SYMPOSIUM ON THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA: BROADENING THE DEBATE

GLOBALIZING JUSTICE, HOMOGENIZING SEXUAL VIOLENCE: THE LEGACY OF THE ICTY AND ICTR IN TERMS OF SEXUAL VIOLENCE

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Introduction

In their contribution to the AJIL Symposium, Robinson and MacNeil remark that a prolific legacy of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) is that "it is now commonsense that rape is and must be a war crime."[1] This line distills the complexity of the legacies of the tribunals regarding sexual and gender-based violence. On the one hand, it articulates the critical role of the tribunals in cementing the idea that sexual violence, hitherto largely relegated to indifference in international criminal law and policy frameworks, is worthy of international attention. Simultaneously, it encapsulates the ways in which the tribunals' jurisprudence has been received globally to narrate a narrow conception of conflict-related sexual violence as a "weapon of war" or committed as part of "strategic" conflict-related goals. In fact, there is little that constitutes common sense about sexual violence in conflict, nor is it always, or even most predominantly, committed as a war crime, crime against humanity, or in pursuit of genocide as envisaged by international criminal law. Various studies suggest that sexual violence in war takes many forms and causalities with differentiation across and within conflict contexts.[2]

This essay argues that while the legacy of the tribunals is significant in contributing to a global legal and policy framework that, at least on paper, is unequivocal about the importance of addressing sexual violence in conflict, the tribunals have also contributed to the universalizing of a narrow focus on sexual crimes as strategic or instrumental. This has interacted with policy and mediatization of conflict-related sexual violence and contributed to an ideational homogenizing of gender-based violence, potentially marginalizing the experience of a significant proportion of victims and survivors. Moreover, in light of the preeminence of international criminal law approaches to atrocity, similarly galvanized by the tribunals, the way in which this legacy is received risks displacing both analysis and recourse to justice for sexual violence outside of the

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[1] Darryl Robinson & Gillian MacNeil, *The Tribunals and the Renaissance of International Criminal Law: Three Themes*, 110 AJIL 191 (2016).

[2] Elisabeth Jean Wood, *Variation in Sexual Violence during War*, 34 POL. & SOC. 307 (2006); Amber Peterman et al., *Estimates and Determinates of Sexual Violence Against Women in the Democratic Republic of Congo*, 101 AM. J. PUB. HEALTH 1060 (2011).

scope of this threshold.[3] In this regard, this essay considers the tribunals' legacy beyond their legal scope, to consider their interaction with policies and narratives surrounding sexual violence. Ultimately, it posits that while the tribunals created a framework that provides some justice for some types of sexual violence crimes, neither they, nor their successors can account for the extent and differentiation of conflict-related sexual violence. However, the manner in which the tribunals have framed international prosecution as a universal remedy for justice for sexual violence, and in which that narrative has been received in social and policy contexts, omits sufficient consideration of these limitations.

The Tribunals' Legacies and their Sites of Reception

A critical contribution of the tribunals in terms of justice for sexual violence globally is the entrenchment of international legal recognition of sexual violence. The tribunals interrupted an historical international legal ambivalence to conflict-related sexual violence, which had hitherto been treated as collateral damage, or as an unfortunate byproduct of war. At the Nuremberg and Tokyo Tribunals, while there was evidence of sexual violence, there were no explicit sexual violence prosecutions. The ICTY and ICTR tribunals had to negotiate the task of defining rape internationally, and their definitions of individual acts of sexual violence were more expansive than many domestic jurisdictions.[4] In the landmark *Akayesu* case at the ICTR, sexual violence was prosecuted as an instrument of genocide. The jurisprudence of the tribunals further saw sexual violence prosecuted as a crime against humanity and as a war crime. For the first time, thus, sexual violence in the course of hostilities was treated in international criminal law as an issue of concern, justiciable, unconscionable, and worthy of attention.

These developments find critical legacy in international criminal law. While actual progress on prosecution of conflict-related sexual violence has been slow, the tribunals have contributed to an international legal order in which sexual violence is considered as part of the rubric of atrocity crimes. The tribunals' jurisprudence was instrumental in the inclusion of sexual violence crimes during the negotiations for the development of the Rome Statute of the International Criminal Court (ICC),[5] which recognizes that sexual violence can be committed as a war crime or crime against humanity.[6] Sexual violence is not included in the Rome Statute as an element of genocide, but the link between sexual violence and genocide is articulated in the ICC's Elements of Crimes Document,[7] which is explicitly indebted to the linking of sexual violence to genocide in the *Akayesu* case at the ICTR.[8] Sexual violence has entered the lingua franca of international criminal law and this feature is indebted to the work and jurisprudence of the tribunals.

This expansive attention paid to sexual violence has led many to speak of the legacy of the tribunals in celebratory terms. A documentary produced as part of a legacy project on the tribunals' work on sexual

[3] Sara Kendall & Sarah M. H. Nouwen, *Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda*, 110 AJIL 212 (2016).

[4] A full discussion of the advances in terms of defining individual acts of sexual violence is beyond the scope of this essay. Broadly, the tribunals omitted the requirement of consent, and eschewed the consideration of the victim's character. In case law ICTR did not consider penetration to be necessary for sexual violence, while the ICTY did. For a discussion, see, Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT'L L. 277 (2002); Kelly Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288 (2003).

[5] Rome Statute of the International Criminal Court, 17 July, 1998, UN Doc. A/CONF.183/9.

[6] LOUISE CHAPPELL, THE POLITICS OF GENDER JUSTICE AT THE INTERNATIONAL CRIMINAL COURT: LEGACIES AND LEGITIMACY (2016).

[7] INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIME (2011).

[8] Valerie Oosterveld, *Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court*, 12 New Eng. J. Int'l & Comp. L. 119 (2005-2006).

violence is rather ambitiously entitled "Sexual Violence and The Triumph of Justice."[9] Many scholars,[10] civil society actors and the tribunals[11] themselves have tended to define the tribunals as constituting a step towards the end of impunity for sexual violence, and a promise of justice for victims globally.[12] Without wishing to detract from the importance of the attention given to sexual violence, these expansive claims to legacy are somewhat overemphasized in light of the actual scope of justice for sexual violence that the tribunals and their successors in international criminal law can provide.

The tribunals, like the ICC, were mandated to prosecute war crimes, crimes against humanity, and genocide. For crimes against humanity, sexual violence had to be shown to be a "part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[13] For genocide sexual violence had to be shown "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group". War crimes require explicit linking to armed conflict. In this regard, the tribunals, through their jurisdictional ambits, were predominantly able to address sexual violence when it was committed strategically, or as an instrument in pursuit of other crimes.

In some respects, the tribunals have thus contributed to a global narrative framing of conflict-related sexual violence as constituting, almost exclusively, a "weapon of war".[14] The term, "rape is a weapon of war," while not a legal concept, is repeatedly used in discussions around the tribunals both in their legacy projects, and in the advocacy and academic literature surrounding them. This echoes and interacts with media reporting, foreign policies, and United Nations Resolutions on conflict-related sexual violence, which frequently proffer that sexual violence is a weapon of war, or is strategic, or instrumental, and its addressing is frequently linked to objectives of international security. The Women, Peace and Security Agenda, which comprises United Nations Security Council (UNSC) Resolutions on gender and security for example, reflects the tribunals' legal classifications of gender-based violence and attempt to prioritize it in policymaking. UNSC Resolution 1820, "[s]tresses that sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security."[15] Similar articulations are reflected in policies such as the U.K.'s Preventing Sexual Violence Initiative.[16] Mary Robinson, writing in advance of the Global Summit to end Sexual Violence in conflict, noted, that "[i]n wartime, rape is a weapon. We cannot claim to be serious about stopping war crimes if we do nothing to prevent and punish these heinous acts."[17]

It would be radically overstretching to attribute this framing solely to the legacies of the tribunals, not least since advocacy around the concept predated the formation of the tribunals, and since, despite their import being largely narrated in terms of war, neither crimes against humanity nor genocide require the existence of

[9] *Sexual Violence and the Triumph of Justice*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA.

[10] Catharine A. McKinnon, *The ICTR's Legacy on Sexual Violence*, 14 NEW ENG. J. INT'L & COMP. L. 101 (2008).

[11] *Sexual Violence and the Triumph of Justice*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA.

[12] It is noted that the tribunals have been particularly honest and self-critical regarding the operational challenges surrounding prosecution of sexual violence, and it is clear that a key component of their legacy projects entails the distillation of lessons learnt. They have been less self-critical regarding their broader legacies and their claims to global justice for victims of sexual violence.

[13] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, UNSC Res. 955 (Nov. 8, 1994).

[14] For an excellent discussion of narratives surrounding sexual violence as a weapon of war, see MARIA ERIKSSON BAAZ & MARIA STERN, SEXUAL VIOLENCE AS A WEAPON OF WAR: PERCEPTIONS, PRESCRIPTIONS, PROBLEMS IN THE CONGO AND BEYOND (2013).

[15] UNSC Res. 1820 (June 19, 2008).

[16] Ministry of Defence et al., *Sexual violence in conflict*, U.K. GOVERNMENT.

[17] Mary Robinson, *Bringing Women to the Table to Address Sexual Violence*, N.Y. TIMES (June 11, 2014, 11:53 AM).

conflict for prosecution. Indeed, law, practice, advocacy and policy are mutually-constitutive. Grace Harbour, in a recent book published as part of the ICTY's focus on distilling the legacies of its work on prosecuting sexual violence, notes that "the international community's intense focus on the strategic use of sexual violence, including sexual violence pursuant to policy . . . profoundly influenced—and in many ways constricted-perceptions within the OTP about how and when sexual violence should be prosecuted."[18] In turn the resultant focus on prosecution for the strategic use of sexual violence provides that both the punishable subject and the victim are required for the operation of the narrative of sexual violence as a weapon of war. In essence, the tribunals are at once products and reproducers of a globalized narrative that stipulates that sexual violence is a weapon of war, or is instrumental to atrocity, not that it can be used as such.

Some Concerns with Sexual Violence as Instrumental

The framing of sexual violence as necessarily instrumental, when juxtaposed with what we know (and more significantly do not know) about sexual violence, cannot address the multiplicity of causes and incidences of sexual violence. Significantly absent from this framework is a recognition that sexual violence, within and outside of conflict, is committed by different actors, for different reasons. In many conflicts, people from all "sides" are victims of sexual violence. In linking sexual violence to strategic aims related to crimes against opponents, the prospects for justice of those on the "enemy" side, so defined by international criminal law, are excluded. At the ICTR, Mibenge and Buss have noted that the requirement that sexual violence be committed strategically to be prosecuted meant that while both Hutu and Tutsi women were raped, there could be no justice for Hutu sexual violence survivors and victims because sexual violence against Hutu women could not be linked to a strategic genocidal aim.[19] In turn, these omissions have shaped discursive framing of victimhood, gender, and sexual violence in Rwanda. Zarkov has made a similar argument around the framing of sexual violence against Serb women in Yugoslavia.[20]

While in some contexts, sexual violence is committed strategically, in others, as Eriksson Baaz and Stern have argued, militaries are urged not to rape, and sexual violence is perpetrated as a result of deviation from strategic aims, rather than in pursuit of them.[21] Dara Kay Cohen argues that sexual violence, in some military contexts is part of a loyalty producing or bonding process for soldiers, which need not be related to the goal of conflict.[22] Critically, despite the international criminal law focus on sexual violence by combatants, there is substantial evidence to suggest that intimate partner violence constitutes if not the majority, a large proportion of the instances of sexual violence in conflict, as in peacetime.[23] In one study of rape in the Democratic Republic of Congo, Peterman, Palermo, and Bredenkamp found that approximately 1.69 to 1.80 million women reported having been raped in their lifetime and approximately 3.07 to 3.37 million women reported experiencing intimate partner sexual violence.[24] This is not an exhaustive description of the causalities of

[18] BARON SERGE BRAMMERTZ & MICHELLE JARVIS, PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY (2016).

[19] Chiseche Mibenge, Gender and Ethnicity in Rwanda: On Legal Remedies *for Victims of Wartime Sexual Violence*, *in* GENDER, VIOLENT CONFLICT AND DEVELOPMENT (Dubravka Zarkov ed., 2008); Doris Buss, *Rethinking 'Rape as a Weapon of War'*, 17 FEMINIST LEG. STUD. 145 (2009).

[20] DUBRAVKA ŽARKOV, THE BODY OF WAR: MEDIA, ETHNICITY, AND GENDER IN THE BREAK-UP OF YUGOSLAVIA (2007).

[21] MARIA ERIKSSON BAAZ & MARIA STERN, SEXUAL VIOLENCE AS A WEAPON OF WAR?: PERCEPTIONS, PRESCRIPTIONS, PROBLEMS IN THE CONGO AND BEYOND (2013).

[22] DARA KAY COHEN, RAPE DURING CIVIL WAR (2016).

[23] Lindsay Stark & Alastair Ager, *A Systematic Review of Prevalence Studies of Gender-Based Violence in Complex Emergencies*, 12 TRAUMA VIOLENCE ABUSE 127.

[24] Peterman et al., supra note 2.

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sexual violence in conflict, but rather a suggestion that they are considerably more varied than a singular notion of sexual violence as strategic permits.

At face value, the juxtaposition of the narrow scope for international prosecution of sexual violence, envisaged by the tribunals and developed in international criminal law, with the complexity of sexual violence, means that a significant proportion of victims or survivors of sexual violence fall outside of the scope of international criminal justice. Of course, this is a product of jurisdiction and mandate. It cannot be expected that the tribunals prosecute cases beyond their mandates. The tribunals and their successors represent one type of redress (criminal justice) for one type of sexual violence (strategic). However, as Kendall and Nouwen argue, the tribunals have also contributed to the globalization of the notion that international criminal law is the appropriate response to atrocity including atrocity-related sexual violence.[25] In a video on the Rwanda Tribunal's official legacy website,[26] the tribunal is credited with moving towards a world in which "international law offers justice to all people, everywhere" while the ICTY's website notes, "[t]he Tribunal has laid the foundations for what is now the accepted norm for conflict resolution and post-conflict development across the globe, specifically that leaders suspected of mass crimes will face justice."[27] This echoes Mégret's argument that "one cannot be oblivious to the fact that international criminal justice, with its somewhat limited ambitions but considerable hold on imaginations, is in fact powerfully displacing other thinking about justice."[28]

Despite rhetorical overtures at a notion of universal justice, it is acknowledged in some documents related to the tribunals' legacy project that the jurisdiction of the tribunals cannot encompass justice for all crimes. This is largely framed in terms of the notion that the tribunals were established to try only the "gravest" of crimes. In a UN Department of Peacekeeping policy paper on the ICTY's legacy website discussing the elements of crimes at the tribunals for consideration in light of UNSC Resolution 1820, it is noted that "[t]he ICTY [and] ICTR . . . were established to deal with grave international crimes amounting to genocide, crimes against humanity and war crimes. Consequently, their judgments dealing with sexual violence usually concern only grave instances of sexual violence, or at least instances of sexual violence linked to the conflict."[29]

Statements such as these reproduce the notion that sexual violence is less egregious if it is committed outside of the scope of systematic atrocity crimes. It delineates certain instances of sexual violence as "grave" implying that others are not. This was an area of critical contestation among feminist scholars and activists around the tribunals and subsequently around the criminalization of wartime rape. While some scholars articulated the specificity of genocidal rape,[30] others, such as Rhonda Copelon argued that "to emphasize as unparalleled the horror of genocidal rape is factually dubious and risks rendering rape invisible once again."[31] If we focus on the victims, as the tribunals frequently invite us to do, it is unconvincing that individuals' experiences of sexual violence might be less grave if committed outside of the scope of atrocity crimes.

Without suggesting that the tribunals and their successors should address all forms of sexual violence, an assessment of legacy ought to consider the ways in which international criminal law has cultural and social

[25] Kendall & Nouwen, *supra* note 3.

[26] *20 Years Challenging impunity*, UNITED NATIONS MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS.

[27] *About the ICTY*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA.

[28] Frédéric Mégret, *International criminal justice: a critical research agenda*, *in* CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION (Christine Schwöbel ed., 2014).

[29] UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, REVIEW OF THE SEXUAL VIOLENCE ELEMENTS OF THE JUDGMENTS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, AND THE SPECIAL COURT FOR SIERRA LEONE IN THE LIGHT OF SECURITY COUNCIL RESOLUTION 1820 (2009).

[30] MacKinnon, *supra* note 10.

[31] Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTING'S WOMEN'S L.J. 243 (1994).

relevance beyond the legal. Law has discursive power to produce meaning beyond its immediate context, not only about how justice should operate, but about what constitutes injustice, and who constitutes a victim of injustice.[32] As Henry argues, "[i]nternational criminal law . . . produces, legitimates and mediates harm according to its internal and external mechanisms of legal governmentality. It authoritatively dictates which harms are 'extraordinary' and who can speak about them."[33] The reifying of a hierarchy of sexual violence embodied in the way in which their work is framed and their legacy communicated and received minimizes the experience of a vast proportion of victims of sexual violence. The strategic threshold and centrality and discursive power of international law, thus potentiate the minimization of the experiences of individuals whose rapes do not fall under it and potentially produces "ideal type" victims, outside of whom, justice is elusive.[34] This is particularly important in light of the tribunals' tethering of their legacy to justice for victims and has ramifications for who has access to justice, and, for the meaning attributed to rape, within and outside of the law.

Conclusion

It is clear then that the ICTY and ICTR find critical legacy in their emphasis on sexual violence in war, through which they have contributed to a legal and political context in which sexual violence cannot be relegated to a lesser crime in the context of other atrocities in international criminal law. The work of the tribunals has in turn shaped and interacted with developments in international policy, focusing critical attention on conflict-related sexual violence. At the same time, the tribunals have contributed to a narrative framing of sexual violence which articulates a necessarily strategic instrumentality of conflict-related sexual violence, which, while presented as universal, does not always accord with how sexual violence happens in conflict. This has implications both for narratives about what constitutes appropriate measures of justice for sexual violence, and for the articulation of the gravity of the crimes themselves. Embedded in the narrative is the risk of marginalizing the plethora of other forms of gender-based violence that occur in conflict and outside of it, while globalizing understandings of sexual violence and identities and conflicts. Addressing the scourge of sexual violence requires attention to the complex array of causalities and instances of sexual violence. It requires concerted focus on the specificities of contexts and their interactions with global patriarchy. It requires careful consideration of how and why sexual violence is committed. Perhaps then, the tribunals' legacies might find their most principled articulation in terms of accountability for the breadth of sexual violence if both their gains and the limitations of their scope are honestly appraised by both themselves, and those around them. Indeed, there ought to be a simultaneous acknowledgment of the remarkable developments of the tribunals in terms of recognition of sexual violence, and a contextualization of the tribunals and the international justice system they nurtured, as several constituents of a broader context of justice. While the actual work of the tribunals is deeply important, the universalized claims made about their legacies are at odds with the gaps in their capacities to address the range of incidences sexual violence in conflict and risk trivializing those beyond their purview.

[32] Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989).

[33] Nicola Henry, *The Fixation on Wartime Rape: Feminist Critique and International Criminal Law*, 23 SOC. & LEG. STUD. 93 (2013).

[34] Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15. HARV. HUM. RTS. J. 1 (2002).

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