"All Human Beings are Born Free and Equal"[1]

Women's Human Rights and the International Criminal Tribunals

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Table of Contents

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Introduction

"*Strong enough but you don't know it*

Good little girls they never show it

When you open up your mouth to speak

Could you be a little weak"[2]

This quote is taken from a song by Madonna, one of the strongest women in today's music industry and probably the world altogether. The video of that song shows her on a crime scene, after seemingly being abused, "acting out a fantasy and doing things girls are not allowed to do". The video caused a controversy for being violent.[3] This quote is not based on readings or statistics, nor is it taken from a woman living in poverty, a refugee camp, or a highly discriminatory country where women are not allowed to leave their houses by themselves. It is a quote taken from one of the strongest, most independent, powerful women out there, talking about the limitations that society puts on her as a female.

Discrimination against women is everywhere. It exists in every country on every continent. You can see it in workplaces with unequal pay between men and women, in social roles which limit the development and independence of women, even if they are formally allowed to work, in the media, in the social control over body image. Women are seen as weak, expected to be weak and are kept that way. They are discriminated against and abused. It is not just a problem existing in countries of poverty and war, in far away societies. It is not only when abuse is evident because you see blue marks and wounds. It exists everywhere.

The following paper will deal with the problem of the discrimination of women, through the lens of international law. Feminism is a movement which had grown from realities seen on the ground, of real life oppression and discrimination, which formed into feminist theory, and then into the active struggles for change of that discriminatory reality. Human rights saw quite a similar development. They constitute an international mechanism which evolved from realities of discrimination and oppression around the world, that needed an answer, then formed into written documents which were meant to protect the ones who suffer from these realities.

A main tool for protecting human rights in severe cases is the establishment of international criminal tribunals, which are mandated to prosecute crimes of war. The tribunals are mechanisms meant to uphold the laws which comprehend the normative ideas of what should and should not be accepted by the international community. When the International Criminal Tribunal for the former Yugoslavia

[2] The Madonna Lyrics Archive n.d.
[3] Gelman 2001.

(ICTY) and Rwanda (ICTR) were established in the 1990s, the feminist activists and organizations saw the opportunity to advance their ideas and goals through this human rights protection mechanism. The movement focused its struggle on the recognition, by the courts, of sexual violence as a crime of war: a practical step forward for the translation of feminist theory into practicality and formal recognition. These struggles ended with landmark developments: the first one through the recognition of rape in war as a crime against humanity (the ICTY being the first international tribunal to do so), and the second through the recognition of rape in war as a form of genocide (by the ICTR). The latter is considered a landmark not only because of the recognition, but also as it provided a new definition of rape in war.

The feminist movement has many goals; the international tribunals were recognized as a way to achieve them. This raises the main research question that will be discussed in the thesis: How does the international criminal system correspond with feminist theories and have the international criminal tribunals been an effective mechanism in promoting women's rights?

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[4] reads the first article of The Universal Declaration of Human Rights, written in 1948. Women and sex discrimination were already mentioned then, and in documents since, but they all included many discriminatory aspects. However, it was not until the 1980s that the feminist academic review on human rights had started to emerge.[5] Human rights has been a specifically slower field to open itself to feminist critique.[6] Christine Chinkin, Shelley Wright and Hilary Charlesworth described their hesitation to publish their article criticizing human rights through the feminist lens.[7] It was finally published as late as 1991, and is now seen as a landmark in feminist scholarship on international law.[8] Through the writings of Charlesworth and Chinkin, together with other key scholars such as Catharine MacKinnon, and many more thinkers, I will analyze the question of feminist theories and international law, defined here above. This research is done by looking at feminist thought and on international law. It is a normative examination of promoting the ideas of human rights and feminism.

This study comes some 20 years after feminist critique of human rights has started to evolve,[9] and the recognition of gendered crimes by the ICTY and the ICTR. Looking at the link between feminist theory and international law is important, because the two are inseparable from real-life reality, always corresponding with it. The feminist movement has used the international criminal tribunals in order to promote women's rights and their ideology behind it. When you look at the international criminal system and women's rights, you look at feminist theory as well. Now, with

[4] United Nations n.d.
[5] Engle 1995:47.
[6] Williams 1997:111.
[7] Charlesworth, Wright and Chinkin 1995:17-18.
[8] Peters and Wolper 1995:1.
[9] Peters and Wolper 1995:1.

the important judicial landmarks behind us, it is also important to take a look back and evaluate. Have these efforts been successful? Did they reach their goals?

It is more than just a practical question. It is also a normative one: how does the international criminal system in fact promotes women's rights? Are women's rights at all protected by the international legal system? What are the problems which accompany the use of the international legal system for promoting and protecting women's rights?

The first chapter will discuss feminist theories and international law, starting with shortly describing the main feminist waves in general. Then it will describe feminist approaches to law. Afterwards, the chapter will discuss feminist critique of international law specifically. This part of the chapter is more critical, based on the criticism of the late 20th century, and will deal with the particular issues, concerns and contradictions which are problematic for women under human rights law.

The second chapter will go deeper and will explore the international criminal tribunals and gendered crimes more specifically. This chapter discusses the correspondence between the harsh realities of war, feminist theory, and the practical mechanism of protecting rights through the international criminal tribunals. It will describe the atrocity of the use of sexual violence as a weapon of war. The chapter will then take a theoretical direction and will describe the change in the views on rape and sexual violence, from the 1970s. This change of views is important for understanding the correspondence between feminist theory and activism and the international ad hoc tribunals. Then, the importance and significance of the tribunals themselves will be discussed. The chapter will continue with describing how gendered crimes have been treated by the international criminal system until the 1990s. Afterwards, the chapter will address the important developments within the ICTY and the ICTR, describing the way it took from the reality on the ground, through feminist struggle, to the influence on the courts' decisions. It will also describe the normative importance of the tribunals' developments regarding rape in war time. The second chapter concludes with a look back at the tribunals, examining how much has changed practically since the advancements of the 1990s: how much the developments were followed up by the tribunals in the cases which came afterwards. It examines whether the international tribunals were able to, in fact, promote women's rights.

The third and final chapter is less descriptive, and may be considered a critical analysis of the questions raised. The first part of the chapter discusses the choice of the feminist movement to use the tribunals for its struggle. What drawbacks did their choice have and which women's rights may have been lost through the choice of using the international tribunals? The second part of the chapter expands the horizon of the thesis and discusses violence against women more in general outside the setting of war, globally and in everyday life. The question it asks is how well the international legal system is protecting women overall and why violence against women beyond the times of war is not prosecuted against through that mechanism.

This study builds on ideas and thoughts which have been developed for centuries. Its roots sprout at the beginning of feminism, which is linked to the idea of individual

rights by John Locke. This study looks back at what is called the suffragist struggle for women's voting rights in the 1800s, which spread the ideas that women are equal to men and are discriminated by law. These are the ideas and struggles preceding radical feminism, which looked at the patriarchal discriminatory order, and used the legal system as one tool to promote its ideas. Radical feminism resulted in female scholars pin pointing the discrimination of women under human rights law. The study builds on the existing criticism, feminist views and thoughts about women's rights and human rights. It is written after gendered crimes had been recognized by the international criminal tribunals for the first time, and enough time had passed to look back at the accomplished recognition. By combining all of the listed ideas and developments, this research is an attempt to add another layer to the existing knowledge, another view, which looks back at developments of years past, and adds new insights.

It is important to look back at what had been done and see if it worked, if the goals and ideas set by the feminist activists and scholars have been reached. This is one of the reasons why this research contributes to the existing knowledge. It is not enough to just look at one's success and achievements. Evaluation is important, in order to enable further developments and improvements.

The focus of this paper is on women's rights' protection under the international legal system. It does not examine the overall effectiveness of the international tribunals and international law. The study also focuses on women as a group in itself, without differentiating them by other forms of identity, such as national or religious. The aspect of feminist approaches that look at the different identities and cultures which women have will be further discussed in the first chapter, as it is important to know and take note of. However, this study examines the oppression of women as a global issue and concern, and the way in which the international legal system, operating universally, handles these issues.

As women are far from being equal, in the world as a whole and in the international system which is a part of the global order, new ideas are important for the development of the existing knowledge, as well as preparing for new ways of activism. This line of thinking, and the importance of women's rights in general, is not only evident for feminist thinkers, but should also be clear for the international community and the overall international law system. As the idea of human rights is to protect humans, as long as women are not protected through that system, more than half the population of the world in not protected. In order to achieve its goals, international law needs to answer and meet the needs of women.

Examining the international law system in the light of feminist theory and women's rights is important for all peoples. Not only is the topic highly relevant for the scholars and activists professionally involved in the fields of feminist theory and international law. Examining international law in the light of feminist theory and women's rights contributes to a better, more equal world, in which all individuals are protected: a world working for the benefit of men and women alike.

Women's oppression and discrimination are not only legal matters in conflict zones. It is the concern of every woman, at any time. For this reason, setting universal

norms and using international mechanisms to protect them is important. The following paper will deal with these universal issues and concerns.

1. Feminist Theory and Law: General and International

1.1 Introduction

"Yes, your honor, but by forms of law all made by men, interpreted by men, administered by men, in favor of men, and against women; and hence, your honor's ordered verdict of guilty, against a United States citizen for the exercise of 'that citizen's right to vote,' simply because that citizen was a woman and not a man.", said Susan B. Anthony in the year 1873, to the judge right before that she had been "tried according to the established forms of law".[10] Anthony was one of the leading figures of the feminist movement which started in the 19th century, now known as the first wave of feminism, which is also referred to as the liberal one. She was tried in court after voting in the election, something which back then was illegal for women and a reason to prosecute those women who did.

"Male reality has become human rights principle, or at least the principle governing human rights practice (…) women's problem has been that society and law do not agree that nature made them human, so nothing that is done to them is a crime against humanity, because they have none".[11] This statement was made some 140 years later by another prominent feminist theorist, Catharine MacKinnon, who at the forefront of the radical feminist wave as a theorist and prominent jurist,[12] wrote her statement during the time she represented Bosnian Muslim and Croat women at the ICTY.[13]

From the suffragist struggle for voting rights, to laws of equality in the work place, through trials against sexual harassment to convictions of rape as a war crime – feminism have used the legal system to promote its goals since its very beginning. These two women, prominent voices of two feminist waves which follow each other, conflict each other in some basic ideas underlying their feminist analysis. Yet, they say the same thing when it comes to men and legal system: women are not seen as human beings and are not treated as equals, the result being the absence of legal protection, both nationally and internationally. The following chapter will describe and discuss feminist approaches, exampled here.

In order to understand feminist approaches to international law, it is important to first know what they have to say in general, and then about legal systems as a whole, before looking more specifically into the international law system. First, this chapter will describe in short the main feminist waves, which lead the main feminist goals and thoughts. After the short introduction of the two main feminist waves, it will take a more detailed look at the feminist approaches to law. Finally, the chapter will conclude with a more focused discussion on the feminist approaches to international law in large.

[10] Stanton et. al 1887:688.
[11] MacKinnon 1993-1994:69, 75.
[12] As presented by Kamir 2002:26.
[13] Encyclopaedia Britannica Profiles n.d.

1.2 The Main Feminist Waves: Liberal and Radical

Feminism is largely categorized into waves, the first one being called the liberal and the second one the radical. Although there are more waves to feminism, which will later also described here, these two are considered to be the main ones.

1.2.1 Liberal Feminism

The liberal ideology, which is tied to the liberal wave of feminism, is the result of the age of Enlightenment which manifested itself in Western Europe and North America in the late 18th century. It replaced the ideas of status, hierarchy and abidance as the natural form of order in society with ideas of equality and freedom of the individual. Until this day, according to liberalism, individuals have the right to define their lives, happiness and goals, and the collective is intended to serve the individual. This notion is the basis of the western culture as we know it till now.[14] These ideas will be further elaborated on later, including their relation to international law.

The first wave of feminism was a result of these ideas, and is in fact called liberal feminism. This first feminist wave gained power from the second half of the 19th century to the 1920s. It claimed that the liberal ideas should apply equally to women as well, and should have the right to vote, get education, acquire a profession and own property, just like men. The main feminist struggle at that time was the one for gaining voting rights for women.[15]

1.2.2 Radical Feminism

The second wave of feminism, referred to as the radical wave, gained power in the second half of the 20th century. It claimed that gaining civil rights for women is not enough; the problem does not lie in having one right or another, but rather in the patriarchal order of society as a whole, which discriminates women. This re-examination of the existing patriarchal order included a call for re-education regarding gender roles, and a different look at the strongest social institutions and their discriminating characteristics, such as marriage and children's upbringing. The radical feminism wave called for releasing women from the stereotypes which tie them to secondary, ungrateful roles. These feminists unveiled the oppressing ideal of beauty, which enslave women to an endless dealing with their bodies, while using damaging methods to do so, causing women to feel continuously unhappy and guilty about their bodies.[16] The radical feminist ideas are also behind the feminist critic of international law and the struggle for recognition by the international tribunals, which are further discussed in this chapter.

[14] Kamir 2002:12.
[15] Kamir 2002:12.
[16] Kamir 2002:15.

Both these main feminist waves have looked at a discriminatory reality, and tried to change the system into being more equal. As the quotes in the beginning of the chapter show, feminism as a whole has always used the legal system in order to promote its goals. The feminist approaches to law are described more specifically next.

1.3 Feminist Approaches to Law

There are several ways of categorizing the feminist approaches to law.[17] One common way is through the categories of "liberal", "cultural" and "radical".[18] Apart from these three main, well established approaches, the 1990s have seen a development of additional feminist approaches to law, which build on the existing approaches and often criticize them. Black and Lesbian feminist jurists have accused the heterosexual white jurists that they have built theories which reflect on their particular reality, just like men did.[19] New feminist approaches to law include the post-modern approach,[20] the black feminism approach and the lesbian feminism approach.[21] The three main approaches to law will be elaborated here, in addition to the Third World approach, as defined by Charlesworth and Chinkin.[22] Although still growing, it is important to take note of, when looking at feminist approaches to law and international law. When it comes to international law and the theories and activism described in this paper, the radical approach seems to be the most influential out of all of them. However, it is of great importance to know the basic feminist approaches to law as a general basis for understanding and analysis of feminist theory and international law.

1.3.1 Shared Ideas of Feminist Approaches to Law

All feminist approaches to law are critical.[23] Although there are many feminist approaches to law, all of them have some things in common in their relation to law. These common focuses make feminist approach to law unique. Feminist philosophy of law assumes law to be a reflection of the world view in a coherent set of propositions. Second, law reinforces and legitimizes the official values of society, which seem natural and inevitable. Therefore, it creates a systematic bias, which often seems as normal and becomes invisible, "the way things are".[24] One of the most important roles of law is to stabilize social arrangements, and to formalize legal

[17] Charlesworth and Chinkin 2000:38.
[18] Kamir 2002:24.
[19] Kamir 2002:28.
[20] Charlesworth and Chinkin 2002:44-46.
[21] Kamir 2002:28.
[22] Charlesworth and Chinkin 2000:44, 46.
[23] Kamir 2002:24.
[24] Smith 2009.

customs. Law restates and institutes cultural presumptions as unavoidable universal norms.[25]

Not only law, but the historical development of society is also seen as one that was created by men, with women seen as different and unequal. The legal system reflects this patriarchal order, which seems as natural. Achieving sexual equality, as named by Smith, in the various institutions, practices and doctrines of law is a unique feature of feminist jurisdictions.[26] They see the legal system as one that has been developed by men and for men, and therefore, reflects patriarchal views and values. The law deals with men's issues through men's thinking with men's solutions. Therefore, law is not neutral, but masculine, in every way[27]. There needs to be conceptual revision and conciseness to be raised in order to identify this bias.

1.3.2 The Liberal Feminist Approach to Law

The first, oldest feminist approach to law is the liberal one. In the heart of this approach stands the claim that women and men are not essentially different.[28]

The initial liberal feminist approach to law was to achieve formal equality, which denies sexual difference as being relevant to legal doctrine.[29] According to this approach, law gives rights to men, which it does not provide to women. Therefore, the legal system must provide equal rights and status.[30] The law is assumed to be rational and impartial.[31]

The liberal approach accepts the existing legal system and its mechanisms. Many of their arguments use the liberal idea of natural individual rights, and they call for equal, natural treatment of both men and women through law.[32] Besides the suffragist claim for the right to vote, its other achievements include winning a case which supported the claim that women could not be considered as a separate class of workers, and therefore should not be prohibited from any kind of work. The claim was that the only evaluation conducted should be one's performance.[33] The same way, women should not be fired for being pregnant. Sometimes, the liberal approach goes beyond the demand for formal equality, and looks at equality in opportunity and outcome. Such are laws of affirmative action.[34]

[25] Smith 2009.
[26] Smith 2009.
[27] Kamir 2002:24.
[28] Kamir 2002:24.
[29] Smith 2009.
[30] Kamir 2002:24.
[31] Charlesworth and Chinkin 2000:40.
[32] Carlesworth and Chinkin 2000:38-39.
[33] Smith 2009.
[34] Charlesworth and Chinkin 2000:39-40.

1.3.3 The Cultural Feminist Approach to Law

The Cultural feminist approach to law bases itself on a complete different idea. This approach claims that due to education and different social functions, women and men develop different perceptions and ideas of the world, and that includes different perceptions of justice. The existing legal system reflects men's perception of justice.[35]

In 1982, Carol Gilligan had published her book "In a Different Voice". The book contained Gilligan's research on different patterns of decision making and problem solving by boys and girls. Girls, according to that research, made decisions based on caring and connection. Boys, however, based their decision on abstract logic.[36] Gilligan explained the differences between feminine and masculine thinking with the idea that men tend to think in a hierarchical way, positioning themselves over other people; they are intimidated by closeness to others, and see individuals as separate and independent of each other. On the other side of the equation, women think in ways of connections and networks, positioning themselves in the centre of establishing connections to as many people as possible; they are intimidated by distance from others, rather than closeness, and tend to see the human systems and relations which connect people. Women see the needs of people around them, and the relations between those needs.[37]

Gilligan pointed out in her book that traditional psychological theories prefer the male perspective over the feminine one. Some feminist lawyers picked up on that point, saying that law demonstrates the same preference.[38] As a result, both women and law itself lose: women are oppressed in the legal system as their perception of justice is not taken into account,[39] and the legal system itself is activating only a narrow view of the human experience.[40] Gilligan's approach was different than the approaches of other scholars who described differences in the ways of thinking of men and women, says Kamir, as it did not put the feminine way as inferior to that of men.[41] According to Charlesworth and Chinkin, however, Gilligan put women's way of thinking as preferable to that of men, because of the knowledge which women gain through their subjugated experiences.[42]

Practically, some feminist jurists following that approach had suggested legal methods like mediation and conciliation, which are more in line with the feminine ways of thinking.[43] Many women found themselves identifying with Gilligan's description of the female perspective of justice, and the positive attention which she attributes to their ways of thinking, not placing it under the masculine ones. This

[35] Kamir 2002:25.
[36] Charlesworth and Chinkin 2000:40.
[37] Kamir 2002:25.
[38] Charlesworth and Chinkin 2000:40.
[39] Kamir 2002:26.
[40] Charlesworth and Chinkin 2000:40-41.
[41] Kamir 2002:25.
[42] Charlesworth and Chinkin 2000:40.
[43] Carlesworth and Chinkin 2000:41.

gives the feminist cultural approach to law a great value.[44] However, many other feminists had criticized this approach, saying that it enhances the idea that women are 'naturally different'. Catharine MacKinnon had claimed that the differences in feminine and masculine thinking are a result of the patriarchal culture. "When you are powerless", said MacKinnon, "You don't speak". "Take your foot off our necks, then we will hear in what tongue women speak".[45]

1.3.4 The Radical Feminist Approach to Law

The Radical feminist approach to law, which MacKinnon represents, is the most significant and influential critical legal feminist approach, says Kamir.[46] It focuses on the oppression of women by the patriarchal order in society, and the legal system as a tool which serves the existing orders' interests. According to MacKinnon, mentioned by Kamir, the basis for the status of women in society and law is their oppression. Differences between men and women are not the cause for the oppression, but are the result of it. Women received the roles of caring for the babies and the elderly, cleaning and cooking, not because they were more skilled for them, but rather because men did not want to fulfill them. Then, success in these roles became a measurement for the evaluation of women. While women's value became determined by men and their needs, attractive appearance became a desired quality which grants social and economic benefits. As a result, women became different from men for caring about diets, make up and such. The qualities of women as supportive, caring and affectionate are ones which women developed in order to survive in the patriarchal world. It is a result of the oppression, and should not be preserved, but rather freed from.[47] The legal system is another mechanism which maintains the oppressing patriarchal system.[48] Law should offer freedom from oppression that is caused by one's sex, rather than treating one without relation to their sex,[49] as claimed by liberal feminism.

MacKinnon argued for the use of the legal system to uncover women's real suffering, and she used the legal system to uncover these invisible subordinations which are of a particular concern to women, such as sexual harassment and pornography.[50] All the legal agreements should be re-examined to see where and how they reinforce the oppression of women. This goes for all the laws, and special attention should be paid to the ones which deal directly with the lives of women, such as women's labor, prostitution, pornography and abortion. Every legal agreement, in which women are oppressed to men, should be changed into one which allows women the freedom of self determination.[51] This is not easily applied, as it involves looking deeply at legal

[44] Kamir 2002:25.
[45] Charlesworth and Chinkin 2000:41-42.
[46] Kamir 2002:26-27.
[47] Kamir 2002:26-27.
[48] Kamir 2002:28.
[49] Charlesworth and Chinkin 2000:43.
[50] Charlesworth and Chinkin 2000:43.
[51] Kamir 2002:28.

agreements which seem natural, and subordination of women which became invisible.[52]

The feminist radical approach to law have of course also been criticized. Critics have argued that MacKinnon attributes too much power and authority to law, and by doing so also maintains its place in the patriarchal structure. Others have asked how she could find the 'authentic' female voice in a world dominated by men. Another critic said that MacKinnon's work is dogmatic, disregarding other influences on women such as race, class or sexuality.[53]

1.3.5 The Third World Feminist Approach to Law

The term Third World refers to feminists of the South and women of color in the North. While gender and class define the oppression of Western women, the women in the third world are discriminated against not only as a result of their gender, but also by race and imperialism. Western feminists, they say, assume a reality of free white liberal democracy. Moreover, the societies which Western feminists belong to benefit from the oppression of the societies in which third world women live. The focus should be broader than oppression based on gender and sex. Gender, race, class, colonialism and global capitalism are all interconnected.[54]

The above discussion sums up the general ideas behind the main feminist approaches to law. The next part of the chapter will discuss the feminist critic of international law in particular.

1.4 Feminist Theory and International Law

In the light of these waves and approaches, how does feminist theory see and criticizes the treatment of women human rights and international law?

1.4.1 The Historical Development of Human Rights Law

In the second half of the 19th century, Europe saw several changes in the conduct of war: compulsory military service, change of civilization and improvement of technology which led to higher numbers of military casualties. At the same time, the civil war in the United stated took place. These developments led to a growing need in formulating a code of conduct during times of war. Between this period and the First World War, several regional and international codes of war had been signed, namely the Geneva Convention in 1864, the first international convention to form a

[52] Charlesworth and Chinkin 2000:43.
[53] Charlesworth and Chinkin 2000:43.
[54] Charlesworth and Chinkin 2000:46-48.

code of war. In 1907, in the Hague conventions, a complete codification of the war of law was finally formed.[55]

After World War I, several treaties have been signed by a few countries, in order to protect minorities, through the League of Nations. In 1929, the Declaration of the Rights of Man was signed. Though it had no judicial power, it had some revolutionary ideas, such as asking nations to protect all individuals, "without distinction as to nationality, sex, race, language or religion".[56] However, there was still little attention for human rights, the general notion was to protect rights of people through national identities, like protecting national minorities.[57] After World War II, more attention began to be paid to the idea that universal human rights could help to protect civilians. The most prominent human rights group in the United States, in the 1940s, was the International League of the Rights of Man, taking after a French group with a similar name.[58] In 1948, through the leadership of the UN, the Universal Declaration of Human Rights was formed. In this document, there was a shift from national responsibility to universal individual human rights.[59] The Geneva conventions of 1949 showed the shift from law of war to a human-rights oriented law.[60]

In the 1960s, with the growth in national liberation struggles, there was a renewed interest in humanitarian law. This brought about the adoption of two protocols which were added to the Geneva Conventions in 1977 by the UN. The protocols combined human rights and the context of armed conflict. With the adoption of these protocols, there was greater protection intended for civilians in armed conflict, separating them from combatants. The protocols also gave attention to people fighting against colonial domination and racist regime.[61] The number of national, ethnic and tribal motivated conflicts has seen a strong growth since the end of the cold war. Mass atrocities conducted in places like former Yugoslavia and different African countries led to the notion of the need for international humanitarian law.

However, do these rights which have evolved through historical developments, include the rights of women? This question will be discussed next.

1.4.2 Liberalism: The Ideas Behind Human Rights

Liberalism is the basic ideology behind human rights as we know them today. The ideas of individual rights go back to the liberal ideas of 'natural rights', mainly attributed to John Locke.[62] It followed the age of Enlightenment which took place in Western Europe and northern America in the late 18th century, and replaced status

[55] Schindler 2003:165-168.
[56] Buergenthal 2006:783.
[57] Buergenthal 2006:784.
[58] Dezalay and Garth 2006:233.
[59] Buergenthal 2006:785-786.
[60] Schindler 2003:170.
[61] Schindler 2003:172-173.
[62] Fedorova and Sluiter 2004:12.

and hierarchy notions with individual rights.[63] The basic idea behind human rights is that all humans have inherited dignity, and the goal is to organize society in a way which would protect it.[64] The concept of Natural Law and Natural Rights is probably the most central concept in Locke's theory, although these ideas had existed long before Locke had elaborated on them, with thinkers such as Hobbes, Grotius and Puffendorf. The natural law and rights view claims that there are certain moral truths which apply to all people, regardless of where they live or agreements they have made. It can be discovered by reason alone and applies to all humans, in contrast to divine law, which is a result of God's special revelation.[65] The basic idea behind human rights is that all humans have inherited dignity, and the goal is to organize society in a way which would protect it.

1.4.3 Feminist Criticism of the Ideas Behind Human Rights

The ideas on which humans rights are based, says Catharine MacKinnon, have always overlooked women. While basing the right to vote on these liberal natural rights, women were not given that right. Women could not own property, but rather they were mostly property; could not kill; could not raise their opinions. Women were never given a human status.[66]

Historically, rights of individuals only referred to men. The liberal ideas from the time of Locke actually recapture the philosophies on individuality from the Greek democracy thinking, and were a reaction to the medieval hierarchy, which differentiated between people based on their place in society, something that was determined by on their birth. The American and French revolutions had brought new ideas, that each individual has equal rights: to life, security, liberty, dignity, and the list goes on. MacKinnon tracks the roots of this approach back to the liberals' Greek and Roman ancestors. But in this same Greek democracy, Aristotle's ideas of empirical equality were "treating likes alike and unlikes unalike". With this notion of equality, women were so unalike that they were not even citizens.[67]

Basing themselves on these ideas, leaving them unquestioned, the original liberals,[68] speaking in the name of individual equal rights, formulated societies in which women could not vote.[69] Men are the humans which rights referred to. Women lack power, and had no role in formulating these laws. Women are not equal to men, and therefore not equal in the eyes of these newly formulated laws.[70]

The fact that human rights law and international humanitarian law have, since there very beginning, systematically resulted from war, is another historical development

[63] Kamir 2002:12.
[64] Fedorova and Sluiter 2004:12.

[65] Tuckness 2010.
[66] MacKinnon 1993-1994:72-73.
[67] MacKinnon 1993-1994: 68-75.
[68] With the exception of John Stuart Mill (MacKinnon 1993-1994:72).
[69] MacKinnon 1993-1994:68-75.
[70] MacKinnon 1993-1994:68-75.

which leaves women out of the development of protecting humans. This historical basis neglects women and their experiences, as women are usually not part of the combat act, not as soldiers nor as decision makers. From the very onset of the development of the ideas about human rights they were left out. This historical reality overlooked the fact that women have always been harmed during wars as civilians. Nowadays it is even widely agreed, that women experience conflicts in a different way than men. Even within their own societies, women have a distinct vulnerability. They are less mobile because of their status in relation to men, often less educated, and are not part of the power structures and decision making.[71]

Law is based on experience, says MacKinnon. It grows in a social logic. Human rights law is based on experience. But it is based on the experience of men.[72] It is the social context which determines orders which later on seem natural. And in this way, women did not gain a human status.

1.4.4 Human Rights and Language

The history which human rights are based upon shows the neglect of women. Language is one central example. The term Human Rights does not necessarily mean that women are considered as humans in these terms. In short: tha women are human, just like men.

Feminist research of language shows how language can reflect and reinforce the centrality of men in society.[73] Language is a crucial factor which constructs social rules and reality. By using language we bring our world into realization; we use it to classify and make order of the world. This way, it can also be a source of manipulation. While the rules constructed by it seem natural, they are not: the rules of meaning in language had to be invented. Only then they become self-validating, the assumptions behind them become invisible.[74]

One systematic rule in language is its construction of "male-as-norm". This is one of the strongest rules in language. We are forced to classify the world under the assumption that the standard human being is male. Male is the standard. The female status is derived by the status of male; one can either be plus male or minus male. On this construction, in its natural-seeming way, flourishes the patriarchal order.[75] The language of human rights is no different: it is very masculine - directly, but mostly in a subtle way, it excludes women. With only two exceptions (The Children's convention and the International Convention on the Protection of the Rights of All

[71] Gardam 1998:421-432.

[72] MacKinnon 1993-1994:59

[73] Spender 1980:9.

[74] Spender 1980:2-3

[75] Spender 1980:3-4.

Migrant Workers and Members of their Families),[76] it uses only a masculine pronoun.[77]

For example, the documents and organizations, mentioned earlier, show this clearly: the same declaration which called for equality of people was called the Declaration of the Rights of Man. No matter the content, this name for the declaration leaves women out of the rights discourse. The mentioning of equality without distinction of sex may be an answer as for the intentions in the declaration, but as a normative tool language is important; furthermore, if women were in fact meant to be a part of the people which it indented to protect, using the word 'man' puts women in the same group, ignoring women's particular interests and needs, using men as the default subject.

1.4.5 The Particular Violations of Women's Human Rights

Women suffer in the same way as men. But it is also known, that women are also being violated "in ways which men are not, or rarely are".[78] Seventy per cent of the world's population living in poverty are women. Traditional roles often leave women less mobile and many of them are disadvantaged in education. Women have less access to power structures and decision making, which leaves them with even less ability to draw attention to their problems.[79] Many of the violations of women are of sexual character and are in the context of reproduction.[80] All these inequalities and vulnerabilities, which exist in different degrees in all societies, are even more enhanced in times of conflict. While in conflict, when international law is greatly disregarded, all people suffer from violations of human rights, women have different experiences of conflict than men do.[81] As the dominant figure is the one of man, women's problems lack visibility. Women experience violations of their human rights in a gendered way; because they are female. Even when they experience the same violations as men do (like being prosecuted because of their ethnic group), they often experience unique violations, because they are female. One example is sexual assault,[82] further discussed in the next chapter.

1.4.6 The Feminist Criticism of the Public/Private Dichotomy

The above relates to the public/private dichotomy, which is central in the radical feminist approach. Traditionally and also validated politically and legally, one's privacy is separated from the public sphere.[83] In their own private space, each person is entitled to act upon their wishes, without the interference of society and

[76] Charlesworth and Chinkin 2000:232.
[77] Charlesworth and Chinkin 2000:232.
[78] MacKinnon 1993-1994:60.
[79] Gardam 1998:421-432.
[80] MacKinnon 1993-1994:60.
[81] Gardam 1998:421-432.
[82] Bunch 1995:12.
[83] Kamir 2002:20.

state. The feminist argument is that much of the oppression of women takes place in what is considered to be private,[84] in their homes and families.[85] Hence, this distinction between private and public benefits men over women, allowing them to oppress and be violent in what is "private". Exposing the private sphere to social criticism would therefore enhance the protection of women.[86] While "public" and "private" may vary across classes, ethnicities and even regions in the same country, they always have one thing in common: in what is considered to be part of public life, women have a lesser position.[87]

Just like the states system, the international arrangement of human rights also fails to protect women in the same way. The earlier developments in the field of human rights resulted from the wars in the 19th century, and the codes protecting minorities and groups were based on national struggles, on national and ethnic group identities. Furthermore, human rights protected the individual through the countries which the different individuals are a part of.[88] Human rights had developed through the state. It started from codes of war, which in itself excludes women. Later, when the ideas of individual and civilians' rights started to be incorporated into international law, the system continued to operate through states, all the way until now. Treaties are signed and conventions are ratified through the state system; states operate and represent individuals when it comes to human rights.

Men have always used the state to violate other men, says MacKinnon. On this masculine experience, the state being the tool of discrimination evolved human rights.[89] The international law system holds the state accountable for violations done by its organs or agents. Some treaties hold the state responsible for violations done by private actors.[90] Either way, the state is the main actor for protection of individuals' human rights.

Gender equality is however systematically not even addressed as an obligation of the state, says Sullivan, but is rather put under development policy.[91] Feminism was born as a reaction to the reality of discrimination of women, both domestically and intuitionally all over the world.[92] As a movement, feminism can be compared to national and status-based struggle groups, that called for the wakening of a group which, according to the activists, needed a change in their status. However, although these similarities exist, feminism faces unique difficulties. Most women see themselves as a part of a national or other form of a group, which are defined and led by men. Women are also connected through personal relationships to men. Therefore, it is difficult for feminism to define itself as oppose to the other group – the men.[93] International law prosecutes and convicts individuals for killing or

[84] Kamir 2002:20.
[85] Charlesworth and Chinkin 2000:44.
[86] Kamir 2002:20.
[87] Sullivan 1995:128.
[88] Fedorova and Sluiter 2004:11.
[89] MacKinnon 1993-1994:69-70.
[90] Sullivan 1995:129.
[91] Sullivan 1995:127.
[92] Kamir 2002:5.
[93] Kamir 2002:6-7.

harming people on the basis of their identity. The identity which applies is national or ethnic. The national origins of human rights and humanitarian law reinforce these ideas: when talking about groups, it is never the group of women, but rather women are seen as being taken as a part of their overall national or ethnical group. This ignores the particular needs and risks of women in a conflict, and still looks primarily at men as the default.

The civil and political rights of the individual enjoy a central, privileged position in the law and practice of human rights. Its liberal background leads to the view that of protecting one's rights need to be protected by limiting the state's intervention in the private area.[94]

Human rights are based on the idea that they are meant to protect the individual from the state.[95] But women's rights as humans and individuals are mostly violated not through the state but rather in their own homes and families. The protection of the private sphere results at the same time into the human rights mechanisms to overlook violations done to the rights of women. To give one example: the right to free movement within a territory and to have free choice of residence was never interpreted as a ground to protect women from their husbands and other male relatives who do not let them out of their own house.[96] Many women's access to the public life is already limited, and through the protection of the private sphere, human rights fail to offer that right to those women.

Not only are women invisible and unnoticed in human rights. The rights themselves also reinforce the existing patriarchal order. For example, human rights strive to protect the structure of a family, which is described as "the natural and fundamental group unit of society". But the assumption of the family is the traditional one which consists of a man, a woman and their offspring. It indirectly excludes the possibility for other ways of structuring the family. This is a way of reinforcing existing structures, in a way that seems natural – or makes it seem natural. Furthermore, human rights also protect the privacy of the family, as a right,[97] connected to the previously described treat of violation of the rights of women within the family. The woman in this family is dependent on the man, and if widowed, is entitled to social security. The purpose of this family is to have children. Therefore, the emphasis on the family as a natural social foundation suggests that human rights stop where family begins.[98]

While the civil and political rights have a preference, the international community formally recognizes the interdependence of economic, social, cultural, civil and political rights.[99] The economic, social and cultural rights, also referred to by Charlesworth and Chinkin as second generation rights, seem to be less clear in their individual-state distinction.[100] And yet, it still transfers the human rights to the

[94] Sullivan 1995:126-127
[95] Charlesworth and Chinkin 2000:233.
[96] Charlesworth and Chinkin 2000:236.
[97] Sullivan 1995:127.
[98] Charlesworth and Chinkin 2000:232.
[99] Sullivan 1995:126.
[100] Charlesworth and Chinkin 2000:237.

individual through the state. For women, says Shelley Wright, the way to the state has to go through subjection to men or a man. When talking about economic rights, the work which is done at home mostly by women is left unrecognized. When talking about religious and cultural rights, women come out with the lower hand both in secular and in religious states. In secular states, culture and religion are considered to be "private", away from the public eye, in particular when it comes to discrimination against women. In religious states, religion, including its oppressing practices, is supported by the state.[101]

1.4.7 Representation through a group

Besides these categories of rights, another category has been brought into the UN. This idea of human rights favors the welfare of the community over a particular individual. It is led mostly by developing countries, and less accepted by the "mainstream" international community, as it challenges the liberal, individual model.[102] This takes us back to the idea of women as a group and the representation of human rights under the state and different social groups, which women are discriminated in and yet are represented through them.

The idea of protecting group rights came, in fact, from the liberal democracies, which came to the conclusion that minority cultures and their ways of life are not enough protected under individual rights.[103] But atrocities which happen to women on the basis of their identity as women are disregarded.[104] Nonetheless, the idea of group rights seems only natural and fair in this case, further protecting humans. But while protecting a group, what happens to the individuals in that group? Who dominates who in that group? Who checks how individual human rights are still upheld?

The Declaration on the Right to Development calls for entitlement to "enjoy economic, social, cultural and political development", equally for men and women. But then again, the declaration still ignores the reality of the lives of women, and while referring to violations like apartheid and race discrimination, sex discrimination is not mentioned. While calling for economic equality, it ignores the fact the women in the South contribute to their family economy, mainly in agriculture, and yet are unequal in the same families and communities. Paid work is still considered to have a better status. When women are provided aid, it is mostly in their role as mothers. And again, the right to development also ignores the needs and realities of women around the world, using the same neutral terms.[105]

All cultures have practices and beliefs about gender. Mostly men are in positions to determine the group's practices and beliefs, which are overall antifeminist.[106] Moreover, it is the private sphere of the personal and family life which concerns

[101] Charlesworth and Chinkin 2000:237-239.
[102] Charlesworth and Chinkin 2000:240.
[103] Okin 1999:10-11.
[104] MacKinnon 1993-1994:60
[105] Charlesworth and Chinkin 2000:240-243.
[106] Okin 1999:12.

most cultures, and in this way women are even more affected,[107] while less incorporated in decision making. It is also striking that the idea of cultural and group rights shows more sensitivity to the other and the different. While it looks like it covers more aspects of one's rights that should be protected, it is the women who remain unseen and even neglected in those adopted rights. The upholding of a group's religious and cultural rights often protects the rights of the men of that group, who also made these group's rules. But while men's rights are protected, it is often forgotten that the religious practices and culture all too often lead to the subordination of the women in the group; men are given the group right to subordinate women. The women, as a part of the protected group, naturally also are a part of their identity protected. With this protection comes, however, often overlooked side effects which are important parts of their lives, experiences and identity. As women are not protected and these are overlooked, their individual rights receive the same treatment.

1.4.8 The Acknowledgment of Women's Issues Under Human Rights Documents

Throughout the years, several documents have acknowledged the special circumstances of women. The UN's Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) was held in 1979,[108] but it was only 14 years later, in 1993, 45 years after the Declaration of Human Rights, that is was confirmed that women's rights were human rights at the UN World Conference on Human Rights.[109] The declaration of 1993 had addressed for the first time crimes which happen to women in the private sphere, and the state's obligation toward it.[110] In 1996, the UN Special Rapporteur on Violence against Women had compared forms of domestic violence to torture. The Declaration on the Elimination of Violence Against Women from 1993 had already supported this approach.[111] In fact, the crime of rape was addressed as early as in the Geneva accords in 1949, article 27.[112] Rape in wartime was listed as a crime against humanity by the Nuremberg Military Tribunals and the Geneva Conventions.[113] But although these written acknowledgements existed, little, if anything at all, was done in practice.[114] The acknowledgement of rape under the international tribunals was not put into practice by the international legal system until the 1990s, through the ad hoc tribunals for the former Yugoslavia[115] and Rwanda.[116] The Convention of 1993, while putting on

[107] Okin 1999:12.

[108] The United Nations Population Fund n.d.

[109] The United Nations Population Fund n.d.
[110] Sullivan 1995:131-132.
[111] Charlesworth and Chinkin 2000:233-237.
[112] Kalosieh 2003:122.
[113] Franco 2006:1662.
[114] MacKinnon 1993-1994:74
[115] Gardam 1998:421-432.
[116] Eboe-Osuji 2007:251, 253.

paper important issues, also stated the difficulty of dealing with this issue under the human rights framework. The Convention was still unclear on connecting abuse of human rights with violence against women. The reason for that was the objection of some states, which were afraid to change the existing notion of human rights.[117] This is further evidence of states' participation in maintaining the oppression of women.

"For women", says Catharine MacKinnon, "international human rights present the biggest gap between legal and practice in the known legal world".[118]

1.5 Conclusion

This first chapter is a walk through feminist theory, going from a general examination of feminism, to its theory of law, and then to the more specific criticism on international law. It started with the description of the two main feminist waves, the liberal wave from the 19th century, and the radical wave, starting at the second part of the 20th century. The chapter then went on to describing feminist approaches to law. Though not all of them are central in the criticism of international law, they are all important and influential. The feminist approaches to international law are more specific, criticizing this mechanism which claims to offer protection for all humans on all levels. In the light of the radical approach, it unveils discriminatory orders which make international law unequal from its very basis: its language, the social institutions it protects, the choice of protecting the private sphere of the individual and separating it from the public, and over looking women as bearers of rights, and their particular needs. While human rights are written documents which came as a response to the realities of war that needed an answer, feminism looks at the reality of women worldwide, criticizes the existing theory and ideology behind women's particular discrimination and concerns, and creates its own theory. But theory is effective if it helps to change the existing realities which it criticizes. The final quote by MacKinnon takes us to the next chapter, examining the translation of theory into the practice of international law.

[117] Charlesworth and Chinkin 2000:233-237.
[118] MacKinnon 1993-1994:74.

2. Gendered Crimes in War and the Ad Hoc Tribunals of the 1990s

2.1 Introduction

"*It is common to say that something is good in theory but not in practice. I always want to say, then it is not such a good theory, is it?"*

Catharine MacKinnon[119]

The previous chapter discussed the feminist critique on how human rights ignore women and their realities of life, disregarding them as humans. These rights are embodied in written documents, meant to set norms to apply to and protect each and every individual living on the planet. But without proper enforcement, these rights cannot influence individuals' reality. These human rights were designed as a result of certain realities, which led to the need to protect people through an international mechanism. The need transformed into theory and the formulation of these rights, but in order to uphold the written human rights and effectively protect people, there is a need to ensure the rights come into effect in reality. One of the ways to enforce international human rights is by the international criminal tribunals, which came as a response to the mass atrocities and violations of human rights seen in different conflicts around the world.

Feminism as a movement is motivated by the reality of women, the experiences of women in daily life.[120] The feminist critics of human rights observed the reality of women and noticed how the international human rights are blind for their reality. The feminist critics therefore strived to challenge this blind spot, so women's rights would be protected, and the particular needs of women would be answered. When the time came to enforce human rights through the international criminal tribunals, the feminist movements saw this as an opportunity to bring about recognition to women's rights. Although gendered crimes were mentioned before in international conventions like the Geneva Conventions, it was never put into practice, and the way these crimes were referred to did not match the way the critics of radical feminism saw and theorized the reality of women. The reality the critics saw led them to develop the theory uncovering and criticizing the subordinating patriarchal order. Then, the theory needed to be translated into practice, through the international legal system, and receive formal recognition.

This chapter will discuss the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). These tribunals are significant to the feminist struggle, as they had recognized sexual violence in war in a way which was never seen before, and is therefore considered to be an important development in this regard.

[119] MacKinnon 1991:13.
[120] MacKinnon 199:14.

The first section of this chapter will discuss the significance of sexual violence for the feminist struggle, and its use as a weapon of war. Rape in armed conflict had existed for centuries - this was always known, but disregarded. The feminist theorizing of rape started when courts ignored certain realities and situations in which rape can occur; realities which were the lives of women. The method of rape and sexual violence as a weapon of war has particular features, which will be described and discussed.

After the review of sexual violence in the context of war, the chapter will discuss the change in the view of the crime of rape, led by feminist scholars. This change of view is relevant to the theoretical context in which the landmark recognitions of the tribunals were accepted. Then, this chapter will describe how the ad hoc tribunals came to be, the goals they were meant to serve and their importance in norm setting and recognition, which make them important in the eyes of feminist activists. In order to understand the importance of the ad hoc tribunals fully it is also important to take note of how sexual violence in war was regarded within the international court system before the 1990s.

The next section of this chapter will discuss the important developments within the ICTY and the ICTR, leading toward the recognition of sexual violence in war. It will describe the struggle to reach this recognition, all the way from the ground to the top level, and the continuing linkage between theory and reality, both in international law and feminism movement. This section will conclude by underlying the importance of the recognition of sexual violence in war, also including the link to the feminist views which led to it.

While the second and third parts of the chapter describe the importance of the tribunals and the importance of the recognition by them of sexual violence in war, the final part of this chapter examines the initial triumphs of the radical feminist movements in perspective of a few years afterwards. Quite a few years later, it is already possible to see what happened in the tribunals after the landmark recognitions, what had changed in the international legal system and what has not.

2.2 Sexual Violence in War

Different methods of crimes affect men and women in different ways and degrees. Men, for example, are victims of 'disappearances' in a much higher percentage than women. However, as was seen in chapter one, international law is much more responsive and adequate to the male's perspective and experience. The subordinated position of women in society, together with the construction of social sex and gender roles, lead to conflicts influencing women in particular ways.[121]

One particular way in which women suffer is the use of rape and sexual violence as a weapon of war.[122] This use of sexual violence in war is not at all new or modern. And although the practice of war changed over time, with modern technology allowing

[121] Charlesworth and Chinkin 2000:252-254.
[122] Charlesworth and Chinkin 2000:252.

war without physical contact, the use of sexual violence has remained.[123] Accounts of rape as a war method go back to ancient times, for example in ancient Greece, with the abduction of Helen of Troy, or the rape of Sabine women.[124] During the 20th century, sexual violence had been used as a tool for warfare throughout different conflicts in the world: In World II, in the war in Vietnam, in Afghanistan and Iraq, and more.[125] The frequency of using sexual violence in war varies between situations and societies; ranging from high instances in some cases to a lower degree in others, and sometimes it does not seem to happen at all. Nonetheless, it is a historic feature of the practice of war.[126]

So how is sexual violence used as a crime of war and what is its significance as such? As shown in the previous paragraph, it is an old, well known practice of war. To explain this practice, the particular examples from the conflict in former Yugoslavia and Rwanda from the late 20th century will be used, as these are the examples which later on which brought about important developments through the international tribunals in the recognition of these types of crimes.

According to Diken and Bagge Laustsen, the main goal of rape in wartime is to "inflict trauma and thus to destroy family ties and group solidarity within the enemy camp".[127] Rape is used to destroy a group.[128] In Bosnia, for example, rape of Muslim women was used to destroy families. As a form of ethnic cleansing, for example through the use of enforced pregnancies, as the Muslim religion determines the ethnicity of the child. In the war in Bosnia, many women were raped in rape camps. In these camps there was mass use of enforced pregnancies as a tool, which showed a great deal of planning: women were continuously raped and then examined until found pregnant, then kept captive until they were no longer able to have an abortion. Apart from being a practice of torture, this also became a method of ethnic cleansing. According to the UN, the patterns of rape that occurred during the conflict also show the existence of a systematic rape policy.[129] Rape of Muslim women by Serbian men was meant to increase the Serbian population, as according to Muslim law, the ethnicity of the child is determined by the father. Forcefully impregnated women often were not accepted back in their own societies due to cultural reasons. These methods were not coincidental; they were planned.[130] Another purpose of the mass rape of Muslim women was to break up families, which in some cases led to the murder of the victims, who were not accepted anymore in their own communities afterwards. The practice was also intended to lead to a mass exodus of the Muslim population, and its demoralization.[131] The ICTY describes extensively

[123] Vikman 2005a:22.
[124] Donohoe 2004.
[125] Donohoe 2004.
[126] Vikman 2005b:42.
[127] Diken and Bagge Laustsen 2005:111.
[128] Eboe-Osuji 2007:266.
[129] Diken and Bagge Lausten 2005:112-113.
[130] Diken and Bagge Lausten 2005:112-113.
[131] Kalosieh 2003:132.

how Muslim girls were mistreated by Serbian soldiers "because they were Muslim".[132]

In Rwanda, evidence shows a similar use of rape as a weapon of war. The judges in the Akayesu trial under the ICTR, for instance, found that the rapes he was accused of all followed the definition of genocide: systematic, discriminatory where all raped women belonged to one group (Tutsi). Often murder followed the rape, the female bodies ending in mass graves. According to the judges, there was a clear intent to destroy the Tutsi group. Akayesu was found responsible as the mayor, who ordered the rapes but also because he knew about the existence of the rapes being committed and by not acting upon it, in effect approved them. According to the judgment, force can come also in the form of presence of soldiers, not just the use of physical force.[133] Another example from Rwanda is the case against Gacumbitsi, who was found guilty of rape of Tutsi women, often followed by killing the victim, in the context of genocide.[134]

In the Gacumbitsi trial, there was evidence of mass rape of Tutsi women, which was targeted against all women of the group. Groups of women were victims of sexual slavery. Men were heard saying they could freely kill Tutsi women who refused to marry Hutu men. These rapes sometimes took place in the presence of family members, often followed by murders. All this happened in the context of genocide. While other extreme forms of violence were taking place against the same group of people, the accused was heard ordering to kill Tutsi girls who resisted in an 'atrocious manner'. [135]

There are other ways in which sexual violence and abuse was used and can be used in the context of war. One example is the use of 'comfort women' by Japanese soldiers in World War II, when the women were used as a reward for the fighting soldiers. These women were not recognized by the Japanese government or even mentioned at all in the peace treaties.[136] The practice of sexual slavery through military prostitution, providing women to soldiers through force and fraud,[137] was also a part of the war in Vietnam, used by American soldiers. Sexual slavery was also used by the elite French Foreign Legion. In many wars, like in the above examples, the practice of providing sexual services to soldiers seems to be 'necessary' and even 'patriotic'.[138] Even after a war has ended, often displaced women, living in refugee camps, keep experiencing violent attacks, and are forced to provide sexual services in exchange for necessities like food, shelter, and even a refugee status.[139]

The use of sexual violence against women in war has to do with the subordinated position of women in relation to men that exists in general, and the idea of women

[132] Campbell 2004:344.
[133] Lyons 2001:107-109.
[134] Cole 2008:64-65.
[135] Cole 2008:64-65.
[136] Charlesworth and Chinkin 2000:253.
[137] Charlesworth and Chinkin 2000:253.
[138] Barry 1979:70-74.
[139] Charlesworth and Chinkin 2000:253.

as property.[140] By seeing women as such, women are hurt in order to hurt the whole community,[141] the perpetrators attacking the land, resources and women of the men of the other group.

2.3 The Change in the View on Sexual Violence

The issue of dominance and violence in relation to rape started to gain ground long before the ad hoc tribunals of the 1990s. In the 1970s, starting with Susan Brownmiller's ground breaking book "Against our will: Men, women and rape", some feminist writing started to be published, talking about the crime of rape from a different perspective. This new view was led by radical feminists, taking over from the liberal feminism thought which had dominated the debate until the 1970s and '80s. Following liberal ideas, liberal feminism emphasized the importance of the private sphere.[142] The modern view however, also increasingly being excepted by national courts, sees rape as a crime of violence and dominance, rather than a crime of sex (without consent).[143]

Traditionally, in courts, rape victims had to prove that they did not agree to the act, based on the view that one would do anything in their power to prevent sex from happening, if they did not want it to. If she did not, it must mean she consented. The new feminist writings criticized this viewpoint, saying that it ignores the reality of women's relative powerlessness.[144] New insights started to gain more and more ground, acknowledging that rape can happen also within marriage,[145] and by perpetrators which the victim knows. A woman can consent to, or not refuse, sex because of fear and pressure; coercion can be demonstrated by difference in position and dominance[146]. The law assumes consent and objection in a neutral, equal situation; consent is assumed to be the woman's control over the situation. But it does not always match the reality of day to day live,[147] which is not neutral and is surrounded by power relations.

The growing radical feminist view on rape uncovered the oppressing orders which exist in the private sphere as well as the public one. This was the viewpoint which was behind the struggle for the recognition of rape as a war crime, in the context of coercion, violence and power relations.

[140] Charlesworth and Chinkin 2000:254.
[141] Charlesworth and Chinkin 2000:254.
[142] Torrey 1995:36-38.
[143] Eboe-Osuji 2007:256.
[144] Torrey 1995:36-38.
[145] Torrey 1995:36-38.
[146] Torrey 1995:42.
[147] Torrey 1995:42-43.

2.4 The International Criminal Tribunals and Their Importance

Before addressing the treatment of gendered crimes under the international tribunals, it is important to understand the background behind their establishment, together with the importance of their jurisdictions.

2.4.1 Historical Developments

The international criminal tribunals go back to just after the World War II. The Nuremberg and Tokyo international courts were the first attempts of the international community to prosecute and convict perpetrators of war crimes. These courts worked on the basis of the existing pre war Geneva and Hague Conventions.[148] The atrocities of the Second World War also led to a revision of the existing laws of war, leading to the Geneva Conventions of 1949.[149] Horrified by the atrocities against civilians during World War II, the Geneva Conventions of 1949 offered for the first time protection to civilians who are harmed by war.[150]

While writing the Geneva conventions, the question of whether these new laws should refer also to internal conflicts and civil wars, besides wars between two states, became central. International interference in internal conflicts represented however a threat to state security and authority of its internal affairs. The debate ended with the adoption of article 3, which appears in all four conventions of 49', and is the only article which refers to civil wars.[151] Within the conventions a more innovative development was also included: the "grave breach" system. These are universal codes of war, which address individual responsibility. While the initial intention of the Red Cross was to have an international court to look after the upholding of the grave breach system, the states themselves had opposed to that. In the end it was decided that states would be asked to enforce the grave breach system domestically.[152] A few decades after the adoption of the Geneva conventions in 1949, the international community witnessed a growing number of non-international armed conflict and struggles for national liberation.

After World War II, civil wars and inter-state conflict had continued to erupt.[153] The era of after the cold war had led to eruption of internal conflicts, based on ethnic, tribal, ideological and other divisions. Unlike in the past, these conflicts could not anymore be controlled by totalitarian regimes.[154] These conflicts were demonstrated by attacks against civilian population, in a diversity of forms such as genocide, ethnic cleansing, starvation and other atrocities.[155] In the 1990's reports from journalists

[148] Danner 2006:8-9.
[149] Danner 2006:10-12.
[150] International Committee of the Red Cross 2009.
[151] Danner 2006:10-12.
[152] Danner 2006:12-13.
[153] Danner 2006:18.
[154] Schindler 2003:173-174.
[155] Schindler 2003:173-174.

and NGOs about killings, torture and mass rapes in Bosnia gained awareness.[156] This led once again to the rethinking of the existing international legal framework. In 1977, again as a response to the reality in the world, an additional protocol was added to the conventions. This additional protocol became the first international treaty to ever address non-international armed conflicts exclusively.[157] However, besides the protocols of 1977, the Geneva Conventions had not been discussed or negotiated from 1949 until the 1990s. The existing laws of war during this period remained abstract and vague. States turned out to be unwilling to enforce the grave-breach system in practice.[158]

The international community soon saw a need to intervene in these situations. From the year 1990 to 1995, The UN sent out some observer missions, together with some peace-keeping forces, to the conflicts in El Salvador, Cambodia and Mozambique. But when it came to more complex conflicts, like the ones in Rwanda and the former Yugoslavia, these simple interventions just were not enough.[159] Faced with the reality in which states did not take up the role of protecting their citizens' human rights, the international community needed to find a different way to reinforce the rule of law.[160] The international criminal tribunals came in place of the ineffective national courts.[161]

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established as the international response to the war crimes committed in those countries.[162] The tribunals were another step in the protection of human rights by the international community, after the previous mechanisms were found ineffective.[163] The Security Council described the goal of these tribunals as to 'bring to justice' those who committed the crimes.[164]

2.4.2 The Roles of the International Tribunals

The international tribunals emphasized the human rights principal of the focus on the individual, which is laying behind human rights: they prosecuted individuals who were held accountable for committing war crimes and crimes against humanity,[165] and protected individual victims who were violated by the perpetrators. Besides its role in bringing about accountability and justice, the tribunals, representing the ideas of crimes against humanity in practice, also have a normative role.

[156] Danner 2006:18.
[157] International Committee of the Red Cross 2009.
[158] Danner 2006:18.
[159] Schindler 2003:173-174.
[160] Humphrey 2003:495.
[161] Humphrey 2003:495.
[162] Humphrey 2003:495.
[163] Buergenthal 2006:802.
[164] Campbell 2004:330.
[165] Humphrey 2003:495.

Humanitarian law represents the international norms of humanity. The ICTY itself declared its role of defining and addressing universal norms, in its different rulings. The perpetrators who commit crimes against humanity do not refer to their victims as humans; by doing so, they violate the concept of a human overall. The tribunal comes in to protect the universal concept of humanity, and every victim's humanity.[166] By striving for justice for the victims, the tribunal recognizes them as humans, which had been 'dehumanized'.[167] Considering the view that women are ignored and are not considered as humans in human rights, the importance of the recognition by the tribunals to the feminist activists is clear. Together with this basic human concept, go all of the other particularities of women, largely ignored by the international legal system. The tribunals therefore have an important role in universal norm setting, through recognition of violated individuals.

2.5 Sexual Violence under the International Criminal Tribunals Before the 1990s

Rape in wartime was listed as a crime against humanity by the Nuremberg Military Tribunals and the Geneva Conventions of 1949.[168] However, In the Geneva accords, even though rape was mentioned, it was referred to as a crime of honor of the woman, going back to traditional views which saw rape as violating the honor of the man which the woman belongs to. Rape was also not mentioned as a "grave breach" of the conventions,[169] and was never referred to as a war crime standing on its own.[170] The above laws of war were written by men, at a time where rape was seen as an "inevitable consequence of war".[171] In practice, the statute of the Nuremberg tribunals does not mention rape at all, even though clear evidence of rape in war was brought to the Nuremberg judges by the prosecution.[172] The Tokyo Tribunal had mentioned rape in its judgment, devoting one paragraph to it. However, the tribunals referred to rape as one of the general atrocities done under the command of the accused. No victim was called to testify in front of the Tokyo tribunal, and the forced prostitution of the "comfort women" was fully ignored.[173]

These examples show that although the practice of rape in war was already known and mentioned, it was lacking the right theoretical framework to match the experiences and realities of the victims. This changed only in the 1990s, through feminist struggle.

[166] Campbell 2004:336.
[167] Campbell 2004:339.
[168] Franco 2006:1662.
[169] Goldstone 2002:282.
[170] Goldstone 2002:282.
[171] Goldstone 2002:279.
[172] Goldstone 2002:279.
[173] Goldstone 2002:279.

2.6 Sexual Violence in the ICTY and the ICTR: The Struggle for Recognition and Its Significance

The efforts to change the invisibility of sexual violence in the eyes of the international courts had already started at the local level before the war in former Yugoslavia, notably by Korean and Filipina women who raised attention to the issue of "comfort" women.[174] However, the broader efforts for change and the recognition of sexual violence in war started in the context of the conflict in former Yugoslavia, when the world as a whole became witness to the mass atrocities conducted there. The efforts started by women and nongovernmental organizations.[175] During the conflict in former Yugoslavia organizations, such as the Women's Rights Project of Human Rights Watch and Women's Program of Physicians for Human Rights, sent out fact-finding missions at the local level, to raise awareness about sexual violence in wartime. The Vienna World Conference on Human Rights was the target of their campaign.[176] These activities for change were made by women and organizations not only in former Yugoslavia, but also in the rest of Europe and even outside of it.[177] It was clearly seen as an international struggle, not only a local matter, with major efforts made to keep it on the international agenda. Feminist journalists had also joined in, breaking the media's barriers and bringing in testimonies of victims of sexual violence in war.[178] Groups in former Yugoslavia and Europe did not only call for recognition, but also for humanitarian intervention, and provided psychological, physical and legal assistance to the victims.[179]

In 1994, Richard Goldstone was appointed as the Chief Prosecutor, based in The Hague. Right after getting into office, Goldstone started to receive letters from private women and men, living across Western Europe and Northern America, asking him to give appropriate attention to gendered crimes. Goldstone was specifically impressed by the fact that these letters were all different, written individually by each sender, and not copied in a pre-made manner. The efforts of the organizations brought up much of the anger and frustration that many people, mainly women, felt, and expressed in those letters.[180] These letters, said Goldstone, raised his awareness to the issue, and brought him into applying institutional change. He appointed a legal advisor for Gender Crimes for the Office of the Prosecutor. The first steps being taken in the area of gender equality were in the office itself, which turned out to be much needed, says Goldstone.[181]

Not only the organizations mentioned above, but also the UN had itself investigated the mass atrocities in former Yugoslavia.[182] One of the UN's early resolutions had included for the first time a condemnation of rape in war.[183] These investigations

[174] Green et. al 1994:173-174
[175] Green et. al 1994:173.
[176] Green et. al 1994:173-174.
[177] Green et. al 1994:173-174.
[178] Green et. al 1994:173-174.
[179] Green et. al 1994:174-175.
[180] Goldstone 2002:280.
[181] Goldstone 2002:280.
[182] Green et. al 1994:175.
[183] Goldstone 2002:278.

were the first step which led to the establishment of the ad hoc tribunals, aiming to punish the perpetrators.[184] From 1992 onwards, numerous resolutions were passed, protesting directly against rape in war.[185] In 1994, a specific investigation was undertaken particularly to report on crimes against women.[186] This was the first time in which the Secretary-General's Report referred to rape as a crime against humanity. The report even suggested that, as the tribunals would need to deal with victims of sexual violence, qualified women should be appointed to the Office of the Prosecutor.[187] This report later led to the drafting of the statute of the ICTY.[188]

The statutes of both tribunals became ground breaking in their attribution to rape as a crime against humanity, as well as their procedure to ensure the safety of the victims. The ICTR even stated "[r]ape, enforced prostitution and any form of indecent assault" as crimes which violate the Geneva Conventions.[189] However, despite these important, ground breaking developments, rape was still not listed in the grave breaches which are based on the Geneva Conventions, and it was also not listed as a violation of the "customs and laws of war". The fact that rape was not mentioned under these two definitions, meant that it will need to keep being examined and litigated by the tribunal and its particular development, in each specific indictment.[190]

An important development which did take place, however, was that while the crime of rape was not being recognized as a grave breach of the Geneva Conventions, the tribunals did include it as a part of other grave breaches.[191] It was also the first time that gendered crimes received a distinct treatment.[192] The ICTY was the first international court to hold individuals accountable for rape as a crime against humanity.[193]

In the judgments of the ICTY, the crime of rape in war was referred to as "violating the women's dignity" and "serious violations of sexual autonomy". Through these references, rape in war can be seen as violating the right over the most personal property: the body.[194] This is an important step in recognizing women as human. The Geneva Conventions originally referred to the woman as one who belongs to the man; his honor is being violated when she is violated. The crime of rape in war is generally connected to the view of women as property, of the men of each side of the conflict. The attributions of the ICTY bring back the woman's body to be owned by herself, being her own personal property, not belonging to the men of any other identity group. They also protect her right to have her body safe and not violated. She is seen as a bearer of her own property.

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[184] Green et. al 1994:175.
[185] Green et. al 1994:175.
[186] Green et. al 1994:175.
[187] Goldstone 2002:278.
[188] Goldstone 2002:278.
[189] Goldstone 2002:279.
[190] Green et. al 1994:176.
[191] Nikolic-Ristanovic 2005:281.
[192] Green et. al 1994:173.
[193] Pilch 1998-1999:109-110.
[194] Campbell 2004:334.

The developments of the ICTY are considered to be a landmark in the recognition of sexual violence as a crime of war. However, what is considered, to a large extent, as the most significant progress in this regard is the trial of Akayesu under the ICTR,[195] which was the first conviction or rape as an act of genocide.[196] The Akayesu ruling is significant not only because the recognition of the seriousness of the crime of rape in war and the harm it inflicts, but also because of the tribunal's reference to that crime.[197]

The ad hoc tribunals have dealt with the prosecution of individuals for the crime of rape, without a statutory definition of it in international law.[198] The Akayesu trial was the first time in which the ad hoc tribunals' judges had to deal with the issue of rape and the lack of a definition. The tribunal ended up with the following definition of rape: "a physical invasion of sexual nature, committed on a person under circumstances which are coercive". The judges in the Akayesu trial refused the traditional view of rape which exists in many national jurisdictions, one that focuses on descriptions of objects and body parts, which they called "mechanical". The judges have addressed the importance of cultural sensitivity when discussing intimate matters, which could also prevent witnesses from disclosing "graphic anatomical details". They went as far as saying that sexual violence does not have to include even physical contact.[199] The Akayesu Trial Chamber referred to the definition of torture, as infliction of suffering upon persons who are under another's control. It linked the torture definition to the crime of rape, saying that as there is no detailed list of means and methods of torture, the same approach should be applied for rape.[200] With their definition, the Akayesu judges accepted the view of rape as a violent act in unequal circumstances.[201] It is a broad definition, which looks at the difference in status and equality, and the violent, coercive circumstances, pointing its finger at the perpetrators rather than the victims. By doing so, the tribunal went in line with the modern view of rape as a crime of violence and dominance, the one which stood behind the feminist struggle for recognition of these crimes by the international tribunals.

The Akayesu decision was declared in the Annual Report of Human Rights as a "milestone" in women's human rights.[202] In 2008, Catharine MacKinnon called the broad definition of rape in war time, phrased by the Akayesu judges, "The Tribunal's single biggest substantive accomplishment".[203]

These are important developments in the recognition of gendered crimes under international law. This is further important in the context of the norm setting role of the tribunals. Through addressing rape as a crime against humanity, the tribunals did not only enhance justice to the victims, but rather set norms. They recognized the

[195] Pilch 1998-1999:99, 110.
[196] Eboe-Osuji 2007:251.
[197] Pilch 1998-1999:110-111.
[198] Eboe-Osuji 2007:252.
[199] Eboe-Osuji 2007:252-253.
[200] Cole 2008:57.
[201] MacKinnon 2008:102-103
[202] Pilch 1998-1999:111.
[203] MacKinnon 2008:102.

women victims as human, bearing human rights, and being part of the collective human community. This is a much broader norm. As the crime of rape in wartime, which particularly affects women, was neglected so many years before, these developments have a further importance in the norm setting on the protection of women's rights. With the UN World Conference on Human Rights from 1993, declaring that women are human in human rights, at around the same time of the tribunals' recognitions, this is an important practical step in setting universal norms of the importance and protection of the rights of women. The idea that the jurisdictions determine the woman's rights over her body is clearly directed to the liberal ideas of individual natural rights to which human rights refer, discussed in the previous chapter. This could be an important development in the reference to women under international law, a reference which was vastly criticized. Accepting the modern feminist view on the crime of rape as a crime of violence and dominance is an example of incorporating feminist theory into the practice of change, a further step in answering women's needs, and the progression of their rights.

2.7 What Happened After the Developments at the ICTY and the ICTR?

The ICTY and the ICTR have made some important rulings on rape in war. The next question which comes up, a few years later, is therefore, how did the tribunals follow suit on convicting of rape in times of war? While the judges of Akayesu were faced with the lack of a definition of rape, the trial chambers which followed had the definition of Akayesu to rely on. How did the tribunals follow this definition? The answer is, not as expected and as anticipated.

While the importance of the Akayesu jurisdiction and its definition of rape is well recognized, it was much less influential on its following cases. Right after Akayesu, the following jurisdictions of the ICTR ignored or undermined the key advancement of Akayesu.[204] In fact, only two out of nine rape charges in the ICTR after Akayesu had ended with a conviction.[205]

The tribunals' next opportunity to deal with sexual violence in war was during the ICTY's trial of Celebici, which followed Akayesu's definition. [206]. However, in the ICTY trial of Furumdzija the chamber acknowledged the Akayesu development, but stated that there is no definition of rape under international law. The judges turned to national laws in order to formulate a definition, and ended with a well detailed definition which included what the Akayesu chamber tried to avoid, and thereby ignoring the concerns raised there: a well detailed definition of sexual actions and body parts, while also addressing the coercion of the actions.[207] The Kunarac judges in the ICTY followed the Furumdzija definition. The important edition of the Kunarac

[204] MacKinnon 2008:103
[205] Franklin 2008:189-190.
[206] Eboe-Osuji 2007:253.
[207] Cole 2008:59-60.

chamber was addressing the importance of the consent of the victim.[208] According to the Kunarac Appeals Chamber, the lack of consent from the side of the victim is an element of rape as crime against humanity, and it is the prosecution's role to prove that there was no consent.[209] By doing so, the judges did not follow what was the important advancement in the Akayesu jurisdiction: a broad definition looking at the coercive circumstances which do not allow free consent.

Afterwards, in the ICTR itself, a few judges followed the Akayesu definition, while others followed the Kunarac one.[210] The first attempt to integrate these two approaches was in the ICTR's case of Gacumbitsi.[211] There, the prosecution addressed the question of consent, claiming that rape should be referred to just as any other violation of international criminal law, where there is no need to prove consent or lack thereof. Furthermore, it claimed that under the context of genocide, consent is impossible.[212] The judgment of the Gacumbitsi case ended up saying that the prosecution will still need to prove the absence of consent, and it can do so by proving that there were "coercive circumstances under which meaningful consent is not possible".[213]

While Akayesu and Gacumbitsi were convicted of rape as genocide, other cases with similar evidence were not.[214] One example is the case of Kajelijeli.[215] Many times, the cases constituted of rape followed by murder right afterwards. Yet, while the murder was found to be a part of genocide, the rape which occurred just before ironically was not.[216] The treatment of murder, in comparison to rape, is overall different. Prosecutions themselves were more reluctant to charge for rape as they were for murder, and were more willing to drop rape charges. The tribunal was more reluctant to convict the accused for being accountable for rape committed by a subordinate, then they were to convict for accountability over murder being committed by someone else. Rape witnesses were held to a higher standard of credibility than witnesses of murder.[217] This shows, according to MacKinnon, a pattern of a "boys-will-be-boys" attitude, rape seen as something that is not really their leader's fault,[218] as oppose to the crime of murder in comparison.

Yet, there were some other positive developments. The Rome Statute of the International Criminal Court (ICC), following the developments of the tribunals of the 1990s, did mention sexual slavery as an international crime for the first time in history. Sexual crimes can be prosecuted as war crimes under the ICC, and Article 7(1)(g) mentions specifically sexual slavery, forced prostitution, forced sterilization, forced pregnancy and "any other form of sexual violence of comparable gravity".

[208] Eboe-Osuji 2007:254.
[209] Cole 2008:72.
[210] Eboe-Osuji 2008:254.
[211] Eboe-Osuji 2008:254.
[212] Cole 2008:71.
[213] Eboe-Osuji 2007:260.
[214] MacKinnon 2008:103
[215] Franklin 2008:193.
[216] MacKinnon 2008:103-104
[217] MacKinnon 2008:104-105
[218] MacKinnon 2008:105

However, these crimes are still not considered as grave breaches. This court also does not follow the definition of Akayesu fully.[219] Another development following the developments in the discussed tribunals was in the Special Court for Sierra Leone (SCSL), which recognized for the first time, in 2008, forced marriage as a separate crime.[220]

Evidence therefore shows that although there were important developments within the ICTY and the ICTR, the tribunals have failed to follow suit of these developments. Although the Akayesu definition did have some effect and influence on its following rulings, it did not change the tribunals' general orders, and their way of thinking about rape as a weapon of war. The Akayesu definition did not gain the superior stand in the international courts. However, these convictions also stand for themselves, and marked the way for future convictions, even if not at a satisfying rate.

The real progress of the jurisdictions seems to be, therefore, one that is more on the written, documented area. MacKinnon defines the measurement of success of the international tribunals in the area of sexual violence as a "backdrop of the reality and law of sexual violence in every nation in the world, every single day, including outside zones of recognized conflict".[221] In a conversation held in 2008 Katharyn Lockett, a manager in a women's organization, said that the UN had achieved large progresses when it comes to writings and theory, such as the CEDAW, resolution 1325[222] and the Rome Statute. However, the problem remains in implementation. The UN's Declaration on the Elimination of Violence Against Women from 1993, for instance, is an important development as it regards to violence against women as an international matter, which is the result of unequal relationship between the genders. However, the objection of some states had prevented it from raising this problem as a major human rights concern.[223]

Hilary Charlesworth followed on that point, saying that when it comes to international law, Resolution 1325 and the ICC Statute do reflect the absorption of the gender and sex language. But this acceptance remains on these levels, and therefore superficial. While gender mainstreaming resolutions have been largely accepted, the commitment for real-life change had reduced.[224] The acceptance of language and resolutions can indicate that while the normative change had started, it is yet to be implemented: through the international tribunals in practice, before it has an effect on the lives of women around the world. Judges as well as states write and read the words, but are reluctant and even resistant to act upon them.

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[219] Hallett 2009:190-191.
[220] Gong-Gershowitz 2009:53.
[221] MacKinnon 2008:101.
[222] A landmark resolution from 2000 on women, peace and security, which recognized the unequal role of women in conflict prevention and resolution, called for action for more equality, and recognized the unique effects of armed conflict on women, especially in forms of sexual abuse (Office of the Special Adviser on Gender Issues and Advancement of Women n.d.)
[223] Charlesworth and Chinkin 2000:235.
[224] The Conversations Project 2008:2.

2.8 Conclusion

This chapter discussed the use of sexual violence in war and the international criminal tribunals, focusing on the ICTY and the ICTR. Sexual violence as a method of war is an old practice, existing since ancient times and practiced in different conflicts. The methods vary, from rape before killing to enforced pregnancies, and even use of sexual slavery. As demonstrated by the evidence of the conflicts in Rwanda and the former Yugoslavia, rape is used to destroy a group by raping the women which are a part of it.

The international tribunals are a system which the international community had conducted in order to protect human rights. It resulted after viewing the mass atrocities of World War II. Besides the goal of bringing upon justice, the tribunals have also an important role in norm setting. They recognize crimes, and through that the humans who are entitled for protection. Before the 1990s, rape as a weapon of war was somehow mentioned by legal documents. However, it was never recognized by international tribunals. Around the 1970s, feminist theory had also brought upon change in the overall thinking of rape. The new view of rape had described it as a crime of dominance and violence, in a reality which is unequal in its very basis. This modern view is linked to the feminist struggle for recognition of rape in war by the tribunals, and to the developments which followed those efforts. The efforts finally resulted in the ICTY recognizing rape as a crime against humanity, and the ICTR recognizing rape as genocide, with a broad, groundbreaking definition.

Although these tribunals were the final decision makers on the rulings, their recognition of sexual violence in war is the result of long going feminist activities. Only when the realities on the ground were theorized by feminists in a different way, and activists struggled for their recognition, sexual violence as a war crime become part of the practice of human rights protection and received its recognition. The broad definition of rape under the Akayesu trial also matches the modern radical feminist view of rape.

Feminism grew and keeps developing from a reality of the lives of women, striving to change it. The feminist activists chose the ad hoc tribunals as a mechanism to bring upon change. The linkage between the tribunals and feminism is demonstrated here in a clear way: feminist activists brought to the recognition of rape in war not only through recognition of the reality on the ground, but recognition of their view and theorizing of that reality. The success in bringing upon recognition of the ad hoc tribunals is clear. The importance of the tribunals' developments in the 1990s goes far in terms of the potential protection of women in war, and accepting the feminist view of women's concerns and violations. However, reflection over time shows that little had changed since then: the tribunals have been reluctant in following these progresses. A look back by feminist scholars and activists does show some changes, mainly in language and resolutions. Implementation, however, is still to be struggled for. This raises questions on how suitable the international legal system is to promote women's rights.

3. The International Criminal Tribunals and the Protection of Women's Rights: A Critical Analysis

3.1 Introduction

The knowledge of feminist thinking about international law is an ever growing field. It is also a clear case of how theory (as seen in chapter one) corresponds with practical activism (as seen in chapter two). Feminism does not only put its theories and ideas on paper; it works and strives to transform it into real life change. One of the main agents for achieving practical change are the international criminal tribunals.

The feminist movement, through their formulation of radical ideas, had been successful in the 1990s to bring upon the recognition of crimes against women in war. The use of the tribunals for the struggle was a choice. It corresponded with the growing theory on sexual violence as a crime of dominance, as well as growing criticism of discriminatory orders in international law. The ad hoc tribunals were built not only to investigate particular crimes; they have a great normative importance in defining who is considered to be human; who deserves protection; what are the desired norms in society. The international tribunal system is there to protect every individual which is being violated. It is therefore not only a concern for the particular victims, but rather has great global normative goals.

The following chapter will combine the theory of feminism and human rights with practice and will analyze the prosecution and recognition of rape in war through a normative lens. How well are women protected by the international legal system? Are the tribunals the right tool to promote women's rights?

This analysis has two parts. First, it looks back at the choice to prosecute sexual violence in war through the international tribunals. Feminism has been vastly concerned with ignoring women's issues, and therefore with promoting orders which discriminate against them. While crimes against women in particular conflicts had been recognized, some of the side effects of such recognitions can be harmful and contradicting women's rights and feminist ideas, while promoting ideas that do not go in line with what was originally intended.

The second part takes a more global look at women's rights. Moving from the particular conflicts used here to examine the issue, this part will address violence against women as a global concern. It will look at human rights with the feminist criticism of it, the struggle for change through the tribunals and the roles the tribunals are meant to fulfill when they are being acted. It is an examination of the protection of women under the international legal system.

3.2 The use of the International Tribunals

The developments in the treatment of gendered crimes under the international tribunals did not happen over night; it was a result of a long struggle by feminist activists. It was a choice. While the advantages and the importance of the jurisdictions have been discussed, some questions may arise regarding the choice of using the international tribunals to promote women's interests and its disadvantages. The international criminal tribunals may in actuality promote and protect identities and norms which go against the rights of women.

The struggle and ideology leading to the choice of the tribunals to make a change had been led by radical feminist ideas. While liberal feminism strives for equality by law, radical feminism looks at the overall patriarchal order and strives to change it. According to this view, the courts themselves are patriarchal, the whole system is. In order to gain change, these orders need to be unveiled and changed. These feminists have also unveiled the discriminatory orders of human rights as a whole; orders which seem natural, but were developed by men and based on men's experience, needs and interests. While rape as a weapon of war is significant, it also has many similarities to rape of women in everyday life. Both of which are crimes of domination of one over the other. Both are violent crimes which, according to radical feminists, look at the woman's body as the property of the man (whether her partner, or a member of her own society, destroying the woman's body which belongs to the men of the ethnically cleansed group, or the men of one group toward the women of the other group). Incorporating the radical ideas into the existing system may have risks. The international tribunals are activated in the context of war, and prosecute rape as a weapon of war, and only in the context of war.

The systematic, planned use of sexual violence in this context is used to harm a national, ethnic or religious group, and the tribunals hold the individual accountable for these crimes, even if not committing them personally. But one aspect in missing from these recognitions: the identity of the victims as women.

By emphasizing rape as a weapon of war, the message that is sent out is that rape in war is terrible because it is used to destroy a national, ethnical, racial or religious group. The mass rape during the war in Bosnia, for instance, received the world attention because it was a form of "ethnic cleansing" or genocide. The media had described it as "raping the enemy's women". A leading Croatian-American scholar had distinguished that same week between rape in war and "normal" rape.[225]

Rape in war is significant because it was used to displace, destroy and abuse the other group, consisting of women and men and dominated by men. Violence against women is only prosecuted if the group of men is being violated. This prosecution of rape in war is of course important. The methods used also result in women being abused at a much higher scale than in other times. But violence against women

[225] Copelon 1995:198.

happens all the time, based on similar ideas, all around the world. While acknowledging rape as a weapon of war is important, it does not necessarily send the right message when it comes to the rights and needs of women. It does not necessarily send the right message about the significant problems that women face. Radical feminism strives to unveil and change the existing discriminatory orders. But when it came to prosecuting against gendered crimes, it happened under the existing laws, made through and by men, as feminist criticism says.

This thinking about women as property goes even further, when thinking about the context of war, and the gender roles it structures. Just like men attack women of the other group as they are seen as property, the men of their own group protect them. In war, men protect their property: their land, resources and their women. The women are either attacked or protected by men. But they cannot protect themselves.[226]

By focusing on ethnic and national identities, the international tribunals protect one of these groups against the other. After the genocide, women in Rwanda were afraid to talk about what happened to them, because of the social stigma on rape in their society, which shows them no sympathy and even denigrates them. One of the stigmatizing views is that the rape victims used their bodies to save their lives, while men and children died without defense. Their chances of marrying were often destroyed, and the ones who became pregnant by the rapes had children who were also denied by society.[227] Similar evidence is mentioned as the harmful results of rape in Bosnia.[228]
In what way, is the described social mechanism different than the one that subordinated the women through raping them in the context of war?

The description of the harms caused to the raped women, with a few examples described here above, often mentions how difficult it is for them to return to their own societies, which often reject them and judge them for being violated. When prosecuting for gendered violence in war like it is done, only the perpetrators, the members of the other group, are judged. The discriminatory patriarchal order which rejects the abused women is not being judged; in fact, often it is accepted as a consequence of the rape, a result of the rape committed by the other group, which is the problematic violation for the women. But these dominating, subordinating beliefs exist also in their own group. The social mechanisms and structures that reject them after they were raped by the other group are the result of the same patriarchal, discriminating orders. By focusing on rape as a weapon of war, the violations of individual women's rights are ignored, because the rape was done by the "other group", to destroy the national, ethnical, etc group. It was not done to the women, but rather to the group. So the group which the women belong to is accepted in full, and therefore their mechanisms which abuse women are not under discussion. Rejection of the raped women by their own societies is not caused by the rape. The rejection is the consequence of the societal structure that allows the

[226] Charlesworth and Chinkin 2000:254.
[227] Newbury and Baldwin 2000:5.
[228] Bulent and Bagge Laustsen 2005:115.

domination over women, their discrimination and their abuse. It is this mechanism in the women's society that allows their rape by the other group to become a weapon of war. By looking at sexual violence through the lens of war, done by men, to men, for men, the real social orders which discriminate against women are not only ignored; they are accepted.

"This is all about identity", Susan Brownmiller quotes a TV newscaster reporting from the conflicting former Yugoslavia. "Perhaps", she says, "the newscaster should have amended his analysis to say *male* identity".[229]

3.3 Violence Against Women and the International Legal System

The idea and practice of human rights is based on the liberal ideology, which saw, for the first time, every individual as the bearer of their own rights. This is also where modern feminism had started, with women saying that this treatment and point of view should be given equally to women. In other words: women should be protected by law and given the same rights as men do. Violence against women is not only in times and areas of war. The next section will discuss this global concern and its protection under the international legal system.

3.3.1 The Crimes that the Tribunals Prosecute

While the initial international treaties and conventions which modern human rights are based upon, were based on codes of war, the new wars of the 20th century were different from the ones these documents were based on: they were based much more on national and ethnic struggles, which resulted in more and more civilians being killed and harmed. This new reality led the international community into realizing that it should protect those civilians, based on the idea of the individual rights they hold. On this basis the international criminal tribunals were constructed: to bring upon justice to the victims of genocide, ethnic cleansing and other similar atrocities, as well as the accountability of the ones responsible.

The crime of rape, therefore, is not recognized as a crime in itself by the tribunals, but as a part of a crime of war, crime against humanity or genocide.[230] The same goes for other crimes which harm individuals. The idea is that the tribunals prosecute for violating individuals' rights, but only as these individuals are part of a group which was meant to be hurt and destroyed in large.

The ICTY was meant to protect the human rights of the victims of the war which erupted between the different nationalities and ethnicities that assembled Yugoslavia. The ICTR was put in charge of bringing justice to the victims of the Hutu tribe, which were murdered for being Tutsi. Both ad hoc tribunals' statutes included the Nuremberg concept of 'crimes against humanity'.[231] The ICTY was the first

[229] Brownmiller 1993:37.
[230] MacKinnon 2006a:238.
[231] Humphrey 2003:495.

international criminal tribunal to acknowledge rape as a 'crime against humanity'. The ICTR was the first tribunal to acknowledge rape as genocide.

Crimes against humanity are crimes that are against a collective of people, and therefore go against not just an individual, but against the collective of humanity.[232]

The legal definition of genocide, adopted in 1948 by the Convention on the Prevention and Punishment of the Crime of Genocide, is: [233]

". . . Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

1. *killing members of the group;*
2. *causing serious bodily or mental harm to members of the group;*
3. *deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
4. *imposing measures intended to prevent births within the group;*
5. *forcibly transferring children of the group to another group.*

The following acts shall be punishable:

- *genocide;*
- *conspiracy to commit genocide;*
- *direct and public incitement to commit genocide;*
- *attempt to commit genocide;*
- *complicity in genocide."*

The convention defined genocide as "a crime against international law, 'whether committed in time of peace or in time of war'".[234]

3.3.2 Violence Against Women: Context, Consequences, Goals and Society

The UN defines violence against women in the Declaration on the Elimination of Violence Against Women as: ". . . any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women". This is a broad definition, it generally refers to acts which cause harm to women and are based on sex inequality. Practically, violence against women refers to forms of abuse which affect women and girls.[235] These abuses start even before birth, with selective abortions based on the sex of the embryo, continue with cultural specific forms of abuse like female mutilation, and honor killings, global forms of abuse such

[232] Campbell 2004:335-336.
[233] United Nations Department of Public Information 1998.
[234] United Nations Department of Public Information 1998.
[235] Watts and Zimmerman 2002:1.

as domestic violence, also during pregnancy, and rape, until abuse of elderly women and widows. The abuse can be direct and physical, but can also come in forms of psychological abuse by family members and differential access to food and medicine.[236] The perpetrators who commit these abuses can be found anywhere: from complete strangers, through acquaintances, to their own family members.[237]

Violence against women is almost globally under-reported, and therefore it is difficult to collect exact figures. However, in the last 20 years, the documentation of evidence of such gendered violence has increased, and many organizations publish reports on the matter. For this reason, it is possible nowadays to have access to more data; but the figures are better seen as only minimum figures of the phenomena.[238]

Women suffer from violence, sexual or other, at an overwhelmingly high rate.[239] The World Health Organization (WHO) report from 1997 showed that every woman will be physically or sexually assaulted by a man at least ones throughout her life.[240] One out of every two women will be beaten at least ones by her husband. One out of every six women will be abused, physically or sexually, during pregnancy. In the US, about 9 out of 10 murdered women are murdered by men; about half of them by their partner.[241] According to a World Bank report from 1993, gender-based violence causes as much death and health problems for women aged 15-44 as does cancer. It is also a cause of ill-health for women more than malaria and traffic accidents combined.[242] Physical abuse in relationships does not end at just that. It is almost always accompanied by psychological abuse. In one third to half of the cases, it is also accompanied by sexual abuse. When it comes to the perpetrators, while women can be the violent perpetrators, the vast majority of partner abuse cases is committed by the male partner toward the female.[243] It goes even further than that: women worldwide, even if they are not or have never been victims of abuse, live their lives with a background fear of becoming victim of sexual violence. Women think about preventive measures to protect themselves against it, each and every day of their lives.[244]

The harm caused to the victims also relates to different areas of their lives: the most obvious one is of course the physical injury caused by the attack. However, the health risks for the victims can also have a much longer term affect, like unintended pregnancy, sexually transmitted disease, chronic pain and disability. Other risks are less visible, yet not less painful: the abuses erode the victims' self esteem, reduce

[236] Watts and Zimmerman 2002:1-2.
[237] Watts and Zimmerman 2002:1.
[238] Watts and Zimmerman 2002:1.
[239] Torrey 35-36
[240] Venis and Horton 1172
[241] Torrey 1995:35-36.
[242] Torrey 1995:35-36.
[243] Heise et. al 2002:S6.
[244] Torrey 1995:35-36.

their energy, can lead to depression and to drug and alcohol abuse, which of course have further health risk implications.[245]

The previous chapter discussed the growing view, the common one nowadays, of rape as a crime of violence and domination. A study of American college students, for example, from 1980, which was conducted through delivering surveys to the students, examined attitudes toward gender roles and marital violence. The analysis linked the students' answers with their sex and racial background (black/white). The findings showed that students who thought the men should be dominant over the woman in the family (i.e. "wear the pants"), also supported the man's right to use physical force to maintain his position. The more the responders had views which supported equality, the less they legitimized the use of physical force. The factors of race and gender played a lesser role in the attitudes toward violence than the attitude towards male dominance.[246] These ideas about male dominance and gender equality come from somewhere; these students, as all other people in our world, live within certain surroundings, communities and states.

While violence against women is a world-wide phenomenon, there is evidence of small-scale societies in which there is no domestic violence.[247] So where does it exist, and which powers legitimize and encourage it?

Violence against women is wide spread in many corners of the world, different cultures and regions.[248] On the personal level, men who abuse women have certain personal characteristics, such as being abused as a child or being exposed to marital violence, having an absent or a rejecting father and use of alcohol. But when it goes beyond the personal level of the individual perpetrator, other goals and cultural orders begin to unveil. It is connected to more than just the acts of violence themselves; it is a result of the overall gender structure, from the general society outside into the inside of the home.[249]

In marital violence, there is a strong factor of control of the male partner over wealth and decision making. The communities in which these partners live do not offer support for the women, while condoning and legitimizing male's violence, through their male peer groups. The overall society is many times one in which there are clear gender roles, through which the male is defined by toughness, male honor, or dominance. The perception is that the men have 'ownership' over women. The society is tolerant toward violence against women and children, seeing physical punishment as an acceptable form of solving disputes. In many countries, in different continents, men are seen to have the right to control their women's behavior, the husband has the justified right to 'correct' her by using violence. The actions which may trigger violence are ones which challenge the control of the man: not having food ready on time, talking back, not obeying the husband, refusing him sex, going somewhere without the husband's permission and so forth. This violence is

[245] Heise et. al 2002:S6.
[246] Finn 1986:235, 241.
[247] Hiese et. al 2002:S7.
[248] Watts and Zimmerman 2002:1234.
[249] Heise et. al 2002:S8.

therefore used as a tool to reinforce the dominance of the husband over his wife, and the existing gender norms.[250] The WHO report from 2002 also mentions social norms as a means of justification of violence against women. Not only that, but common taboos also prevent recognition of these crimes and services for their victims.[251]

Other cases of violence against women may not be as explicit in their goals, yet nonetheless carry the same consequences. For example, a man raping a woman could justify his crime by accusing the victim of being provocative, and by that she was punished for deviating from her societal gender role.[252] Studies have also shown that within couples in which one of the partners is dominant, whether it is the men or the woman, the dominant partner will be violent toward the other, to maintain their position. It is a further proof that violence is related to dominance, and not inherited in one gender or sex.[253]

Gender norms also result in women being prevented from objecting the dominance of the men, carrying the fear of being attacked or raped. So it is also the gender roles and status which make women more vulnerable to violence in the first place.[254] Women's fear plays an important role in their victimization: while men are more likely to be victims of violent crime, women are more fearful. Women are more likely than men to be victims of sexual violence. Their fear is related to their perceived vulnerability: they fear more, because they perceive themselves as being vulnerable, and not able to resist or escape attack if it happens. It is enough to know that some women have been victims for other women to be afraid.[255]

This also raises questions regarding women's subordinated position in society. Not only women, but also men would not necessarily be able to resist an attack, armed or otherwise, if it comes their way. But girls, and women, are taught to be careful instead of being taught how to protect themselves. Physical activity, mainly violent one, like self defense needs to be, is perceived as something that boys do, not girls. Strength, and standing up for yourself, raising your voice, being powerful, are characteristics which society teaches to boys, while girls are taught to be silent, accepting, not arguing. This results in women living in fear of attack, and not in their power to fight against it (or getting skills to fight against it). In this way, both the actual attack and the fear of it are two sides of the same coin.

The above shows the linkage between women's position in society and the treatment they receive in their own homes. On this idea lays the feminist call for public responsibility over the private sphere as one that carries. The woman who is abused at home, is abused because of social structures and beliefs, which shape people's knowledge and ideas, rewards certain behaviors and punish others. In

[250] Heise et. al 2002:S8.
[251] Krug et. al 2002:1087.
[252] Watts and Zimmerman 2002:1232.
[253] Straus 2008:252-275.
[254] Watts and Zimmerman 2002:1232.
[255] Yodanis 2004:657-658.

overall societies, and this is not new knowledge, women are subordinated and dominated not only in the private area, but in the public one as well.

Statistics from around the world show, that in countries in which women were more equal in public institutions and spheres, such as workplaces and higher education institutes, sexual violence was less common. However, the same relationship does not apply to other forms of physical violence. In the private sphere as well, women who were more educated or with a higher occupational position, were not less exposed to sexual violence than other women in the same country.[256] In general, in countries in which sexual violence was more common, women were more afraid than the men of the same country. [257]

3.3.3 Prosecution of Crimes Against Women Under the International Legal System

Violence against women is, therefore, something that is a result of social orders. It is not embedded in men, but rather is a result of social norms. It is more common in societies with certain norms, and less common in others. Their goal is to keep women subordinated. The victims suffer the violence, sexual and otherwise, not because of their personal attributes, but rather because of their identity as women. That is, because they belong to the collective of women.

The definition of genocide includes the "intent to destroy, in whole or in part", through different methods such as: killing members of the group, causing serious bodily or mental harm to members of the group, imposing measures intended to prevent births within the group. All these methods are inflicted upon women worldwide, only because they are members of the group of women. Even the criterion within the definition of genocide stating the deliberately inflicting on the group condition of life calculated to bring about its physical destruction in whole or part, is relevant. The first part, inflicting condition of life, covers for sure a method that is being used against women for being women: by denying women of education, control of the husband over money and resources, lower salaries which are given to women in relation to men, and more. While the women are not killed for destruction, all this is done with the intent to keep that group as a whole weak, powerless and dominated.
The final paragraph, "forcibly transferring children of the group to another group", is the only one which is not clearly inflicted upon women, whose role is seen as the central figure to raise children.

If violence against women answers in such a clear way to the definitions of crimes against humanity and genocide, why are therefore the acknowledged groups to suffer from it only "national, ethnical, racial or religious"? If genocide can, by definition, happen in times of peace, why is the constant violence against women all

[256] Yodanis 2004:669.
[257] Yodanis 2004:669.

over the world everyday not being prosecuted? International law protects the rights of minority groups who consist of low percentage of states' and the world's population.
Why then are the human rights of more than half of all humans not protected?

"Because so much violence against women takes place in what is called peacetime", says MacKinnon, "its atrocities do not count as war crimes unless war among men is going on at the same time".[258] MacKinnon stresses the point that if women were recognized as a group, violence against women would be recognized as genocide as well.[259] Why are then women not recognized as a group? Why is gender not recognized as a group?

Women are protected under the international criminal tribunals only when they are attacked under their related male's identity. The international community emphasizes to a great extent, through these definitions and the international criminal tribunals, the importance of these identity groups and their protection. But these groups, such as other orders and institutions, analyzed in this paper, are not natural; they were built and constructed, until seen natural in today's world.

While the overall commonsense view is that ethnicity is a personal property which one gets at birth, social sciences refer to ethnicity as one that is a product of social relationships.[260] Nationality is also a concept which uses power relations to form identity, which later seems natural.[261] The academic knowledge as a whole had vastly criticized the idea of identity, saying it is a result of power relations which construct it. Under this construction, the powerful gets the higher status of essentiality, while the weak, the woman in our case, receives a low, reduced status.[262]

Looking at this data, I would like to go back to what crimes against humanity are: crimes which are against a collective, not an individual.
The identity groups mentioned above were built and controlled by men. Under all these identities, through different mechanisms and ways, women are subordinated to the men of that identity group and are discriminated against. In other words, women are only protected by the highest levels of the international community through the identity of men. By emphasizing the high importance of the group, the international community reinforces and protects the existing world order in which these identity groups had developed. It says which identity form is more important than others.
"We have suffered", said a Rwandan woman after the genocide. "The men made war, and women suffer".[263]

[258] MacKinnon 2006b:6
[259] MacKinnon 2006b:14.
[260] Baumann 1999:59.
[261] Bekerman 2007:26.
[262] Bekerman 2007:26.
[263] Newbury and Baldwin 2000:3.

The ICTR prosecutes individuals who were responsible for large scale atrocities committed by their subordinates.[264] International law works through official entities; it enforces crimes committed between states or to an individual through the state; the exceptions which are done in the cases of crimes against humanity and genocide, the large scale of the actions often requires official backing or at least condonation.[265]

The domination gained by violence against women is supported by the existing male-dominated hierarchy of the nation state.[266] Under international human rights law, all governments are obliged to: "Prevent, investigate and punish acts of all forms of violence against women whether in the home, workplace, the community or society, in custody or in situations of armed conflict; Take all measures to empower women; Condemn violence against women and not invoke customs, traditions or practices in the name of religion or culture to avoid their obligations to eliminate violence against women; Develop and/or utilize legislative, educational, social and other measures aimed at the prevention of violence against women."[267]

However, according the UN Development Fund for Women (UNIFEM), 120 countries around the world do not have specific legal provisions against domestic violence. In at least 53 countries, rape is not a prosecutable offense.[268] Violence against women and girls around the world is treated with governmental apathy, silence or lack of interest. Not only that, but women suffer violence by states agents, which is also unreported, and not scrutinized.[269] It is, as shown here, a result of social norms and orders, which influence the minds of the perpetrators as well as the victims, and later on officially enable it. In other words, the man who abuses the woman does so not only on his own merit; he does so as a product of the society in which he lives. Although there is self responsibility which the individual should be accountable for, this context is important: because it is important to get to the root of the problem in order to solve it, and also as it is the frame through which international law operates and protects.

Standing by and enabling the killing can also be killing, says MacKinnon.[270] But not only her; the legal definition of genocide defines the acts of "direct and public incitement to commit genocide" and "complicity in genocide" as punishable. Looking at the above data, are states not responsible directly for exactly that? Why does protecting the identity of men through their cultural rights of have a priority over defending the women who are abused under these cultural rights?

[264] MacKinnon 2008:104.
[265] MacKinnon 2006a:15.
[266] Charlesworth and Chinkin 2000:235.
[267] Amnesty International n.d.
[268] United Nations Development Fund for Women n.d.
[269] Amnesty International n.d.
[270] MacKinnon 2006a:16.

Looking at the data, cannot states, states agents as well as formal entities within states, be found, at least in part, responsible for the punishable acts of "genocide", ”conspiracy to commit genocide" and "attempt to commit genocide" of women?

Chapter two discussed the role of the international criminal tribunals as one that goes beyond bringing legal justice to the victims of mass atrocities and accountability for the responsible. They also have a normative role, sending a message of the wanted universal norms to the entire world. The tribunals themselves were established to address atrocities which were too severe for the international community to handle, came instead of non acting national courts, set a clear message of what is accepted and what is not. They were built, like other advancements in international law, as a result of the observed existing reality, which needed response.

One particular difficulty of the feminist movement, as oppose to other liberation movements, is that women live with the "other group", the men, with whom they have strong contacts, which are important to them.[271] But the shared lives and identity which men and women have should not be a reason not to protect women. On the contrary, it makes it even more important, for the lives of all individuals and the world orders of everyone's daily lives.

Violence of men against women is not a force of nature; it is not necessary. It is norms, and it is the mechanisms that set, allow and defend those norms. Men do not have to be perpetrators; women do not have to be victims. But under the international criminal system, just like in their own states, women are yet to be protected. By addressing women as a group who needs protection, it is a clear case of seeing reality as it is and responding to it. It will send the message that violence against women is a priority. It will set universal norms of stopping violence against women.

3.4 Conclusion

The international legal system was conducted and constructed with the idea of enhancing justice and spreading norms around the world. The feminist movement has used this mechanism to promote women's rights and the recognition of women's particular concerns, something which it saw as lacking under international law theory and practice. This chapter had examined the link between feminist ideas and activities, and the international legal system, asking if the latter in fact promotes and protects the rights of women.

The use of feminist scholars and activists of the international ad hoc tribunals has many positive aspects. The feminist struggle had led to the recognition of gendered crimes by the tribunals, incorporating the feminist views. However, there are some disadvantages which come together with the conviction of gendered crimes under the international tribunals. First, radical feminism criticizes the patriarchal order as a

[271] Kamir 2002:6.

whole, and particularly the legal system and the international legal system which is built on experiences of men, representing men's interests. On one hand, it could be important to change that system from the inside. The Akayesu definition could be an example of that. On the other hand, by prosecuting sexual violence in war and in the context of war, under the existing structure and laws, it may even go against some of the women's interests. The tribunals prosecute for the rape of women only in the context of war, under their other identities, which were constructed by men. It may give the wrong impression, that rape is wrong only in the contexts of war. This view does not enhance the view of women as human, equal, bearers of rights, but rather the property of men under the certain identity group which was perpetrated. While the abuse of women is recognized, the real concerns of women, together with the goals of equality for women, are not promoted that way. They remain ignored.

Another aspect which is a mal result of the prosecution of gendered crimes under the international tribunals also has to do with identity. The tribunals convict of rape of women of a certain group, but overlook the mechanisms and social orders which oppress the women in their own societies. The tribunals prosecute one identity group (for example Hutu), which violated another group (for example Tutsi). By that, the violated group seems as the one that needs protection, as a whole. However, the mechanisms which oppress the women of the violated group are not different than the ones which allowed them to be abused by the perpetrating group. Under the tribunals, looking only at certain forms of identities, the oppression of women in their own societies is overlooked, and even accepted.

Another concern regarding the international tribunals and the protection of women's rights is more global, less particular to concrete tribunals and jurisdictions. Human rights were meant to protect individuals through normative ideas of what is accepted and what is not. The international tribunals are a tool which demonstrates those norms, sets them, recognizes humans which are entitled to protection. They were built to bring justice to victims, accountability from the part of the perpetrators, and protect individuals whose rights were violated. The tribunals do so by prosecuting the responsible for mass atrocities. Looking at the scale of violence against women, it is a global issue, affecting women around the world who are abused just because they are women. While these crimes take place often in private households and spheres, they do not stand alone. They are a result of social orders and beliefs, resulting from the view of women as having a lower status than men, which allows men to abuse them in order to maintain their dominance, and a result of this dominance. It is condoned socially, often not well protected and encouraged by states. The reality of violence against women worldwide matches the definitions of crimes against humanity and genocide. However, the international legal system does not mention gender as an identity worth protecting. It defines certain identities which are entitled protection by international law, and by that also defines the importance of certain social structures. These structures may seem natural, but are in fact constructed; the international legal system maintains them. It ignored a large group, whose members are being violated globally just for belonging to that group. By doing so, the international legal system fails to protect major concerns and problems, and chooses not to set the norms against them at the highest level.

General Conclusion

This study is dealing with the issue of women's rights, and their protection under the human rights system. As a point of observation, the international criminal tribunals are taken as a practical mechanism of promoting the written human rights. Practicality and theory are ever linked in both international law and feminism. The study shows the link between the two, and questions how well the harsh reality of women's rights violations is protected by the practical mechanism of the international legal system. As a point of evaluation, what are considered the most important developments of the international criminal tribunals in terms of gendered crimes in war, were chosen. The first being the acknowledgement of rape in war as a crime against humanity for the first time by the ICTY, and the second the broad definition of rape in war under the ICTR's Akayesu trial. The latter was also the first time in which rape in war was recognized as genocide.

Feminism had always criticized the legal system, while also using it to promote its goal. The first wave of modern feminism, the liberal wave, built on the same ideas of individual natural rights which lie at the basis of modern human rights. The liberal ideology, seeing every individual as a bearer of their own rights, transformed into legal rights and orders. An example of such legal rights would be the right to vote, and by that to have an influence over the regime and decision making, a right that had not existed before. However, women were not considered as individual bearers of those rights. These ideas that took over the world, had led women, which were not granted the legal rights that were given to men, to look at their reality of life. They linked their reality to the liberal ideology and demanded that the same rights that applied to men would be applied to them as well. The second wave of feminism, the radical one, starting in the 1960s, also evolved because women looked at their reality of continued discrimination and oppression. They claimed that society as a whole is patriarchal and based on patriarchal orders, and therefore these orders should be unveiled. Radical feminism, unlike the liberal one, looks at the discriminatory patriarchal order and strives to change the system as a whole, and not just at achieving equality in written rights and laws. Those feminists turned these experiences into theoretical knowledge, which was then the basis for struggle for change.

Feminism had developed, since its beginning and over time, several approaches to law, all of which criticize it. Besides the liberal and radical ones mentioned before, it also developed the cultural approach, looking at the differences between the ways of thinking of men and women, criticizing the legal system for following the masculine way and by that under representing women. Other approaches in feminism criticize the main approaches, the third world approach being a major example. The third world feminist approach looks at the interaction between different forms of identity which women have, different backgrounds and cultures, and the different views, needs and experiences they may have due to that. A subtlety in the approach which was seen as lost in the main two feminist waves.

The feminist criticism of international law only came at the end of the 20th century. It was mostly demonstrated by the radical feminist ideas. Just like the suffragists

looked at the liberal ideology, which called for individual rights for all, and asked that it would be given to them as well, these scholars looked at the human rights system, which granted protection for each individual under international law, and demanded it would be granted to them. They unveiled many discriminatory orders in human rights, as radical the feminist wave does, which may seem natural but are in fact constructed. From language, to the institutes it protects, to the discriminatory preference for the protection of the private from the public (which is a central radical feminist concern). Overall, according to these critiques, women are simply not even considered to be human, bearers of those rights. Human rights and international law seemed to ignore concerns which are particular to women, and reinforce orders which oppress them. In the human rights system, women are protected and represented through institutes which already discriminate them, the state being a central example.

The realities of war which led to human rights, based on the liberal ideology, also led to practical mechanisms constructed to protect those rights. The international criminal tribunals were set up after the world saw mass atrocities and violations of human rights, which needed response. Among other abuses and violations of human rights done in war time, sexual violence against women as a weapon of war had always existed. However, for many years it was not acknowledged or protected against by the same practical mechanisms which are meant to protect the violated humans. When the mass atrocities in former Yugoslavia and Rwanda brought upon the establishment of the ICTY and the ICTR in the 1990s, feminist activists saw the use of sexual violence in those wars and decided they should be recognized this time. This struggle was linked also to new views of rape as a crime of violence and dominance. The efforts of the movement finally led to these crimes being acknowledged by the international tribunals. It is important for a few reasons. First, the tribunals had the intention of bringing upon justice to the victims and accountability on the side of the perpetrators. But they also carry a normative role: they define what is accepted and what is not, internationally, what are the desired norms for humanity as a whole. By recognizing the violations of one's human rights, they recognized their humanity.

Another achievement is the broad definition of rape in war by the Akayesu judges under the ICTR. This definition has an important role in norm setting and intergrading theory with practice: the judges accepted the growing feminist view of sexual violence, acknowledged it, and put it into practice by convicting based on it.

Some years after these important developments, it is important to look how the international criminal system had evolved in the protection of human rights. Practically, as evidence show and as experts say, not much had changed through the tribunals. Not in jurisdictions afterwards, and not in the reality on the ground. What had succeeded was the change in the language used, the feminist one being more accepted. In reality, there is still much more to do in acceptance and change in terms of women's rights. Not only the tribunals but also many countries refuse to commit to protecting women's rights. By focusing on the international tribunals, radical feminism, which criticizes it, also accepts it. It accepts the focus of the tribunals on masculine forms of identity which discriminate the women who are a part of them.

By focusing on rape as a crime of war there is also the risk that rape will be seen as an atrocity only in the context of war. It ignores the violation of the women in everyday life, and can send an opposite message to the one intended: that rape in war is terrible because the ethnic, national, racial or religious identity had been attacked, not because it is bad in itself. That the protection of these identities is more important than protecting the violated women. Not only that, but by focusing on national, ethnical, racial or religious groups, the emphasis is put on one of these identity groups attacking another one. The tribunals protect the attacked group, and the mechanisms and social orders which oppress women, such as rejecting them after being raped by the other group, are not questioned. The abuse that women suffer by their own identity group, resulting from the same beliefs which allowed their abuse by the other one, is ignored, and even accepted.

This leads to the overall question of the protection of women under international law. Violence against women is not just a method of war between two different other groups in today's world's conflicts. It happens all the time, all over the world, in everyday life. Women all over the world suffer from different forms of violence, physical, sexual, violence resulting from cultural costumes which lead to fear – all of which, just because they are women. The scale and character of the violence against women perpetrated worldwide meet the definitions of crimes against humanity and genocide. It is not a force of nature, but rather it is a result of cultural and societal beliefs about the oppressed position of women. Violence is being acted out because of these beliefs, and is also used to maintain existing orders of domination over women. Women's rights are also not well protected by states, and many times remain ignored; societies condone and encourage it, and do not prosecute and punish the responsible. The definitions of crimes against humanity and genocide come to protect groups whose members are being abused, violated and destroyed for no other reason but belonging to that group. When looking at the reality of violence against women around the world, it answers both those definitions. Even the list of punishable acts by the ones accountable is being met. The only thing missing is that women as women cannot be recognized under the list of groups entitled for recognition as victims of these crimes.

The international criminal tribunals have important roles in bringing upon justice and accountability, and setting universal norms. The tribunals represent a tool that is used to prosecute the most horrible crimes, and by that recognizes them as such. But so far, while the international criminal tribunals are being acted when Tutsis in Rwanda are violated because they are Tutsi, and Muslims in Bosnia are violated because they are Muslim - women worldwide, who are being violated simply because they are women, do not receive protection as such.

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