INTERNATIONAL CRIMINAL JURISPRUDENCE OF SEXUAL VIOLENCE: A STUDY OF INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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INTRODUCTION

Sexual violence against women and girls has brought its own brand of shame to conflicts throughout human history. From conflicts in Bosnia to Peru to Rwanda, women have suffered rape, imprisonment, torture and execution. Sexual violence which is identified by psychologists as one of the most intrusive forms of trauma has been documented in many armed conflicts. Sexual Violence occurs in all wars, with dramatic variations in pattern and intensity. The conflict of Bosnia-Herzegovina witnessed the sexual abuse of Bosnian Muslim women which was so systematic and widespread that it constituted a crime against humanity in International Law. In Rwanda, sexual violence against Tutsi women took the form of Genocide. Depending on the type of conflicts and agents involved, sexual violence and its types vary accordingly. From sexualized torture, ethnic or political cleansing, combatants engaging in sexual violence only opportunistically and most commonly sexual violence carried out with the purpose of public shaming, it takes different forms, driven by a number of factors and motives.²

This prevalence of sexual violence has deprived women from exercising their civil and political rights, economic, social and cultural rights and also the rights to peace and development. Credible studies have undeniably identified the rise in this form of violence causing demise in

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the observance of human rights of women and girls.\textsuperscript{3} The recognition that gender-based violence has received under International Law is a recent endeavor to end impunity of gendered war crimes. The acknowledgement of sexual violence as a tactic of war was an important step in this regard. The failure of governments and local legal authorities to protect women and girls and hold the perpetrators accountable for their acts, raised concerns for the need of an international framework of law, to not just have a moral obligation on nations to check this but to also create a legal obligation to fix criminal responsibility for these crimes.\textsuperscript{4} The paper attempts to look into the role played by International Criminal Tribunal for Rwanda, challenges faced by the court in prosecution of sexual violence and the possibilities of further progress and enrichment in the law with respect to sexual violence and armed conflicts.

SEXUAL VIOLENCE AGAINST WOMEN DURING ARMED CONFLICTS; INSTANCES FROM RWANDA

The conflagration that destroyed the small densely populated country of Rwanda had been breeding for four years. This was fueled by a severe economic crisis and the ethnic polarization of Hutu and Tutsi (the two major ethnic groups of Rwanda). The Rwandan genocide resulted in shattering the dense local friendship networks and community systems that had consistently provided solace and support to women in events of violence previously as well. Women had their family members and friends killed or fled, neighbors and friends also turned into enemies. This resulted in their social dislocation creating an environment of fear, insecurity and also anger.


Under these conditions, societies collapsed and many women came to feel isolated, alone, and abandoned.\(^5\)

During the conflict of 1994, the perpetrators of the massacre began targeting women and children as well, along with men. Tutsi women in general were at risk. Also those women who were married to Hutu men, Hutu women married to Tutsi men, Hutu women who tried to protect Tutsis and Hutu women associated with groups seen as opponents of the Habyarimana regime. Though women individually also were at risk because of their gender but the risk got compound because of their group membership. All Tutsi women were targeted with sexual violence and torture simply because they were Tutsi and large numbers of them were killed. Educated and elite women also became a target irrespective of their ethnicity. Some Hutu women were subjected to violence in revenge for the violence perpetrated by Hutu men.\(^6\)

As Human Rights Watch has documented, an estimated 200,000 Rwandan women became victims of some form of sexual violence during the genocide. The militias and soldiers were particularly brutal towards the Tutsi women. Sexual abuse was used as a weapon to humiliate Tutsi as a group by targeting their women. The survivors of this barbarous treatment have been described as the “living dead”.\(^7\) Women were sexually mutilated, had to deal with chronic pain, in addition to the fear of getting AIDS and other sexually transmitted diseases along with the fear of unwanted pregnancies. The psychological trauma was equally worse. Women were often sexually abused women in public and were also forced to serve as “sex slaves” for Hutu men.\(^8\)

Testimonies of the survivors confirmed that sexual violence was extremely rampant and that

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thousands of girls and women were not only subjected to rapes, gang-rapes, but were also tortured with objects such as sharpened sticks and gun barrels etc. They were held in sexual slavery through forced marriage and were also sexually mutilated. After the killing and torture of their family members and relatives and the destruction and looting of their homes, women were then subjected to sexual violence and killed immediately after that.\(^9\)

Women who have been raped during conflicts are not only victims of sexual violence but also of political struggles and war. They are denigrated by the society. They are considered unmarriageable and some have to give birth to children who themselves are rejected by society. Clearly, these women have had to carry enormous burdens, particularly of caring for the surviving members of their own family. Many women being the lone heads of their family have to provide for food, clothing and house that too by continuing to live in a society which has already shunned them.\(^10\)

**DEVELOPMENT OF GENDER CRIMES IN INTERNATIONAL LAW; ESTABLISHMENT OF INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR)**

Rape, although outlawed under international humanitarian law and also covered, though implicitly, by international human rights law, was rarely the subject of international legal attention for a bigger part of the twentieth century. Although in international humanitarian law, rape is been considered a war crime, but it was only prohibited as a form of “humiliating treatment”, an “outrage upon personal dignity” and an “attack on honor”, instead of being treated as a crime of violence. It was also not named in the list of “grave breaches” which could have

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given an obligation to prosecute. The international criminal tribunals established after World War Two had jurisdiction over rape, but failed, on the whole, to prosecute it. The exclusion of sexual crimes in general from the Charter of the Nuremberg Tribunal despite having known that a gamut of sexual offences have been committed in the Nazi concentration camps, is a testimony of the great disregard for the crime of sexual violence against women during armed conflicts.\footnote{Hilly Moodrick, ‘Silence at the Nuremberg Trials: The International Military Tribunal at Nuremberg and Sexual Crimes against Women in the Holocaust’, \textit{Women's Rights Law Reporter}, Vol. 35, No. 1 (2013): 44-45.}

In relation to the Tokyo Tribunal, some rape cases were prosecuted (without any conviction), but despite having a good amount of knowledge about sexual crimes committed against the “comfort women” by the Japanese forces, there was no prosecution for these crimes at all. During the 1970s and 1980s there was increasing recognition at the UN level that violence against women was a human rights issue, however the Convention on the Elimination of Discrimination against Women, adopted in 1979, failed to have an include an explicit mention, or rather, have a provision criminalizing or at least condemning such violence. When international criminal tribunals were set up in the 1990s following conflicts in the Former Yugoslavia and Rwanda, there was again significant evidence of the systematic use of sexual violence against women (and later acknowledged against men), and rape was included in the jurisdiction of the tribunals as both a war crime and crime against humanity.

\textbf{Role of UN Security Council:} The following year of the conflict in former Yugoslavia, in the wake of mass slaughter and other crimes committed during the genocide in Rwanda, the United Nations appointed a Special Rapporteur for Rwanda in mid-1994. Consequentially, the U.N. Security Council established a Commission of Experts to look into the reports and allegations of serious crimes committed during the conflict in Rwanda. Obliged by evidence that over
600,000\textsuperscript{12} people have been killed in nearly 100 days period in Rwanda, the Security Council, again acting under Chapter VII of the U.N. Charter, took the much needed decision of establishing International Criminal Tribunal for Rwanda (ICTR) for the "Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for Genocide and other Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994."\textsuperscript{13} The Final Report of the Commission of Experts for Rwanda, while documenting substantive crimes in detail also noted that disturbing reports have been filed with the Commission of Experts which tells that during the conflict, abduction and rape of women and girls have taken place in Rwanda. The U.N. Special Rapporteur on Rwanda also declared that "rape was the rule and its absence an exception".\textsuperscript{14}

\textbf{Crime of Sexual Violence in ICTR:} The Statutes of the Rwanda tribunal has authorized the ad hoc tribunal to prosecute war crimes, crimes against humanity, and genocide. The definition of genocide in the Statute is similar to the definition contained in the Genocide Convention. The provisions of the ICTR statute encompassing gender or sex crimes are mentioned under the following core crimes:

\textbf{Genocide (Article 2 of ICTR):} ICTR has reproduced the definition of Genocide contained in the Genocide convention. The crime of Genocide is an international crime which puts an ‘individual criminal responsibility’ upon those either those committing it and also those facilitating it. The intent of the person committing the crime of genocide is what actually defines this crime. The


intent must be to destroy, wholly or partially, a national, ethnic, racial, or religious group, as such, by acts

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;”15

Sexual violence is placed under the above mentioned sub-elements as means or instruments of Genocide. If the intent of the perpetrator is to seriously harm or destroy, in whole or in part, a member of a group by any of the aforementioned methods, based on their group membership; that should constitute genocide. Often the destructive act can be both; systematic and intentionally random.16

**Crimes against Humanity (Article 3 of ICTR):** The term ‘crime against humanity’ first appeared in the Nuremberg Charter17 but the statute of ICTR has defined it differently to accord it a better scope in covering crimes of a wider spectrum. In essence, crimes against humanity include those inhumane acts which are committed as part of a widespread or systematic attack that is meant against a civilian population (this may include acts of murder, rape and torture). The most common manifestations of crimes against humanity are extermination and persecution. Rape becomes a crime against humanity when it is committed against a civilian population in a systematic and widespread manner. Article 3 of ICTR also includes acts of persecution, torture,
enslavement and other inhumane acts as crimes against humanity and sexual violence can be prosecuted under any of these sub-elements.18

**Violations of Common Article 3 and Additional Protocol II to the Geneva Conventions (Article 4 of ICTR):** The term common article 3 refers to the identical article 3 found in each of the four Geneva Conventions. It is considered a mini convention in itself dictating rules for the treatment of persons in internal armed conflicts.19 It has also been considered an important part of customary international law. Additional protocol, meant for internal armed conflicts and also included in the jurisdiction of ICTR, includes similar provisions. Common article 3 requires that humane treatment be given to persons not taking part in hostilities. It explicitly prohibits cruel treatment, torture, mutilation, outrages upon personal dignity and humiliating and degrading type of treatment. The jurisprudence of ICTR confirms that common article 3 does encompass various forms of sexual violence.20

The Statute of ICTR also has a provision for individual criminal responsibility (article 6) for persons participating in the crime by planning, instigating, ordering, committing, or otherwise aiding or abetting any of the above mentioned crimes (article 2 – 4). They statute also provides for superior criminal responsibility for persons in position of authority who knew or had reasons to know that a subordinate was about to commit such acts or had done so but still failed to take the any required measures to prevent such acts or to punish the perpetrators accordingly.21

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PROSECUTING SEXUAL VIOLENCE DURING ARMED CONFLICTS; ROLE OF ICTR:

The discourse of ICTR is one with a lot of success but yet a lot of challenges. In total, 93 people were accused of rape and other sexual crimes. Statistics for all 93 cases prosecuted by the Tribunal are as follows:

- 63 have been found guilty at trial;
- 12 have been acquitted at trial or on appeal;
- 2 indictments were withdrawn prior to trial;
- 3 accused died prior to or during trial;
- 10 cases have been referred to national jurisdictions (2 to France and 8 to Rwanda); and 3 accused, who remain fugitives from justice, are to be tried by the Mechanism for International Criminal Tribunals (MICT) which carries out a number of essential functions of the International Criminal Tribunal for Rwanda after completion of their mandate.22

Not all the cases of rape and sexual violence resulted in convictions for whatever reasons. In some cases the charges were dropped by the victims. Thereby creating a lot of confusion among the authorities and exposing a lot of loopholes in the handling of these cases. These led to the adoption of a manual to provide a global strategy to ensure that sexual violence is fully and effectively investigated and prosecuted, and that the welfare and security of victims and witnesses is safeguarded. The manual titled “The Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict”, was produced in 2008.

and was of great help in this regard. Accordingly, in 2011, the Committee produced a second manual entitled “Best Practices Manual on the Handling of Victims and Witnesses of Sexual Violence Testifying in International Criminal Tribunals”. The manual provided guidance on the management of victims and witnesses in both investigation and trial phases. 23

Today the law has come to a relatively substantial position to document and prosecute rape and other forms of sexual violence. This monumental task began in 1993 and 1994 after rape and sexual violence were specifically recognized as independent crimes within the statutes of ICTY and ICTR. Though ICTY was established prior to ICTR, but the predecessor went ahead with its first prosecution, making rape a war crime with the tribunal’s inaugural case of Jean Paul Akayesu. The judgment of the war crimes tribunal for Rwanda on Jean-Paul Akayesu was the first judgment for the crime of genocide under international law. It not only made rape a part of Akayesu’s genocide conviction but the decision has also advanced the world’s legal treatment of rape and sexual violence.24

- Prosecuting Rape as a War Crime; Case of Jean Paul Akayesu: This is one of the historic and landmark cases to have come before the ICTR. This was the inaugural case of the Tribunal. The case, been led by two young American prosecutors is believed to have achieved the success of ‘classifying rape as a war crime’. They won their case in 1998 and made history as sexual violence was declared part of genocide for the first time in the final verdict. This made new contributions to the handling of the cases of sexual violence by International Law. Pierre-Richard Prosper and Sara Darehshori, the lawyers who prosecuted the first genocide trial, said to the media in an interview - "Failure literally was not an option, too much depended on it. If we lost,

what would that mean to the victims and the survivors? Their deaths were not being recognized or valued. Before (the tribunal), rape and sexual violence was just seen as spoil of war. For the first time in history, sexual violence was given considerable significance as much as all the other crimes committed during the times of armed conflict."\(^{25}\) The crisis of sexual violence that followed with the mass killings occurred in the conflict so recurrently that Prosper and Darehshori realized the utter need to have rape classified as a war crime and a major constituting part of the genocide.\(^{26}\)

Charges on Akayesu in Accordance with the Definitions of Rape and Sexual Violence in the Statute: The prime accused Jean Paul Akayesu, was posted as the Mayor of that Taba commune from April 1993 until June 1994. Prior to that, he was also a teacher and a school inspector in the same commune. Being the Mayor, Jean Paul Akayesu had the responsibility of maintaining public order within his commune, which the subject to the authority of being the prefect. He was also the commanding authority over the communal police, as well as any other police placed at the commune during the time. He was responsible for the proper maintenance of laws and regulations and also the execution of justice.\(^{27}\) During the Rwandan Genocide of 1994, some Tutsis were indiscriminately slaughtered in Taba commune and others were subjected to different forms of violence and hatred. Not only did Akayesu refrained from ceasing the killings, but also allegedly personally supervised the murder of various Tutsis. He also accused to have issued a death list to other Hutus, and encouraged house-to-house searches to identify and locate the Tutsis. Tutsi women were subjected to multiple acts of sexual violence which were, many a

\(^{25}\) Melissa Jeltsen, 'A Look Back at the Trial that Made Rape A War Crime', 29\(^{th}\) July 2014, The Huffington Post.


times committed by more than one perpetrator. Sexual violence also accompanied threats given to Tutsis of death or bodily harm. The female civilians who got internally displaced in the conflict had to live with the constant fear of their life. Their physical and psychological health crumbled because of the sexual violence and beatings and killings. Akayesu had the knowledge of the acts of sexual violence, beatings and murders being committed and he himself was sometimes present during their commission. Jean Paul Akayesu encouraged the commission of these crimes by allowing them to be committed on or near his bureau premises. His presence facilitated the commission of sexual violence, beatings and murders and by failing to prevent them, he encouraged these activities.  

Under the Statute of ICTR, Akayesu was charged with - Genocide, Crimes against Humanity and Violations of Article 3 Common to the Geneva Conventions. Under the heading of Crimes against Humanity, Article 3(g), the Statute mentions of rape and sexual violence. Since there is no widely used and accepted definition of rape in International Law, it became paramount for the tribunal to reach to a particular definition of rape and to decide which acts would actually constitute rape. It was quite a task as the Tribunal observes that many of the victims and witnesses were using the term "rape" in their testimony. At times, the prosecution and the defense have also tried to drive an explicit description of what happened in physical terms, to conclude what the witnesses actually mean by the term "rape". The Tribunal noted that since rape has always been technically defined in jurisdictions across nations as non-consensual sexual intercourse, variations on the form of sexual violence may incorporate acts which involve the “insertion of objects and or the use of bodily orifices not considered to be intrinsically sexual”.

is defined rape in the Tribunal's view. The Chamber then defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, including rape, is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact." \(^{30}\)

The Chamber also noted in this context that coercive circumstances need not be confirmed through a show of physical force only. Acts such as threats, intimidation, extortion and other forms of duress, which cause fear or desperation, may also constitute coercion. Hence Akayesu was charged with Article 3(g) (rape) and 3(i) (other inhumane acts), Article 4(e)(outrages upon personal dignity) and Article 4(a) (violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment). Akayesu was also charged with 'individual criminal responsibility' under Section 6(1) and 6(3) of the Statute. \(^{31}\)

Summary of the Findings by the Chamber: Jean-Paul Akayesu was arrested in Zambia on 10 October 1995. He was indicted of over 13 that included genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions of 1949 and of Additional Protocol II of 1977. During the entire trial, forty-two witnesses were heard by the chamber, which were called by the parties. The proceedings carried on to produce more than 4000 pages of transcripts and 125 documents entered in evidence. \(^{32}\) On 17th June 1997, the Chamber also ordered addition of three more counts with respect to the allegations of rape and sexual violence by several other


witnesses who have recorded their testimonies before the chamber. Initially the accused was not found guilty of any of the charges against him. Of all the evidences and statements of experts and witnesses that came before the trial chamber, it left no room for doubt that there occurred a massacre and genocide in Rwanda in 1994 in order to completely exterminate the Tutsi population. Besides having said that, the court was supposed to carry out the proceedings of this case in a dispassionate and unbiased manner, assuming the accused to be innocent, until proven guilty.\footnote{Extraordinary Chambers in the Courts of Cambodia, Summary, Prosecutor v. Akayesu Judgment, Case No. ICTR-96-4-A ICTR Appeals Chamber, 1 June 2001, available at: http://www.eccc.gov.kh/en/document/court/prosecutor-v-akayesu-judgment-case-no-ictr-96-4-ictr-appeals-chamber-1-june-2001-para, accessed on: 4/10/2014.}

The Chamber finds that, throughout the period covered in the Indictment, Akayesu, in his capacity as the Mayor of Taba, was responsible for maintaining law and order in the commune of Taba and that he had sufficient authority over the communal police. Moreover, as one of the most prominent figures, the inhabitants respected him and followed his orders. It was also proved beyond doubt that a large number of Tutsis were massacred in Taba between April and the end of June 1994, under the authority of Akayesu as the Mayor of the commune. Knowing of such activities, he attempted to prevent them only for a short period, after which not only did he quit trying to maintain law and order in his commune, but was also present during the acts of violence and killings and sometimes even gave orders himself for killings and torture. As far as sexual violence is concerned, it was confirmed how Akayesu encouraged and watched over Hutu men being sexually violent towards Tutsi women. Numerous Tutsi women were forced to endure acts of sexual violence, mutilations and rape, repeatedly, publicly and often by more than one perpetrator. Tutsi women were purposely and methodically raped. One of the female victims also
testified to that by saying that "each time that you met assailants, they raped you". A large number of episodes of this kind of rape and sexual violence against Tutsi women came before the tribunal’s chamber. It has been proven that some armed policemen themselves were present while some of these rapes and sexual violence were being committed. Furthermore, it was also established that on several occasions, Akayesu’s presence, attitude and his provocative words, encouraged such acts. A witness even testified that Akayesu, addressed one of the perpetrators on one occasion who was committing the rapes and said "never ask me again what a Tutsi woman tastes like"

Chamber was satisfied that the acts of rape and sexual violence described above were targeted particularly against Tutsi women. Not only that sexual violence but many Tutsi women were also subjected to public humiliation, mutilation and rape that was repeated several times over, often in full public view, in the Bureau Communal premises of Akayesu and also in other public places. These rapes not only had physical but psychological impact on the Tutsi women, their families and the entire communities. Sexual violence was an integral part of the whole process of devastation.

In accordance with all the substantial testimonies brought before it, the Chamber concludes that in most cases, Tutsi women were raped and killed simultaneously in Taba in systematic attacks and hence it was a genocidal sexual violence. Many rapes took place near the mass graves where the women were taken to be killed. In this respect, it was made clear before the chamber that the acts of rape and sexual violence as well as other acts of serious bodily and mental harm which

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were carried out against the Tutsis was a reflection of the determination to make them suffer and to torture them unnecessarily even before killing them with the clear intention of destroying them together as a group, while simultaneously inflicting acute suffering in the whole process of genocide.”

Judgement of the Trial Chamber: On 2nd September 1998, Trial Chamber I of the International Criminal Tribunal for Rwanda, found Jean Paul Akayesu guilty of 9 of the 15 counts. Having heard the prosecutor and Akayesu in punishment of the above mentioned crimes, the chamber sentenced Jean Paul Akayesu to:

- Life imprisonment for the crime of genocide (Count 1).
- Life in imprisonment for crimes against humanity, extermination (Count 3)
- Life imprisonment for direct and public incitement to commit genocide (Count 4)
- 15 years of imprisonment for crimes against humanity, murder (Count 5)
- 15 years of imprisonment for the crime - - for crimes against humanity, murder (Count 7)
- 15 years of imprisonment for crimes against humanity, murder (Count 9)
- 10 years of imprisonment for crimes against humanity, torture (Count 11)
- 15 years of imprisonment for crimes against humanity, rape (Count 13)
- 10 years of imprisonment for crimes against humanity, other inhumane acts (Count 14)

The Chamber decides that the above sentences shall be served concurrently and therefore sentenced Akayesu to a single sentence of life imprisonment.\textsuperscript{37}

Arguments in the Appeals Chamber: Akayesu filed his appeal against his conviction and the charges placed on him. The principal ground of his appeal was that he was not given the counsel of his choice to represent him. The Prosecution also gave their four grounds of appeal. The Appeals Chamber however affirmed that the right to appeal of an indigent person to be represented by a lawyer free of charge does not simply imply the right to have an advocate of choice to be assigned to defend the accused. The Chamber also said that in this case there had been an abuse of this right at the expense of the international community. Consequently all other grounds of appeal, as well as the Akayesu’s appeal against the life sentence given to him by the chamber were also rejected. The Appeals Chamber after examining the arguments of Akayesu confirmed the judgment and life sentence for genocide.\textsuperscript{38}

**CONCLUSION**

Even in times of peace, sexual violence is a crime which is least reported. The problem is compounded in conflict situations where law and order breaks down and perpetrators are often people with authority such as armed forces etc. Victims in this situation have little hope of getting justice and are reluctant to report the assault in the first place. Women are skeptical about the international organizations like U.N. and do not know where to report. Survivors are also


reluctant in reporting because of the fear of shame and humiliation that may come their way from the community. Besides these personal reasons, for the prosecutors to prove the existence of the use of sexual violence as systematic and widespread, evidence in hundreds of cases is required. To achieve that, one of the greatest practical challenges on front of the tribunal is to provide security and medical, psychological and other social assistance to the victims and witnesses so that they can come to the tribunal and testify. The tribunal is short of financial means to provide all of this. Though several forms of reparations exist for the victims within the tribunal but they are not comprehensive or effective. Reparation to victims in the form of restitution of property and compensation to victims can be decided by the along with other support measures.39 However, the possibilities with regard to reparation in the form of restitution of property and compensation have produced no positive results for the victims.40

A greater challenge for the tribunal is the prosecution of military and political leaders on charges of sexual violence. To this date no man has been prosecuted exclusively on charges of sexual violence. Some feminist theorists are of the opinion that it is for some reasons difficult for international policy drafters, who are men primarily, to view sexual violence as a violation of a woman’s human rights. They consider it a private act of violence not worthy of international public prosecution.41