

LLM: INTERNATIONAL AND HUMAN RIGHTS LAW

Topic: *Women as Forgotten Victims in the Process of Transitional Justice and National Reconciliation*

Research Paper submitted in partial fulfillment of the requirements of the degree LLM,

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DECLARATION

I, JOHNLYN TROMP, do hereby declare that this research paper is an original work in partial fulfillment of the LLM Programme in International and Human Rights Law. To the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

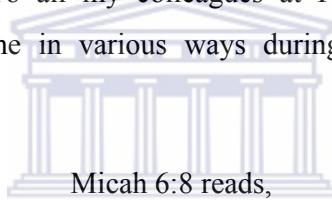
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DEDICATION

First and foremost, I would like to thank my Lord and Saviour, Jesus Christ who provided me with the necessary strength and courage to persevere despite times of weakness. I have truly learnt to understand that perseverance builds character and strengthens one's faith. To my parents, John and Cheryl Tromp and dear aunt, Sonia Newman who instilled the principle of hard work and serves as a constant source of encouragement to me. To my brothers and sisters, Ulreich, Lynne, Beauregard, Nadia, Carlisle, Imelda and Charné, I am so grateful to have such amazing people in my life whom I look up to and who have encouraged me to reach higher heights. To my nephews and nieces, Christian (my godson), Mishay, Qaim, Zorina, Ethan and Mika'il, your young lives have already brought so much joy into mine. My sincere prayer is that you too may seek justice in the choices that you make and have sincere benevolence for the plight of the vulnerable. I am indebted to Professor van der Poll who not only guided me in my research but also challenged me in my analytical thinking. Your constant encouragement, professionalism and passion is so evident and for that I am grateful. To all my colleagues at Projects Abroad, and friends who have encouraged me and accommodated me in various ways during the past two years, your support is appreciated more than words can say.



Micah 6:8 reads,

‘He has shown you, O mortal, what is good.

And what does the Lord require of you?

To act justly and to love mercy,

and to walk humbly with your God’.

Lastly, this research paper is dedicated to the countless women who have in the past and continue to be subjected to sexual violence. The research undertaken was particularly challenging knowing that women's status remains a low priority on the international agenda. It is through efforts within the academic field as well as on the grassroots level that change will come.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
CEDAW	Convention on the Elimination of Discrimination Against Women
CGE	Commission for Gender Equality
DEVAW	Declaration on the Elimination of Violence against Women
GC	Geneva Convention
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
SADC	South African Developmental Community
SCSL	Special Court for Sierra Leone
TRC	Truth and Reconciliation Commission



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CHAPTER 1: INTRODUCTION

1. Introduction

1.1 Background to the study

Women's experiences during armed conflict are generally left untold and unacknowledged. Even more, crimes committed against women during these times of political upheaval and unrest have for centuries been silenced along with the countless casualties of war. Perhaps it is as a Human Rights Watch Report of 2002 described it, a dual war, since women suffered as casualties but were also specifically targeted. African states have had their share of authoritarian leaders, who in the name of power; control; dominion and even as reward, have subjected women to *untermenschen*¹ (sub-human) or as "second-class citizens"² with second rate rights. This sense of dominion has then transcended beyond class and public and private domains, into women's lives and is manifested in rape because rape is about *power*.

Radical feminist, MacKinnon, rightly argues that law is itself a vehicle for gender discrimination because law and legal structures create and maintain male dominance.³ The state, predominantly comprised of male members to international agreements, is tasked with securing and implementing women's rights. It is therefore questionable whether the plight of women is given sufficient emphasis under such compromising circumstances. The individual is the primary actor in terms of human rights law and the principle of self-determination and thus, society cannot override the individual's rights. It is also then questionable whether women qualify as human at all, since their so-called equal rights are more often than not, overridden by society.

Transitional justice is a mechanism through which redress for human rights abuses is made possible through non-judicial and informal methods in countries transitioning from conflict situations. The premise is that truth leads to justice or redemption, which in turn leads to reconciliation.

The goals of transitional justice are as follows:

- addressing and attempting to heal divisions in society that arise as a result of human rights violations;
- bringing closure and healing the wounds of individuals and society, particularly through 'truth telling';
- providing justice to victims and accountability for perpetrators;
- creating an accurate historical record for society;

¹ A German term meaning "sub-human or inferior people".

² Simone de Beauvoir, renowned feminist, referred to the notion of women being 'second class citizens' in her book entitled *The Second Sex* (1953).

³ MacKinnon CA 'Towards a feminist theory of the state towards radical feminism' (1991) *The Yale Law Journal* 1281.

- restoring the rule of law;
- reforming institutions to promote democratisation and human rights;
- ensuring that human rights violations are not repeated and
- promoting co-existence and sustainable peace.⁴

States which have implored transitional justice as a mode of transformation in the country seem to have a specific focus on truth and forgiveness as prerequisites in the process of transformation. This paper focuses on Sierra Leone and the Republic of South Africa, both countries in transition which have implored similar mechanisms of transitional justice. It will be argued, *prima facie*, that the so-called national reconciliation sought via truth commissions is largely at the expense of the acknowledgement of women's experiences. Specific emphasis will be placed on rape. President Alfredo Cristiani, the president of El Salvador said the following in 1993, when explaining why amnesty was necessary: "to move forwards and build a better future *for our country*, it [is] necessary to erase, eliminate and *forget everything in the past*".⁵ This statement suggests that victims who have suffered, often irreparable human rights abuses should, as a matter of national interest, simply opt for a permanent state of amnesia. We also explore the international prosecutions of sexual violence and how the judiciary has dealt with the prosecutions.

One then questions the motive for transitional justice mechanisms such as truth commissions and amnesty within the individualistic-centred sphere of human rights. It appears from the afore-mentioned quote and accounts which are to follow in this paper, that forgiveness is used as a means to an end and in essence, is a political ploy to coerce victims into doing what is best for the country's well-being. Women are the forgotten victims whose stories are left untold, unacknowledged for the greater purpose of national reconciliation.

1.2 Objectives of the study:

This research paper as a study will focus on female sexuality (gender) and its role in transitional justice, adopting a radical feminist paradigm. The main objective is to ascertain whether women have in the past, and continue to be forgotten within the process of transitional justice and national reconciliation because of male dominance. The paper also lends critique to transitional justice as an appropriate form of justice in Sierra Leone and the Republic of South Africa, specifically.

⁴Anderlini SN, Conaway CP and Kays L 'Transitional Justice and Reconciliation' available at http://www.huntalternatives.org/download/49_transitional_justice.pdf (accessed on 21 March 2010).

⁵ Also known as Alfredo Félix Cristiani Burkard who was the president of El Salvador from 1989 to 1994. Own emphasis.

Furthermore, the research paper investigates how women's experiences of sexual violence, specifically rape, are, owing to the South African Truth and Reconciliation Commission (TRC) and the Special Court for Sierra Leone (SCSL), respectively, are not given their due. Upon evaluation, this research paper seeks to prove that despite strides at an international, regional and domestic level, women continue to be forgotten in the pursuit of, and under the guise of national reconciliation.

1.3 Rationale of the study

The Beijing Declaration and Platform for Action of 1995⁶ (hereinafter referred to as the "Beijing Declaration") was and remains the largest United Nations gathering of all time. It called for a global redress of gender inequality in all spheres of personhood-policy and programming. Even more pivotal was the fact that accountability was stressed as a vital component in achieving these goals. *Inter alia*, it was acknowledged that there exists a direct correlation between gender inequality and poverty.

Truth is a relative concept, since perpetrators have, often in their minds, absolved their own behaviour and justified their actions. For many women, justice is as elusive as transition. Transitional justice mechanisms such as the TRC and the SCSL certainly cause a victim to question the sincerity and honesty with which that apology is being sought. "It was a war that broke all the rules of warfare and ignored international conventions. It had no friends. Everybody was the enemy".⁷ Although this quote refers to the conflict in Sierra Leone, this is the epitomes every country which has experienced conflict. The residue of war is one of distrust, fear, corruption and injustice. Therefore, it can be argued, that transitional justice, despite its noble aspirations, is a challenge in and of itself. This is not merely because of the redress sought but also due to the fact that the victims, who are predominantly women⁸, are expected to trust a male-dominated institution, the same institution which was responsible for breaking the rules of war and intentionally breaching a moral code and international law. The debris of armed conflict and the correlative legacy of sexual violence perpetrated against women during armed conflict are at minimum, an expression of traditional gender roles. Sexual violence against women is common-place, to such an extent that it is regarded as a by-product of war and part of a game plan; plotted and strategic in nature.

⁶ The Beijing Declaration and Platform for Action: Action for Development and Peace was adopted at the United Nations Fourth World Conference on Women in September 1995 held in Beijing, China.

⁷ Bangura Z 'Sierra Leone: Ordinary Courts and the Special Court' Open Society Justice Initiative (Feb.2005) 54.

⁸Violence against Women Online Resources available at <http://www.vaw.umn.edu/documents/inbriefs/sexualviolence/sexualviolence.html> (accessed on 14 February 2011). See also 'In War as in Peace: Sexual Violence and Women's Status' available at <http://www.hrw.org/en/news/2004/01/25/war-peace-sexual-violence-and-women-s-status> (accessed on 14 February 2011).

Artz and Smythe rightly argue that the law has been a tool used to challenge both the legal and social understanding of women's experiences of inequality, oppression and violence.⁹ It is a general assumption that the law is put in place to protect everyone (both men and women), a mechanism through which equality, substantively and procedurally, would eradicate decades of discrimination and thus lead to egalitarianism. However, law being a fundamentally patriarchal institution, corrupts feminist engagement to its purposes.¹⁰ In Africa, male patriarchy is a way of life, hereby nullifying any legislative reforms. Traditional notions of superiority, power-play and authority seeps through every sphere of life – household, workplace, government and legislation. In 2002, the South African Law Reform Commission published results of a 1998 investigation into sexual offences showing that rape differs owing to the inherent nature of the offence in that it takes a victim-centred approach. In reality, women are still regarded as promiscuous temptresses and provokers, deserving of their so-called misfortune. These social norms again perpetuate male patriarchy and the correlative subservient position which is still assumed by women.

“Law can reflect social change, even facilitate it, but can seldom, if ever, initiate it. No matter what the formal legal articulation, implementation of legal rules will track and reflect the dominant conceptualisations and conclusions of the majority culture... it is more a mirror than a catalyst when it comes to enduring social change”.¹¹ This depicts and emphasises the mere symbolic and toothless nature of international legal instruments which some may call a two-sided mirror. The power in fact vests with the actors and not within the text of the legislation. States are absolved by being given the opportunity to opt out of provisions if these provisions are in conflict with their own domestic legislation. Reservations of provisions have the same effect. This reflects the powerless manner in dealing with women's rights within the international arena. Impunity is thus perpetuated because state sovereignty overrides women's rights. The significance of this proposed contribution cannot be over-emphasised. Despite years of legal transformation; attempts at national reconciliation; pursuits of gender equality and transition, there still exists a greater need for awareness-raising in the interests of uninformed or ill-informed communities. The importance of this research is vital, particularly within the African context where, to a large extent, patriarchy is a way of life.

⁹ Artz L and Smythe D 'Feminism v The State? A Decade of Sexual Offences Law Reform in South Africa' (2007) 74(1-3) *Agenda: Gender Based Violence Trilogy*.

¹⁰ Freeman (1980) in *ibid*.

¹¹ Fineman MA and Thomdsen NS (eds) *At the Boundaries of the Law* London: Routledge (1991) xiv in Artz L and Smythe D (2007).

1.4 Research questions

This research paper will pose the following questions:

- Do international and regional legal instruments with a specific focus on women adequately provide redress and protection to women who have experienced sexual violence in light of male patriarchy? Specific reference is made to the Convention on the Elimination of Discrimination against Women (CEDAW) of 1979 and The Protocol to the African Charter on Human and People's Rights on the Rights of Women of 2003
- In light of recent currents in gender equality, is progress evident?
- How has the role of the International Criminal Court (ICC), the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY) contributed to the pursuit of defining and prosecuting rape and thereby ending impunity and encouraging accountability?
- Is transitional justice an appropriate form of justice within the African context and does it express the continent's commitment to women who are victims of sexual violence, specifically rape?

1.5 Literature review

Transitional justice within the African context has a rich repository and thus there is a myriad of literature available on the subject. Boraine¹² provides for insightful reasoning with specific reference to transitional states and how the particular mode of transition is greatly dependent upon the government's political will and not necessarily international law. He suggests that such a combination calls for a collective turning from the past that neither ignores past evil nor excuses it, that neither overlooks justice nor reduces justice to revenge, that insists on the humanity of enemies even in their commission of dehumanising deeds, and that values the justice that restores political community above the justice that destroys it.¹³

MacKinnon is well respected within the feminist academic field and has ardently debated on the subject within the radical feminist paradigm. Her latest offering¹⁴ focuses on women within their various spheres of life and is quite relevant to women's experiences in present day. The aforementioned literature exposes gaps and ambiguities in terms of gender equality in international law. The author vehemently agrees.

¹² See generally Boraine A *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (2000).

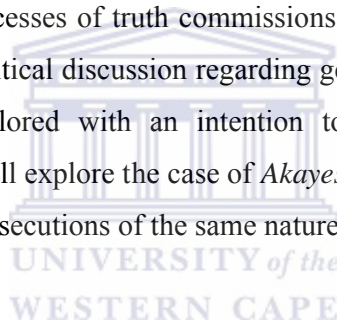
¹³ Boraine A (2000) 440.

¹⁴ See generally MacKinnon CA *Are Women Human? And international dialogues* (2006).

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)¹⁵ as well as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹⁶ (The African Women's Protocol), are seminal documents within the subject-matter and shall be criticised with specific reference to answering the question as to whether they adequately address the experiences of African women within their context. The author shall argue that the political showcase by state parties is at the expense of women's individual experience of misfortune. This has become somewhat common-place within the African context - almost sensationalist.¹⁷ Bell and O'Rourke argue that victims take what justice they can get which does not amount to much. "It views tradeoffs (truth for amnesty; forgiveness for punishment and prosecution of only the most serious offenders for most serious offenders)".¹⁸

The International Centre for Transitional Justice (ICTJ) published a Gender Justice series¹⁹ which informs this research paper, since it directly addresses the research question and critiques the fact that women are regarded solely as sexual beings.²⁰

The ICTJ series also questions the successes of truth commissions and other transitional mechanisms with specific regard to gender equality. A critical discussion regarding gender-related crimes before International Criminal Tribunals will also be explored with an intention to show the progressive and changing interpretation of rape. *Inter alia*, we shall explore the case of *Akayesu*²¹ in the ICTR and whether false hope was created in anticipation of future prosecutions of the same nature.



1.6 Delimitation of study

This research paper is based on certain presumptions. First, that there is a gender divide which exists and it would appear that despite mechanisms being put in place, African women remain a struggling second class.

¹⁵ Adopted in 1979 by the UN General Assembly. Available at <<http://www.un.org/womenwatch/daw/cedaw/>> (accessed on 15 April 2010).

¹⁶ Adopted in July 2003. "This groundbreaking Protocol, for the first time in international law, explicitly sets forth the reproductive right of women to medical abortion when pregnancy results from rape or incest or when the continuation of pregnancy endangers the health or life of the mother. In another first, the Protocol explicitly calls for the legal prohibition of female genital mutilation, and prohibits the abuse of women in advertising and pornography." Available at <http://www.equalitynow.org/english/campaigns/african-protocol/african-protocol_en.html> (accessed on 9 November 2010).

¹⁷ Chinkin C cited in Bell C and O'Rourke C 'Does Feminism Need a Theory of Transitional Justice? An Introductory Essay' (2007) *The International Journal of Transitional Justice* (1) 23-44.

¹⁸ Bell C and O'Rourke C 'Does Feminism Need a Theory of Transitional Justice? An Introductory Essay' (2007) 36.

¹⁹ See Nesiah V 'Truth Commissions and Gender: Principles, Policies and Procedures' available at <<http://www.ictj.org/static/Gender/GendHandbook.eng.pdf>> (accessed on 22 March 2010).

²⁰ Ibid p.10.

²¹ *Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T (1998).

Further, the insistence upon Sierra Leone and the Republic of South Africa as focused countries is attributed to the similarities between the Special Court and Truth Commission but also because they were hailed as successful mechanisms in addressing gender-related crimes. The focus of this research paper is specifically on African women, since particularly within the twenty-first century, major strides have been made as far as international and regional legal instruments are concerned.

A common argument concerning human rights is that it is deemed to be a Western concept forced upon non-Western societies. It is arguably therefore, not culturally relative to the African context. However, if one considers the regional documents which have been introduced specifically to women's rights, it would appear even more progressive than international treaties. Further, the legacy of corrupt African leadership causes successful transitional within African states to be a challenge in itself. With specific regard to the plight of African women, trusting in a male dominated institution such as the state proves to be even more challenging.

1.7 Research Methodology

The research paper in itself will to a large extent draw on literary study. The particular subject matter lends itself to a rich repository of written works. The primary sources will be comprised of treaties; legislation, general comments and case law where relative. Further, secondary sources will be comprised of books; cases; academic articles; journals and all other related literature.

1.8 Overview of the proposed chapters

The first chapter sets out the context of the research question, and briefly reviews the projected aims and rationale which gave rise to the topic. It also outlines the literature review which structures the research, discusses certain debates in literature and explains the limitation of the research paper.

Chapter two, entitled "Hu[man]'s Rights: International and regional seminal documents on Women's rights" expounds legislation which have specifically been adopted with women in mind. It explores the protection of women under these binding instruments and how the lack thereof is influenced by the perpetuation of male patriarchy within the topical states. Further, chapter two traces recent trends in the arena of gender equality, both on an international and regional level, and questions whether these developments go beyond rhetoric.

Chapter three entitled “Women’s bodies as collateral damage: International judicial processes of rape”, critically explores the prosecution of rape in international criminal courts, specifically the ICTR, the ICTY and the ICC with a specific focus on landmark cases which have been heard before these courts. This chapter, in essence, argues that women have been transformed from pawns of war to pawns of peace.²²

Chapter four, entitled “The Gender-Blind”²³ Mandate of the TRC and the Special Court of Sierra Leone: A Story Not Worth Telling” provides for a critical analysis of transitional justice mechanisms as an appropriate form of justice within the African context and their commitment to women, with a specific focus on the TRC and the SCSL. Upon scrutiny of numerous testimonies offered by women during these respective hearings, for various reasons, women have, either through testimony or lack thereof, felt that their stories were not as important as those of men. Chapter five summarises the findings of the research paper, providing concluding remarks and sets out recommendations in light of the aforementioned arguments.

CHAPTER 2:
HU [MAN]’S RIGHTS
INTERNATIONAL AND REGIONAL SEMINAL DOCUMENTS ON WOMEN’S RIGHTS

2.1 Introduction

The preamble to the Universal Declaration of Human Rights (UDHR)²⁴ explicitly refers to principles of inherent dignity and equality, which are pivotal to producing freedom, justice and peace. It depicts a sequence of realisation of rights with equality at the apex of them. The UDHR, one of the earliest codifications of egalitarianism, presupposes a world where the playing fields are leveled between men and women in all spheres of life. The reality cannot be further from the truth. Further, a hierarchy and subsequent inter-dependence of legal systems, namely international, regional and domestic is established, presupposing co-operation by all states to the ideals of universality. Sixty-two years later, women are still fighting for this intrinsic right, which questions their very existence as humans.²⁵

²² See n.14 above.

²³ Kusafuka A ‘Truth Commissions and Gender: A South African Case Study’ (2001) Vol.9:2 *African Journal on Conflict Resolution*. Also see generally, Van Zyl P ‘Promoting Transitional Justice in Post-Conflict Societies’ (2005) in Chapter 10 of Bryden A and Hanggi H (eds.) *Security Governance in Post-Conflict Peacebuilding* (2005) DCAF, Geneva. See Bosire L ‘Overpromised, Under-delivered: Transitional Justice in Sub-Saharan Africa,’ (2006) Occasional Paper Series, International Center for Transitional Justice.

²⁴ The UDHR was adopted by the [United Nations General Assembly](#) on 10 December 1948 in [Paris](#).

²⁵ See n.14 and n.22 above. The author questions women’s status and argues that the disparity in law begs the question whether women are in fact regarded as human when in fact; they are not protected as such, although men are.

These foundational values are absent causing women to remain disenfranchised and as a result, continue to be shackled as prisoners of injustice and violence. Equality is inseparable from or interwoven²⁶ with other rights -it makes the attainment of all other rights possible. Without its acknowledgement and ultimate realisation, it stands to reason whether women are recognised as legal subjects.

It could be argued that international law is merely symbolic and provides no tangible redress for women who have been subjected to sexual violence, particularly rape. It is at minimum, aimed at sustaining inter-governmental relations, a political compromise if you will, and discounts the individual woman, thereby placing her in an even more disadvantaged position than her male counterpart. Legislation is often than not drafted in such a manner as to make the state actors appear to be acting *bona fide*, while the *mala fide* atrocities which legislation seeks to eradicate still prevails, mostly within the private sphere.

This chapter offers support to this view and that international and regional instruments, with a specific focus on women, fail to adequately provide redress and protection to women who have experienced sexual violence and rape in particular.

2.2 International documents

2.2.1 Convention on the Elimination of Discrimination against Women (CEDAW) 1979 and ‘sex’

Gender stereotypes are manifested in acts of violence, particularly sexual violence against women, within a context of *assumed privilege* and hierarchical power for certain groups of men.²⁷ Even more, it would appear that the law under CEDAW²⁸ is not an entitlement but rather an aspiration or a hope. Equality is the goal and conversely, the greatest obstacle - a striving for, as it were.²⁹ CEDAW, more commonly referred to as an international bill of rights for women, has been hailed as a watershed in terms of addressing gender or sex discrimination and has become the minimum core or standard for equity to be achieved. A fundamental criticism of CEDAW however, is that it fails to expressly mention violence against women as a form of direct discrimination but that this is rather inferred from Article 2.³⁰

²⁶ See Khan JA *et al Advancement of Women* (1998) Wilmette Illinois: Baha; Publishing Trust.

²⁷ Available at <<http://www.un-instraw.org>> (accessed on 3 March 2010).

²⁸ See n.15 above.

²⁹ In *Legal Resources Foundation v Zambia, Communication 211/98*, the decision of the AFCmHPR, 29th Ordinary Session, April/May 2001 [2001] IHRL 1 (1 May 2001) mentioned, in para.63 that, equality informs all their rights.

³⁰ Article 2 of CEDAW of 1979 states that, “[s]tate parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake....”

To this end, reliance is placed upon General Recommendations 12 of 1989³¹ and 19 of 1992,³² as adopted by the United Nations General Assembly respectively. This omission by the drafters of this seminal document which underscores the vulnerability of women universally, can be said, as suggested by Khutsoane, through silence, perpetuates these perceptions and subsequent violations.³³

It is common-place for African states to ratify legislation but regrettably so, this seminal document is widely reserved by African states,³⁴ a reflection of the fundamental breaches which occur against women. This silence denotes that the drafters did not deem this a priority, thereby allowing room for further gender-specific violations to be perpetrated against women. The CEDAW Committee further defined violence against women as “a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of *equality* with men”.³⁵ Under CEDAW, states have a dual function of responsibility in ensuring that women are protected against sexual violence in both the private and public sphere and in cases where such violence has occurred, to punish the perpetrator. An omission of the afore-mentioned on the part of the state would amount to non-adherence of the specific provision and the underlying purport of CEDAW. CEDAW however, fails to mention state accountability and sanctions in the case of non-adherence. What then, is the motivation or rather, deterrent for a state to comply otherwise?

Scully is rightly of the opinion that international law is male represented and henceforth, their interests are furthered because they are favoured.³⁶ These laws, despite their misleading titles, are centred on men.³⁷

³¹ General Recommendation 12 of 1989 called for state parties to include their compliance mechanisms with specific regard to violence against women if they failed to do so in their periodic report as required in terms of Article 18 of CEDAW.

³² It is arguable that General Recommendation 19 of 1992 preferred the term ‘gender-based violence’ as opposed to ‘violence against women’ due to the fact that the nature of the violence committed is committed because a woman is a woman. The term ‘gender based violence’ delineates the nature of the violence as well as the causes.

³³ Khutsoane BSN *Gender-based violence in Africa: Perspectives from the continent* University of Pretoria, Centre for Human Rights (2007) 19.

³⁴ ‘Human Rights of Women: Commitment Progress Matrix Analysis,’ p.3, available at <http://awro.uneca.org/downloads/Commitment%20Progress%20Matrix%20Analysis.doc> (accessed on 1 November 2010). “[T]en African countries have ratified the Convention with reservations out of 51 who have ratified...sometimes contradicting the objective of the Convention, owing to customary or religious practices”. For further discussion, regarding a polarised view, see Wallace RMM *International Human Rights Text and Materials* 2ed. (2001)16 at which the author asserts that the rescinding of reservations to CEDAW is evidence of an increasing recognition of women’s rights at a national level. Further, on p.17 she says that the Fourth World Conference on Women in Beijing (1995) was the actual impetus for the increased ratifications of CEDAW.

³⁵ Para. 1 of General Recommendation 19 of the Committee on the Elimination of All Forms of Discrimination against Women, definition of violence against women. [Own emphasis added].

³⁶ Scully P ‘Should we give up on the State? Feminist Theory, African gender history and Transitional Justice’ (2009) 9 (2) *African Journal in Conflict Resolution*.

³⁷ MacIvor H *Women and politics in Canada* (1996) 161.

Historically, there has been opposition to including women as a protected group during armed conflict. These reasons are arguably now manifested by means of reservations.³⁸ The fact that women and children are granted protection within the same provision of many seminal documents, further gives the impression of women as perpetual minors.³⁹

Particularly within the African context of traditional expectations, prejudices, a disproportionate imbalance of power and consequent female insubordination, there is no need to search further than the law for this manifestation of the human standard. Women's lives are essentially held according to the male standard.⁴⁰ Women walk to the tune of men's laws which are ascribed to them on the basis of gender inequality. Further scrutiny of the text of CEDAW will show that traditional societal roles as prescribed to the sexes are, as MacKinnon suggests, anachronistic.⁴¹

The following arguments deal critically with certain Articles contained in CEDAW which are relevant to this research paper. In an attempt to be concise, the author does not offer detailed analyses of other Articles. In terms of Article 1, discrimination on the basis of sex as opposed to gender is a fundamental criticism, since sex refers to the inherent biological and physical differences between men and women. Gender, conversely, refers to socially constructed roles and therefore, the emphasis placed on "sex" nullifies the underlying traditionally engineered gender stereotype. Further, Article 2 instructs that all domestic or national legislation of state parties to CEDAW are to incorporate equality provisions domestically and CEDAW is set as the minimum core against which such legislation is to be measured. Gender equality in terms of Article 3 is a guaranteed right and not one which is to be progressively realised. However, the text in Article 4 creates an indirect claw back by suggesting otherwise, since it calls for "temporary special measures to accelerate equality" and thereby discouraging permanency to equality – merely a façade.

The CEDAW Committee is tasked with reviewing and assessing the progress made, or non-compliance, by those countries that have ratified CEDAW in terms of Article 18.⁴²

³⁸ Secretary-General Report: 'The Protection of Women and Children in Emergency and Armed Conflict in the Struggle for Peace, National Liberation and Independence,' UN Doc E/CN.6/586 (26 December 1973).

³⁹ Gardam JG and Jarvis MJ *Women, Armed Conflict and International Law* (2001) 139.

⁴⁰ MacKinnon CA *Women's Lives, Men's Laws* (2005) Belknap Press of Harvard University Press.

⁴¹ See n.14, 22, 25 above.

⁴² 1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect: (a) Within one year after the entry into force for the State concerned; (b) Thereafter at least every four years and further whenever the Committee so requests. 2. Reports may indicate factors and difficulties affecting the degree of fulfillment of obligations under the present Convention.

Accountability is questionable, since reporting by member states have been dismal, arguably reflecting the lack of commitment towards this particular treaty. Cook asserts that a more aggressive approach towards state compliance is necessary in light of the degree of violence against women in our time. Factors such as culture or religion become the scapegoat, forcing women into a state of perpetual minority. As alluded to previously, implementing sanctions to counter the lack of accountability by state parties has historically and successfully so, acted as a deterrent for adherence. Lack of enforcement and the correlative impunity delineates sexual violence against women as a lesser offence.

2.2.2 CEDAW Protocol

The CEDAW Protocol⁴³ creates a complaints procedure and makes provision under Article 1 for an individual or group to lodge a complaint. One can either act personally or as an agent on someone else's behalf with that person's consent. Domestic remedies need first to have been exhausted as a pre-requisite to lodging one's complaint⁴⁴ and thereafter, a six month time period within which to respond to allegations can be expected.⁴⁵

Article 3 of the said Protocol suggests that this procedure is exclusive, meaning that women who suffer breaches in terms of the CEDAW Protocol and who happen to be nationals of a non-state party do not enjoy this benefit. In most, if not all cases, it is indeed those states where the most atrocities are committed who are not parties to legislation which protect women.⁴⁶ This negates the efforts of the drafters since immense disadvantage is experienced. This very argument was underscored by the appointment of Radhika Commaraswamy,⁴⁷ who called for states to implement gender equality since their accountability should be taken seriously and therefore, their inaction could be inferred as the perpetuation of the insubordination of women. Further, she also reminded the state of its' duty to implement punitive measures as a deterrent.⁴⁸

⁴³ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly Resolution A/RES/54/4 on 6 October 1999.

⁴⁴ Article 4 of Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

⁴⁵ Article 6 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

⁴⁶ Available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en> (accessed on 3 March 2010) to view those state parties who have signed and ratified the CEDAW Protocol.

⁴⁷The first UN Special Rapporteur on Violence against Women, including its causes and consequences in 1994. For further discussion regarding the implementation of this role, see Thompson A (1994-2009) '15 Years of the United Nations Special Rapporteur on Violence against Women, It's Causes and Consequences' <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en> (accessed on 13 April 2010). Also see n.33 above.

⁴⁸ See n. 47 above.

A grave and disappointing drawback of the CEDAW Protocol is the opt-out clause facilitated by Article 10 which is afforded to state parties who ratify the said Protocol. Although Article 17 prohibits reservations by member states, Article 10 negates this wholly.

The focus of this research paper is limited to the Republic of South Africa and Sierra Leone and for purposes of brevity, we shall briefly comment upon their country reports to CEDAW in this section. South Africa submitted their only report in 1998, four years after the first democratic election and after years of racial, gender and class discrimination.⁴⁹ This country ratified CEDAW on 15 December 1995. The content of the report *prima facie* indicates significant progress in terms of addressing gender disparity but also shows the shortcomings of a young democracy. The preamble to the Final Constitution⁵⁰ shows an express commitment by the South African government to, *inter alia*, non-sexism. The Constitution contains an equality provision⁵¹ which prohibits discrimination on listed grounds, such as gender and sex.

The Constitution also provides for the right to freedom from violence⁵² and this is further given effect to by the Sexual Offences Act⁵³ and the Criminal Procedure Act.⁵⁴ The amended Sexual Offences Act defines rape in gender-neutral terms as opposed to the outdated definition ascribed to rape.

Giving effect to the requirement found in Article 2 of CEDAW, the report also admittedly refers to the fact that women have not attained equality in all spheres of life. A Constitutional court judge correctly stated that, “It is a sad fact that one of the few profoundly non-racial institutions of South Africa is patriarchy”.⁵⁵ This aptly delineates the reality of women in South Africa which in terms of its severity, is compared to racial discrimination and subsequent exclusion. The report also refers to gender-based violence as being a specific manifestation of the gender inequality within the country. One of the advancements of the new constitutional dispensation is the establishment of the so-called Chapter Nine institutions which derive their mandate directly from the Constitution.⁵⁶ Contextually, the roles of these institutions are vital in addressing the human rights violations which were rife during the apartheid era.

⁴⁹ UN Doc.CEDAW/C/ZAF/1 Eng. 25 February 1998. Available at <http://www.un.org.za> (accessed on 13 April 2010).

⁵⁰ The Constitution of the Republic of South Africa, Act 108 of 1996.

⁵¹ The Constitution of the Republic of South Africa, Act 108 of 1996, section 9.

⁵² In terms of section 12 (1) of the Constitution of the Republic of South Africa, Act 108 of 1996, “Everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial; to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way.”

⁵³ No.23 of 1957 was amended by Sexual Offences and Related Matters Amendment Act, No. 32 of 2007.

⁵⁴ Act 51 of 1977.

⁵⁵ An extract taken from the first South African report to the CEDAW Committee in 1995. Available at <http://www.polity.org.za/polity/govdocs/reports/cedaw2.html> (accessed on 13 June 2010).

⁵⁶ The Constitution of the Republic of South Africa, Act 108 of 1996, sections 184-194.

One of these institutions is the Commission for Gender Equality (CGE). General Recommendations 12 and 19, respectively, also mention violence against women which is a direct result of the dominant/subservient relationship between men and women. The report avers that this specific violence shows a direct correlation between violence which is prevalent within the state and violence within the private sphere. This contention suggests then, that a violent household is borne from a violent state and suggests an indivisible relation between the public and private sphere, as opposed to dichotomies of the same.⁵⁷

With regards to victims (women) of rape, a particular indignation existed regarding the “cautionary rule”⁵⁸ in terms of the law of evidence. This rule is however no longer applied in South African criminal law. The very phrasing of the rule inferred that women, who were victims of sexual violence, should be cautioned against. It directly discriminated and created a prejudice against the victim, presuming that the woman is untrustworthy. Upon scrutiny, the report by South Africa was contemptibly inadequate, lacked substance and stands to reason whether it was submitted merely to meet reporting requirements. A newspaper article in 1997⁵⁹ provides a good indication as to the intolerable levels of violence against women in South Africa and perhaps substantiates the earlier argument about the private/public dichotomy which in fact is inseparable. This was a bold statement for a member of the judiciary to make at the time, in light of the country being three year’s into its new constitutional dispensation.

The Human Rights Watch reported that approximately 275,000 women and girls were sexually violated during the war in Sierra Leone.⁶⁰ In MacKinnon’s critique of the text of CEDAW, she describes the experiences of sexual violence by women, as either too particular to be universal or too universal to be particular⁶¹ - a so-called lose-lose situation. The author cannot agree with the contention of the former, since violence against women *is* particular, as women are specifically targeted because of their gender.

⁵⁷ See n.36 above. At p.34 she avers that international law perpetuates dichotomies of the private and public sphere and promoting the interests of men in the private sphere.

⁵⁸ In terms of the cautionary rule, the judge must show awareness of the special dangers of relying on uncorroborated evidence of a complainant. See also Artz L and Smythe D ‘Should we consent? Rape law reform in South Africa’ (2008) 74 at which the authors state that the alleged motivation behind this principle was due to improper motives for laying a charge. The authors rightly describe this as “misogynistic”.

⁵⁹ The article was published in the Sunday Times, 25 May 1997. Justice Mohammed was quoted as saying the following in the case of Grant Chapman, a convicted rapist, “the time has come for this court to say that the women of South Africa are entitled to walk the streets of the country in peace and that louts cannot invade their peace. We are determined to protect the *equality*, dignity and freedom of all women and we shall show no mercy to those who seek to invade these rights”.

⁶⁰ Cited in CEDAW Report of Sierra Leone of 2006 at p.18. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/687/70/PDF/N0668770.pdf?OpenElement> (accessed on 11 November 2010).

⁶¹ See n.14, 22, 25, 41 above.

A manifestation of this is the civil war in Sierra Leone. Sierra Leone submitted their first and only CEDAW report in 2006⁶², although the country had ratified the treaty without reservation as early as 1988. Section 27(3) of the Constitution of Sierra Leone⁶³ expressly prohibits discrimination on the basis of sex. The country report, however, reflects a country which, despite ratification of an anti-discriminatory legislation, experiences spates of gender discrimination, particularly within the private sphere. This can perhaps be attributed to the fact that, as of 2006, CEDAW was yet to be incorporated into legislation by Parliament⁶⁴ as required by Article 2. Again, the state lacks accountability which perpetuates intolerable levels of violence and impunity. The government of Sierra Leone assented to be held responsible according to international standards without acting in terms of their requisite positive duties and domesticating laws to protect the women in their country.⁶⁵ This permeates into the private sphere as is evidenced by reports of domestic violence which is rife.⁶⁶ It is common for husbands to reprimand their wives, despite the Domestic Violence Bill of 2000. The report refers to traditional codes of conduct and societal expectations which are largely informed by these roles. In terms of national legislative efforts, Sierra Leone has made some progress, such as the Sexual Offences Act of 2004 and those mentioned prior.

2.3 Regional documents

The African continent, in light of recent legislative developments, is spoilt for choice when it comes to the plethora of manifestations of gender disparity. The former Organisation of the African Union (OAU) however failed to mention gender in its constituting document. This shortcoming was to a large extent remedied by the advent of the Protocol on the Rights of Women in Africa to the African Charter on Human and Peoples' Rights⁶⁷ (The African Women's Protocol) and Article 4(1) of the Constitutive Act.⁶⁸

⁶² CEDAW/C/SLE/5 on 14 December 2006 available at <<http://www.un.org.za>> (accessed on 10 March 2010).

⁶³ Constitution of Sierra Leone, Act No.6 of 1991.

⁶⁴ CEDAW Report of Sierra Leone, 2006, pg. 24 is available at <<http://www.un.org/womenwatch/daw/cedaw/reports/htm#r>> (accessed on 13 April 2010).

⁶⁵ A Resolution by the UN General Assembly called for gender equality to be domesticated, for an end to, and eradication of, all forms of violence against women. UN GA Resolution on the Intensification of Efforts to Eliminate All Forms of Violence Against Women A/RES/61/143 available at <http://www.iccnw.org/documents/GA61_ViolenceAgainstWomen_19_Dec_06.pdf> (accessed on 13 April 2010).

⁶⁶ TRC Report Volume 3B, p. 86 quoted the Report of the Secretary-General in 2003 as suggesting the following, "Violence against women is severe and pervasive throughout the world; many women are subjected to sexual, psychological and emotional violence by an intimate partner. Violence against women in armed conflict frequently includes sexual violence".

⁶⁷ 2003.

⁶⁸ Assented to on 11 July 2000 in Togo. Available at <http://www.au2002.gov.za/docs/key_oau/au_act.htm> (accessed on 23 May 2010).

The continued work of the African Union (AU) is progressively attempting to change gendered stereotypes and in so doing, is expressing their commitment to equality for all⁶⁹ and also their representation of women as commissioners. They have also taken a step in the right direction with respect to gender reform, by establishing a Directorate for Women, Gender and Development in terms of the Constitutive Act. It is however a fact, that men to a large extent still pull the puppet-strings whilst women are used as agents. The legislature is essentially led and controlled by males and females, though represented according to the required quota, do not make the decisions and to a lesser degree implements them.

The Southern African Development Community (SADC) Protocol on Gender and Development of 1997 made a bold and commendable stand against gender-based violence, calling for the enactment and enforcement of legislation and subsequent prohibition by the year 2010. At first glance, it appears as though a date was picked at random. This can be criticised as being over-zealous, not only because of the three year time period within which change was to occur but particularly when taking into account the context and uncontrollable environment within which such violence occurs. The particular Protocol also calls for punitive *measures* to be enforced as a deterrent for perpetrators of domestic violence. The vague phrasing of the term “measures” questions what type of measures are envisioned by the drafters for such deterrence. The irrefutable influence of patriarchy is like a golden thread and will not be eradicated over a few decades.

2.3.1 The African Women’s Protocol of 2003

The mere fact that a Protocol to the African Charter on Human and People’s Rights on the Rights of Women was deemed necessary, questions the initial commitment of African states to addressing the issue of gender discrimination. In terms of normative content, The African Women’s Protocol⁷⁰ is considered to be more advanced than the CEDAW and this is interesting, since the former is a regional document which should be subsidiary to the latter, being an international document.⁷¹

Alluding specifically to Articles 2⁷² and 18(3)⁷³ of the ACHPR, an onus is placed on state parties to act positively. The Preamble to The African Women’s Protocol expressly mentions current trends in international law, *inter alia*, United Nations Security Council 1325 of 2000; the Constitutive Act of the

⁶⁹ Informed by Article 3 of the African [Banjul] Charter on Human and People’s Rights, 1986.

⁷⁰ See n. 16 above. Available at <http://www.achpr.org/english/info/women_en.html> (accessed on 13 April 2010).

⁷¹ Murray R *Human Rights in Africa: From the OAU to the AU* (2004) 145.

⁷² Prohibits discrimination on, *inter alia*, the basis of sex.

⁷³ Calls for the elimination of *every* (own emphasis) discrimination against women and also ensure protection of rights for women. The emphasis placed on ‘every’ is for the purposes of proving that there is acknowledgement of various forms of discrimination which is specifically targeted at women.

African Union,⁷⁴ the Beijing Platform for Action of 1995⁷⁵ as well as specific mention of Articles 2 and 18 of the ACHPR which shall be discussed below. Further, it also mentions that despite the ratifications of the African states to eliminate all forms of discrimination, there fails to be adherence to the provisions contained in international human rights instruments. Article 2 is phrased in broad terms, similarly to the document as a whole, and one can infer that the legislature purposefully did this in order to acknowledge the various manifestations of discrimination which does exist. It also regrettably grants opportunity for oversight by governments. Article 2(d) makes specific mention of disparity in law. The dominance theory⁷⁶ finds support in Article 2(2) which basis the afore-mentioned disparity on the unequal relationship between men and women and stereotyped roles of superiority and inferiority.⁷⁷

Of particular interest to this research paper is Article 4 which guarantees the rights to security of the person, hereby, prohibiting so-called “unwanted or forced sex”.⁷⁸ It is commendable for three reasons, in that that it covers both the public and private sphere. Sub-section (d) admits to pre-conceived societal roles being the root cause of violence against women and sub-section (e) calls for the punishment of perpetrators who violate this right. Questionable however, is the hesitancy or omission to refer to such prohibition expressly as “rape”.

A further drawback is that African countries have eagerly signed and ratified this Protocol but have failed to domesticate the African Women’s Protocol. It is therefore, not used as a yardstick against which domestic legislation can be measured. Drafted in order to be particularly contextual to African women, the African Women’s Protocol seems almost futile, since the intended beneficiaries are not claiming their rights. In the concluding remarks, this research paper shall discuss the role which civil society has to play to this end.

The Special Rapporteur on the Rights of Women in Africa,⁷⁹ exposed the context within which women find themselves, alleging, *inter alia*, that human rights is experienced as a notion which is exclusively for the benefit of men and is reflective of the traditional values of Africa. This is supported by MacKinnon who

⁷⁴ See n.68 above.

⁷⁵ See n.6 above.

⁷⁶ MacKinnon, a radical feminist, implores the dominance theory in order to prove whether a policy is discriminatory on the basis of sex. If it directly or has the effect of women being subordinated, such gender imbalance is true. Fundamentally, it is a question of power.

⁷⁷ Beyani C ‘Toward a More Effective Guarantee of Women’s Rights in the African Human Rights System’ in Cook RJ *Human Rights of women: national and international perspectives* (1994) University of Pennsylvania Press. The author elucidates that women are regarded in light of traditional notions of family and that it is within this dynamic that power relations play themselves out.

⁷⁸ Article 4(a).

⁷⁹ At the 23rd Session of the OAU, July 2003 in Maputo.

says that, “[t]he state, an apex form in which the power of men is *organised* both among men and over women while *purporting* to *institutionalise* peace and justice, has been revealed as an institution of male dominance, its behaviour and norms partial and gendered”.⁸⁰ She suggests in fact that law is systematic and gender-bias in favour of men. If this is to be believed, then CEDAW is merely a smoke screen for national and perhaps international reconciliation, whilst manifesting patriarchy in its truest form - through law.

2.3.2 Constitutive Act of the African Union of 2000 and the Solemn Declaration on Gender Equality (Solemn Declaration) of 2004

The Constitutive Act of the African Union,⁸¹ the founding document of the African Union, is ratified by 53 countries.⁸² The preamble states unambiguously, that it is the “common vision” of all African countries to, *inter alia*, but in particular, incorporate women. Article 4(l) establishes gender equality as a principle. Accountability is provided for in terms of Article 4(h), which provides for AU intervention in respect of grave circumstances.⁸³ Theoretically, this is commendable in light of historical and present day impunity, particularly in African states.

The Solemn Declaration is the successor to Article 4(l)⁸⁴ which was deemed necessary to expand upon the principle of gender equality within the African context. Institutionally, equality regarding the appointment of female commissioners reflects gender disparity and is perhaps a solid starting point in reflecting parity.⁸⁵

The Solemn Declaration reverts to the ratification of the African Women’s Protocol and calls for state parties to express their commitment to the plight of women by such ratification by 2004.⁸⁶ Again, in an attempt to reinforce accountability by state parties, paragraph 12 implores an annual reporting mechanism, which in reality has proven to be unsuccessful.⁸⁷

⁸⁰ See n.14, 22, 25, 41, 61 above. Own emphasis.

⁸¹ See n. 68, 74 above. Adopted by Assembly of the African Union at the Third Ordinary Session, 6-8 July, 2004 at Addis Ababa, Ethiopia.

⁸² Available at <<http://www.africa-union.org>> (accessed on 13 March 2010).

⁸³ These grave circumstances refer to war crimes; genocide and crimes against humanity, which have subsequently taken cognizance of sexual violence (rape) as such.

⁸⁴ See n. 68, 74, 81 above.

⁸⁵ At the Inaugural Session of the AU Assembly of Heads of State and Government in July 2002 in Durban, South Africa it was decided that this development would be implemented during the Second Ordinary Session of the Assembly in Maputo, Mozambique, 2003.

⁸⁶ See para. 9.

⁸⁷ Banda states at p. 36 that “only 8 out of 53 (member states) reported (in terms of para.12) during the first year.” One of the reporting states was South Africa.

2.4 Recent developments in the arena of gender equality

2.4.1 The Beijing Platform for Action of 1995

The Beijing Platform for Action⁸⁸ ignited the ratification for CEDAW, as a sense of urgency was expressed in the text of this document. In terms of Article 114(a) violence against women was defined in broad terms, including both acts perpetrated in public and private. It does not provide for a *numerus clausus*.⁸⁹ This rather impressive depiction of the struggle for gender equality in respect of women is introduced by equating women's rights with human rights.⁹⁰ This provision substantiates the fact that women's rights should not be claimed as a separate category of rights, but rather under the umbrella of international human rights. Specific reference to rape in correlation to their gender is made in various provisions.⁹¹ Furthermore, the dominance theory finds application in paragraph 119 at which the unequal power relations which is intrinsic in sexual violence is mentioned. Stigmatisation by society acts as a deterrent in claiming their rights. The objectification of women is perpetuated through these violent acts and manifests male dominance over female subordination.

Having discussed the attempts at both an international and regional level, to not merely recognise but also give effect to gender discrimination, it naturally follows that we should examine the implementation thereof. International human rights law, despite operating in a context of peace time, because of academic discussions, to a large extent has also informed the field of international humanitarian law which is applicable during war time. It is then in light of this fundamental difference that we shall, in the following chapter, discuss gender inequality during periods of armed conflict specifically. A commonality however, we shall discover, is that the male-bias seeps through every area of law, despite its context.

⁸⁸ See n. 6, 75 above. See also 'Beijing 15: Global 15-year review process in the 54th Session of the Commission on the Status of Women' Division for the Advancement of Women (2010) available at <http://www.un.org/womenwatch/daw/beijing15/index.html> (accessed on 13 April 2010).

⁸⁹ "Violence against women is defined as, 'any gender-based violence that results in or is likely to result in physical sexual or psychological harm, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life'."

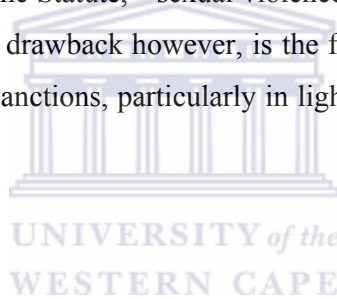
⁹⁰ See para.14 which states that "women's rights are human rights".

⁹¹ Chapter II of para.13 delineates rape as grave violation; para.14 describes rape as a weapon of war and Articles 132-137 which specifically focus on women who are in the situation of armed conflict. Implicit in para.136, is that women are targeted owing to their status and sex.

2.4.2 UN Security Council Resolutions 1325 and 1820

United Nations Security Council Resolution 1325 of 2000,⁹² particularly noted the specific vulnerability of women during armed conflict and condemned sexual violence, reminding states of their international obligations in this regard, placing a positive duty on states and thereby, encouraging accountability. Importantly, it stated that these crimes are exempt from amnesty.⁹³ Its successor was significant in explicitly describing “sexual violence as a tactic of war” and by implication, recognising rape as a grave breach, which Article 147 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 (GC IV)⁹⁴ failed to do. This provides a particular male perspective as to what constitutes a “grave breach” and also reflects the mentality of the drafters.⁹⁵ UN SC Resolution 1820⁹⁶ further draws upon and incorporates the four Geneva Conventions of 1949, the Additional Protocols of 1977, as well as the Rome Statute of 1998 into international policy.

According to Article 7(1) (g) of the Rome Statute,⁹⁷ sexual violence (rape) is recognised as a separate crime within the context of armed conflict. A drawback however, is the failure to provide for state accountability in terms of reporting, monitoring, and sanctions, particularly in light of the lack of political will by African states.



2.5 Conclusion:

As shown by the above-mentioned attempts at legislating the protection of women’s rights on an international and regional level, there certainly is not a lack of sound mechanisms. Even more recent, is the seven resolutions adopted by the Commission on the Status of Women on 2 March 2010. After reviewing 15 years of the implementation of the Beijing Platform for Action, the Commission called for, *inter alia*, the release of women who are in armed conflict situations.

⁹² S/RES/1325 (2000) adopted by the United Nations Security Council at its 4213th meeting on 31 October 2000. Available at <<http://www.un.org.za>> [accessed on 13 April 2010]. See also ‘International Humanitarian Law and Gender: Report Summary of International Expert Meeting; Gender Perspectives on International Humanitarian Law’ held from 4-5 October 2007 in Stockholm, Sweden.

⁹³ See n.92 at paras. 9, 10, 11 and 14.

⁹⁴ “International Humanitarian Law - Fourth 1949 Geneva Convention” International Committee of the Red Cross (ICRC). Available at <<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5>> (accessed on 2 March 2010).

⁹⁵ See De Brouwer ALM *Supranational Criminal Prosecution of Sexual Violence* (2005) 180.

⁹⁶ S/RES/1820 (2008) adopted by the United Nations Security Council at its 5916th meeting on 19 June 2008.

⁹⁷ Rome Statute of the International Criminal Court, July 17, 1998. The International Criminal Court was established with the intention of being permanent in nature.

Arguably, upon scrutiny of the Beijing Platform for Action, a rather comprehensive and realistic account of women's experiences are defined and expounded – perhaps even more so than the governing legislation. The issue however, is that by virtue of its status as Declaration, it has no binding authority. Historically, this has been a rather prevalent issue in terms of the recognition of the protection of women's rights against sexual violence. The documents which hold the greater or greatest protection for women are non-binding. Examples of these are the Declaration on the Elimination of Violence against Women (DEVAW) of 1993 and the Beijing Platform for Action. In the following chapter, we further see how, by being informed by these international and regional developments, international criminal tribunals legislate matters surrounding sexual violence against women within the context of armed conflict. The cases which shall be examined further depict a hesitancy regarding defining rape and the immense burden women face as victims and witnesses alike.

CHAPTER 3

WOMEN'S BODIES AS COLLATERAL DAMAGE: INTERNATIONAL JUDICIAL PROCESSES OF RAPE

3.1 Introduction:

“So now, let no man hurry to sail for me, not yet...
not til he beds down with a faithful Trojan wife,
payment in full for the groans and shocks of war we have all borne for Helen”.⁹⁸

The above-mentioned quotation depicts how women were devalued during the Trojan war as spoils of war. This particular text also rather aptly describes how women were regarded, and arguably so even in the present day, are regarded as a soldier's reward for their “groans and shocks of war”.⁹⁹

Certain schools of thought are of the opinion that the abnormal context of armed conflict acts as a trigger mechanism in men and produces violence which would otherwise not occur was it not for the high levels of libido.¹⁰⁰

⁹⁸ Homer. Translated by Fagles R and MacGregor Walker B *The Iliad* (1990) 111.

⁹⁹ De Than C and Shorts E *International Criminal Law and Human Rights* (2003) 347 at marginal no. 11-002 where the authors discuss the effective and systematic manner in which rape is historically perpetrated during periods of armed conflict and the impact upon the husbands of those women who are subjected to sexual violence. They also question the realistic outcome of the belief that women can truly be protection from sexual violence during war, whilst they have failed during peace time. To this end, they suggest the abandonment of the public and private dichotomy.

¹⁰⁰ The Biosocial Theory presupposes that sexual violence is a result of an “inevitable genetically determined reflex.” Armed conflict is therefore, the *sine qua non* or blameworthy and shifts the responsibility from the perpetrator to the so-called abnormal

One of the earliest codifications of protection for women during armed conflict can be found in Article 44 of the Lieber Instructions in 1863¹⁰¹ which, upon describing rape, delineated women as property as opposed to a legal subject worthy of protection under the law.¹⁰²

A woman's chastity or purity was and in many cultures today, remains a reflection upon her family and this then determines her worth.¹⁰³ By inference, the opposite is then true - she is devalued if she is not.

This is particularly troublesome in times of armed conflict, where rape forgoes consent. The law of war, contemporarily known as international humanitarian law (IHL), appears to be an oxymoron, since jurisprudence and case law have proven that law, during times of armed conflict, are sooner forgotten and consist of imaginary boundaries.¹⁰⁴ Male dominance is manifested in the manner in which women are specifically targeted. They are primarily targeted on the basis of their gender and secondly on other grounds, such as nationality, ethnicity, political affiliation etcetera.

International Humanitarian Law (IHL) has been described as "chivalry" as it prescribes stereotypical gender roles to women and describes women in relational terms as opposed to individual legal subjects within their own right.¹⁰⁵ The nature of IHL is such that one claims protection by being affiliated to a particular

situation.

¹⁰¹ Lieber Instructions defined rape as "a crime of troop discipline". Article XLVII expressed an intolerant attitude towards rape and in terms of article XXXVII, such offence "shall be rigorously punished." See also de Than C and Shorts E (2003) 117 at which the authors trace the identification of war crimes under IHL to the 1864 General Convention for the Amelioration of the Conditions of the Wounded in Armies in the Field.

¹⁰² See generally n.14, 22, 25, 41, 78 above.

¹⁰³ See n.39, p. 109-110 above which provides a discussion of this in light of Article 27(2) of the Fourth Geneva Convention and the contention that it reflects chivalric ideas.

¹⁰⁴ Aning EK 'Gender and Civil War: Cases of Liberia and Sierra Leone' (1998) available at <<http://www.jstor.org/stable/4006459>> (accessed on 21 March 2010) in which the author discusses the experiences of women during these internal armed conflicts. She mentions how women are so desperate to survive, that they join faction groups. An intercepted radio message between Charles Taylor and his field commander provides for a clear depiction of the subordinated light within which women are regarded: "If you have men among them, chop them, and for the women, rape them. To hell with them."

See also, Chinkin C 'Rape and Sexual Abuse of Women in International Law' (1994) 326 *EJIL* 5, cited in de Than C and Shorts E (2003) 345 where the author rightly asserts that sexual violence against women knows no boundaries, in spite of the nature of the conflict. She goes on to state that, "Rape in war is not merely a matter of chance, of women being in the wrong place at the wrong time. Nor is it a question of sex. It is rather a question of *power and control* which is structured by male soldiers' notions of their *masculine privilege*". Own emphasis.

¹⁰⁵ See Durham H 'Women, Armed Conflict and International Law' (2002) 656 Vol. 84, No.847 *RICR*, cites Gardam JG and Jarvis MJ, "Generally, women are valued in IHL in terms of sexual and reproductive aspects of their lives." Furthermore, at p.93, the authors also assert that the particular experience of war by women is not given its due. Males are viewed as the comparator in the law of war and therefore, a superior and subordinate relationship is created when there is preference and/or recognition one

marginalized group. Rape has the power to seep into and affect the entire group to which a woman belongs.¹⁰⁶ MacKinnon questioned whose experience (male or female) international law seeks to reflect.¹⁰⁷ Further, Jarvis and Gardam rightly assert that a gendered hierarchy¹⁰⁸ exists and this is also emphasised by the express omission of sexual violence as a grave breach of the Geneva Conventions of 1949, save for Article 27(2) of the GC IV. On the contrary, Durham criticises their assertion that IHL is blind to gender disparity but is of the opinion that IHL is contextual.¹⁰⁹ This research paper argues in favour of the former understanding using a radical feminist paradigm.

Law should act as a deterrent or a moral barometer in order to address violations suffered by women, but how does a male-dominated institution such as the judiciary, realise this? It has been argued that in both contexts, the court and war make visible the shame that is associated with rape and manifests the power which men hold.¹¹⁰ The author vehemently agrees, since a double-standard exists - soldiers are hailed as heroes, and so it would appear as though judicial proceedings to a certain extent make a mockery of witness' testimony, or as Manji suggests, that there is a price to be paid by women who want to claim their rights which requires a sacrifice of that which they are entitled to for mere recognition.¹¹¹ Women who choose to lodge a complaint of sexual violence, commonly experience stigmatisation and ostracisation within their own communities and this is the price of freedom, which conceivably deters women from lodging their claims. A woman's freedom needs to be bargained for, whereas a man is born free. Gender inequality is evident as females are portrayed as relational in comparison to the individual male.

By virtue of being a woman, claiming rights is accompanied by detrimental consequences and retracing those events do come at a cost of degradation, humiliation, loss of a sense of security and self-worth.¹¹² The state is predominantly comprised of male members to international agreements who are tasked with securing

over the other.

¹⁰⁶ See Nowrojee B 'Shattered Lives: Sexual Violence during the Rwandan Genocide and it's Aftermath' (1996) New York Human Rights Watch available at <<http://www.hrw.org/legacy/reports/1996/Rwanda.htm>> [accessed on 3 April 2010] where the author substantiates this argument, by stating that "[t]he rape of one person (woman) is translated into an *assault upon the community* through the emphasis laced in every culture on women's sexual virtue...." Own emphasis.

¹⁰⁷ Dixon R 'Rape as a War Crime in International Humanitarian Law: Where to from here?' (2002) *BEJIL* 699, cited in MacKinnon CA 'Crimes of War, Crimes of Peace' (1993) 59 *UCLA Women's Law Journal* 37.

¹⁰⁸ See n.39 and 103, p.99 above.

¹⁰⁹ See n.105, p.657 above.

¹¹⁰ Agamben, G *Remnants of Auschwitz: the Witness and the Archive* (2002) 106.

¹¹¹ Manji A 'Imagining Women's Legal World: Towards a Feminist Theory of Legal Pluralism in Africa' (1994) ix.

¹¹² See n.4 above. See also n.39, 103, and 108 at p.94 above, where the authors substantiate gender stereotypes during armed conflict by arguing that the environment itself provides for the epitome of male and female Western gendered stereotypes to play themselves out.

and implementing women's rights. It is therefore questionable whether the plight of women is given sufficient emphasis under such compromising circumstances. The individual is the primary actor in terms of human rights law and the principle of self-determination and thus, society cannot override the individual's rights. It is also then questionable whether women qualify as human at all, since their so-called 'equal rights' are more often than not, overridden by society. Despite misconceptions, sexual violence is not novel to post-World War II conflicts, despite only being legally recognised as such. So-called 'comfort women' who were abused during World War II for the sexual pleasure of Japanese soldiers were subjected to sexual violence *en mass* to such an extent that they became indifferent to their own suffering and accepted their lot.¹¹³ Historically, rape and sexual violence has been inherent in armed conflict and has only recently become a gendered debate.

Significant strides have been made since the inception of the Military Tribunal in Nuremberg (Military Tribunal)¹¹⁴ to the present day Rome Statute.¹¹⁵ The former failed to prosecute rape as a categorical crime,¹¹⁶ whereas the latter was groundbreaking regarding the codification of the sexualised nature of violence and showing the advances and recognition of gender-based human rights prosecutions. The failure by the Military Tribunal to prosecute rape supports the notion that rape is intrinsic to war and therefore, went unpunished.¹¹⁷

Similarly, the Tokyo Tribunal¹¹⁸ disregarded sexual violence against women as an after thought, shown by the failure to convict rape. Rape camps were even disguised as brothels, used as a farce to represent a degree of volition on the part of the women.¹¹⁹ GC IV was the first to mention rape as a crime of international law.¹²⁰ The fact that it expressly constitutes a violation against a woman's "honour"¹²¹ as opposed to her

¹¹³ Kimura M 'Listening to Voices: Testimonies of 'Comfort Women' of the Second World War' Issue 8, April 2003. Available at <http://www2.lse.ac.uk/genderInstitute/pdf/listeningToVoices.pdf> (accessed on 10 October 2010).

¹¹⁴ Established by the Charter of the International Military Tribunal, post World War II, August 8, 1945.

¹¹⁵ See n.97 above.

¹¹⁶ M^cHenry JR 'The Prosecution of Rape under International Law: Justice that is Long Overdue' (2003) Vol.35 *Vanderbilt Journal of Transitional Law* 1277.

¹¹⁷ Balthazar S 'Gender Crimes and the International Criminal Tribunals' (2006) 10(1) *Gonzaga Journal of International Law* 44 at which the author referred to the *dictum* of a prosecutor at the Nuremberg Tribunal who described rape as "atrocious details "which was impossible to prosecute.

¹¹⁸ The International Military Tribunal for the Far East in Tokyo (1946-1948).

¹¹⁹ See n.99, p.348-349 above. See also Trabucchi E 'Rape Warfare and International Humanitarian Law' (2008) *Human Architecture: Journal of the Sociology of Self-Knowledge* 43.

¹²⁰ Article 27(2) of the Fourth Geneva Convention reads, "Women shall be especially protected against any attack on their *honour*, in particular against rape, enforced prostitution, or any form of indecent assault".

¹²¹ See generally Askin KD 'Prosecuting wartime rape and other gender-related crimes under International Law: Extraordinary advances, enduring obstacles' *Berkeley Journal of International Law* (2003) 21 (2) 288-349.

body further substantiates chivalric notions in terms of protection of women and disregards the sexual nature of rape.¹²² It is necessary to discuss the development of the recognition of rape as a form of sexual violence in the international arena in terms of case law before the ICTR, ICTY and ICC respectively, which as argued by M^cHenry is “long overdue”.¹²³

The context allows one to explore the recognition of sexual violence primarily as a war crime, with some references to rape as, *inter alia*, genocide, a crime against humanity,¹²⁴ and as constituting torture. The ICTR and ICTY case law has aided the definition of, *inter alia*, crimes against humanity beyond the text and prove the realities of rape as experienced by women. History has shown that sexual violence is equally prevalent during non-international armed conflict, as it is during international armed conflict. This was remedied by Article 3 common to all the Geneva Conventions, as it applies in instances of internal armed conflict. Two vital differences exist between international human rights law (IHRL) and IHL, one being that the former is applicable during peace time while the latter within a war context. IHRL grants general protection while IHL grants specific protection which is evident in the provision related to “protected persons”.¹²⁵

The international principle of protection¹²⁶ prohibits discrimination on the following grounds: sex; race; nationality; religion; political opinions or any other similar criteria.¹²⁷ This is not a *numerus clausus* as expressed by the term “or any other similar criteria”. In terms of this principle, protected persons are to be treated in terms of humane standards. Rape is defined in terms of the Rome Statute according to the four elements of crime.¹²⁸ In terms of Article 7(3),¹²⁹ the definition is expressed as gender-neutral.

¹²² See generally, Van der Poll L ‘The Emerging Jurisprudence on Sexual Violence perpetrated against women during armed conflict’ (2007) *African Yearbook of International Humanitarian Law* 1 in which she asserts that rape is about sexual power and violence as opposed to lust and/or desire.

¹²³ See n.116 above. A portion of his publication entitled, ‘The Prosecution of Rape under International Law: Justice that is Long Overdue’ (2003) 1269-1311 *Vanderbilt Journal of Transitional Law* 35.

¹²⁴ See n. 97 and 115 above, Art.5 (b).

¹²⁵ See n.99 and 119. Women are expressly categorised as protected persons according to Article 27 of the Fourth Geneva Convention, 1949.

¹²⁶ Kalshoven F and Zegveld L *Constraints on the Waging of War: an Introduction to International Humanitarian Law* (2001) 53.

¹²⁷ Articles 12 of GC I and II, 16 of GC III and 27 of GC IV.

¹²⁸ Article 7(1) (g)-1 requires that the following requirements be met in order to prosecute rape as a crime: lack of consent; coercion characterised by force or threat; crime against humanity and *mens rea*.

¹²⁹ Ibid Article 7(3).

In order to understand rape as a crime of genocide, it is necessary to refer to the Genocide Convention of 1948.¹³⁰ In terms of the afore-mentioned, the perpetrator must have expressed, through his actions, an intention to destroy, in whole or in part, a specific group on the basis of their nationality, ethnicity, race or religion. The important features of genocide are *mens rea* and require that such intentional and targeted destruction is directed against a person by virtue of their political affiliation, race, nationality, ethnicity, cultural background or religion. The severity with which genocide is regarded as an international crime is corroborated by related acts which are culpable: conspiracy, direct and public incitement, attempted and complicity.¹³¹ The specific intention can be inferred if not vivid. Women are expressly excluded as a listed ground and therefore, are not regarded as being specifically targeted by virtue of their sex.

The next two sections will at the outset depict how problematic this fact (women as ‘unlisted’) is. Furthermore, the mutual co-operation and developments between the ICTR and ICTY will be explored. This is depicted in the provisions applicable to rape and sexual violence but also in the ensuing judgements. The novelty of the adjudication of rape in the international arena is thus shown in the duplication of the two instruments. We shall explore the ambiguities and male bias in the governing provisions which arguably promote male interests and the converse prejudicial effect this has caused in the prosecution of sexual violence against women.

3.2 International Criminal Tribunal for Rwanda [ICTR]

“The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown. As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects... Sexual violence was a step in the process of destruction of the Tutsi group”.¹³²

¹³⁰ The Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (78 UNTS 277) was adopted on December 9, 1948. The UN General Assembly Resolution 96(1) of 1946 was the predecessor for the Genocide Convention. See de Than C and Shorts E (2003) 65 at marginal no.4-001 where the authors, in explaining the origins of genocide, note that “[g]enocide is widely perceived as being the *most barbaric, heinous and abominable of all the inhuman acts* man is capable of committing against his fellow man.” Own emphasis.

¹³¹ Sassòli M and Bouvier AA *How Does Law Protect in War?: [Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law]* (2006) 310-311.

¹³² *Prosecutor v Akayesu*, ICTR-96-4-T, paras 5070-08, 731 (Sept.2, 1998).

Sexual violence, as shown from the testimony by a witness in the case of *Prosecutor v Jean-Paul Akayesu*,¹³³ before the ICTR¹³⁴ is a depiction of the exercise of domination, power and control by men over women, whilst women are regarded as property, sexual objects or reward.

It further illuminates the deliberate intent with which rape is perpetrated and in the case of Rwanda, it was a means to an end - systematically increasing the population of the superior Hutu ethnic group. The witness *in casu* clearly stated that she was not targeted because of her ethnicity, but on an unlisted ground, namely gender.

The accused excused the charges against him (specifically the charges of rape as a crime against humanity, other inhumane acts as a crime against humanity and outrages upon personal dignity (rape and sexual violence) as a Geneva Convention violation, as being “fantasists,” in support of the myth that “women lie about rape”.¹³⁵ The facts of the well-known case of *Akayesu* will be repeated briefly and has also been discussed at length in a myriad of discussions by authors.¹³⁶

The accused, a husband and father of five, was elected into office as mayor of the Taba community in Rwanda. His role was pivotal in the Rwandan genocide, as he aided and abetted acts of sexual violence against women which were directly perpetrated by Hutu governmental officials. These acts were premeditated and systematic, in that the premises of the bureau communal were used to carry them out on and he had also incited the male Hutu population in these attacks.

The facts of the case show that the period during which the acts were perpetrated supports the requirement of systematic and widespread attacks because it intensified over such time. *In casu*, the ICTR described the encouragement and utterances by the accused to his subordinates as the *sine qua non* which necessitated the sexual violence against countless Tutsi women. The accused waived his right to legal counsel which is arguably reflective of his confidence and belief that he acted within the confines of man-made law.

He apologised to the Rwandan society but this was not intended to constitute an admission of guilt or a confession, but was offered for allegedly not living up to his *duties of protection* as mayor. Subjectively, he had contributed to the *eradication of the problem* by inciting sexual attacks against Tutsi women.

¹³³ *Supra*.

¹³⁴ Statute of the ICT for Rwanda was adopted by UN SC Resolution 955 of 1994.

¹³⁵ See Estrich S ‘Teaching Rape Law’ (1999) Vol.102 (2) *The Yale Law Journal* 509.

¹³⁶ See n.121, which notes a criticism of the *Akayesu* case, in that it went into great detail regarding factual information but failed to provide sufficient legal arguments. See also, Steiner HJ and Alston P *International Human Rights in Context: Law, Politics, Morals* (2000) 1178-1190 and Haffajee RL ‘Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory’ (2006) Vol.29 *Harvard Journal of Law and Gender* 203-210.

Despite averring during mitigation of sentence that he opposed the killing and violence and that he sought to protect the population, the accused was still found guilty. Further, Akayesu abused his position of authority, showed by the blinded manner in which his male subordinates followed his orders. His power to influence them overshadowed the mitigating factors. It was the genesis for defining rape as an independent international crime, and *in casu*, was defined as “a *physical* invasion of a *sexual nature* committed *on a person* under circumstances which are *coercive*”. This broad definition offered by the ICTR firstly, explicitly notes rape as a crime against humanity and therefore, no inference is required. Secondly, the physical nature of the act discounts the psychological and emotional residue of rape as a crime. It is by definition focused upon the physical aggression involved in the commission of rape as a crime.

Lastly, the phrasing of this definition is gender-neutral and therefore speaks to the reality of armed conflict in that both men and women are equally affected as perpetrators and victims of rape, whether personally or through agency.¹³⁷ The *Akayesu* judgment was pivotal not solely for securing the first rape conviction in this context, but also for shifting the collective responsibility to individual responsibility. The accused was not exempted from liability by virtue of his non-participation but rather, his incitement of the atrocities was sufficient to prove such liability. He was in fact liable of commission by omission.¹³⁸ The rapes of Tutsi women were found to be carefully plotted, intentional and not isolated. The mind had been applied with the pre-requisite *mens rea* to destroy in whole or in part, and therefore rape was defined as a crime of genocide in terms of Article 6(b) of the Rome Statute.¹³⁹

This was the impetus necessary to deter future attacks of a similar nature and express the intolerance of the international community. The importance of defining rape as a crime of genocide is particularly vital as “umbrella protection” for women, since it is applicable during times of peace and war.

¹³⁷ Pauline Nyiramasuhuko, the Minister for Women’s Development and Family Welfare was charged with rape as a crime against humanity and contravention of Geneva Convention on war crimes. She abused her authority to incite others to commit rapes of Tutsi women.

¹³⁸ Criminal law doctrine states that an individual will incur legal liability where a specific duty existed to prevent harm in a particular circumstance but such individual failed to act accordingly.

¹³⁹ Article 6 of the Rome Statute should be regarded in light of the Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948. Available at <<http://www.un.org/millennium/law/iv-1.htm>> (accessed on 10 October 2010). For further discussion regarding the impact of the Genocide Convention on international law, see Schabas ‘Convention for the Prevention and Punishment of the Crime of Genocide’ United Nations Audiovisual Library of International Law, p. 1-6 which is available at <http://untreaty.un.org/cod/avl/pdf/ha/cppcg/cppcg_e.pdf> (accessed on 10 October 2010).

Furthermore, owing to the discriminatory basis on which these attacks were conducted,¹⁴⁰ the inhumane manner in which it was done, and being part of a widespread and systematic attack, rape also satisfies the conditions for crimes against humanity.¹⁴¹

Another aspect which needs to be expounded, is the meaning of “to destroy” in order to be classified as genocide. Destruction in the context of armed conflict is ordinarily associated with physical death but for all intents and purposes, albeit not resulting in death (in some cases); women are essentially left dead inside. The residue of rape remains long after the physical invasion.¹⁴² Rape leaves women with irreparable damage and can be equated with serving a life sentence. Perhaps the archaic Lieber Instructions¹⁴³ is correct to a certain degree, in saying that rape is indivisible from a woman’s honour and dignity. The landmark case of *Nyiramushuko et al* in 2009 saw the first woman being accused of rape as an international crime. She was indirectly involved as an accomplice to systematic rapes of Tutsi women during the Rwandan genocide, by controlling a roadblock and thereby, feeding the women as bait to Hutu governmental officials. This perplexes advocates of radical feminism, as it questions the tenets of power and control which characterises this school of thought. However, the conditions under which this was perpetrated, needs to be delved into. Women act as agents for men who hold authoritative roles within society, as women obtain enhanced power within the community. It would appear as though this is the only way that the accused sought to achieve parity with men for power and respect.

3.3 International Criminal Tribunal for Former Yugoslavia [ICTY]

Despite the highly volatile context of warfare and general reasons for being targeted in such circumstances, women are further disenfranchised and vulnerable because of their gender. The nature of war may have changed but women’s bodies remain the battlefield,¹⁴⁴ whilst masculinity is stereotypically manifested in

¹⁴⁰ In order to constitute as a crime against humanity in terms of Article 7, there must be discrimination on the following grounds: nationality, political affiliation, ethnicity, race or religion. Tutsi women were specifically targeted by virtue of their ethnicity and their gender in a game of warfare. Gender is not mentioned as a specific category, although this has been criticised in favour of and opposing such an amendment to the GC.

¹⁴¹ Brown (1994) 249 with reference to article 7(1) (g) of the Rome Statute, described the effectiveness of sexual violence as a method of warfare as “calculated, cynical, and subhuman”. The systematic and well organised nature in which rape is perpetrated was also expounded in the case of *Prosecutor v Tadic*, para. 249. In the case of *Celebici*, at para. 178, the definition was expanded to include isolated incidences as “part of a widespread or systematic attack”.

¹⁴² See n.39, 103, 108, p.45 above. Balthazar states that, “The sexual violence was ultimately designed to result in death or to destroy the woman psychologically, culturally and physically so as to render her incapable of normal existence, her capacity to reproduce and produce diminished, even eliminated”.

¹⁴³ See n. 101 above at which rape was defined as “a crime of troop discipline”.

¹⁴⁴ Trabucchi E ‘Rape Warfare and International Humanitarian Law’ *Human Architecture: Journal of the Sociology of Self-*

conflict. Testimony given in support of prosecuting sexual violence in the ICTY provided insight into the patriarchal nature of sexual violence and the importance of male genealogy within culture. Since men carry the family name, the strategic manner in which rape was perpetrated, was callously effective in causing a rift among ethnic groups.¹⁴⁵ The psychological damage achieves the aim of eradication because once the woman's body is defiled; she not only bears the scars of her own pain but that of her war-torn country. Upon return to her community, she is stigmatised and faces further rejection and humiliation - an unexplainable double-standard, since soldiers are hailed as heroes.¹⁴⁶

Further, when regarding the onerous burden of proof placed upon victims (women) of sexual violence, it is no wonder that there have been such a dismal number of complaints and prosecutions. Re-traumatisation is often experienced as women are required to recall horrid accounts, which they would much rather forget.¹⁴⁷ The rules governing evidence required for acts related to sexual violence for the International Criminal Tribunal for the former Yugoslavia (ICTY)¹⁴⁸ depicted a stereotypical view of women as temptresses who are deserving of such inhumane treatment. It was formerly required to bear evidence of the female victim's past sexual conduct, used in order to corroborate testimony. Rule 96 of the ICTY is akin to the cautionary rule in South Africa, which served the same purpose. Both have been ousted due to its' prejudicial effect against women who had been victims of sexual violence.¹⁴⁹ In light of recent judgments related to gender-based violence as experienced by women, it is evident that this view has changed. The 1996 matter of *Prosecutor v Tadic* was the first case where testimony was given regarding rape as a war crime.¹⁵⁰ This was followed by *Prosecutor v Furundzija*¹⁵¹ in 1998, where rape was recognised and defined as a war crime. During that same year, *Prosecutor v Delic et al* adopted the broad definition of rape by its predecessor *Akayesu* judgement. The case was groundbreaking not only because the court defined rape as a war crime but also as a form of torture.¹⁵²

Knowledge (2008) 40-41.

¹⁴⁵See n.144 p. 43, 45.

¹⁴⁶ See n. 105, 109 above.

¹⁴⁷ See n.99, 119, 125 at marginal no.11-020 above which cites what the Tribunal mentioned in *Prosecutor v Tadic*, "Women who have been raped and have sought justice in the legal system, commonly compare this experience to being raped a second time".

¹⁴⁸The UN SC passed Resolution 808 in 1993, establishing the ICTY. Available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf (accessed on 23 August 2010).

¹⁴⁹ For further discussion, see n. 99, 119, 125, 147 above, pp. 357-358 and 363-64.

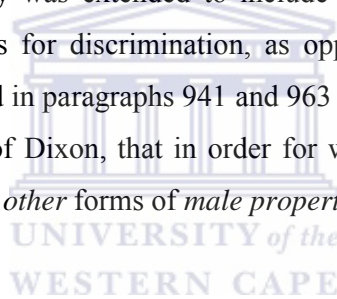
¹⁵⁰ Fenrick WJ (1999) 771 cited in Gardam JG and Jarvis MJ (2001) 72 in which the definition of a war crime is described as being: (a) one of a list of acts generally prohibited by treaty but occasionally prohibited by customary law ... (b) committed during an armed conflict ... (c) by a perpetrator linked to one side of the conflict, and (d) against a victim who is neutral or linked to the other side of the conflict.

¹⁵¹ Case No. IT-95-17/I-T, 10 December 1998.

¹⁵² *Prosecutor v Delalic et al* (Celebici) IT-96-21-A (2001). See *ibid*, n.2,22,51, p.364, "[t]he court saw the extent to which rape

*Prosecutor v Kunarac et al*¹⁵³ was the first case in history, where the indictment was solely based on sexual violence against women. *In casu*, albeit narrower in definition, emphasis was placed on the specific intention of sexual penetration and the non-consensual nature. It suggests a rather insensitive and contractual definition of rape. Prosecution under these circumstances prove to be more difficult as is shown by the dismal number of prosecutions. The three accused however were charged and prosecuted for rape as genocide, a war crime and as a crime against humanity.¹⁵⁴ The court recognised the victim's right to sexual autonomy and self-determination and this laudably departs from the Article 27(2)¹⁵⁵ description of rape as "affecting [a woman's] honour". Superior orders no longer qualified as a defence against these grave breaches and this showed how fearlessly the court dealt with the severity of sexual violence as an international crime.

Referring to the manner in which rape attacks were orchestrated, rape was defined as "a weapon of war".¹⁵⁶ The court also offered a more expansive definition to the UN Convention against Torture with specific reference to criminal liability. Liability was extended to include non-state officials. The court however, focused solely on ethnicity as grounds for discrimination, as opposed to the motivation for rape being expressed as sex-specific. As mentioned in paragraphs 941 and 963 this was discriminatory and amounted to torture.¹⁵⁷ This proves the contention of Dixon, that in order for women to have a successful claim, such claim needs to be instituted "along with *other forms of male property*, rather than as women".¹⁵⁸



causes *both physical and psychological suffering* to the victim and to others, and found that rape which occurs in armed conflict almost *automatically* has the purpose required for a finding of torture; ie. punishment, coercion, intimidation or discrimination". Own emphasis. See M'Glynn (2009) 2 "Rape, Torture and the European Convention on Human Rights". The matter of *Aydin v Turkey*, 25 September 1997 was heard under Article 3 of the European Convention on Human Rights as a breach of the protection of inhuman and degrading treatment. The 17-year old victim was raped by a member of the Turkish Security Forces whilst in detention for 3 days. The author strongly suggests that the reason for the specific emphasis on rape which is committed by a public official is due to the inherent trust associated with such an individual, thus "exploiting the vulnerability and weakening the resistance of the victim". This is an aggravating factor in light of the symbolism of protection which the security forces encapsulate. *In casu*, the court decided that rape constitutes torture, taking into account the physical and mental violence associated with rape.

¹⁵³ *Prosecutor v Kunarac, Kovac and Vukovic*, Case No. IT-96-23/I-T. 22 February 2001.

¹⁵⁴ *Supra*. The Appeals Chamber, in its *rationale* for prosecuting rape as genocide, said that rape, by its very nature inflicts pain and suffering upon its victims. They went on to say that, "the sexual motivation to which the accused admitted certainly does not exclude the intent to commit an act which has as a consequence severe pain and suffering or the purpose of discrimination." See also Dixon R (2002) 697.

¹⁵⁵ GC IV of 1949.

¹⁵⁶ See n.6 and 75 above. Rape was described "as a tactic of war".

¹⁵⁷ See n.107 above, p. 494.

¹⁵⁸ See n.107 and 157 above, p.701-702.

Similarly to *Akayesu*, the accused in *Furundzija* had committed a commission by omission. He possessed the requisite *mens rea* and failed to prevent the sexual violence perpetrated against Tutsi women, despite being in a position to do so. The defence requested the medical, psychological and psychiatric history of one of the witnesses in the matter. This was vigorously defended by civil society and legal scholars who joined the case as *amicus curiae*.¹⁵⁹ What is pivotal *in casu* is the fact that the court defined rape as torture¹⁶⁰ and consequently as *jus cogens*. The failure by the Appeal Chamber to charge the accused with rape as a form of torture is disappointing, in light of the myriad of crimes the accused was convicted of.

The ICTY in *Furundzija*¹⁶¹ adopted a technical and gender-specific definition of rape and departed from the gender-neutral phrasing in *Akayesu*. The approach of the ICTY *in casu* portrays definite tenets of patriarchy with specific reference to words such as “oppression” and “power” and favours a feminist approach. It also disregards the sexual nature of rape as a crime but places emphasis on the vulnerability of women and the exercise of power over women for this very reason. On appeal, the appellant rendered an utterly absurd argument related to the definition of rape.

It was suggested that the elements of *force or the threat of force* and the *victim's continuous or genuine resistance* be conditions for such a conviction.¹⁶² Rape, by its very nature, presupposes non-consensual sexual intercourse and within the context of war, such coercion and force is equally accepted. The suggestion that a man needs *continuous or genuine* reminding, that the act of rape is not desired by the woman, supports how deeply seated male dominance and female subordination is.

Five years after the International Criminal Tribunal of Rwanda (ICTR)¹⁶³ ruling in *Akayesu*, the ICTY was challenged to take the international definition of rape a step further and this is what they did in the case of *Prosecutor v Laurent Semanza*.¹⁶⁴ A narrower definition was ascribed to rape as opposed to *Akayesu* and it

¹⁵⁹ See n.107, 157,158 above, p. 369, 371-372 above.

¹⁶⁰ See n.107,157-159 above, p. 371 which cites the judgement at *ibid* n.58, “[it is] inconceivable that it could ever be argued that the acts charged ...namely, the rubbing of a knife against a woman’s thighs and stomach, coupled with a threat to insert the knife into her vagina, once proved, are not serious enough to amount to torture”.

¹⁶¹ See n.151. Case no. IT-95-17/1-T, 10 December 1998. The ICTY defined rape as follows *in casu* as, “The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving consent”.

¹⁶² See n.107, 157-160 above, p. 374.

¹⁶³ The UN SC passed Resolution 955 in 1994 establishing the ICTR, which, like the ICTY is temporary in nature and has binding authority. For further discussion, available at <http://untreaty.un.org/cod/avl/pdf/ha/ictr/ictr_e.pdf> (accessed on 22 March 2010).

¹⁶⁴ ICTR-97-20-T (2003). The accused’s sentence was reduced by six months owing to the fact that he did not receive notification of his appearance timeously and within the prescribed time. Thus, his fair trial rights were violated. This emphasises the blatant

favoured a particular gendered perspective in favour of women.¹⁶⁵ *In casu*, the ICTY failed to charge the accused with genocide. This is regarded as a grave error on the part of the ICTY and is said to have damaged the tribunal's credibility, an anti-climax after the engrossing interest created by the *Akayesu* judgement.¹⁶⁶ Another example was the matter of *Prosecutor v Kalijelijeli*¹⁶⁷ in which the prosecution failed to establish the requisite *mens rea*.

Most of the rapes were proven to have been committed in the absence of the accused, and thereby proving specific intention was difficult. The accused was acquitted of the rape charges.¹⁶⁸ This is troublesome, in light of the fact that the Tribunal had relied on the "superior responsibility" principle mentioned in *Semanza*, which states that "the superior-subordinate relationship is established by showing a formal or informal hierarchical relationship involving an accused's effective control over the direct perpetrators".¹⁶⁹

This principle unambiguously depicts the institutionalised power and control within armed conflict and how men create a hierarchy among themselves, believing that they are not accountable. Failure to prosecute, as in *Semanza* will perpetuate this practice and fallacy. Haffajee avers that it is not so much the legal definition of rape, but rather the cumbersome evidentiary burden related to proving sexual violence that is the hindrance.¹⁷⁰ The previous section has shown that there is support for the view that the evidentiary burden places the victim (female) in a more disadvantageous position than her assailant, in light of the trauma which she has already experienced. We shall now explore how the ICC, hailed as a step in the right direction, approached the contentious issue of prosecuting sexual violence.

inequality that exists within the judiciary.

¹⁶⁵ "[T]he non-consensual penetration, however slight, of the vagina or any of the victim by the *penis* of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the *penis* of the perpetrator".

¹⁶⁶ See generally, de Than C and Shorts E 'International Criminal Law and Human Rights,' (2003) Sweet and Maxwell.

¹⁶⁷ ICTR-98-44A (2003).

¹⁶⁸ Haffajee RL 'Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory' (2006) Vol.29 *Harvard Journal of Law and Gender* 213.

¹⁶⁹ Cava M 'ICTR Judgment Summaries: Semanza' available at <<http://www.wcl.american.edu/warcrimes/semanza.cfm>> (accessed on 9 July 2010).

¹⁷⁰ See n.168 above, p.206.

3.4 International Criminal Court [ICC]

“The establishment of the Court (ICC) is still a gift of hope to future generations, and a giant step forward in the march towards *universal* human rights and the rule of law”.¹⁷¹

There is no contest regarding the motivation behind the Rome Statute and what it has achieved, however, the goal of universal human rights and maintenance of the rule of law is ultimately at the mercy of efforts made at an international level. Without the political will and co-operation by states at a national level, the hope which is intrinsic in the Rome Statute is in and of itself, ineffective. Schabas is of the opinion that despite a person’s opinion regarding the ICC, most of which are sceptical, the institution itself is admittedly a “phenomenon”.¹⁷² Mitchell expresses a counter-argument, rightly regarding the Rome Statute as a “political compromise”¹⁷³ since in reality, it is virtually impossible to satisfy all states. Penal codes of states that have ratified the Rome Statute should elucidate their stance and intolerance of rape. A culture of impunity is thus perpetuated and correlative oppression of women by laws which are constructed to further the interests of men.

In terms of Article 7(1) (g), rape is expressly listed as a crime against humanity and Article 7(2) (e) provides a definition of torture¹⁷⁴ which by inference delineates the act of rape. In comparison, the Torture Convention, which Article 7(2) (e) was adopted from, uses gender-specific language and presupposes that only men (he) can be tortured. Article 8(2) (a) lists a *numerus clausus* of crimes constituting grave breaches of the Geneva Conventions. The crimes of rape or sexual violence is not expressly mentioned in this provision but may be implied from Article 8(2) (a) (ii) and (iii).¹⁷⁵ Article 8(2) (c) (ii) has been construed so as to refer to rape as a war crime and as a grave breach.¹⁷⁶

¹⁷¹ Kofi Annan, former Secretary General of the UN, July 18, 1998 at the signing of the Rome Statute of the ICC in Rome.

¹⁷² Schabas WA ‘First Prosecutions at the International Criminal Court’ (2006) *Human Rights Law Journal* 25. See also Schabas at p. 40 where he expresses his disappointment at the absurd delays which are prevalent in prosecutions before the ICC. He is of the opinion that this relays a message that there is no sense of urgency and mentions examples of the various tribunals in relation to their first prosecution: The first indictment at the ICC and ICTR occurred one year after the election of its judges and its establishment respectively.

¹⁷³ Mitchell DS ‘The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*: Clarifying the Doctrine’ (2005) Vol.15 *Duke Journal of Comparative and International Law* 242.

¹⁷⁴ “Torture means the *intentional infliction of severe pain or suffering* whether *physical or mental*, upon a person in the custody or under the *control* of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.

¹⁷⁵ See n.144.

¹⁷⁶“Committing outrages upon *personal dignity*, in particular humiliating and degrading treatment”. Article 75(2) of Additional Protocol I of the Geneva Convention of 1949 and Article 4(2)(e) of Additional Protocol II are phrased exactly the same as this

The authors, de Than and Shorts, have rightly argued, that “[m]en do not *give women their honour*, and so cannot take it away... as with all crimes of sexual violence, it is a *crime of violence*, an *attack upon the body*”.¹⁷⁷

Some commendable developments by the ICC are, first, the fact that the requisite *mens rea* of the accused, in terms of Article 30,¹⁷⁸ was extended to include *culpa* or recklessness. This has assisted in the prosecutions of cases, which otherwise would have been set aside.¹⁷⁹ Secondly, Article 54(1) (b) places a non-derogable onus on the ICC to investigate sexual and gender-based violence. Lastly, with reference to Rule 96 of the ICTY Rules of Procedure and Evidence of 1996 and Rule 70 of the ICC Rules of Procedure and Evidence of 2002 which similarly governs the principles of evidence in cases of sexual violence, the latter states the following in summary: Conflict situations automatically negate consent in cases of sexual violence. A victim subjected to an act of sexual violence surrenders her freedom due to fear. Silence should not connote consent. More importantly, a victim’s sexual history shall not influence the mitigation of sentence of the accused or be used to discredit the victim. It is left to question whether the impact of these developments has been significant to the extent that it has been reflected in prosecutions before the ICC.

A further development in the international arena is that made by the UN Security Council who is mandated to maintain international peace and security. Sexual violence, having been identified as such a concern is more expressly dealt with in the Resolution which has been adopted and will briefly be discussed in the next section.

3.5 Conclusion:

“Perhaps the failure to conceptualise, and thus proscribe,
all sexual violence, as *jus cogens* will only be resolved
once the male bias inherent to this very notion has been exposed and suitably addressed”.¹⁸⁰

Article. Article 27(2) of Fourth Geneva Convention also describes rape in the same manner. Article 76 of Additional Protocol I expressly includes rape in its provision.

¹⁷⁷ See n. 99, 119,125,147, 149 above, p.347.

¹⁷⁸ See n. 97, 115,124 above.

¹⁷⁹ See n. 99,119,125,147,149, 177 above. See also *ibid* (2003) 137-138 at marginal no.6-026 and 6-027.

¹⁸⁰ Van der Poll, L ‘Torture and Sexual Violence as *Jus Cogens*? A Critical Reflection on the Emerging Norms in International (Humanitarian) Law’ (2009) 23 *Speculum Juris* 35.

The term *jus cogens* derives its mandate from the Vienna Convention on the Law of Treaties of 1969 which refers to international crimes, otherwise known as “compelling law”¹⁸¹ and shows a prioritisation of international law crimes. *Inter alia*, crimes against humanity, war crimes and torture are accepted as *jus cogens* and rape, as discussed in the cases above, constitutes a crime under all of these and therefore, by implication, rape qualifies as an international law crime which *should be* held to a higher standard. Albeit this should be hailed as a progressive step in the international arena, there has not been consensus on this subject.¹⁸²

Gardam and Jarvis correctly aver and elucidate the so-called “gendered hierarchy”¹⁸³ which permeates international law and especially within provisions which are specific to women. They argue that the ease with which states are able to opt out of legislation¹⁸⁴ or enter reservations as well as the failure to amend grave breaches as expressly including rape supports this hierarchy. If nothing else, law has in fact proven that if a provision is not expressly mentioned, that there is greater room for loopholes and non-compliance. It can thus be deduced that rape was not considered severe or “grave” enough to be included as such. Arguably, if rape is universally to be accepted as *jus cogens*, reservations entered into by states in terms of our previous discussed seminal documents are void *ab initio*.

The term “pawn” is described as “the source of nearly all of the strategic depth of chess”.¹⁸⁵ This rightly fits the description of how women have been strategically and tactfully used as “pawns of war”.¹⁸⁶

¹⁸¹See n. 39,103,108,142 above, p. 9.

¹⁸² See n. 39,103,108,142,181 above, p.10. See also van der Poll (2009) 2 at which she describes *jus cogens* as the “technical term given to those norms of general international law which is of a peremptory force, and from which, as a consequence, no derogation may be made, except by a subsequent norm of the same character”.

¹⁸³ See n. 39,103,108,142,181,182 above. See also M^c Glynn (2009) 3-4 where the author rightly states that a hierarchy is created, particularly regarding rape, relative to whether it has been committed by a state actor or non-state actor. This is in fact reflected by the definition of, for example, ‘spousal rape’ which is committed in the private sphere by non-state actors. Then again, the international courts have set the threshold for torture extremely high. A rather apt *dictum* is found in *Aksoy v Turkey* (100/1995/606/694) 18 December 1996, which states that, “[s]ome acts established *per se* the suffering of those upon whom they are inflicted. Rape is obviously such an act”. McGlynn refers to MacKinnon who advocates for rape to be conceived as torture and criticises the international community for disregarding rape as petty or less serious as opposed to torture. Paradoxically, Engle contends that the “overgeneralizing of rape may add to the perception of rape as exceptional ... to be a fate worse than death”. Victims would in fact respond in the affirmative, that rape destroys the victim emotionally and one is forced to live with the humiliation and degradation which is arguably worse than death. It is to many as though walking around as though alive but inside, it is as though that victim has already died.

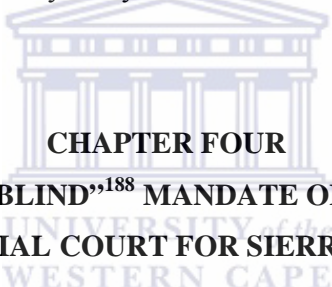
¹⁸⁴ The Rome Statute of the International Criminal Court, Article 127 which permits states to opt out of their commitment by written notification to the UN Secretary General.

¹⁸⁵<[http://www.wordiq.com/definition/pawn_\(chess\)](http://www.wordiq.com/definition/pawn_(chess))> (accessed on 11 October 2010).

¹⁸⁶ See n. 17 above, p. 25.

Women's bodies are pawns by chess players (men) who define the law protecting women and so determine the opening, middle and endgame. Their (women's) experiences of armed conflict are then openly displayed in a courtroom, in an attempt to bring peace to these war-torn countries. With respect, false expectations have been created in *Akayesu* and this is evident by the dismal number of successful rape prosecutions before the ad hoc tribunals. The closing date of this temporary court is 2010 and for the sake of expediting cases, it seems as though rape will once again be an "atrocious detail" which will be overlooked as a lesser offence without it being given due consideration.¹⁸⁷

Having taken into consideration the approach taken by the international criminal courts, we shall now specifically focus upon the transitional justice mechanisms established by the transitional governments of South Africa and Sierra Leone. In the latter, being a hybrid court, the UN was also involved in the process. The goal of national reconciliation, as shown from the countless testimonies from women specifically, depicts the manner in which these mechanisms have lacked a gendered perspective, despite incorporating certain initiatives. Chapter four will critically analyse the failure or success of these mechanisms in light of granting women a voice post-conflict.



CHAPTER FOUR
THE "GENDER-BLIND"¹⁸⁸ MANDATE OF THE TRC AND
THE SPECIAL COURT FOR SIERRA LEONE:
A STORY NOT WORTH TELLING

4.1 Introduction:

"Forgiveness is a *power* held by the victimised, not a right to be claimed.

The ability to *dispense*, but also to *withhold*. Forgiveness is an ennobling capacity and part of the *dignity* to be *reclaimed* by those who *survive* the wrongdoing. Even an individual survivor who *chooses to forgive* cannot, properly, forgive in the name of the victims.

To *expect* survivors to forgive is to heap yet another *burden* on them".¹⁸⁹

¹⁸⁷ See n. 39,103,108,142,181-183 above, p. 48. In both cases of Omar Serushago and Bisengimana, charges against the accused were withdrawn. See also see n.47, p.204 above at which Radhika Coomaraswamy is quoted as stating that "rape is the least condemned war crime".

¹⁸⁸ See n. 23 above. Also see generally, Van Zyl P (2005) 'Promoting Transitional Justice in Post-Conflict Societies' in Chapter 10 of Bryden A and Hanggi H (eds.) (2005) Security Governance in Post-Conflict Peacebuilding', DCAF, Geneva and Bosire L (2006) 'Overpromised, Under-delivered: Transitional Justice in Sub-Saharan Africa,' Occasional Paper Series, International Center for Transitional Justice.

Minow suggests that this so-called “burden” or expectation is exactly what the TRC and the SCSL have placed upon women who have been subjected to rape. These institutions are ignorant towards certain determining factors affecting a woman’s particular ability or willingness to forgive, such as religion, culture, custom, trauma and a gendered stereotype. Freedom, it would appear, is not meant for women, as there is a price to be paid if they do decide to testify, shown by accounts of stigmatisation and severe emotional consequences which have been experienced.¹⁹⁰ Some women consider this societal suicide worth the opportunity to have their stories told. They regard it as a necessity in order to reclaim that which was stolen from them.¹⁹¹

Transitional justice is historically unpopular and in societies where this type of justice is implored, the truth is exactly what threatens reconciliation.¹⁹² For this and a myriad of other reasons, women have remained silent in an effort to maintain national peace and reconciliation at all costs. It is indeed a paradox that those crimes which are regarded as violations against human rights or, as in the case of South Africa, a crime against humanity, were legitimised in the previous regime and often perpetrated by the repressive rule.¹⁹³

This forms the basis of our question in this chapter – is transitional justice an appropriate *and* effective mechanism for gender reform in these societies? Reflecting upon the previous chapter, the *ad hoc* tribunals were not immune to political interference, and similarly no less should have been expected from the TRC and SCSL. This called for a great deal of diplomacy during this process (transition) in an effort to reclaim morality and correlatively inspire noble aspirations of national reconciliation. This however begs the question of whose justice was truthfully being fought for and depicts a compromise of individual healing in exchange for the guise of national reconciliation.¹⁹⁴

¹⁸⁹ Minow M cited in ‘Forgetting the Past: Why Amnesty?’ p.56-57.

¹⁹⁰ See generally Backer D ‘Exit, Voice and Loyalty in Transitional Justice Processes: Evidence on Victims’ Responses to South Africa’s Truth and Reconciliation Commission’ All Academic Inc. Available at http://www.allacademic.com/meta/p61174_index.html (accessed on 12 March 2010).

¹⁹¹ ‘Gender-Based Violence in Transition’ (7-8 May 2008), p.17 of Concept Paper: Violence and Transition Project Roundtable in Johannesburg, Centre for the Study of Violence and Reconciliation, Transitional Justice Programme.

¹⁹² Leebaw BA ‘The irreconcilable goals of transitional justice’ *Human Rights Quarterly* (2008) 30(1) 95-118 cites an extract from Madeleine Albright, former United Nations Ambassador, in which she says, “Establishing the truth about what happened in Bosnia is essential to – not an absolute to – national reconciliation.” Available at http://calbears.findarticles.com/p/articles/mi_1584/is_n16_v5/ai_15282479 (accessed on 22 March 2010). See generally Bell C and O’Rourke C (2007).

¹⁹³ See n. 192 above. Leebaw specifically refers to the Group Areas Act and the Immorality Act which were legal instruments which legitimised discrimination and flourished during the apartheid dispensation. The legislation and consequent acts by the former regime were regarded as lawful.

¹⁹⁴ See n. 193 above. The author defines “reconciliation” and “transitional justice” as divisible concepts. The former being the goal of stability, whilst the latter is regarded as a threat to short term stability. See also Saunders R (2008) where the author

The definition of “transitional justice” conceptually, has been argued to be dependent upon the context within which it is being discussed and therefore, no legal framework aptly prescribes guidelines for it. The use thereof has been to its monotony and in so doing, its true meaning has been lost. A plethora of definitions have however been offered by various authors who vaguely share the same belief.¹⁹⁵ Teitel defines transitional justice as a change from a period of despotic rule to a political democracy.¹⁹⁶ Admittedly, emphasis is often placed on the actual process or journey, but not on the destination.

As Roht-Arriaza questions, “what is the state transitioning to?”¹⁹⁷ Transitional justice mechanisms are contentious, in that it is questionable whose *truth* is being reflected in the search for a common history,¹⁹⁸ and in turn, who decides upon this truth? Testimonies appeared to be cosmetic accounts of women’s realities, as questions were particularly formulated to evoke a particular type of emotion, as opposed to the premised common history.¹⁹⁹ The histories of women cannot be said to resonate, since so many stories are left untold. Despite the guarantee of equality in both international human rights law and international humanitarian law, as previously discussed, gender-based violent crime remains under-litigated. A real fear exists among women to relive their stories through testimony as the account of this so-called common history, says Leebaw, is often subjective.²⁰⁰

Amnesty is a controversial tenet of transitional justice, since the perpetrator is absolved from serving a custodial sentence. Truth telling is generally encouraged for the attainment of national reconciliation. The motivation for such amnesty applications are therefore questionable, since exemption from prosecution serves as sufficient encouragement.

describes the South African TRC as follows: “[It] functioned to prioritise national over individual forms of healing, and allowed the South African government to substitute spiritual and symbolic forms of reparation over material ones”.

¹⁹⁵ See generally Elster J (2004) ‘Closing the books: Transitional Justice in Historical Perspective’ available at <http://www.restorativejustice.org/articlesdb/articles/4806> (accessed on 12 March 2010) and Anderlini SN, Conaway CP and Kays L (2004) 1 in ‘Transitional Justice and Reconciliation, and Gender-Based Violence in Transition’ (7-8 May 2008), p.14 of Concept Paper: Violence and Transition Project Roundtable in Johannesburg, Centre for the Study of Violence and Reconciliation, Transitional Justice Programme. See generally, Bell C and O’ Rourke C (2007) and Teitel RG available at http://www.nyls.edu/faculty/faculty_profiles/ruti_g_teitel?action=view_publications 223-225.

¹⁹⁶ Teitel RG ‘Transitional Justice Genealogy’ (2003) 98 *Harv.Hum.Rts.J.* 69 cited in Leebaw BA (2008).

¹⁹⁷ Roht-Arriaza N *Impunity of Human Rights in International Law and Practice* (1995) 281-204.

¹⁹⁸ See n.189-192 above.

¹⁹⁹ “A paradoxical aspect of participation is that some victims actually feel a greater sense of *injustice* by virtue of their exposure to the TRC process. This is explained by a cycle of increased expectations leading to a greater disappointment”. Own emphasis.

²⁰⁰ Ibid. See also Deleat (2006) “Gender Justice: A Gendered Assessment of Truth-Telling Mechanisms” cited in Borer TA ‘Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies’ (2006) cited in ‘Gender-Based Violence in Transition’ (7-8 May 2008), p.16 of Concept Paper: Violence and Transition Project Roundtable in Johannesburg, Centre for the Study of Violence and Reconciliation, Transitional Justice Programme.

The decision by truth commissions *not* to prosecute acts of sexual violence committed during times of conflict vividly reflects the reality of societies in transition and the perpetuation of male-favoured bias, causing a further divide between the two sexes. The failure to address the gendered nature of sexual violence as specifically targeted against women perpetuates a culture of impunity, hereby compromising a common history. Women take whatever justice is offered, revealing the desperation to taste it, for however long it may last. It is then, as Shklar says, that justice is not an obscure and objective concept but demands that victim's subjective experiences are heard.²⁰¹

Arbour rightly avers that transitional justice, like international human rights law has created a hierarchy²⁰² with sexual violence arguably being regarded as a lesser offence. This argument was substantiated by the United Nations Secretary General in 2004²⁰³ also referring to the sequential order and disproportionate manner in which justice is implemented. Rape reflects the vast inequality between men and women and manifests itself during peace and wartime, albeit specifically during wartime, as a “favoured weapon of the aggressor”.²⁰⁴ It has been rightly argued that the military instils gender engineered behaviour of discipline, power and control in soldiers. These tenets, by definition, depict a real man and instils masculinisation. This is then manifested through acts of rape. Fehrenbach described the dilemma faced by the men and women of German post-conflict. Particular reference is made to the national conception of masculinity and how, when that is compromised, causes national disorder²⁰⁵, as it is accepted that men set the tone for societal behaviour.

There are a few similarities between South Africa and Sierra Leone: South Africa became a republic in 1960 and Sierra Leone, just a year later. During periods of armed conflict, women were systematically targeted to emasculate countrymen. Further, both the TRC and SCSL were located in the countries where the atrocities

²⁰¹ See Shklar JN *The Faces of Injustice* (1992).

²⁰² Arbour L ‘Economic and Social Justice for Societies in Transition’ available at <http://www.chrgj.org/docs/Arbour_25_October_2006.pdf> (accessed on 23 March 2010). See also, Boraine A ‘Transitional Justice as an Emerging Field’ paper presented in Canada in March 2004. Available at <<http://www.idrc.ca/uploads/user-s/10829975041/revised-boraine-ottawa-2004.p-df>> (accessed on 22 March 2010).

²⁰³ See n. 202 above. “For the UN, “justice” is an *ideal* of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large”. Para.7 of the UN Secretary-General’s report on “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616, Aug. 23, 2004.

²⁰⁴ ‘Rape As A Tool of War: A Fact Sheet’ (Aug. 25, 2005) p.2. Amnesty International USA. Available at <www.amnestyusa.org/women> (accessed on 13 April 2010).

²⁰⁵ Fehrenbach H ‘Rehabilitating Fatherland: Race and German Remasculinization’ (1998) 24 *SIGNS* 107,109. “[I]n the wake of defeat and occupation, German men lost their status as protectors, providers, and even (or so it seemed for a short time, as procreators: the 3 P’s that had traditionally defined and justified their masculinity”.

took place and had taken cognisance of the gender-specific manner in which conflict is experienced by women and therefore, made provisions to accommodate women's testimonies. This is perhaps where the similarities between these two conflicted democracies end.²⁰⁶ The establishments of the TRC and the SCSL, albeit similar in nature, functioned differently, owing to their respective contexts. The TRC, as opposed to the SCSL was not hybrid and therefore, there was no United Nations intervention during the course of proceedings. Intervention by the UN of the SCSL and in effect, bringing about a hybrid court, was due to the human and financial resources required for the effective functioning of this court. The penal code of the country was and to a great extent, remains outdated. Sierra Leone had a depleted morale and economy and this seemed like the most viable option in an effort to bring about justice via accountability. The TRC was established in 1995, a year after the first democratic election and the SCSL, seven years later, in 2002 after the conclusion of the Lome Agreement.

The Commission for Gender Equality compiled a "Report to CEDAW Committee on South Africa's Implementation of CEDAW from 1998-2008," in which they provide a critical analysis of the country's adherence or non-adherence to the CEDAW provisions. This shall further be expounded upon.

South Africa's failure to submit CEDAW country reports for 2001 and 2005 reflects impunity regarding accountability of international norms and standards. With particular reference to the country's 2008 report, described as being "repetitive and superfluous,"²⁰⁷ it was found that certain provisions were omitted despite its relevance and in particular, the 12 key areas of the Beijing Platform for Action. Admittedly one of the most violent countries in the world, the report observes the high levels of violence against women in particular which is substantiated by statistics.²⁰⁸ Regarding implementation, the report goes on to expose inadequacies in the protection services by the South African Police Services.²⁰⁹

4.2 South Africa and the Truth and Reconciliation Commission:

The inter-faction fighting between the United Democratic Front (UDF) and Inkatha Freedom Party (IFP)²¹⁰ during the apartheid dispensation was a vivid depiction of how women's bodies were used as the battlefield for a male sport – rape. By sexually violating women in this manner the perpetrator/s had clearly left his or their mark and in this strategic and tactful manner, left irreparable damage.

²⁰⁶ Ni Aolain F *et al.* (2005) 173,176. The authors explore the concept of countries which qualify as "conflicted democracies" and they proceed to provide the following criteria to be met: there must be division in the body politic and this division must threaten significant political violence.

²⁰⁷ Report to the CEDAW Committee on South Africa's Implementation of CEDAW from 1998-2008 (2010) p.10.

²⁰⁸ See n. 207 above at p.17.

²⁰⁹ See n. 208 above at p.37.

²¹⁰ Bailey G 'Rape as a Weapon of War' in Khanya, A Journal for Activists (2003) 28.

Women bear the scars of war which transitional justice mechanisms, such as the TRC seek to illuminate in an effort for nation building, whilst their men are reminded of how they failed to act according to societal norms and protect their women.

The expectation or ideal of what South Africa was transitioning to was evident by the very title of the governing Act which birthed the TRC.²¹¹ Redemption or absolution would be sought by the perpetrator and forgiveness would be expected of the victim. The addition of “reconciliation” to the title of this mechanism, rendered the South African Truth Commission unique, compared to those who had preceded it.²¹² We shall discuss the importance of this inclusion in this chapter.

The first testimony heard by the newly established TRC was that of Mrs. Nohle Mohape, whose husband, a member of the Black Consciousness Movement, was killed in 1976 whilst in police detention. It was however reported that he had committed suicide. Despite having suffered as a victim herself, it is evident from her testimony, as it is re-told in relational terms, that she discounts her own experience as being inferior to the country and her late husband.²¹³ Torture is generally associated with men who had experienced severe physical harm under the control of the Security Police (SSC) but this is exclusionary in that it does not take into account the experiences of women.²¹⁴ This so-called “truth” which was sought for the nation’s healing and unity was a relative truth, depending on what purpose the truth served. This is corroborated by Bishop Peter Storey of the Methodist Church at Winnie Madikizela Mandela’s hearing. He said that, “[t]he truth has been trimmed to prevailing political whims by politicians very often, by people with political interests”.²¹⁵ *In casu*, Winnie Mandela was detained for 17 months, proving how institutionalised racism and fundamentally, gender-based violence was and still is today.²¹⁶ There was a resounding apathy expressed by victims towards alleged perpetrators of the crimes, since the power of forgiveness did in fact lie in the victims themselves.²¹⁷

²¹¹ TRC Report of South Africa 1998:1.4.3 states that “truth telling would create understanding and dignity and healing”.

²¹² Some examples are Uganda in 1974, Bolivia in 1982, Argentina in 1983, Germany in 1992, and Rwanda in 1992. Available at http://www.beyondintractability.org/essay/truth_commissions/ (accessed on 11 November 2010).

²¹³ Boraine A (2000) 98. This is further corroborated by the comment which was made by the Commission, who validated her and her courage by saying that, “[t]his is a testimony to your commitment to truth, to justice, to reconciliation and to peace between you and all people and all South Africa”.

²¹⁴ See n. 213 at p.136-144

²¹⁵ See n. 214 at p. 222.

²¹⁶ See n. 215 at p.224.

²¹⁷ A widow testifying at the TRC hearing in South Africa in 1997 said the following, “No government can forgive, no Commission can forgive. They don’t know my pain. Only I can forgive and I must know before I can forgive”.

One of the primary criticisms of the TRC however, is the exclusivity regarding *who* were deemed to be victims and by implication, who were not. There was an inclination, perhaps largely owing to the public attention which these cases drew, to focus on highly politicised cases, as opposed to the “unknowns” which in the majority of cases refer to women. In terms of the Promotion of National Unity and Reconciliation Act No. 34 of 1995, it referred to those “victims of *gross* violations of human rights”.²¹⁸ The perpetrator of rape would be eligible for amnesty upon proving that such an act was *politically motivated*. Rape is therefore implicitly not referred to as being politically motivated within the context of apartheid²¹⁹ and regarded as “severe ill-treatment.” A clear distinction needs to be drawn between political motivation and blatant gender discrimination through acts of sexual violence. Arguably, lines have become blurred, as sexual violence is *excused* as a political means to an end.

A statement issued by the TRC in 1996 specifically focusing upon the issue of gender, was in response to a submission by Beth Goldblatt, Sheila Meinjies, Yasmin Sooka and Glenda Wildschut who documented thirty-three years of the repression of women’s perspectives throughout the lifespan of the Truth Commission.²²⁰ This document was influential, in the following respects, namely, serving as impetus for the inclusion of gender-based violence and sexual violence in the definition of “gross human right violations” and of special women-only hearings.

In contrast, Wilson describes the process of the TRC hearings as “emotional window dressing”²²¹ and this largely due to the fact, as mentioned above, that the hearings were publicly broadcasted and arguably emotionally orchestrated. Perpetrators applying for amnesty would on cue, display an inkling of humanity and mercy which was denied to their victims during the atrocious apartheid era. Women approached the TRC in good faith but were met with injustice.²²² Reparations were implored as a tool to entice vulnerable women in particular. What could arguably have been excused as oversight by the TRC, was that rape and

²¹⁸ Minow M (2000) ‘The Hope for Healing: What Can Truth Commissions Do? In Truth v. Justice: The morality of truth commissions’ cited in *ibid* 4 and 5 above, p.98 n.11.

²¹⁹ Hayner P (2001) cited in Arbour, L ‘Gender and Transitional Justice in Africa’ (2009) Vol. 9 (2) *African Journal on Conflict Resolution*. See also, TRC of South Africa Report 1998:4.10.316 where it depicts the reality of women’s status within transition. “[It] resulted in blindness to the types of abuse predominantly experienced by women”.

²²⁰ Available at <<http://apic.igc.org/docs96/trc9608.htm>> (accessed on 11 November 2010).

²²¹ Wilson cited in Saunders R ‘Lost in Translation: Expressions of Human Suffering, the Language of Human Rights and the South African TRC’ Year 5. Number 9. *Sao Paulo* (2008). Saunders at p.2 correctly avers that the emotional overtones were encouraged, especially with the nation acting as spectators to an unfolding drama, which despite having run its course, somehow seemed more intriguing when captured on camera.

²²² See n. 221 at p.58. The author states that witness testimony was “a cynical process of political expediency...What had been lost in translation was in effect the victim’s own healing, it had been sacrificed, many realised with a bitter hindsight, for the healing of the nation”. This further emphasises at what cost women’s experiences were believed to best be forgotten.

other forms of sexual violence requires no particular context within which to flourish, it simply does by virtue of socially engineered gendered stereotypes. A distinction was drawn between so-called “ordinary” as opposed to “extraordinary” violence.²²³ It is specifically mentioned how South African women were disenfranchised of their voting rights or from entering into inter-racial relationships. A woman’s private life was completely governed by the state and so, sexual violence also became an act which was related to the private sphere. Rape was considered too “ordinary” to be constituted a politically motivated crime.

Women’s testimonies revealed that, as a group, they testified to their experiences relationally, failing to acknowledge their personal experiences and therefore it is argued, that the experience of South African women are largely misrepresented. It would seem that apartheid was only experienced by men and this would, to a certain extent, explain the *raison d’être* for the trend in providing relational testimony as opposed to more personalised ones.²²⁴ The ICTR and ICTY encouraged the international community to no longer regard sexual violence as a side issue,²²⁵ and as argued by Orentlicher, international law imposes a duty to prosecute human rights violations as committed by a prior regime.²²⁶ Similarly to the international criminal tribunals then, the TRC had shortcomings and special mention needs to be made of access. In rural areas, owing to the geographical location of the TRC, it was challenging to gain access. Socially engineered stereotypes of women primarily as caregivers, is particularly still prevalent in South African society and evident in the social inequality. Although legislation has been amended to express the commitment toward gender reform, the sense of urgency regarding such reform has declined and consequently, serious violations have continued against women.²²⁷

²²³ ‘Gender-Based Violence in Transition’ Concept Paper: Violence and Transition Project Roundtable, 7-9 May 2008 in Johannesburg, Centre for the Study of Violence and Reconciliation, Transitional Justice Programme.

²²⁴ Nesiah V ‘Truth Commissions and Gender: Principles, Policies and Procedures’ available at <http://www.ictj.org/static/Gender/GendHandbook.eng.pdf> (accessed on 22 March 2010) 17. “These women didn’t feel comfortable reporting on their own injuries; they negated the political significance of their own sacrifices, given entrenched social norms denying female agency and recognition; perhaps, rightly or wrongly, they felt it was the sacrifices of the male political actor who would be privileged by the Commission, the broader society, or the movements they were involved in”.

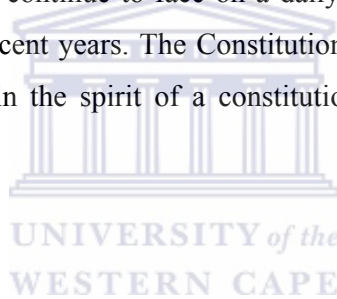
²²⁵ Smart C *Feminism and the power of law* (1989) cited in Bell C and O’ Rourke C (2007) in which the author expands upon the low priority granted to sexual violence against women. “[W]omen’s accounts can be sidelined in such processes in favour of the promotion of elite nation-building”.

²²⁶ Orentlicher D ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 2537, 2612-15 *Yale L.J.* 100.

²²⁷ ‘South Africa: Democracy and Political Participation’ 2006. Open Society Foundation for South Africa. Available at http://www.afriMAP.org/english/images/report/AfriMAP_SAPolPart_Full.pdf (accessed on 3 March 2010).

The call for truth which reflects women's experiences was vigorously advocated and lobbied for by activists during the TRC hearings. Gibson regards the TRC as a "phenomenal" success, compared to transitional justice mechanisms elsewhere.²²⁸ Whilst presenting a paper in Cuba, Boraine also displayed a rather optimistic tone and encouraged other countries to learn from South Africa.²²⁹ He however admits in his 2002 publication, that individual reconciliation is to be encouraged and that a hierarchy should not be created at the individual's expense for national unity.²³⁰

Saunders further expands upon this so-called hierarchy by suggesting that the TRC preferred national above individual healing. There have been testimonies of victims who claimed that they had a sense of injustice after offering their testimony since these were distorted in order to achieve a "national identity".²³¹ South Africans and the international community thought that the situation could not get any worse and many believed that the country was on the brink of civil war.²³² One questions the measure of success²³³, when it is solely based on the fact the country avoided a brewing civil war? This does not take into account the perpetual discrimination which women continue to face on a daily basis and the fact that this country has seen a scourge of sexual violence in recent years. The Constitution²³⁴ expressly prohibits discrimination on the listed grounds, *inter alia*, gender in the spirit of a constitutional democracy, based on the tenets of freedom, equality and dignity.



²²⁸ See Gibson JL 'Overcoming Apartheid: Can truth reconcile a divided nation?' (2004) 31(2) *Politikon*, Carfax Publishing. See also, Borer TA (2001) 2 "Reconciliation in South Africa: Defining Success," Kroc Institute Occasional Paper 20:OP:1 where the author rightly argues that success is difficult to measure, since goals set by truth commissions are usually vague.

²²⁹ See Boraine A (2003) "South Africa's Democratic Transition: The Challenge to Achieve Justice. Lessons for Cuba and Others." The author however avers that victims do require more than justice according to its plain meaning.

²³⁰ Boraine A (2000) 352.

²³¹ Saunders R *Lost in Translation: Expressions of Human Suffering, the Language of Human Rights and the South African TRC* Year 5. Number 9. *Sao Paulo* (2008) 1.

²³² Habib A 'The Transition to Democracy in South Africa: Developing a Dynamic Model' *Transformation* 27 (1995) 49. Habib expressed a rather critical view of the role players [Nelson Mandela and F.W. de Klerk] who were heralded as heroes in the transitional government of South Africa and expresses that the new constitutional dispensation was overly zealous. He mentions that many believe, excluding him that, "[w]ithout them, and their stabilising influence, South Africa would have degenerated into an abyss of poverty, violence, and economic catastrophe".

²³³ Nathan L 'Accounting for South Africa's successful transition to democracy' Discussion Paper No. 5, Crisis States Development Research Centre (2004) 2 at which the author specifically states that "political trust" is lacking in South Africa which hinders its successful transition.

²³⁴ See n.48 above.

4.3 Sierra Leone and the Special Court :

The SCSL was established in August 2000 by the adoption of Security Council Resolution 1315. The approach of addressing past injustices was implemented by prosecuting “those who bear the *greatest* responsibility” or “the worst offenders”²³⁵ thereby, not prosecuting many who were directly involved in perpetration.

As explored in the previous chapter, many accused who have been prosecuted in the international criminal tribunal, were not directly involved but depended upon their subordinates to carry out sexual acts against women. The SCSL was assisted by UN Development Fund for Women (UNIFEM) to provide gender-sensitive training to staff and debriefing for women who testified before the SCSL.²³⁶ Admittedly, eight years after the establishment of the SCSL and after the dissolution thereof, stigmatisation still remains a deterrent to reporting sexual violence. This method seemed like the most effective means to an ongoing war which needed expeditious methods. Whether this was indeed effective, is questionable. The problem perhaps, has not been in the response to the Court’s aims and objectives but rather in the sustainability thereof.

Crane, Chief Prosecutor of the SCSL commented on why he deemed the location of the Court as a benefit to the Sierra Leonean community, because “victims will see justice start and finish before their eyes”.²³⁷ Arguably, this alleged advantage presupposes equal access to justice. The civil war had such a devastating effect on the country’s economy, that justice is generally not a reality because women specifically, are accustomed to not experiencing economic or other justice as tangible. Further, women are placed in an even more vulnerable position, since rape defiles the virtuous customary rules. Virginity is prized as a reflection of purity and virtue and even more, directly reflects upon the girl or woman’s family. The social stigma attached to rape paradoxically has the effect of causing shame upon the victim, which could be supported by traditional disillusioned beliefs that women are temptresses and promiscuous. Specifically in the Sierra Leonean context, the country’s morals were turned on its head with no reverence towards international human rights instruments and the rule of law.²³⁸

²³⁵ See Perry A ‘Guilty: Justice in Sierra Leone at Last’ 26 February 2009. Available at <<http://www.time.com/time/world/article/0,8599,1881862,00.html>> (accessed on 11 November 2010).

²³⁶ See also <<http://www.unifem.org/worldwide/africa/>> (accessed on 15 October 2010).

²³⁷ Nathan L ‘Best-Practice Recommendations for the Protection and Support of Witnesses, Special Court for Sierra Leone: An Evaluation of the Witness and Victims Section’ (2008) 4. See also Nowrojee B ‘Your Justice Is Too Slow: Will the ICTR Fail Rwanda’s Rape Victims?’ (2005) Occasional Paper 10, United Nations Research Institute for Social Development.

²³⁸ Cited *ibid* n.33 above. “It was a war that broke all the rules of warfare, and ignored international conventions. It has no friends. Everybody was the enemy”.

Women were previously treated with respect but were now being dishonoured in the worst possible manner. There are also accounts of the systematic rape of older women as it is believed that “they were almost virgin”.²³⁹

4.4 Conclusion:

Janus was a god in Roman mythology who was said to have two heads – one looking back to the past and one looking forward towards the future.²⁴⁰ It was said that Janus could never truly revel in the moment, since he was always still looking to what was. This is the paradox of justice²⁴¹, which, despite aspiring towards a forward looking approach of national reconciliation, needs to unravel the truth.

Some positive outcomes in the area of transitional justice and with a specific focus on women are that of the SCSL, whose findings were used to effect legislative reform and the UN Security Council which issued a report by the Secretary-General in 2004, on “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”.²⁴² This report listed women as a minority group whose vulnerability directly influences the maintenance of the rule of law.²⁴³ Sexual abuse is recognised as a real threat to post-conflict societies and attempts are being made to eliminate impunity and encourage accountability.²⁴⁴

In attempting to provide an answer to the daunting question of whether South Africa and Sierra Leone can be said to have successfully transitioned towards a democracy, it would depend on who you are asking. As this research paper is a woman’s study, arguments put forth reflect this gendered perspective.

Nathan avers that South Africa’s transition is successful, based on the fact that it has made immense strides, despite being such a young democracy. It is arguable who exactly is benefiting from the fruits of democracy, freedom and respect. Without contest, it is indeed commendable to note that South Africa’s Constitution is hailed as a model for countries in transition, reflecting values of good governance and a strong commitment towards upholding human rights. However, in light of the particular vulnerability experienced by women, judgement should rather be rendered upon whether the country is at and where it is going. Realistically then, men are the beneficiaries of these entitlements and do not have to qualify for equal enjoyment.

²³⁹ See n.7 above, p.54.

²⁴⁰ Available at <<http://www.pantheon.org/articles/j/janus.html>> (accessed on 9 October 2010).

²⁴¹ Minow M cited in Franke K ‘Gendered subjects of Transitional Justice’ (2006) 15 (3) *Colum. J. Gender and L.* 813.

²⁴² S/2004/616 is also available at <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/IJ%20S2004616.pdf>> (accessed on 13 October 2010).

²⁴³ See n. 242 at para.3.

²⁴⁴ See n. 24.3 In terms of para.33 “the all too *common* sexual abuse, exploitation and traumatization of these groups in conflict and post-conflict setting”. Para.64(g) further calls for the “recognition of gender-specific experience by women”.

They are granted them by virtue of their gender. As Smart rightly says, women will always be a step behind, as they are “running hard to stand still”.²⁴⁵ The rules are not the same for men and women but justice is something that women need to fight for. The gendered-hierarchy of crimes deems women as a low priority and national stability or nation building and reconciliation is threatened in this way. The final chapter will set out conclusions based on the research paper in its entirety and also provide recommendations in light of these conclusions.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

Sexual violence against women epitomes the unequal power relations between men and women which is as prevalent during war as in times of peace. The inescapable truth is that this type of modern day warfare is perpetuated to further generations of men and women who construct their worldview around socially engineered ideas of gender which in turn, causes grave injustices in both the private and public spheres. Further, the transitional justice mechanisms implored by South Africa and Sierra Leone respectively have not reflected the *truth* regarding women’s experiences of sexual violence prior to transition. It is questionable how these are sidelined for the benefit of the appearance of national unity. This research paper supports greater involvement by various role-players and the recommendations set forth are rendered for due consideration.

5.2 Conclusions

This research paper set out to prove that women have been forgotten in the process of transitional justice and national reconciliation. The arguments in favour thereof, show that this is evident. Firstly, international and regional legislation have lent itself to severe critique and as argued in Chapter two, have, owing to gaps in law, failed to ensure a gendered perspective. Certain amendments of existing legislation as well as elevating the statuses of declarations would remedy this to a large degree. A further deduction was made in examining the international criminal tribunals with particular reference to uniformity. The inconsistent application of recognising women as victims is evident in the judgements which have been discussed. Among the recommendations below, this will be addressed. Taking into account the discussions in Chapter 4 particularly, the TRC and SCSL strived for national unity at the cost of women’s experiences by evoking their emotions. As Roht-Arriaza said, there was an over-emphasis on transition or change, but there was no plan as to what the country would do once they arrived at this destination.

²⁴⁵ Smart C ‘Law, Crime and Sexuality: Essays in feminism’ (1995).

An expectation or coerced reconciliation failed to aptly reflect the plight of women of these transitional societies. Granted that in Sierra Leone, the delimitation on “those who bore the greatest responsibility” was implored as a matter of urgency, there are those perpetrators who were not equally ranked but yet equally responsible and who benefit from the impunity which has been created. Recommendations are offered below, in addressing these conclusions.

5.3 General recommendations

(a) International and Regional Instruments

Having discussed at length, the evident hierarchy of legislation and the consequent lower status granted to women, a culture of universal equality needs to be continually nurtured. This should be reflected in binding instruments on a domestic, regional and international level. In terms of international law, the legal statuses of Declarations are that of non-binding instruments, as opposed to Conventions. Declarations are moralistic and aspirant without having the necessary legal status to support it, thus rendering it toothless. As mentioned above at paragraph 2.5, these are the hindrances by virtue of the status of a particular document. For example, the Beijing Platform for Action has the potential to be more effective than Conventions, particularly because it is more comprehensive than any equivalent legislation of its kind and provides the greatest protection and correlative accountability. A united and concerted effort should be made by the international community to pass Declarations into Conventions, particularly the Beijing Platform for Action, which would strengthen the status of women globally.

(b) Accountability of state parties

A further cause for concern is the opt-out clause contained in Article 10 of the Optional Protocol to CEDAW which is in direct contravention of the Vienna Treaty Law, since it is against the purport of the said Protocol and should for this reason be amended and accordingly omitted. Reporting on a domestic, regional and international front has been dismal. This is not only evidenced in the actual reports received but also in the failure to provide stringent sanctions as a deterrent. Recidivism is the product of lack of accountability by state parties and despite legislation which depicts idealistic and noble promises; it would appear as though national reconciliation is to be achieved at the expense of women’s safety and security.

(c) Political will

As previously discussed, (see paragraphs 1.5, 2.4 and 3.4 above) despite the codification of various instruments condemning sexual violence against women, the lack the political commitment by state parties renders these attempts futile. With respect, owing to the lack of a human rights culture and deep seated male patriarchy, political will particularly on the African continent, will remain as is.

This recommendation is dependent upon the other recommendations being met and therefore, should be regarded in light of these.

(d) Judicial uniformity

The vague phrasing in the governing legislation for the ICTR, ICTY and ICC, have necessitated an attitude of “making it up as we go along”. Uniformity among these pivotal tribunals and court should be strongly encouraged. An example would be the milling process which the definition of “rape” has undergone and also the definition of “genocide” to include rape as such a crime. This proves the evidentiary burden which sets victims (women) up for failure, perpetuating further inequality regarding their access to justice.

(e) Civil society involvement

Education at grass-roots level to women who have suffered sexual violence is an empowering tool, coupled with sensitivity training for communities. By involving community leaders in this process, legislative reform will transform from being aspirations to realisations. Change needs to come from within, as an outsider will be deemed as a threat and will not be able to effectively identify with the plight of the citizens.

The gender-bias which is inherent in our society, translates into households which are dictated by this belief. It is therefore, more effective to raise awareness within these societies. More importantly, there have been criticisms against civil society imposing their ideals and ideas upon communities. To this end, it is advisable that change occurs from within and by civil society liaising with community leaders, the specific dynamic can be better understood. As alluded to in this paper, the stigmatisation which accompanies sexual violence is unbearable and therefore, training workshops would encourage victims and witnesses to speak out against sexual violence without the threat of subsequent harm.

5.4 Annexure

A Two-Sided Mirror: “Reflections of a Disempowered Woman”

Holding a mirror to my soul
 I see the turbulence of a conflicted mind
 Troubled by the daily battles to find
 My place in a world that
 Defines me, Deprives me, Derides me, Denies me
 Personal autonomy

Body violated, Choices dictates, intellect races
 Challenging social constructs that limit me
 Stereotypes devised

By a patriarchal hegemony
 Divided inside I struggle to find
 A place of peace
 Where I can just be me
 Together and free



Conditioned behaviour based on my genitalia
 I suffer discrimination, distressed demeanour
 Psyche beaten into submission
 Bruised emotions abused by a political system

I feel undervalued, robbed of my dignity
 My inner strength raped
 By negative agents of change
 That prohibit my social rights
 The complexities of human rights
 Evade me

Shrouded by political correctness
I hear the rhetoric “Gender” redefined
My constitutional claim to equality
Yet I cannot conceive the reason why
He has power of Me

The provider designed to protect me
Rather nurtures the pain that destroys me
I must gather my wits and
Strength around me
With the support of my sisters
Hold the gender lens to the conscience of my brothers

Will the world turn topsy-turvy to accommodate me?
My tormented soul cries out
Let me just be Me
In an enabling environment
A woman free
With complete autonomy²⁴⁶



²⁴⁶ This poem was written by Devraj and Phoenix and cited in *ibid* n.9.

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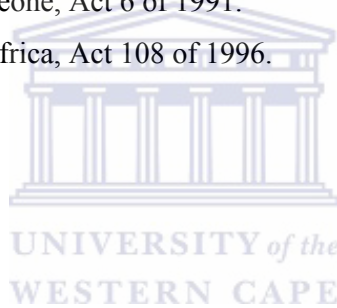
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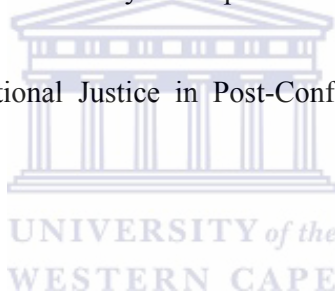
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