.

⁹² Article 31 of GC IV.

⁹³ Article 34 of GC IV.

the life, health or physical or mental well-being of persons, in particular: (i) murder, (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and mutilation; (b) outrages upon personal dignity, in particular, humiliating and degrading treatment, enforced prostitution and any form of indecent assault; (c) the taking of hostages; (d) collective punishment and (e) the threats to commit any foregoing acts.”

Article 76 of AP I continues to state 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.” This article complements article 75 and does not use the term ‘honour’ when stating the acts that are prohibited.⁹⁴

In cases of non-international armed conflicts Common article 3 of GC IV will be of great importance as it sets out the minimum standards that are to be respected by warring sides during conflicts. Article 4 of the AP II is similar in wording to that given in article 75 of AP I.

3.1.2 Protection against sexual violence

Sexual violence as a form of GBV is committed widely in hostilities as a weapon of warfare. The term sexual violence encompasses other forms of violence and not only those that are sexual in nature. This is because there is social stigma and psychological effects that are present long after the violence has taken place.⁹⁵ This stigma is placed on the victims as a result of religious and other cultural reasons.⁹⁶ When it comes to the GC IV, sexual violence is not widely dealt with and is very seldom mentioned in AP I and AP II. Article 27 of the GC IV provides for the protection of women from crimes against their honour such as

⁹⁴ H. Durham, ‘International Humanitarian law and the protection of women’ in H. Durham and T. Gurd *Listening to the Silences: Women and War* (2005)98.

⁹⁵ Lindsey (n 70above) 51.

⁹⁶ As above.

rape, enforced prostitution and, or any form of indecent assault. However, due to the fact that this provision was drafted over 50 years ago, it has been criticised because of the way it expressly states crimes against a woman's honour'.⁹⁷ This is because the use of the term 'honour' stigmatizes the sexual offences mentioned and does not adequately deal with the fact that this form of crime not only affects the victim's but her physical and psychological well-being as well.⁹⁸

The crime of sexual violence especially rape can be argued to be protected when a provision states that there is a prohibition against the 'wilful causing of great suffering or serious injury to the body and health of a person'.⁹⁹ Article 75 and 76 of AP I and article 4 of AP II, as stated in the previous paragraph have also mentioned prohibitions against some forms of sexual violence.

However, it must be noted that there is an argument that in IHL, the breach of rules protecting women is not treated seriously, in that the treaty provisions do not provide for the breaches to be classified as "grave breaches".¹⁰⁰ The recent Statutes of the ICTY,ICTR and the SCSL have tried rectifying this notion due to the now gender sensitive way in which prosecution of GBV crimes takes place. For example, even though rape is not expressly considered a grave breach of the treaties, it is now argued that article 147¹⁰¹ of the GC IV expressly provides for the crime of rape as a grave breach of the rules.¹⁰²

⁹⁷ As above

⁹⁸ As above.

⁹⁹ Article 147 of GC IV.

¹⁰⁰ J. Gardam & M. Jarvis *Women, Armed Conflict and international law* (2001) 100.

¹⁰¹ Rape under this article can be classified as "wilfully causing of great suffering or serious injury to the body or health" of a person.

¹⁰² Gardam et al (n 100 above).

3.2 Prosecution of GBV in the ICTR, ICTY and SCSL

The ICTY and the ICTR were formed as a result of resolutions that were passed by the UN Security Council. The Security Council requires member states to report any violations of IHL that have occurred or are occurring.¹⁰³ The Security Council also “calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict.”¹⁰⁴ The prosecution of crimes against humanity, war crimes and genocide is one of the ways in which victims of GBV can be redressed at the international level.¹⁰⁵ Due to the backlog and enormity of the cases that the international tribunals face, there are other extra-legal mechanisms through which redress can be sought.¹⁰⁶ These include truth and reconciliation commissions¹⁰⁷ and also traditional courts set up in villages and communities. These courts are usually not similar to the normal national courts that carry out prosecutions and they carry out proceedings in a different way.

Some of the major differences between the ICTY and previous ad hoc tribunals were that the ICTY had jurisdiction over crimes against humanity and war crimes but not against crimes against peace.¹⁰⁸ Secondly, the previous ad hoc tribunals only had the mandate to deal with crimes that were committed during inter-state

¹⁰³ United Nations Security Council Resolution 771, UN SOCR, 47th Session, 3106th meeting, par. 5, U.N Doc S/RES/ 771 (13 August 1992).

¹⁰⁴ Security Council Resolution 1325, 4213th Meeting, par. 10, U.N Doc S/RES/1325 (31 October 2000).

¹⁰⁵ United Nations, Study submitted by the Secretary-General pursuant to Security Council resolution 1325 (2000) *Women Peace and Security*, (2002) 38.

¹⁰⁶ Henckaerts et al (n 68 above) 39.

¹⁰⁷ As above.

¹⁰⁸ M. Kaszubinski ‘The United Nations Commission of Experts pursuant to the Security Council Resolution 780 (1992) to investigate violations of International Humanitarian law in the Former Yugoslavia’ in M Bassiouni (ed) *International and Comparative law Series: Post Conflict justice*, (2002) 468.

wars whereas the ICTY could adjudicate over crimes that were committed both in the course of internal strife within a state and inter-state wars.¹⁰⁹ In the aim of upholding justice, the ICTY has the right to interfere with national proceedings at any time and take over. Finally, the ICTY can only try individuals unlike the previous tribunals whose aim was to try criminal organisations.¹¹⁰ The ICTY dealt with grave breaches of the GC IV, violations of the laws or customs of war, genocide and crimes against humanity.¹¹¹

The mandate of the ICTR on the other hand, was to prosecute “persons responsible for genocide and other serious violations of IHL 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.”¹¹² The crimes against IHL that the court had the mandate to deal with were the crimes of genocide, crimes against humanity and the violations of common article 3 of GC IV and AP II.¹¹³ The difference between the statutes of the ICTY and the ICTR when dealing with the violations committed was that the statute of the ICTY expressly stated in two separate articles the violations of the GC IV and then the violations of the laws or customs of war whereas the ICTR Statute expressly provided in one article the violations of the GC IV and the AP II.

The SCSL on the other hand, was very different from the ICTY and the ICTR. Firstly, as mentioned in the previous chapters, it was a hybrid court that was formed with the help of both the UN and the government of Sierra Leone. After the civil war that took place in Sierra Leone, the Lomé Peace Agreement was

¹⁰⁹ (n 67 above) par 10. See also article 1 of the Statute of the ICTY.

¹¹⁰ Article 7(1) of the Statute of the ICTY.

¹¹¹ Articles 2, 3, 4 & 5 respectively of the Statute of the ICTY.

¹¹² Annex to the Statute of the ICTR.

¹¹³ Article 2, 3 & 4 respectively of the Statute of the ICTR.

signed.¹¹⁴ However, contrary to customary international law and IHL, the agreement had a very controversial article.¹¹⁵ This article provided for amnesty and pardon for those who were responsible for the atrocities committed during the civil war. This was because the government thought that this amnesty provision was the only way through which lasting peace would be brought and maintained in the country.¹¹⁶ However, the UN strongly opposed this provision of the agreement and decided to sign the agreement only if the provision would not apply to those who committed the crimes of genocide, war crimes, and crimes against humanity and serious violations of IHL.¹¹⁷ The provision was stated as being contrary to customary international law and this in turn led to the SCSL being formed.¹¹⁸ Unlike the ICTR and ICTY, the SCSL has the power to prosecute “persons who bear the greatest responsibility”¹¹⁹ and the latter court used both IHL and Sierra Leonean law when prosecuting the violations.¹²⁰ The Statute to the court provided that the SCSL had the discretion of punishing persons that committed the crimes pursuant to an order that was given by a

¹¹⁴ This was the Lomé Peace Agreement of 18th May 1999.

¹¹⁵ Article IX of the Lomé Peace Agreement.

¹¹⁶ Article IX (1) & (2) provided for complete amnesty and pardon for both the leaders that orchestrated the war and their combatants.

¹¹⁷ Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, S/2000/915 (2000) par 23. Also see Security Council Resolution 1325, 4213th Meeting, par. 11, U.N Doc S/RES/1325 (31 October 2000), which “emphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes, where feasible from amnesty provisions.”

¹¹⁸ J.Poole ‘Post Conflict Justice in Sierra Leone’ in M Bassiouni (ed) *International and Comparative law Series: Post Conflict justice* (2002) 581. Also see the Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, S/2000/915 (2000) par 9 that stated that the court is a court formed through a treaty and it is mixed in jurisdiction and composition.

¹¹⁹ Poole (n 118 above) 582, Poole stated that the ‘most responsible’ meant those that were in authority or had command responsibility over a group of people that committed the crimes.

¹²⁰ Poole (n 118 above) 582.

superior of the government.¹²¹ Both the ICTY and the ICTR had to deal with national law but they were not bound by the law. The Rwandan government (and national courts) for example had to bear the enormous burden to deal with those that were also responsible for the atrocities that were committed in Rwanda as the ICTR was not able to prosecute all of the persons.¹²² A traditional form of justice known as the Gacaca courts was also formed in order to deal with the cases that could not be dealt with in the ICTR or the national courts.¹²³

In dealing with the prosecution of crimes, the SCSL has concurrent jurisdiction with the national courts in Sierra Leone but the SCSL has primacy over the national courts in instances where there is a clash between the laws governing both courts.¹²⁴ Finally, unlike the ICTR and the ICTY, the SCSL works in conjunction with the Truth and Reconciliation Commission in order for the latter to deal with the jurisdictional limitations of the SCSL and promote justice while preventing the need for vengeance to occur.¹²⁵

3.3 Statutes of international criminal tribunals

The Statutes that govern and guide the ICTY, ICTR and the SCSL have introduced different ways of dealing with GBV after conflict situations. These courts have interpreted IHL and customary international law in such a way as to suite the different conflict situations that they had to deal with. The ICTY and the ICTR statutes have been able to deal with the crimes of rape and other GBV crimes in a way that they have never been dealt with in international law before. The provisions will be discussed in the paragraphs to follow.

¹²¹ Article 6 & 4 of the Statute to the SCSL.

¹²² R. Boed 'The International Criminal Tribunal for Rwanda' in M Bassiouni (ed) *International and Comparative law Series: Post Conflict justice*, (2002) 495.

¹²³ As above.

¹²⁴ Poole (n 118 above) 585.

¹²⁵ Poole (n 118 above) 591.

The SCSL statute has also gone further to also apply Sierra Leonean law in prosecuting its perpetrators. Some of the provisions of Sierra Leonean law have assisted in dealing with the unique gender-based violations that were committed during the civil war in the country. This is because the national courts have been able to apply this law on perpetrators who did not fall under the scope of the SCSL. The perpetrators still had to be ‘those that bear the greatest responsibility’ for the crimes committed’.¹²⁶ However, the Statute of the SCSL also provides for some of the crimes under Sierra Leonean law which it has the powers of prosecuting. Of importance is a specific crime that is connected to GBV which will be discussed in the paragraphs to follow.

3.3.1 The Statute of the ICTY

The crimes that are stated in this Statute are classified into four different categories; those that are grave breaches of the GC IV, the violations of laws or customs of war, genocide and crimes against humanity.¹²⁷ When dealing with GBV, there are specific provisions in the defined crimes that are expressly forms of GBV or can be implicitly argued to be a form of GBV. Under article 2, which deals with the grave breaches of the GC IV, it can be argued that some forms of GBV constitute ‘torture and inhumane treatment, including biological experiments’ as well as the ‘wilful causing of great suffering or serious injury to the body and health of a person.’¹²⁸ These forms of GBV that occurred in the former Yugoslavia included physical assault, the rape of the women in the camps and the forced impregnation of the women amongst others.¹²⁹ Article 4 deals with genocide and defines genocide as “any acts committed with the intent to destroy,

¹²⁶ Poole (n 118 above).

¹²⁷ Articles 2 - 5 respectively of the Statute of the ICTY.

¹²⁸ Article 2 of the ICTY Statute.

¹²⁹ R.C. Carpenter, ‘Surfacing children: limitations of genocidal rape discourse’, 2000 *Human Rights Quarterly* Volume 22, 429 and 432.

in whole or in part, a national, ethnic, racial or religious group and as such:..... (b) Causing serious bodily or mental harm to members of the group.....”

During the war in the former Yugoslavia the greatest number of the assaults against the women was said to be committed by the Serbs against Muslims and also some Catholic Croats.¹³⁰ The reason why sexual violence was discussed and elaborated in the Statute unlike the previous international law treaties was because of the extent in which this form of GBV occurred. The very first indictment ever in international law to include rape as a crime against humanity was brought before the ICTY.¹³¹ The ICTY Statute considered rape as both a crime against humanity and a war crime. Crimes against humanity and war crimes were those crimes committed during armed conflict and they need not be committed in a ‘widespread and ‘systematic’ way.¹³² It was then decided that a single case of rape would be prosecuted as a war crime and where the rape was committed on a wide scale then it would be categorised and prosecuted as a crime against humanity.¹³³ Rape with intent to commit genocide came to a whole new level during the Bosnian war in Yugoslavia. This is because this act was used as a ‘weapon of war’ to carry out assaults not only on the woman’s body but also on her reproductive capabilities.¹³⁴

¹³⁰ T. Salzman, ‘Rape camps as a means of ethnic cleansing: Religious, cultural and ethical responses to rape victims in the former Yugoslavia’, 1998 *Human Rights Quarterly* 349. See also *The Prosecutor v Kunarac, Kovac and Vukovic*, IT-96-23-T, where the defendants were found guilty of the crimes of rape and torture as war crimes and crimes against humanity.

¹³¹ *The Prosecutor v Dusko Tadic* Case No. IT-94-1-AR72. In the same indictment an alternative allegation of rape as a violation of the law or customs of law was given.

¹³² Carpenter (n 129 above) 435.

¹³³ Salzman (n 130 above) 349.

¹³⁴ Salzman (n 130 above) 349. See also M. Kaszubinski ‘The United Nations Commission of Experts pursuant to the Security Council Resolution 780 (1992) to investigate violations of International Humanitarian law in the Former Yugoslavia’ in M. Bassiouni (n 3 above) 430, where the author discusses the “systematic rape” that occurred in Bosnia, by Bosnian-Serbs and Serb militias against Bosnians.

The Statute also deals with enslavement, torture, rape and persecutions on political, racial and religious grounds as crimes against humanity.¹³⁵ The crime of genocide should also not be forgotten when dealing with violations that are GBV. Forms and acts of GBV can also form part of a means through which ethnic cleansing takes place.¹³⁶ Furthermore, the Statute of the ICTY, also states that sexual violence has been charged as a grave breach of GC IV.¹³⁷

3.3.2 The Statute of the ICTR

This Statute provides for the prosecution of three separate offences; genocide, crimes against humanity and violations of article 3 common to the GC IV and AP II.¹³⁸ These crimes are stated almost similarly to those in the ICTY Statute. The only difference is that in the Statute of the ICTR the violations of the GC IV and AP II are stated in the same article whereas in the statute of the ICTY they are divided into two; grave breaches of the GC IV and violations of the laws and customs of war. Therefore before prosecuting a crime, one has to specify in the indictment how the GBV offence will be categorised. When dealing with GBV it must also be noted that the offence does not necessarily have to be expressly noted in the Statute. For example the crime of forced impregnation is not stated expressly in the Statutes of the ICTY and the ICTR. This does not mean that the crime will not be prosecuted but the prosecutor can argue that the offence falls under or can be classified as part of a violation that has been expressed in the Statute. The various forms of GBV can be classified under the different article. This includes the crime of genocide.

¹³⁵ Articles 5(c), (f), (g) & (h) respectively of the Statute of the ICTY.

¹³⁶ J. J Preece, 'Ethnic cleansing as an instrument of nation-state creation: Changing state practices and changing legal norms' 2000 *Human Rights Quarterly* volume 20, 822.

¹³⁷ Article 2 of the Statute of the ICTY.

¹³⁸ Articles 2, 3 & 4 of the Statute of the ICTR.

Articles 2 (a) to (c) will be applicable in the instances of physical assault and sexual violence against women. These provisions state that genocide is committing the following acts amongst others with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group by the “killing of members of a group”, “the causing of serious bodily or mental harm to members of the group” and “the deliberate inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part....”¹³⁹

When enslavement, torture and other inhumane acts are “committed in a widespread or as a systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”, then it will be a crime against humanity.¹⁴⁰ The forms of GBV that will fall under this category that were experienced in Rwanda include amongst others, sexual enslavement, torture, rape, performing acrobatics while naked. There are also forms of GBV that can be argued to be violations of common article 3 of the GC IV and AP II which include but are not limited to “violence to life, health and physical or mental well being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment”, “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;” and threats to commit any of the foregoing acts.

It is in this tribunal that developments with regards to the prosecution against GBV crimes began. The case of the *Prosecutor v Akayesu*¹⁴¹ was the first time in international law where the crimes of rape and sexual offences were given the same footing as other offences or crimes.¹⁴² It was in this case that a landmark decision was held when the court decided that rape or sexual violence can be

¹³⁹ Articles 2 (a), (b), & (c) of the Statute of the ICTR.

¹⁴⁰ Article 3 (b), (f), (g) & (i) of the Statute of the ICTR.

¹⁴¹ *Prosecutor v Akayesu* Case No. ICTR 96-4-I.

¹⁴² D. J. Scheffer, *Rape as a war crime*, A report by D.J. Scheffer, Ambassador-at-large for war crimes issues remarks, Fordham University New York, October 29, 1999, 2.

prosecuted as genocide if the characteristics of genocide were in place when the offence was being committed.¹⁴³ This was also the first international tribunal where a woman was indicted for the crime of rape as an aide and abettor.¹⁴⁴

3.3.3 The Statute of the SCSL

Under this Statute, violations are categorised into four articles. These violations are crimes against humanity, violations of article 3 common to the GC IV and AP II, other serious violations of IHL and crimes under the Sierra Leonean law.¹⁴⁵ The latter two provisions are not provided for in the ICTY and the ICTR Statutes. The SCSL Statute is also unique in that it does not provide for the crime of genocide and it provides for crimes under the Sierra Leonean law that the hybrid court can prosecute as violations. This Statute is also unique because it provided for more forms of sexual violence as crimes against humanity. These examples of sexual GBV were for the first time expressly stated in international law as crimes against humanity. These violations include rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence.¹⁴⁶ These violations had to be committed as a widespread or systematic attack against any civilian population.¹⁴⁷

The crimes under Sierra Leonean law that could be prosecuted also provided for GBV especially that directed against girls. It stated that the SCSL had the powers to prosecute persons who committed “offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap 31): abusing a girl under 13 years of age, contrary to section 6; abusing a girl between 13 and 14

¹⁴³ Scheffer (n 142 above) 3.

¹⁴⁴ *Prosecutor v Nyiramasuhuko* Case No ICTR 97-21-I. The woman was Pauline Nyiramasuhuko, Rwanda's former minister of women affairs.

¹⁴⁵ Articles 2, 3, 4 & 5 of the Statute of the SCSL.

¹⁴⁶ Article 2 (g) of the Statute of the SCSL.

¹⁴⁷ Article 2 of the Statute of the SCSL.

years of age, contrary to section 7 and abduction of a girl for immoral purposes, contrary to section 12.”¹⁴⁸ This is one of the provisions that outline the nature of the SCSL being a hybrid court. This is because national law was used as a basis for prosecution in a partly international court. The reason for this can be linked to the nature of the offences that occurred during the civil war in Sierra Leone. Not only were the adults targeted but some of the warring factions used children in the hostilities. Article 4 (c) of the Statute also mentions this by stating expressly that “conscription or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.” Another development that arose due to the statute was the prosecution of perpetrators who committed the crime of “forced marriage”.¹⁴⁹ For the first time in international law, the court decided in a landmark decision stating that “forced marriage” was a crime against humanity in terms of customary international law.¹⁵⁰

3.4 Conclusion

In conclusion, it can be noted from the above explanations regarding the Statutes of the international tribunals that there has been developments in providing for articles that deal with violations of IHL in armed conflicts. GBV can therefore be prosecuted effectively due to the fact that there is law in place to support the indictments of the perpetrators based on the acts that they committed. However, this does not mean that the crimes of GBV have effectively been prosecuted due to the law that is there to support the prosecutions. The case law in the following chapter will highlight the negative and positive influence that the international statutes have had over the prosecution of the crimes. The landmark cases that

¹⁴⁸ Article 5 (a) (i) to (iii) of the Statute of the SCSL.

¹⁴⁹ *The Prosecutor V Brima, Kamara, and Kanu* (SCSL-04-16-T)

¹⁵⁰ M. Frulli, ‘Advancing international criminal law: The Special Court for Sierra Leone recognises forced marriage as a ‘new’ crime against humanity’, *Journal of International Criminal Justice* 6 (2008), 1034.

dealt with GBV in the armed conflicts in the former Yugoslavia, Rwanda and Sierra Leone will therefore be elaborated in chapter four.

CHAPTER 4: THE PROSECUTION OF GBV AT THE ICTR, THE ICTY AND THE SCSL

4.1 Introduction

The aim of this chapter is to critically analyse the various judgments that have been handed down in the ICTR, ICTY and the SCSL that have had an impact on the prosecution of GBV. Some of the cases are detailed in order to give a proper description as to why and how the different trial and appeals chambers arrived at their decisions whereas some of the cases only state the legal principle that was unique to the particular facts of the case without going deep into the events that unfolded.

The reason for this is because all of the cases were not dealing wholly with the issue of gender-based crimes. These cases illustrate the uniqueness of each with regards to the definition of the different forms of GBV and how they dealt with the evidence and the testimonies of the witnesses. Comparisons are also made within the different cases of the different courts and how each of the courts applied each other's precedents and definitions. The cases in the ICTR will be discussed first followed by the cases in the ICTY and finally the cases in the SCSL.

4.2 Case law at the ICTR

The cases that are discussed below are of importance because firstly the international tribunal had to deal with the crime of rape as a form of genocide and secondly precedent was set in international law as to how the prosecution of gender-based crimes should be carried out. The first case was important because it was the first time that the definition of rape was given in an international tribunal. The second case is of importance because it was the first

time when a woman was charged with gender-based crimes in an international tribunal.

4.2.1 *Prosecutor v Jean-Paul Akayesu* ¹⁵¹

Jean Paul Akayesu, the accused, a Rwandan citizen was Bourgmestre of Taba commune and Prefecture of Gitarama, in Rwanda.¹⁵² As a prefect of the bureau communal, Akayesu had control over the communal police and was responsible for the execution of laws and regulations and the administration of justice in the commune.¹⁵³

The first indictment against him was confirmed on 16th February 1996 but later on it was amended. Like many other original indictments brought before international tribunals, the original indictment brought by the prosecution against Akayesu had defects.¹⁵⁴ The defects were that no charges of rape or sexual violence were included in the indictment. The amendment introduced these charges in paragraphs 10 A, 12 A and 12 B and counts 13 to 15.¹⁵⁵ Akayesu was not only charged with gender based crimes but also murder and torture that fell under the scope of genocide and crimes against humanity and violations of common article 3 of the GC IV.

The first mention of sexual violence at the trial was through the evidence of Prosecution Witness H who coincidentally when describing how violence

¹⁵¹ Case No IT-96-4-T₁, Hereinafter referred to as the *Akayesu* case.

¹⁵² (n 151 above) para 1.

¹⁵³ (n 151 above) Para. 4.

¹⁵⁴ W. Price, K. Grady & R Ibreck (2010) *Injustice after sexual violence: Problems in Practice at the International Criminal Tribunal for Rwanda* at 1 in http://www.psa.ac.uk/journals/pdf/5/2010/1043_864.pdf > (accessed on 10th August 2010).

¹⁵⁵ Paras 10A, 12A and 12B subsumed these crimes under crimes against humanity and count 13 dealt with rape whereas count 14 dealt with “other inhumane acts’ under crimes against humanity.

occurred in 1994, testified of how three men raped her six year old daughter.¹⁵⁶ This only occurred halfway through the trial. The Trial Chamber then discovered that the prosecution had failed to question the witnesses about the sexual violence that occurred even though many of the female witnesses later testified to have been explicitly targeted by the defendant.¹⁵⁷ After the testimony of Witness H, the trial took a break for a few months. When it resumed, there was pressure from non-governmental organisations to amend the indictments and also Judge Navanethem Pillay, the only female judge at the hearing, requested the prosecution to examine their case and bring an indictment that included the charges of sexual violence.¹⁵⁸

The defence criticised the addition of gender-based crimes to the original indictment, stating that the prosecution was pressured by public opinion in the form of the non-governmental organisations.¹⁵⁹ Furthermore they stated that the charges set forth in the indictments did not match the evidence provided by the witnesses.¹⁶⁰ Subsequently, the defence counsel did not contest that killings and beatings occurred at the bureau communal but the accused denied there being any acts of sexual violence committed at the communal even when he was not present.¹⁶¹

The prosecution provided witnesses who stated in their testimonies that the accused was present in the bureau communal when they were being attacked and that in some cases he even passed comments to the perpetrators about them committing sexual violence before killing some of the women.¹⁶² Witness H,

¹⁵⁶ (n 155 above) 4.

¹⁵⁷ As above.

¹⁵⁸ (n 155 above) 4. See also D.M. Amann International decisions-Prosecutor v Akayesu case ICTR-96-4-T *American Journal of International Law* Volume 93 No1 (1993) 196.

¹⁵⁹ (n 151 above) Para. 42.

¹⁶⁰ As above.

¹⁶¹ (n 151 above) Para. 32.

¹⁶² (n 151 above) pares 420-437.

Witness JJ, Witness OO, and Witness NN all testified that they themselves were raped, and all, with the exception of Witness OO, testified that they witnessed other girls and women being raped. “Witness J, Witness KK and Witness PP also testified that they witnessed other girls and women being raped in the commune of Taba. Hundreds of Tutsi, mostly women and children, sought refuge at the bureau communal during this period and many rapes took place on or near the premises of the bureau communal Witness JJ was taken by Interahamwe (young Hutu militia) from the refuge site near the bureau communal to a nearby forest area and raped there.”¹⁶³The accused was also charged with other gender-based crimes such as forced nudity. He was also convicted of this crime because the charge was subsumed under “other inhumane acts” of crimes against humanity.¹⁶⁴

The judgment in this case set a landmark precedent with regards to the prosecution of rape and sexual violence in international tribunals.¹⁶⁵ The ICTR was the first tribunal that decided that rape was a form of genocide and torture, that sexual violence committed during civil conflict was punishable and that mass rape constituted a crime against humanity.¹⁶⁶

The judgment also set out the definition of rape and noted that there was a lack of such a definition international law. The Trial Chamber held that “rape is a form of aggression and the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.”¹⁶⁷ Rape was then defined

¹⁶³ As above.

¹⁶⁴ Judgement Para 697. Here the defendant was found guilty of the crime against humanity of “other inhumane acts when the forced undressing of a victim named Alexia wife of Ntereye and her two nieces Louise and Nishimwe occurred. They were then asked to perform exercises and were also raped.

¹⁶⁵ W. Scabs ‘Commentary on the *Prosecutor v Akayesu* Judgement’ in A. Klip & G. Sluiter (eds) *Annotated leading cases of international criminal tribunals* (2001) 545.

¹⁶⁶ Judgement paras 681- 696.

¹⁶⁷ Judgment paras 597 and 687.

as; “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”¹⁶⁸

This definition was accepted and used in the ICTY judgment of *Prosecutor v Delalic*¹⁶⁹ but rejected in another ICTY judgement of *Prosecutor v Furundzija*¹⁷⁰ where the chamber decided to define rape as according to “a mechanical description of objects and body parts” a definition that was the direct opposite of the *Akayesu* one.

The definition given in the *Akayesu* case illustrated how the Trial Chamber was culturally sensitive towards the victims because in their culture, most of the victims were not allowed to discuss matters such as rape or sexual violence in detail in public.¹⁷¹ The Trial Chamber also rejected the need for “lack of consent” in the definition when the crime occurred. This also illustrated that the Chamber acknowledged the widespread and extreme nature in which the sexual violence had occurred during the conflict.¹⁷²

When the Chamber in its judgment held that rape was a form of torture and genocide, the reasoning was that rape constituted serious bodily or mental harm and it was solely committed against Tutsi women (genocidal intent). The rape that occurred in Rwanda was also accompanied by the crime of forced impregnation that illustrated another form of genocidal intent.¹⁷³ The reason behind this act was that in Rwanda’s paternalistic society, the father of the child

¹⁶⁸ Judgment Para 599.

¹⁶⁹ Case No. IT-96-21-T paras 1065 – 1066.

¹⁷⁰ Case No IT-95-17/I-T Para 185.

¹⁷¹ Para 687.

¹⁷² Judgement Para 688, it was held that when coercion was taking place there need not be physical force, although during armed conflict or when there is military presence with threatening forces, physical force may be inherent.

¹⁷³ M.S Kalra ‘Forced marriage: Rwanda’s secret revealed’, *University of California, Davis Journal on International law and policy* (2001) 199.

determined the child's ethnicity. The Hutu militia therefore raped the women with the intention of impregnating them in order to wipe out the Tutsi lineage.¹⁷⁴ The result of this being the physical and psychological destruction of the women, their families and their communities in general and this was torture in itself.¹⁷⁵

This case also dealt with the extension of protection to the Tutsi group as an ethnic group, yet they are not in the strict definition a classified group under the four groups classified in the Genocide Convention of 1948.¹⁷⁶ The Tutsi group was not per se a different ethnic group from the Hutus (for example they had the same language and culture),¹⁷⁷ but membership to the former group was given at birth and the Rwandan legal system and social structure accepted this membership and so it remained for life.¹⁷⁸ The perpetrators separated themselves from the victims and distinguished themselves as different ethnic groups. The identity given to the Tutsis was therefore permanent in nature.¹⁷⁹

The crime of sexual violence was not expressly stated in the ICTR statute. However, the ICTR in the *Akayesu* case stated that sexual violence could be subsumed within the scope of "other inhumane acts" under crimes against humanity. The ICTR stated that:

"Sexual violence which includes rape is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive."¹⁸⁰

¹⁷⁴ As above.

¹⁷⁵ Judgment Para 721. See also Landesman at 116 where it was stated that there was genocidal intent when the Hutu's raped the Tutsi women with the aim of infecting them with the HIV virus.

¹⁷⁶ According to Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, the four different groups are national, ethnic, racial and religious groups.

¹⁷⁷ (n 165 above) 542.

¹⁷⁸ D.M. Amann International decisions-Prosecutor v Akayesu case ICTR-96-4-T *American Journal of International law* Volume 93 No1 (1993) 198.

¹⁷⁹ As above.

¹⁸⁰ Judgment para 688.

This Trial Chamber applied this definition when it listened to evidence of forced nudity from a number of witnesses amongst them Prosecution witnesses PP and KK who witnessed women and girls in the Taba commune being told to strip of their clothes and perform gymnastics while naked.¹⁸¹ However, the court has been criticised for having not prosecuted the crime of forced marriage though it was evident from Witness NN's testimony.¹⁸² A lack of resources at the Office of the Prosecutor has been given as one of the reasons why this crime could not be prosecuted.¹⁸³

In the end, the court held that Akayesu was aware of the rapes and sexual violence that was being committed in his bureau communal and by him not doing anything to stop these crimes he by omission participated in the acts that were committed. The appeals chamber affirmed Akayesu's conviction and he received three concurrent life sentences.¹⁸⁴

4.1.2 Prosecutor v Nyiramasuhuko¹⁸⁵

This was a unique case in the ICTR when dealing with GBV because it was the first case in an international tribunal whereby a woman was charged with rape as a crime against humanity. Her alleged involvement began in Butare. She was

¹⁸¹ Para 10 A of the charges listed forced nudity as a charge subsumed in "other inhumane acts" of crimes against humanity.

¹⁸² Witness NN testified of how she was rescued by a Hutu militia just before the group she was in was killed. The Hutu militia told the other perpetrators that witness NN was his "wife" and they should not harm her. He however went ahead to rape her and force her to do household chores and Witness NN said that this was in no way a means of "saving her life." See also (n 23 above) 203 for a broader explanation of this crime in Rwanda.

¹⁸³ (n 173 above) 203.

¹⁸⁴ Sentences, *Prosecutor v Akayesu* Case No. ICTR-96-4-T.

¹⁸⁵ Case No. ICTR-97-21-I. See also C. Spering *Mother of atrocities: Pauline Nyiramasukho's role in the Rwandan Genocide* Fordham Urban Law Journal (2005-2006)637-639 for a brief history of the accused's life.

the Minister of Women and Family Affairs and it was alleged that she used her official authority to dehumanize Rwandan women when she offered food and safety to thousands of Tutsis at the Butare stadium only to later order their killing and further ordered the Hutu militia to rape the women before killing them.¹⁸⁶

This case was unique because in most instances rape and sexual violence has male perpetrators.¹⁸⁷ However, just like other original indictments the indictment in this case had to be amended in order to include charges of inciting the militia to commit acts of sexual violence against Tutsi women.¹⁸⁸

4.2 Cases at the ICTY

The cases are discussed below were of importance because they gave another definition of rape that was different from the one earlier issued in the ICTR and also because the tribunal had to deal with different forms of gender-based crimes that were not earlier on dealt with in other international tribunals.

4.2.1 *Prosecutor v Delalic, Mucic, Delic and Landzo*¹⁸⁹

The above mentioned case will be referred to as the *Celebici case* as it occurred in the village of Celebici in the Celebici prison camp, located in Konjic

¹⁸⁶ Paras 6.7 and 6.9 of the amended indictment. See also Landesman 'the minister of rape: how could a woman incite Rwanda's sex crime Genocide?' New York Times Magazine (September 2002) 82 as cited in S.K Wood 'A woman scorned for the "least condemned" war crime: precedent and problems with prosecuting rape as a serious war crime in the International Criminal Tribunal for Rwanda', *Columbia Journal on Gender and law* (2004) 287.

¹⁸⁷ S.K Wood, 'A woman scorned for the "least condemned" war crime: precedent and problems with prosecuting rape as a serious war crime in the International Criminal Tribunal for Rwanda' *Columbia Journal on Gender and law* (2004) 287.

¹⁸⁸ Counts 7 & 11 contained the amended charges of inciting rape.

¹⁸⁹ Case No IT -96-21-T 2008.

municipality, in central Bosnia and Herzegovina.¹⁹⁰ The accused Landzo is alleged to have worked as guard at the camp, Delic and Mucic also acted as commanders at the same camp with Mucic being the commander and Delic the deputy commander. Delalic on the other hand was said to have exercised control over the prison camp as the coordinator of the Bosnian Muslim and Bosnia Croats forces.¹⁹¹ Landzo and Delic were charged with individual criminal responsibility pursuant according to article 7 (1) of the statute as direct participants in the criminal acts of murder, rape and torture.¹⁹² However, the allegations of rape were charged as torture or cruel treatment. This is because the crime of rape is not expressly stated in the GC IV provisions on grave breaches or in the common article 3.¹⁹³ Mucic and Delalaic were charged as liable superiors in terms of article 7 (3) of the Statute for the crimes committed by their subordinates including the crimes that were committed by Landzo and Delic.

Delic was charged with the counts of torture and cruel treatment under which the allegations of rape and other forms of sexual violence were categorised. Witnesses Grozdana Cecez reported of how she suffered repeated forcible sexual intercourse in the hands of Delic and others between May and August of 1992. Another witness, Witness A also testified of how Delic raped her during her first interrogation and repeatedly thereafter.

When the Trial Chamber dealt with the allegation of rape as torture, it agreed with the decision held by the ICTR in *Prosecutor v Akayesu*, where it was held that the definition of rape would constitute the 'invasion of a sexual nature, committed on a person under circumstances that are coercive.'¹⁹⁴ The Trial Chamber also considered other decisions given by international and regional

¹⁹⁰(n 189 above) para 3.

¹⁹¹ (n 189 above) para 4.

¹⁹² (n 189 above) para 5.

¹⁹³ (n 189 above) para 475.

¹⁹⁴ (n 189 above) para 479.

judicial bodies. One decision was *Fernando and Raquel Mejia v Peru*¹⁹⁵ The Inter-American Commission found that the rape of Mrs Mejia constituted torture according to article 5 of the American Convention of Human Rights because it consisted of three elements; firstly, and intentional act to inflict physical and mental pain, second, the suffering must be inflicted for a purpose and thirdly, it must be committed by a public official or private person acting under the orders or instructions of a public official.¹⁹⁶ Delic and Lanzo were found guilty of murder, rape and other torture of victims that caused lasting and profound damage.¹⁹⁷ Delalic was however acquitted of all counts of command responsibility in relation to the atrocities that were committed.

4.2.2 Prosecutor v Anto Furundzija¹⁹⁸

The prosecution alleged that on 15 May 1993, members of a special unit of the military police of the HVO known as the 'jokers' arrested Witness A, a Muslim woman residing in Vitez.¹⁹⁹ She was taken to a house where the accused, who was at the time the local commander of the unit, began interrogating her to give names of Croatians and state the activities of her sons. One of the soldiers then forced witness A to strip and threatened her if she did not give the information asked.²⁰⁰ She and another Witness D were later on beaten and the soldier had oral and vaginal intercourse with witness A. The accused however, did nothing to stop these events from occurring.²⁰¹

¹⁹⁵ Annual Report of the Inter American Commission on Human Rights, Report No. 5/96, Case No. 10. 970, 1 March 1996.

¹⁹⁶ (n 189 above) para 185.

¹⁹⁷ (n 189 above) paras 467 & 469.

¹⁹⁸ Case No IT -95-17/1-T.

¹⁹⁹ (n 198 above) para 3.

²⁰⁰ (n 198 above) para 4.

²⁰¹ (n 198 above) para 5.

It must be noted that this case, having issued its judgement three weeks after the *Celebici* case, a set of different judges, accepted a different definition of rape than the one given in the *Akayesu* case. Based on an enquiry of the national legislation, the Trial Chamber undertook a thorough investigation of the particulars of the crime of rape. It was held that in defining rape the Trial Chamber looked at the principles of common law common to the major legal systems of the world.²⁰² The Trial Chamber gave a wider definition of rape and stated that the objective elements of rape also included oral penetration and that the coercion or threat was against a victim or a third person as well.²⁰³

The Trial Chamber however faced criticism because it categorised oral penetration as rape and this was therefore against the *nullum crimen sine lege* principle because according to Yugoslav law, such an act constituted only sexual assault. However, the Trial Chamber upheld its decision stating that even if oral penetration was considered a lesser crime under Yugoslav law, the fact was that it was still a crime under Yugoslav law though characterised differently.²⁰⁴

The accused was found guilty and deemed a co-perpetrator (or principal perpetrator) in the war crime of torture but an accomplice (secondary perpetrator) with regards to the crime of rape and therefore received 10 years and 8 years respectively as a sentence.

²⁰² Judgment para 177.

²⁰³ Judgment para 185.

²⁰⁴ W.Schabas 'Commentary on Prosecutor v Furundzija judgement' in *Annotated leading cases of International Criminal Tribunals, The ICTY 1997-1999* in A.Klip and G Sluitter (eds) (2001) 757.

4.2.3 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*²⁰⁵

In this case, two Muslim girls had been abducted, confined and raped in an abandoned house in Trnovace. The Trial Chamber stated it was enslavement and defined it as “the exercise of any or all of the powers attaching the right of ownership over a person. Further evidence of enslavement includes exploitation; the exaction of forced or compulsory labour or service, often though not necessarily involving physical hardship; sex; prostitution and human trafficking.”²⁰⁶ The court also held that money or kind need not be transferred in exchange of a person for enslavement to have occurred. Witness FWS 191 gave evidence of how the accused raped her and instructed the other soldiers not to rape her. He also told her to “obey his commands” and also forced her to do household chores. All this factors were evidence of the “exclusive nature” of how he exercised ownership over the victim. The accused was therefore charged with the crimes of rape and enslavement.

From Witness FWS 191’s evidence where she testified that the accused had also forced her to perform household chores over and above sexually abusing her and ordering the other soldiers not to touch her is similar to the phenomenon of the “bush wives” of Sierra Leone.²⁰⁷ However, the charge of forced marriage was not yet recognised in the ICTY statute and the precedent punishing the crime of forced marriage was not yet established by the time the *Kunarac* decision was given.

²⁰⁵ Case No IT-96-23-T and IT-96-23\1-A.

²⁰⁶(n 205 above) para 542.

²⁰⁷ J. Gong-Gershowitz ‘Forced Marriage: A “new” crime against humanity?’ *North-Western Journal on International Human Rights Law* Volume 8 Issue 1 (2009) 47.

4.2.4 *Prosecutor v Radislav Krstic*²⁰⁸

In this case, the Trial Chamber held that where rape crimes were committed incidentally for example when an attack was taking place and the perpetrators then spontaneously decided to commit rape, meaning that rape was not planned and systematic; the accused was still found guilty of rape crimes. This is because there the foreseeable consequence to persecute the victims existed.

4.2.5 *Prosecutor v Miroslav Kvočka*²⁰⁹

When dealing with the prosecution of GBV, the importance of this decision was that the Trial Chamber held that if murder, rape and torture were charged separately and jointly as persecution for the same acts committed then the persecution will override all other mentioned crimes. This therefore means that a person could not be convicted for both the crimes of murder or rape and persecution as crimes against humanity for the same acts committed.²¹⁰

4.3 Cases at the SCSL

The cases that are discussed below are of importance in international law because the court had to deal with the unique form of GBV known as forced marriage. This type of crime had never been prosecuted at any international tribunal.

²⁰⁸ Case No IT-98-35-T.

²⁰⁹ Case NoIT-98-33-A.

²¹⁰ K. Askin 'The jurisprudence of international war crimes tribunals: securing gender justice for some survivors' in H. Durham & T.Gurd (eds) *Listening to the silences: women and war* (2005) 129.

4.3.1 *Prosecutor of the Special Court For Sierra Leone v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Boror Kanu*²¹¹

The three defendants Brima, Kamara and Kanu were arrested in 2003 and charged with fourteen crimes against humanity. Brima was a senior member of the Armed Forces Revolutionary Council (AFRC) and had overall command of some of the AFRC troops and was in command in January 1999 when the AFRC invaded Freetown.²¹² Kamara served second in command to Brima and also had overall command over some troops.²¹³ He served as deputy commander of the AFRC fighting forces and also participated with Brima in the invasion of Freetown in January 1999. Kanu was a member of the AFRC council and he had overall command over the fighting forces with specific charge of abducted civilians including women and children.²¹⁴ All three of the defendants were involved in the 1997 coup.²¹⁵

From the onset, the AFRC indictment was tainted with defects. The two major criticisms that the Trial Chamber had about the indictments was that firstly the allegations of liability under the doctrine of joint criminal enterprise had been pleaded incorrectly by the prosecutor.²¹⁶ The second criticism is of importance in this research because this criticism was made by the majority of the Trial chamber and it was with regard to count 7 of the indictment. This count dealt with the crime against humanity of “sexual slavery and any other form of sexual violence”. By stating this count in the indictment, the trial chamber came to a unanimous decision that it violated the rule against duplicity.²¹⁷ After the trial chamber rejected the indictments, the trial and judgments were affected.

²¹¹Case No. SCSL-2004-16-T. Hereinafter referred to as the *AFRC* case.

²¹² Paras. 378 & 420.

²¹³ Paras. 380, 461 & 462

²¹⁴ Paras. 509 & 526.

²¹⁵ Paras 332, 438 & 507.

²¹⁶ Para. 85.

²¹⁷ Par 95.

There were two aspects of the judgment that are recognised as being unique to this case and international criminal law in general. The first aspect was that the *AFRC* case was the first judgment from an international tribunal that dealt with the “conscripting or enlisting of children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities”. This was considered a war crime and all three of the defendants were convicted of this crime.²¹⁸

Secondly, and most important to this research was the fact that the majority of the judges ruled that forced marriage could not be classified as the crimes against humanity charge of “other inhumane acts” because it was part of the crimes against humanity charge of sexual slavery.²¹⁹ In order to avoid redundancy the Trial Chamber dismissed the charge of forced marriage. However, a problem arose because the charge of sexual slavery was also rejected. This was because the Trial Chamber wanted to avoid duplicating a crime.²²⁰ The result of this decision was that the Trial Chamber was faced with strong evidence of sexual slavery but they could not charge this crime as a crime against humanity.²²¹ Some of the evidence included that of Prosecution Witness TF1-094, whose parents were killed by the rebels who had invaded their village of Bamukura and one of the rebels named Andrew intervened when the other rebels wanted to kill her as well and said he would “save her”.²²² However, instead of saving her life and letting her go free he captured and raped her for a period of one month and she fell pregnant. Not only was she raped, she had to

²¹⁸ Paras.2113, 2117& 2121.

²¹⁹ Para. 713.

²²⁰ V. Oosterveld & A. Marlowe, ‘Special Court for Sierra Leone; International decisions.’ *American Journal on International law* (2007) Volume 101, 854. The reason was also because the prosecutor had listed the crime as “sexual slavery and other forms of sexual violence.”

²²¹ Para. 719. See also Oosterveld et al (n 70 above) where it was stated that this decision by the court affected the victims because they could not give evidence of the crime as sexual slavery and this therefore led to the crimes not being acknowledged for what they really were.

²²² Para 1078.

do his laundry and other chores.²²³ The witness further testified that Andrew considered her to be his “wife” and held her captive for a period of 5 months.²²⁴

Prosecution Witness TF1-133 also testified that the women that were captured at the same time as her were given to the men as their “wives” and not only did the men have sex with them; they were also required to clean and wash their clothes and dishes.²²⁵ In light of the evidence and in an effort to avoid the lack of prosecution of the crime, the Trial Chamber decided to classify the crime as a war crime on the charge of it being “outrages to personal dignity”.²²⁶ All the accused were convicted on this charge.²²⁷

This decision with regards to GBV crimes has been highly criticised by authors. Oosterveld stated that by the Trial Chambers majority decision to exclude forced marriage as a charge of “other inhumane acts” under crimes against humanity and categorizing it as part of the sexual slavery charge it classified this crime purely as a sexually motivated or construed crime which was not the case.²²⁸ By focusing solely on the sexual nature of the crime, the Trial Chamber failed to recognise the non-sexual and the gendered elements of the crime.²²⁹

4.3.2 *Prosecutor v Fofana and Kondewa*²³⁰

The *CDF* case was another case whereby the Trial Chamber had difficulties dealing with the indictment. There were also three defendants; Norman, Moinina Fofana and Allieu Kondewa. Norman died a year after the trial closed and

²²³ Paras. 1079 & 1080.

²²⁴ Para 1113.

²²⁵ Para 1118.

²²⁶(n 220 above)

²²⁷ Paras. 2113, 2117, 2121.

²²⁸ (n 226 above).

²²⁹ (n 228 above).

²³⁰ SCSL-04-14-T.

charges against him were terminated. However, unlike the *AFRC* judgment, the *CDF* judgment did not consider any evidence of sexual violence because decisions were made during the trial proceedings to exclude that type of evidence.²³¹ The reason for this was that the Prosecutor had failed to include the charges of rape, sexual slavery and inhumane acts (forced marriage) in the initial indictment and the Trial Chamber then refused the amendment of the indictment.²³² The accused were therefore not charged and convicted with these crimes. This decision was highly criticised because the witnesses were then forced to structure their testimony in such a way that they were to exclude any acts of GBV that were committed against them and some were even completely restricted from testifying.²³³

4.3.3 Comparisons between the *AFRC* and *CDF* decisions

The decisions of the Appeals Chamber of both the *AFRC* and the *CDF* cases transformed the regressive nature in which the previous judgments dealt with gender-based crimes. In the *CDF* Appeals case, the majority stated that the appeal did not succeed as to the amendment of the indictments in order to include the gender-based crimes but the chamber stated that the prosecutor had an alternative route he would have used to bring forth the indictments before the chamber. They stated that the prosecutor could have brought a separate indictment. The main lesson learnt from this was that the error in law that the prosecutor committed did in fact lead to a miscarriage of justice.²³⁴ On the second ground of appeal, the Appeals Chamber held that it was incorrect for the evidence of sexual violence to be completely excluded because such evidence

²³¹(n 230 above) Para 48.

²³² (n 230 above)Paras 533.

²³³(n 230 above) Paras. 561 & 565.

²³⁴ Para. 426.

was also necessary and relevant when dealing with the other charges that were listed in the indictment.²³⁵

The Appeals Chamber of the *AFRC* case concluded that the Trial chamber erred in classifying forced marriage solely as a sexual crime.²³⁶ The Appeals Chamber defined forced marriage as “forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim.”²³⁷ This classification by the Appeals Chamber created a landmark decision as the SCSL recognized and acknowledged the multi faceted nature of the crime of forced marriage.²³⁸ It recognized that not only were the victims raped (sexual nature), they also had to endure hardships such as forced labour, forced child bearing, forced child rearing and domestic slavery.²³⁹ However, the definition of forced marriage as being a crime of forced conjugal association has raised questions as to what the definition of “forced conjugal association” is.²⁴⁰

The Appeals Chamber also held that there were distinguishing factors between forced marriage and sexual slavery that led the conclusion that forced marriage was not solely a sexual crime. These factors were:²⁴¹

- 1) “words or conduct intended to compel a person by force or threat of force into a “forced conjugal association; and

²³⁵ Para. 446.

²³⁶ Paras 182 & 188.

²³⁷ Para 195.

²³⁸ V. Oosterveld ‘Special Court for Sierra Leone: International decisions’ *American Journal on International Law* (2009) volume 103, 108.

²³⁹ As above.

²⁴⁰ (n 238 above) 110.

²⁴¹ Prosecution Witness TF1-133’s testimony described the evidence of the exclusive ownership relationship. She testified of how the rebel leaders created a law that stated that once a man was given a woman, the man would be the sole owner of the woman and he was not allowed to covet his colleague’s wife.

- 2) A relationship of exclusivity between the “husband” and “wife”, which could lead to disciplinary consequences for breach of the “exclusive arrangement”.

However, one author, Gong-Gershowitz criticised the Appeal chambers decision of distinguishing the crime of forced marriage from the crime of sexual slavery. She stated that this decision had “the ironic effect of minimizing the sexual violence and enslavement that were the principal features of forced marriages in the Sierra Leone conflict.”²⁴² Another criticism given by this author was that the Appeals Chamber caused confusion in giving the definition of forced marriage when it stated with emphasis that parental consent was the distinguishing feature between forced marriage during conflict and arranged marriages in peace time.²⁴³

4.5. Conclusion

In conclusion, the above cases have set different precedent in international law as to how gender-based crimes are to be prosecuted. The three tribunals all had to deal with a different set of facts pertaining to the different types of conflict that occurred and this contributed further to the way the different forms of gender based crimes were prosecuted. For example, the crime of forced marriage was only prosecuted as a crime in the SCSL and the prosecution was not able to prosecute the same crime in the ICTR whereas in the ICTY the crime was prosecuted jointly as the crimes of rape and enslavement.

All in all, even though these recent international courts have faced criticism as to how they have dealt with gender based crimes, it cannot be disputed that they

²⁴² J. Gong-Gershowitz ‘Forced Marriage: A “new” crime against humanity?’ *North-western Journal on International Human Rights Law* Volume 8 Issue 1 (2009) 54.

²⁴³ (n 242 above) 65.

have set landmark judgments that are now going to be used by other upcoming international tribunals including the ICC.

CHAPTER 5: RECOMMENDATIONS AND CONCLUSIONS

5.1 Challenges and positive experiences

Before giving recommendations, it is important that challenges and positive experiences that have been gained from the prosecutions that have occurred in these three international tribunals are mentioned. When analysing the challenges and the positive lessons learnt from prosecuting this crime, we have to consider what occurred before, during and after the trial phase.

Starting with the ICTR, the three weaknesses or challenges that were faced when prosecuting these GBV crimes were:²⁴⁴

- i. The inability of the prosecutor to mention sexual crimes from the outset that created the impression that GBV did not occur during the genocide,
- ii. A witness crisis that occurred as a result of the tension between the strong need for the court to administer justice while still upholding the interests of the survivors. An example of this was where the prosecutor and the defence counsel were criticised for retraumatizing and dehumanizing some of the survivors in the way they questioned them and;
- iii. Finally, significant delays were experienced in the arresting and prosecuting of the perpetrators and this led to the victims and the survivors losing their faith and trust in the court to administer justice in a timely manner.²⁴⁵

The most criticised challenge that the ICTR has faced has been deficiencies in the indictments when prosecuting the perpetrators.²⁴⁶ Many of the original indictments including the one in the *Akayesu* case failed to charge the

²⁴⁴S. Wood 'A woman scorned for the "least condemned" war crime: precedent and problems with prosecuting rape as a serious war crime in the ICTR' *Columbia Journal on Gender and Law* (2004) 300.

²⁴⁵ Wood (n 244 above) 301.

²⁴⁶ Wood (n 244 above) 274.

perpetrators with the crimes of GBV and only as result of up roar from civil society and the evidence given by one of the witness that prompted Judge Pillay to request the prosecution to review their evidence and charges was there change in the indictments. Other failures that the court has had were the way in which victims and witnesses were handled at the pre trial phase and during the trial phase of the cases.²⁴⁷

Another challenge that the ICTR faced was the securing of witnesses to testify.²⁴⁸ This was a problematic issue as most of the courts acknowledged the fact that they rely heavily on the live testimony of witnesses.²⁴⁹ The insensitive treatment of victims and inadequate procedures has had a negative impact on the prosecution of GBV at the ICTR.²⁵⁰ The handling of witness at the pre and post trial phase has also been criticised as a negative feature experienced at the ICTR. The ICTR often went to the villages in UN marked large vehicles and collected the witnesses and this showed how the ICTR did not exercise discretion when collecting the witnesses. These witnesses where therefore easily recognised by the community. The government of Rwanda also required that the prospective witnesses had to identify and disclose their personal details to them prior to them going to Arusha where the court was and this made the witnesses easily recognisable.

The statute of the ICTY also contains provisions governing the protection of witnesses in cases of sexual violence.²⁵¹ The ICTY also decided in the *Furundzija* case that a victim or witness who was suffering from post traumatic

²⁴⁷ As above.

²⁴⁸ Wood (n 244 above) 307.

²⁴⁹ As above.

²⁵⁰ N. Price, K. Grady & R. Ibreck *Injustice after sexual violence: Problems in practice at the International Criminal Tribunal for Rwanda* at http://www.psa.ac.uk/journals/pdf/5/2010/1043_864.pdf > (accessed on 20th August 2010).

²⁵¹ J. Gardam & M. Jarvis *Women, Armed Conflict and international law* (2001) 224.

stress disorder was a reliable witness and in this way illustrated that the trial chamber had regard for the psychological condition that the victim had experienced as a result of being sexually violated.

The SCSL has also faced challenges when the prosecution attempted to prosecute gender based crimes. Of importance was the *CDF* case where the Trial Chamber judges refused any evidence proving that sexual violence had been committed by the militia group. Hence, the Trial Chamber only allowed the witnesses to testify about other crimes and not GBV crimes even if some of them suffered GBV.²⁵² The reason for refusing the evidence was that the group was generally believed not to touch women as this would “nullify the special protections endowed on them by medical men”.²⁵³

This dehumanised the victims even more considering the fact that in Sierra Leone only the rape of a virgin is perceived a serious crime.²⁵⁴ Many people believe that when married women or non-virgins are raped, they had consented to the sex. However, there have been positive experiences that should be learnt from prosecutor David Crane of the SCSL. He made sure that justice was delivered to rape victims of the Sierra Leonean war. Despite having financial constraints and limited resources unlike the other international tribunals, he carried out an effective investigation and prosecution of gender crimes.²⁵⁵ He had only ten investigators in his team but two of the investigators were seasoned

²⁵² P. Sellers ‘Gender Strategy is not a luxury for international courts: A key note’ *American University Journal on Gender Social Policy and Law* Volume 167 (2009) 318.

²⁵³ L. Teale ‘Addressing gender-based violence in the Sierra Leone conflict: Notes from the field’ *African Journal on Conflict Resolution* Volume 9 No. 2 (2009) 72.

²⁵⁴ B. Nowrojee ‘Making the invisible war crime visible: Post conflict justice for Sierra Leone’s rape victims’ *Harvard Human Rights Law Journal* volume 18 (2005) 89.

²⁵⁵ Nowrojee (n 254 above) 103. See also *Injustice after sexual violence: Problems in practice at the International Criminal Tribunal for Rwanda* N. Price, K. Grady & R. Ibreck at <http://www.psa.ac.uk/journals/pdf/5/2010/1043_864.pdf> (accessed on 20th August 2010).

female investigators who dealt with the sexual assault investigation and carried out the interviews.²⁵⁶

5.2 General recommendations

Ending sexual violence as a part of GBV in conflict situations starts with empowering women and eradicating notions related to the patriarchal system that prevent women experiencing justice for the crimes that they have suffered especially when there was no conflict.²⁵⁷ Gender equality is therefore important in stopping sexual violence and GBV in armed conflict.²⁵⁸

The second most important factor in improving how the prosecution of GBV takes place is the existence of a great political will at the office of the prosecutor (OTP) for there to be change in the way the prosecutions are being carried out.²⁵⁹ The OTP must also make the issue of the prosecution of gender crimes a policy priority in order for change to occur and this must flow from the head of the prosecution team to the rest of the subordinate members.²⁶⁰

Survivors of GBV during armed conflict seldom receive justice or other forms of consolation for the harm experienced such as the perpetrators being held

²⁵⁶ Nowrojee (n 254 above) 101.

²⁵⁷ A. Kirsten *Guns and Roses: Gender and armed violence in Africa* UNDP (2007) par 33 Document 11916.

²⁵⁸ As above.

²⁵⁹ B. Nowrojee *We can do better investigating and prosecuting crimes of sexual violence* (Paper presented at the Colloquium of prosecutors of the International Criminal Tribunal of Rwanda in Arusha Tanzania, November 25-27, 2004) available at http://www.womensrightscoalition.org/site/publications/papers/doBetter_en.php (accessed on the 24th October 2010).

²⁶⁰ As above.

accountable, reparation and psychological, medical or financial redress.²⁶¹ Prosecutor Richard Goldstone of the ICTY stated that gender crimes had not been accorded the same treatment as other crimes. He blamed this on “the laws that were conceived and drafted by men.”²⁶²

Culture and religion must also be borne in mind when investigations related to GBV crimes committed are taking place. Some cultural practices and beliefs make it difficult for women to open up and discuss the atrocities committed against them especially where there is stigma attached with regards to the acts committed.²⁶³ This was experienced in both Rwanda and Bosnia and Kosovo, where the women found it difficult or refused to testify because of the stigma attached to rape.²⁶⁴

Other measures have been used in order to create a comfortable atmosphere for the women to open up about what they have experienced. The use of female investigators and interpreters has shown to minimise the trauma that the female witnesses experience when having to recount their ordeals.²⁶⁵ Other recommendations with this regard that have been given are that if the investigations are carried out effectively, then there will be more indictments, the protection of witnesses and assistance given to the witness before, during and after the trial and this will also lead to their being more willingness from more witnesses to give their testimonies.²⁶⁶ The investigators must also have the skills or be trained in the collecting and handling of evidence related to gender

²⁶¹ K. Askin ‘The Quest for Post Conflict Gender Justice’ *Columbia Journal on Transitional law* Volume 41 (2002-2003)520.

²⁶² Interview with Prosecutor Goldstone in S. Saywell, “Rape: A crime of war” (Canadian National Film Board Documentary) 1996 as quoted by J. Gardam & M. Jarvis (2001) *Women, Armed Conflict and international law* 217.

²⁶³ Gardam et al (n 251 above).

²⁶⁴ As above.

²⁶⁵ Gardam et al (n 251 above) 222.

²⁶⁶ Wood (n 244 above) 318.

crimes.²⁶⁷ This will then definitely have a positive impact on the prosecution of GBV crimes.²⁶⁸ Evidentiary rules have been adopted by the ICTY and the ICTR in order to minimise the traumatic experience the witnesses have faced especially when they have to testify about the sexual violence they went through.²⁶⁹

Another factor that prevents witnesses in general from testifying is the fear of repercussions and reprisals. Most of the women feel as though the tribunals are not equipped or are unable to protect them when their lives are under threat even after the trials have finished and they have to go back to their families and their communities.²⁷⁰ The international tribunal must provide adequate victim and witness protection units that are designated to protect the witness not only during the pre trial phase but even after the trial has taken place.²⁷¹ During the trial phase, it must be noted that the courts have provided protection of witnesses who were testifying before the accused by providing for pseudonyms, protective screens, image-altering devices, closed sessions and video inked testimony.²⁷² The ICTY protected witnesses to sexual violence when the Trial Chamber stated that the identity of the witnesses had to be protected and hidden during the trial phase.²⁷³

Another recommendation is that there needs to be gender specialised appointments with regards to female judges, investigators and interpreters at the

²⁶⁷ (n 259 above).

²⁶⁸ As above.

²⁶⁹ Gardam et al (n 251 above) 226.

²⁷⁰ (n 266 above).

²⁷¹ Gardam et al (n 251 above) 223.

²⁷² *The Prosecutor v. Anto Furundzija* (Trial Judgement), Case No.: IT-95-17/1-T par 16, there was the use of pseudonyms, two witnesses were also allowed to give testimony in closed sessions whereas others were also allowed to use image distorting devices to protect them

²⁷³ *The Prosecutor v Duško Tadic*, Case No.: IT-94-1-A, where there was a Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses.

international tribunals.²⁷⁴ Some international courts have designated a dedicated investigation team dealing specifically with gender crimes whereas some of the courts have a special prosecutor trained to deal with gender crimes.²⁷⁵ In Sierra Leone there have been note worthy steps that were taken by the Truth and Reconciliation commission in gender sensitizing the commissioners when UNIFEM trained them and other staff members on how to deal with gender based crimes.²⁷⁶

At the pre trial phase, witness preparation is also of importance and necessary.²⁷⁷ The witnesses have to be familiarised by the prosecutor of how the trial takes place and what type of questions they should expect with regards to the GBV crimes that were committed against them. The aim of this is not to coach the witness when they are giving their testimony, but to prepare them mentally with regards to them having to recount the events that took place. Sometimes they have to be ready for some of the questions that are posed by the defence counsel that may seem insensitive and hostile.

In the post trial phase the situation is different. In Rwanda and Sierra Leone for example, there have been reports of an increase in the infection rate of HIV amongst women.²⁷⁸ Many of the women became HIV positive as a result of the rapes. In Rwanda for example, some of the perpetrators raped the women with

²⁷⁴ (n 259 above).

²⁷⁵ As above.

²⁷⁶ B. Nowrojee 'Making the invisible war crime visible: Post conflict justice for Sierra Leone's rape victims' *Harvard Human Rights law journal* volume 18 (2005) 89.

²⁷⁷ Nowrojee (n 273 above).

²⁷⁸ Landesman 'the minister of rape: how could a woman incite Rwanda's sex crime Genocide?' *New York Times Magazine* (September 2002) 82 as cited in S.K Wood 'A woman scorned for the "least condemned" war crime: precedent and problems with prosecuting rape as a serious war crime in the International Criminal Tribunal for Rwanda', *Columbia Journal on Gender and law* (2004) 287.

the sole aim of infecting them with HIV or impregnating them.²⁷⁹ Many of the women therefore either fell pregnant or were infected with HIV. Those that fell pregnant did not have abortions because majority of the population in Rwanda is Catholic and they did not believe in abortion. The women therefore had constant reminders of the atrocities committed against them in their children. The other problem was that they had to financially support these children and integrate them in their families after the genocide and this caused problems in some of their marriages. For the women who were infected with HIV, the problem that they faced was that the perpetrators who were being tried at the ICTR had access to ARVs yet they as victims had to cater for their own medication and some of the women could not afford these drugs therefore there were reports that some of the witnesses died before they even got a chance to testify.

The other issue when dealing with the prosecution of GBV is with regards to the compensation awarded to the victims. The ICTY and the ICTR jurisdictions for example only allows for orders to be made regarding the restitution of property and proceeds acquired as a result of criminal conduct.²⁸⁰ The Statutes of the ICTR and the ICTY also only states that it is the duty of the States to accept the judgement that had been passed by the tribunals.²⁸¹ The States also have the responsibility to pay compensation to the victims. However, there are problems with this approach because most of the governments are ill equipped and lack experience with regards to handing out compensation.²⁸² In the end it is the affected individuals and the victims who suffer.

²⁷⁹ As above.

²⁸⁰ S Gardam & Jarvis M *Women, armed conflict and International law* (2001) 245.

²⁸¹ As above.

²⁸² As above.

5.3 Conclusion

In conclusion, it is evident that there have been steps that have been taken to improve the way in which the prosecution of GBV takes place. The new international tribunals can therefore learn a lesson or two from the ICTR, ICTY and the SCSL. Both the negative and the positive experiences from the prosecutions that have occurred can be used to place the new tribunals at a better position when dealing with the various crimes of GBV.

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