

The International Criminal Court and Restorative Justice: Community Reparations for Victim-Survivors of Sexual Violence

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Abstract: This paper investigates how the philosophic justifications for punishing perpetrators of sexual violence within international law evolved as our conceptualizations of sexual violence in warfare shifted, with a focus on the tension between deterrence and restoration. In the past decade, the prevailing understanding of sexual violence has begun to shift to a focus on the ability of sexual violence to destroy the social fabric of a community, which implies an emphasis on the restoration of community in the justice process with specific attention to the reintegration of victim-survivors. I reframe the debate to the practice of reparations as an effective form of restorative justice by the International Criminal Court. By analyzing the relationship between dominant theories of wartime sexual violence and justifications of punishment emphasized by the ICC, this paper demonstrates how emerging concepts of sexual violence in armed conflict imply the need for an amplified focus on restoration in the ICC. I draw from restorative justice literature to illustrate the potential of bottom-up, gender-sensitive reparative programs to provide economic relief to the entire community while simultaneously undermining structures of gender inequality and rethreading the social fabric by returning autonomy to the community to define their needs and values.

I. Introduction

Sexual violence as a human rights issue was still a novel concept at the inception of the International Criminal Court (ICC) in 1998. Historically, rape had been considered a natural byproduct of warfare rather than a prosecutable atrocity. There was not a single conviction for sexual violence in Tokyo or Nuremberg trials and the only reference to rape within the Geneva Conventions of 1949 described sexual violence as an ‘attack on [a woman’s] honor’ rather than an act of violence like torture or murder, reducing sexual violence to second-tier offense while reaffirming rather than challenging norms attaching women’s sexual value to their purity.¹²

The genocides in Yugoslavia and Rwanda, and the subsequent Tribunals established by the United Nations (UN) Security Council, brought systematic, widespread sexual violence to the forefront for the first time in history. The International Criminal Tribunal for the former Yugoslavia (ICTY), established in 1993, was the first body explicitly authorized to prosecute rape as a crime against humanity.³ The year following, the Statute of the International Criminal Tribunal for Rwanda (ICTR) authorized the prosecution of rape as a war crime in addition to a crime against humanity.⁴

The writers of the Rome Statute, the treaty ratified in 1998 establishing the ICC, relied heavily upon the rich jurisprudence of the International Criminal Tribunals. The ICC was created as a permanent court with jurisdiction over war crimes, crimes against humanity, genocide, and crimes of aggression.⁵ Sexual violence is included both as a crime against humanity under

¹ International Committee of the Red Cross. (1949, August 12). *Geneva Convention Relative to the Protection of Civilian Persons in the Time of War.* 75 UNTS 287.

² International Committee of the Red Cross.

³ Askin, K. (2004). “A. Decade of Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003.” *Human Rights Brief*, 11(3), p. 16.

⁴ Askin, p. 17

⁵ Askin, p. 19.

Article 7 and a war crime under Article 8.⁶ With the horrors of the Rwandan genocide and the break-up of the former Yugoslavia as well as the failures of the international community fresh in public memory, the ICC was erected on the bedrock of mixed philosophical traditions regarding justice and punishment.

This paper investigates how the philosophic justifications for punishing perpetrators of sexual violence evolved as our conceptualizations of sexual violence in warfare shifted. Most philosophic justification for punishment can be organized into five schools of thought: rehabilitation, incapacitation, retribution, restoration, and deterrence.⁷ Rehabilitation has largely remained absent within the philosophy of international law. The first principles on which international law relied were retribution and incapacitation, serving as the focal justifications for the Nuremberg and Tokyo trials, and retribution continues to be a central element of international justice.⁸ By the early 1990's, the ICTY and ICTR began to cite deterrence as an added objective of international criminal trials.⁹ Finally, the Rome Statute, in defining the purpose of the ICC, identified restoration as another intention of global institutions of justice. In this essay, I focus primarily on the tension between deterrence and restoration as two philosophic traditions present within the ICC's jurisprudence.

I focus on two approaches to rationalizing the existence of sexual violence in warfare. The first is a top-down, strategic explanation, promoted by feminist scholars in an attempt to

⁶ UN General Assembly. (1998, July 17). *Rome Statute of the International Criminal Court (last amended 2010)*.

⁷ Miethe, T. & Lu, H. (2012). *Punishment: A Comparative Historical Perspective*. Cambridge University Press, pp. 15-22.

⁸ See UN Charter for the International Military Tribunal, 1945: German officers of the Nazi party will be 'sent back to the countries in which their abominable deeds were done in order that they may be judged and punished.'

⁹ See Drumbl, 2004, p. 561: during *Delalić* trial, the ICTY referred to deterrence as 'probably...the most important factor in the assessment of appropriate sentences.'; Annual Report for ICTY, 1993: claimed one of the main aims of tribunal was to 'act as powerful deterrent'; Cronin-Furman, 2013, p. 437: asserted penalties on the accused are directed 'over and above [other reasons]...at deterrence, namely dissuading for good those who will attempt in future to perpetrate such atrocities.'

undermine the conventional wisdom of wartime rape as natural and inevitable and finally gaining recognition during the Tribunals. It conceptualizes sexual violence as a strategy of war ordered by high-level military officials exploiting the failure of international law to prosecute such crimes as human rights atrocities. This reasoning endorses the philosophy of deterrence and implies the ICC should pursue convictions as to dissuade future perpetrators and undermine the historical incentive of amnesty. More recently, a second approach has advanced a bottom-up, socialization explanation theorizing that instead of being ordered, rape is consciously or subconsciously adopted by combatants who realize sexual violence serves alternative objectives. This theory can then be subdivided into two alleged chief purposes: on one hand, the function of rape to *bond* combatants, and, conversely, the function of rape to *fracture* communities. The implication is that both variants of this theory do not assume a top-down approach, meaning that punitive approaches pursued by many activists fail to operate as a deterrent to future offenders.

This paper builds on the existing literature to maintain that wartime rape is best understood as an attempt to destroy the social fabric of the community by exploiting women's gendered social positions. As philosophies of justice develop alongside conceptions of sexual violence, then, the primary function of justice in ICC proceedings should not be deterrence, but *restoration* of the community, with a specific focus on the reintegration of victim-survivors in a way which alleviates the economic, social, physical, and psychological burdens they experience.

I begin by detailing the top-down explanation of sexual violence in armed conflict and its subsequent support for a focus on deterrence by the ICC. Next, I differentiate between the two sub-theories within the bottom-down explanation, the community-centered approach and the combatant-centered approach, and the consequences of these theories on international law and philosophies of justice. Finally, I argue that the community-centered bottom-up conception

implies restoration, not deterrence, as the most appropriate philosophic tradition from which to draw in the ICC's justice process, focusing on the capability of community restorations to repair the social fabric and reintegrate victim-survivors.

II. Top-Down Conception of Sexual Violence & Justice

Prior to the creation of international crime tribunals in the 1990's, much language around rape assumed that it was an inevitable byproduct of war, fueled by men's sexual desire in a lawless environment, therefore relieving perpetrators of responsibility for their actions and reducing women to the spoils of war and the natural object of men's primal urges.¹⁰ Gradually, scholars and activists began to challenge this perception, asserting that rape is above anything a crime of belligerence, domination, and violence. In other words, rape is not sexual but instead 'extreme violence implemented, of course, by sexual means.'¹¹ By 1975, Brownmiller had written: 'Man's discovery that his genitalia could serve as a weapon to generate fear must rank as one of the most important discoveries of prehistorical time, along with the use of fire, and the first crude stone axe.' However, unfortunately, the concept of rape as a distinct wartime atrocity did not gain widespread recognition until the widely publicized horrors in Rwanda and Bosnia-Herzegovina.

The reconceptualization of rape as a weapon of war was formalized in the consequent international crime tribunals established by the United Nations, the ICTY and ICTR. The ICTY, established in 1993, was the first body explicitly authorized to prosecute rape as a crime against

¹⁰ Seifert, H. (1994). "Prologue." In Stiglmeier ed., p. 55.

¹¹ Seifert, p. 55.

humanity.¹² Judge Florence Mumba of Zambia, presiding over the first conviction in the ICTY, declared: ‘Rape was used by members of the Bosnian Serb armed forces as an instrument of terror.’¹³ The Trial Chamber of the ICTR in the *Akayesu* trial Tribunal ruled that acts of sexual violence constitute an element of genocide:

‘as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute....one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm...Sexual violence as an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole....Sexual violence was a step in the process of destruction of the [T]utsi group—destruction of the spirit, of the will to live, and of life itself.’¹⁴

In 2008, the UN published Resolution 1820, noting that sexual violence can be ‘a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group.’¹⁵ This norm gained notoriety in the public sphere as well in part due to its reinforcement by public figures like Angelina Jolie, who spoke to the UN Security Council, calling rape a ‘preventable war crime that should be confronted with the same determination as the use of cluster bombs and chemical weapons.’¹⁶

¹² Askin, p. 16.

¹³ Lamb, C. (2020). *Our bodies, their battlefields: War through the lives of women*. Scribner, p. 161.

¹⁴ Davis, P. (2000). “The Politics of Prosecuting Rape as a War Crime.” *The International Lawyer*, 34 (4), p. 1244.

¹⁵ United Nations Security Council. (2008, June 19). *Resolution 1820*.

¹⁶ Lamb, p. 401.

Implications for International Law

The perspective that high-level commanders explicitly order rape as a military tactic brings into the conversation the concept of impunity. The UN recognizes that impunity for crimes of sexual violence in armed conflict has historically been the rule, leading some scholars to believe that impunity acts as an incentive for militaries.¹⁷ Cohen cites an unpublished manuscript by Mia Bloom entitled, ‘War and the Politics of Rape: Ethnic v. Non-Ethnic Conflicts?’ in which Bloom argues that because combatants know that historically rape has not been prosecuted internationally, they consider rape to be as effective a tool as mass murder but without the same risk of persecution.¹⁸ Askin adds that because of the burden of shame placed on victims, there is a strong disincentive to reporting sex crimes, therefore little disincentive to commit sex crimes.¹⁹ These suggest that rape is intentionally chosen because it is seen as a ‘cheap’ alternative to other forms of violence while still proving as effective, suggesting a set of policy remedies focused on prosecution.

Increased prosecution as a solution draws on the logic of deterrence. At the root of deterrent philosophy is the concept of a rational actor who weights the costs and benefits of committing criminal acts; therefore, punishment is an attempt to raise the cost of deviance from socially and legally acceptable behavior.²⁰ In international law, proponents of deterrence would expect to see

¹⁷ United Nations. (2022, March 29). *Conflict-Related Sexual Violence: Report of the United Nations Secretary-General*.

¹⁸ Cohen, D. K. (2016). *Rape During Civil War*. Cornell University Press, p. 32.

¹⁹ Askin, D. (2005). The Jurisprudence of International War Crimes Tribunals: Securing Gender Justice for Some Survivors. In Durham & Gurd ed. p. 126.

²⁰ Meithe & Lu, p. 20.

human rights abuses decrease as prosecutions for war crimes and crimes against humanity increase due to a shift in the cost-benefit analysis of military leaders and potential war criminals.

Deterrence did not become a central tenet of the liberal model of global justice until the Tribunals in Rwanda and the former Yugoslavia. While deterrence is not cited as a primary purpose of the tribunals in either Statute, references to deterrent principles have appeared repeatedly in trials and reports since then. The 1993 annual report of the ICTY plainly references retribution, deterrence, and restoration, respectively, claiming the purposes of the tribunals are ‘threefold: to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace.’²¹ Shortly after, the report states:

‘One of the main aims of the Security Council was to establish a judicial process capable of dissuading the parties of the conflict from perpetrating further crimes. It was hoped that, by bringing to justice those accused of massacres and similar egregious violations of international humanitarian law, both belligerents and civilians would be discouraged from committing further atrocities. In short, the Tribunal is intended to act as a powerful deterrent to all parties against continued participation in inhuman acts.’²²

Similar allusions were present in the ICTR proceedings. In the *Kambanda* case, the Trial Chamber noted: ‘The penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished,

²¹ United Nations Security Council. (1993, August 29). *Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*.

²² United Nations Security Council, 1993.

and over and above that...at deterrence, namely dissuading for good those who will attempt in future to perpetrate such atrocities', therein giving deterrence precedence over retribution as the chief purpose of punishment.²³

While the statutes establishing the ICTY and the ICTR were barren of explicit references to deterrent, the Rome Statute, the treaty which created the ICC, wrote into its preamble that the court was 'determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.'²⁴ The importance of deterrence has been increasingly underscored by prominent ICC figures; Judge Silvia Fernandez de Gurmendo asserted accountability is important for confronting the past but also 'an essential element of prevention. We have to demonstrate that there are consequences for those who commit genocide, crimes against humanity and war crimes.'²⁵

The assumptions of a top-down approach implicate deterrence as the primary function of the ICC. In this line of reasoning, by prosecuting perpetrators of sexual violence more aggressively, the international justice system raises the cost of committing sexual violence. As a result, the rate at which commanders order sexual violence would diminish as the cost-benefit equation shifts.

III. Bottom-Up, Combatant-Centered Conception of Sexual Violence & Justice

Wood refers to the two previous conceptions of wartime rape as strategic explanations versus opportunistic explanations. The strategic theorists believe rape is intentionally chosen adopted by

²³ Cronin-Furman, K. (2013). Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity. *The International Journal of Transitional Justice*, 7, p. 437.

²⁴ United Nations General Assembly, 1998.

²⁵ International Criminal Court. (2016, July 17). *ICC President Statement on the occasion of 17 July 2016, Day of International Criminal Justice*. <https://www.icc-cpi.int/news/icc-president-statement-occasion-17-july-2016-day-international-criminal-justice>

commanders in pursuit of group objectives while opportunistic theorists believe rape is carried out for individual reasons, like sexual desire.²⁶ Wood offers a third conception: practice, or rape that is not ordered but simply tolerated by commanders. In a collaboration between Wood, Green, and Cohen, the three describe the ‘practice’ of sexual violence:

‘In these setting, combatants often participate for social reasons, such as a desire to conform to the behavior of other in the unit. Commanders tolerate rape by their combatants because effective prohibition may entail disciplining otherwise-capable troops, expending scarce resources on a behavior infraction that the commander does not see as serious, or withholding what combatants may understand to be appropriate spoils of war.’²⁷

Diken and Lausten examine the social aspect of rape more closely in their article, ‘Becoming Abject: Rape as a Weapon of War,’ differentiating between guilt and shame. While shame, as the victims experience it, is an isolating experience, guilt can create a sense of solidarity among soldiers, which they refer to as a ‘brotherhood of guilt.’²⁸ This serves a dual purpose by additionally providing incentives to not abandon the war effort, and therefore the community of combatants they have created: ‘What, within a closed community of soldiers, is understood as guilt (as a transgression which proves one’s manhood and loyalty), is transformed into shame as soon as the soldier leaves this community.’²⁹ Coomaraswamy adds that the ‘public spectacle’

²⁶ Cohen, D. K., Green, A. H., & Wood, E. J. (2013). Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward. *United States Institute of Peace, Special Report 323* (February 2013), p. 10.

²⁷ Wood, Green, & Cohen, p. 10.

²⁸ Diken, B. & Lausten, C.B. (2005). Becoming Abject: Rape as a Weapon of War. *Body & Society, 11* (1): pp. 111-128.

²⁹ Diken & Lausten, p. 124.

aspect of a gang rape, for instance, ‘strengthens bonds and comradeship among fellow soldiers or militias’ with the intention to ‘create shared experiences among the men.’³⁰

Cohen constructs a similar argument around a concept she dubs “combatant socialization” in her 2016 work, *Rape during Civil War*. Cohen argues that armed groups suffering from low intragroup cohesion use gangrape as a ‘socialization tool’ during which victims act as a ‘vehicle’ for creating status and social bonds.³¹ Central to Cohen’s theory is the potential that rape is not necessarily a military order or even a conscious choice by combatants, but instead an act committed with a subconscious goal of strengthening social bonds among officers.

Implication for International Law

A key tenet of the top-down, strategic explanation is the belief that rape is considered a ‘cheap’ weapon, as in one with comparably less consequences. However, Cohen and others dispute this assumption. In an article coauthored by Cohen and Nordås, the two argue that rape may not be as costless as others have suggested:

‘Instead, sexual violence often comes with significant costs to the armed group and individual perpetrators, including the risk of turning the civilian population against the group and undermining its political goals as well as the emotional toll of perpetrators, the time it takes to perpetrate, and the risks of disease (particularly sexually transmitted infection) that can harm a group’s ability to fight.’³²

³⁰ Coomaraswamy, R. (2005). Sexual Violence during Wartime. In Durham & Gurd ed. p. 55.

³¹ Cohen, p. 2, 38.

³² Nordås, R, and Kay Cohen, D. (2021). Conflict-Related Sexual Violence. *Annual Review of Political Science*, (24), pp. 200-201.

Further, Loken, Lake, and Cronin-Furman argue that rather than possessing freedom to commit sexual violence with impunity, governments at war can in fact leverage accountability for sex crimes to gain moral legitimacy and political authority by drawing on the symbolism of female victimhood.³³ This is not to say that women boast a protect status in warfare or that women receive some privilege over men in that violence against them is taken more seriously. First, the commitment against sexual violence is largely rhetorical; second, it is built from assumptions of women's inherent weakness and victimhood; and third, it demonstrates yet another way in which the politics of violence are carried out on the grounds of female bodies. But it does imply that governments in the twenty-first century do have an incentive to prosecute sexual violence, in contrast possibly to the global system prior to the genocides in Rwanda and Bosnia-Herzegovina and may not be the costless crime which some literature implies.

In summary, violence ordered by commanders versus violence tolerated by commanders follow two completely different logics and demands very different policy solutions. Cohen maintains the narrative of impunity as the root cause of wartime rape is dangerous because it refocuses our policy interventions to closing the 'so-called impunity gap,' producing ineffective policies.³⁴ As this relates to deterrence theory, if rape in warfare is not due to the instruction of higher-ups, then increased cost for commanders ordering rape will not impact the level of sexual violence one can expect to see, meaning deterrence serves as a weak justification from which to draw authority.

³³ Loken, M., Lake, M., & Cronin-Furman, K. (2018). Deploying Justice: Strategic Accountability for Wartime Sexual Violence. *International Studies Quarterly*, 62: pp. 751-764.

³⁴ Cohen, 2016, p. 197.

IV. Bottom-Up, Community-Centered Conception of Sexual Violence & Justice

The performative and social aspect of sexual violence in armed conflict serves two primary purposes. Diken and Lausten describe this divergence as the distinction between guilt versus shame. Shared guilt between soldiers works to bond combatants and create a ‘brotherhood’; conversely, shame traumatizes both the survivor and her community, isolating the victim and undermining the social structure.³⁵ Thus, wartime rape ‘both creates and destroy communities (of the perpetrators and the victims respectively).’³⁶ The previous subset of the socialization theory focused on the brotherhood of guilt, while this section investigates the shame bore by the victim-survivor, her family, and her community.

The powerful capability of violence against women to gut the vitality of a community has not gone unrecognized. In *German Atrocities: Their Nature and Philosophy*, Allied propaganda distributed throughout the West, the author Newell Dwight Hillis warns British troops: ‘Now the German war staff fully realized the true value of the atrocity [rape]...they hoped that when the news of their crime reached the armed opponent, the atrocity committed upon his wife or child would break his nerve and leave him helpless to fight.’³⁷ The Warburton report, issued in February 1993 to investigate the extent of rape in the breakup of the former Yugoslavia, testified that rape had been ‘committed in particularly sadistic ways, so as to inflict maximum humiliation on the victims, on the families, and on the whole community’ and ‘perpetrated with the conscious intention of demoralizing and terrorizing communities.’³⁸ In the wake of Guatemala’s devastating civil war, the Human Rights Office of the Archdiocese of Guatemala released an

³⁵ Diken & Lausten, pp. 112-114.

³⁶ Diken & Laustetn, p. 114.

³⁷ Brownmiller, S. (1975). *Against Our Will: Men, Women, and Rape*. The Random Home Publishing Group, p. 45.

³⁸ WomenAid International. (1993). *Warburton Mission II Report*.

official report denoted theatric sexual violence was intended to ‘degrade women through their sexuality....and to use the intimate aspects of womanhood to add a measure of exemplary terror for the benefit of the population.’³⁹

Dr. Mukwege, gynecologist, human rights activists, and Nobel Peace Prize laureate from the Democratic Republic of the Congo, delineates the function of public rape to fracture community long after the conflict is over:

‘In DRC, rapes usually happen in public.... The perpetrators force their families to watch these excruciating scenes. The raped woman is dishonored and her husband is humiliated. He then leaves his home to hide out somewhere where nobody knows him... These public rapes also lead to the victim’s loss of identity. It’s not unusual for a patient to tell me, ‘I am no longer a woman.’ As for men...they feel they are no longer worthy of being fathers. The situation is just as dire, or even more so, for children born from rape. They are rejected by their own community. They are called ‘children of snakes’, ‘genociders’ – a whole terminology is put in place to deny their humanity. Individual loss of identity means that people no longer recognize themselves as members of their own community. Points of reference are lost, roles are confused, *social cohesion is destroyed.*’

Gang rape, like Mukwege describes above, is a form of sexual violence which exists very rarely in peacetime yet abundantly in wartime, and this is due to the authority imbedded within

³⁹ Recovery of Historical Memory Project. (1999). *Guatemala, Never Again! The Official Report of the Human Rights Office, Archdiocese of Guatemala*. Human Rights Office of the Archdiocese of Guatemala.

its social and performative aspect. In a lengthy series of field interviews in Sierra Leone, Cohen found gang rape was frequently a public spectacle, performed in front of an audience of family members, neighbors, and other combatants.⁴⁰ MacKinnon describes the gangrapes committed by Serbs against Bosnian Muslim women as “a rape to be seen and heard and watch and told: rape as spectacle. It is a rape to drive a wedge through a community, to shatter a society, to destroy a people.”⁴¹

Performance is what endows violence with meaning. Fujii emphasizes how performative violence exploits the relationship between the individual body and the social body, drawing communicative power from the body’s ‘capacity to stand in for entire categories of persons.’⁴² In this sense, every rape has two devastating dimensions: ‘an intimate violation of a woman’ and concurrently ‘a grotesque public display of domination.’⁴³ Through this dualism, the rape of a woman is understood as the symbolic rape of her community, one in which the entire community is forced to participate.

This power of performative rape draws from the rich symbolism of women due to their social positions within society: as mothers, matriarchs, creators of life, the members with the ability to regenerate community and safeguard the group’s identity and culture, the ‘symbolic bearers of the future of their cultural and ethnic identity and as responsible for future generations of their community.’⁴⁴ Women act as a binding agent in their community and family, an especially

⁴⁰ Cohen, p. 106.

⁴¹ MacKinnon, C. (1994). Rape, Genocide, and Women’s Human Rights. In Stigmayer ed., p. 190.

⁴² Fujii, L. A. (2021). *Show Time: The Logic and Power of Violent Display*. Cornell University Press, p. 8.

⁴³ Chesterman, S. (1997). Never Again...and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond. *Yale Journal of International Law* 22: p 300.

⁴⁴ Lindsey, p. 23. See also Lieby, p. 446: ‘[women’s] identity as the bearers and protectors of a community’s culture and future generation’; Diken and Lausten, p. 115: ‘If one aims to destroy an ethnic group, women are good targets due to their position in the family structure.’

significant role in wartime as this sense of community can be a source of strength and resiliency for the morale of a group.

Implicit in many of these perspectives is a belief in a degree of ‘ownership’ of the women in the community by the men, tied to their self-assigned role as ‘protectors’ of their women’s ‘virtue.’ In a time of war, rape is considered an attack by men upon men, demoralizing and emasculating the enemy through their failure to protect their women, their property. This is the stamp of ‘ultimate humiliation’ communicated ‘from man to man’, after which the conquered is ‘wounded in their masculinity and marked as incompetent.’⁴⁵ The ultimate objectification occurs wherein the body of a woman holds power insofar as its ability to humiliate one’s opponent while the experience and subjectivity of the woman is dismissed.

The equivalence between women’s value and their sexual purity, imbedded in society prior to—yet reaffirmed during and after—wartime, has dangerous and long-lasting implications for the victim-survivor post-conflict. She is unable to reintegrate into society. If she is not married, she is considered dirtied and unmarriageable. If she is married, she is often abandoned by her husband, sometimes killed to ‘protect her honor.’ The husband of a 22-year-old Muslim woman who survived the invasion of Serb soldiers said if his wife admitted to being raped, he would ask for a divorce ‘...even if I had 20 children. I don’t hate her, but the story is before my eyes. I feel very cold toward her. [Kissing her] is like kissing a dead body.’⁴⁶

She is rejected by her family and ostracized by her community. The symbolism carries over into peacetime, where her existence continues to represent the humiliation of her family and society. She is ‘defiled’: ‘a disgrace to her family and her (national, religious, political)

⁴⁵ Brownmiller, 38; Seifert, 59.

⁴⁶ Davis, p. 1223.

community' as well as a physical embodiment of the trauma and loss they endured.⁴⁷ A victim-survivor of rape during the Guatemalan Civil War describes how the violence her family experienced devastated their relationships: 'I was left in the street, no one left to look out for me. I have two daughters...they never came back to visit me, since they were also raped by the ones responsible. They left me alone. I am barely surviving. If I die I don't know who will bury me.'⁴⁸

Sometimes she is burdened with sexually transmitted infection, vaginally tearing, internal bleeding, or a child borne of her trauma. Without the support of her husband or family, she becomes financially vulnerable. Throughout all this and for the remainder of her life, she carries with her the memory of her violation, the fear and pain and humiliation.

A retired Bangladeshi army officer, Honorary Captain Abdul Suhan, reflected on the experience of the *birgongona*—the title given to women raped in the Bangladeshi war for independence:

'[A]fter the war men like me got garlands and help while these women got nothing and had to hide away. Those women who were well-off ended up in silence while those who were poor ended up begging. Some hung themselves with their saris.... When I die, like all the freedom fighters, government people will come, they will place a flag on my coffin and a bugler will play. When a *birongona* dies, there will be nothing.'⁴⁹

⁴⁷ Folnegovic-Smalc, V. (1994). Psychiatric Aspects of the Rapes in the War against the Republics of Croatia and Bosnia-Herzegovina. In Stiglmeier ed. p. 176; Brownmiller, S. (1994). Making Female Bodies the Battleground. In Stiglmeier ed. p. 181.

⁴⁸ Recovery of Historical Memory Project, p. 44.

⁴⁹ Lamb, p. 94.

Implications for International Law

The concept of sexual violence as destruction of community does necessitate top-down instruction. Rape *can* be ordered as an intentional military strategy, but it can also, as is more often the case, be a tactic in a part of a broader campaign to ravage an enemy community, a tactic chosen by combatants subconsciously or consciously because of the ability of displayed violence against women to break the community's will and devastate the social fabric. Because the community-centered theory *and* the combatant-centered theory do not assume sexual violence to be a strategic tactic ordered by high-level military officials, the prosecution of high-level officials will not prevent sexual violence in conflict. Therefore, the logic of deterrence fails. Conversely, if the intent of rape is destruction of community, then the most applicable philosophical justification would be restoration.

Restoration is best understood not as a rigid prescription of how to address crime, but instead an alternative framework for understanding harm and justice. Restorative justice draws from indigenous and pre-colonial models of justice that understand crime as 'a wound in the community, a tear in the web of relationships' and these violations create needs and obligations, primarily to repair the harm caused by crime.⁵⁰ The focus on the justice system is on meeting these needs and ensuring that the primary 'stakeholders', those most impacted by the crime (namely the victims, offenders, and community) have a central role in the justice process. Theoretically, the harm is repaired 'in a way that contributes to the restoration of harmony and wholeness in the wider circle of relationships in family, community, and society.'⁵¹

⁵⁰ Zehr, H. (2015). *The Little Book of Restorative Justice: Revised and Updated*. Good Books, p. 29.

⁵¹ Schweigert, F. J. (2002). Moral and philosophical foundations of restorative justice. In J. Perry (Ed.), *Restorative justice: Repairing communities through restorative justice* (Ch. 2. pp. 19-37). Lanham, MD: American Correctional Association, p. 20.

Central to restorative justice is the idea that the justice process must begin with and belong to those most impacted by the crime: first the victim, then the community. It seeks to empower victims by maximizing their participation in the pursuit of justice and in doing so, restore the sense of autonomy stolen in the crime, recognizing that in traditional modes of justice, ‘disproportionate attention [is] given to offenders, often at the expense of victim.’⁵² Just as the participation of victims is central, as should be the participation of the community. Restorative justice also identifies the needs and obligations of offenders, but this paper will focus on the role of victims and communities.

The Preamble to the Rome Statute demonstrates the hybrid nature of the ICC’s normative jurisprudence, appealing to restorative, retributive, and deterrent principles all within a few lines:

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time [*restoration*]...Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished [*retribution*]....Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes [*deterrence*].⁵³

In December of 2012, then President of the ICC Judge Sang-Hyun Song addressed the World Parliamentary Conference on Human Rights in Rome, claiming, ‘The Rome Statute and the ICC

⁵² Oudshoorn, J., Jackett, M., & Amstutz, L.S. (2015). *The Little Book of Restorative Justice for Sexual Abuse: Hope through Trauma*. Good Books, p. 2.

⁵³ United Nations General Assembly, 1993.

bring retributive and restorative justice together with the prevention of future crimes.’⁵⁴

Generally, the ICC considers its restorative elements to be primarily the incorporation of victim participation as well as the option to request reparations, while the punishment of war criminals embodies the retributive aspect.

The ICC permits the first formal channel through which victims can participate in proceedings and request reparations. A booklet published by the ICC claims that embodies the ICC’s philosophy that ‘true justice is achieved when the voices of victims are heard and their suffering is addressed.’⁵⁵ Victims participate by giving testimonies to a legal representative; they very rarely appear in court and are instead represented through the appointed lawyer, often representing the voices of dozens of victims.⁵⁶ If a defendant is convicted, victims can request the judges to order reparation, to be disbursed through the convicted or, if the convicted is indigent, through the Trust Fund for Victims.⁵⁷ The ICC distinguishes between three forms of reparations, any of which can be individual or collective:

- a) compensation: monetary compensation ‘for physical and mental harm, loss of earnings, pain, suffering, emotional distress and lost opportunities’;
- b) restitution: resources aimed ‘to re-establish, as far as possible, the situation that existed for the victims prior to the harm they suffered’; and

⁵⁴ Garbett, C. (2017). “The International Criminal Court and Restorative Justice: Victims, Participation, and the Processes of Justice.” *Restorative Justice*, 5 (2), pp. 198-199.

⁵⁵ International Criminal Court Booklet. (2022). *Victims before the Court*. (accessed 22 Sep 2022).

⁵⁶ International Criminal Court Booklet. (2022). *Victims before the International Criminal Court: A guide for the participation of victims in the proceedings of the ICC*. (accessed 22 Sep 2022); Garbett, 2017.

⁵⁷ ICC Booklet. *Victims before the International Criminal Court: A guide for the participation of victims in the proceedings of the ICC*

- c) rehabilitation: funds intended to ‘cover costs of medical, psychological or psychiatric care, as well as social, legal and other services needed to restore victims’ well-being and dignity.’⁵⁸

The ICC has undoubtedly placed more significance on the role and experience of the victim than any other institution of international criminal justice, yet there are substantial flaws in the application of their victim-centric approach. To begin, victim-survivors are removed from decision-making, reduced to objects of justice rather than subjects. The exclusion of the victims from the in-person court proceedings as well as any substantial decision-making leads Garbett to claim the participation of the victims is ‘limited to ensure the retributive structure of the ICC’s proceedings...[and] largely symbolic and not substantive in form.’⁵⁹

Christie outlines her concept of conflict as ‘property’ which in the Western legal system is taken from the victim and the community and appropriated by the state.⁶⁰ The survivor and their community have then been victimized in two senses: first by the offender, but ‘secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important ritual encounters in life.’⁶¹ It robs the victim of the opportunity to regain the power and autonomy they lost in the crime while ‘undermin[ing] our sense of community.’⁶²

Additionally, one of the most critical needs of a victim is acknowledgement of what happened to them, for the offender to recognize the harm they have caused and take

⁵⁸ ICC Booklet. *Victims before the Court*.

⁵⁹ Garbett, p. 215.

⁶⁰ Christie, N. (1977). “Conflicts as Property.” *The British Journal of Criminology*, 17 (1), pp. 1-15.

⁶¹ Christie, p. 3.

⁶² Zehr, p. 26.

responsibility for the offense. However, in punitive justice systems, offenders are encouraged to plead not guilty, hence disincentivized from acknowledging responsibility.⁶³ In fact, in ICC proceedings, no direct encounter is permitted between the victim and their offender.⁶⁴

The justice process itself can revictimize survivors, forced to relive and recount their trauma, even more so for survivors of sexual violence exposed to ‘systematic disbelief throughout the justice system.’⁶⁵ Curis-Fawley and Daly describe the justice process as a ‘degrading and humiliating’ experience for women who have survived violence.⁶⁶ Throughout a painful and demeaning experience looms the likely possibility that their offender will ultimately go free.

The philosophy of retributive justice rests upon the assumption that an offense ‘can be located in a single individual—or a discrete few. In light of the profoundly social nature of humanity and the involvement of each in the lives and decisions that others make, the designation of a single guilty individual is always to some extent arbitrary.’⁶⁷ This is especially true in proceedings of wartime atrocities, in which the trial of a few selected commanders is intended to stand in for the hundreds if not thousands of combatants who had committed the atrocities.

The ICC makes more of an effort to elevate and value the voices of victims than any institute prior, but still, the majority of financial, temporal, and human resources at their disposal are spent on punishing the offender ‘often at the expense of meeting the needs of the victim.’⁶⁸ Ultimately, symbolic convictions of offenders are largely empty when there are material needs of victims unmet. This is evidence that restoration remains under-incorporated.

⁶³ Zehr, p. 24.

⁶⁴ Garbett, p. 209.

⁶⁵ Curis-Fawley, S. & Daly, K. (2005). Gendered Violence and Restorative Justice: The Views of Victim Advocates. *Violence Against Women* 11 (5), p. 623.

⁶⁶ Curis-Fawley & Daly, p. 616.

⁶⁷ Schweigert, pp.18-19.

⁶⁸ Oudshoorn, Jackett, & Amstutz, p. 3.

This paper does not suggest overturning the Western legal structure of the ICC and removing retribution, but simply that restoration should take precedence over deterrence. Retribution will continue to be a persistent strain in the philosophy of international justice. Whenever such inhumane and devastating atrocities are committed, there will always be public outcry to right these wrongs, always an inveterate and human conviction that those who commit such grave crimes deserve to be punished. Yet a hard-lined polarization between a retributive framework and a restorative framework can be misleading; there are in fact important similarities between the two as well as substantive areas of collaboration.⁶⁹ As stated above, rather than an attempt to overthrow and supplant the established legal structure, restorative justice is better understood as

‘a catalyst to reevaluate, resurrect, legitimate, and adapt older, customary approaches. During colonization, the Western legal model often condemned and repressed traditional forms of justice that, although not perfect, were highly functional for those societies. Restorative justice can provide a conceptual framework to affirm and legitimate what was good about those traditions and to develop adapted models that can operate within the realities of the modern legal system.’⁷⁰

There are countless ways to implement more restorative practices in the ICC, but this paper focuses on the potential of community reparations. Of the three models of reparations the ICC offers, restitution is the least preferable given the aim should not be to re-establish pre-existent norms of property and virtue which in part inform the destructive experiences of women after

⁶⁹ Zehr, p. 74.

⁷⁰ Zehr, p. 54.

war. Rather, reparative policies should draw from secondarily compensation and primarily rehabilitation.

The stigma surrounding sexual-violence continues to impact survivors and communities long after peace is reestablished, ‘expos[ing] victims to life-long disempowerment and marginalization.’⁷¹ Economically, women risk being unable to fulfill basic and life-sustaining material needs. Socially, survivors face exclusion and ostracization. As the head of UN Women Phumzile Mlambo-Ngcuka warned, ‘Once the perpetrator is behind bars, a woman’s life is not healed at that point. The tragedy continues for her. The stigma she lives with, and her economic wellbeing, are significantly compromised...she needs psycho-social support and material support to get her life back.’⁷² The victim suffers far beyond the incident itself, and therefore her community suffers as well.

Restorative justice is intended to be built from the bottom-up, by a community assessing and defining their own needs. The justice process ‘belongs to the community’ and ‘draws from community resources and, in turn, contributes to the building and strengthening of community.’⁷³ Communities are able to not only design reparative programs most beneficial for them, but the process re-empowers the society by placing ownership of the conflict back in their hands and giving them the opportunity to affirm or redefine their communal values. Moreover, the ICC most often operates in previously colonized areas of the world, namely sub-Saharan Africa, imposing a Western model of justice. Restoration returns autonomy to the community and endorses the value of pre-colonial models of justice long rejected, ‘relocating the response to the

⁷¹ Ford, L. (2014, June 11). Sexual violence in war: women must get reparations, say head of UN Women. *The Guardian*.

⁷² Ford.

⁷³ Zehr, p. 88.

crime from the courts to the community’ and ‘tapping into communal sources of authority long underused in Western society.’⁷⁴

Reparations must be devised not only to meet material needs of society but from a purposefully gendered perspective with the intent to transform concepts of gender and overturn ‘structural and systematic inequality and discrimination.’⁷⁵ Reparative justice must embody how women envision redistribution:

‘Women consistently expressed a desire for redistributive justice: scholarships for their children, decent housing, potable water, food in the house, and crops and livestock in their fields...I suggest we work with this vision of redistributive justice and expand it to include shame. One thing that could be redistributed is the shame that has been unjustly apportioned to women; this shame should belong to the rapists, who have to date enjoyed total impunity.... Reparation should include the distribution of goods and services; it should also include the redistribution of shame to those who earned it.’⁷⁶

By facilitating the design of bottom-up, community-centered reparative programs, the ICC can provide economic relief to the entire community, while simultaneously undermining structures of gender inequality and rethreading the social fabric by returning autonomy to the community to define their needs and values.

⁷⁴ Schweigert, pp. 7-8.

⁷⁵ Ford.

⁷⁶ Theidon, pp. 474-475.

V. Conclusion

Throughout contemporary history, philosophic justification for punishment has evolved alongside widely accepted understandings of sexual violence in armed conflict. When rape was widely believed to be a natural and inevitable phenomenon driven by sexual desire, persecutions of sexual violence offenders were not pursued. By the inception of the Criminal Tribunals in Rwanda and the former Yugoslavia, feminist activists had successfully reconceptualized sexual violence as an intentional military strategy. At this point, international thought swung to an emphasis on deterrence, founded on a belief that increased prosecution of sex crimes would discourage future offenders. In the past decade, the prevailing understanding of sexual violence has begun to shift again to a focus on the ability of sexual violence to devastate communities. With an acknowledgement of the destruction of community has followed the emphasis of the restoration of community in the justice process. This paper reframes the debate to the potential of reparations as a form of restorative justice.

In a dissent, Judge Eboe-Osuji acknowledged: '[I]t is to be considered that in recognizing the right to reparation for victims of atrocities, the States Parties were ensuring that the Rome Statute in its principle is in step with development in the relevant sphere of international law that now lay a great store in ensuring that restorative justice (to the victims) is given just as much scope as punitive justice (is given against the accused convicts).'⁷⁷ Recognition of this development by a prominent figure in the ICC has the potential to transform the experience of victim-survivors in the international justice process.

⁷⁷ Garbett, p. 27.

In our current international justice system, a group of justices conduct a largely symbolic trial for a high-level official. Throughout this process, a victim is forced to testify and undergo the trauma of reliving this offense. In a very miniscule percent of cases, her testimony is successful and the defendant is convicted. Often, this verdict is appealed, and sometimes overturned. The victim has revictimized themselves and drawn out the trauma of their experience, then promptly been forced to watch the defendant go off free. Conversely, if the verdict is affirmed in appeal, then one man has received a prison sentence, while thousands of others who did not order the rapes but committed the acts of brutality themselves (one, a few, or dozens of whom are her offenders) have been reintegrated into society. The survivors are not granted such a merciful fate. Their attempts at reintegration are denied: society, and often their husbands or families, have deemed them dirtied and devalued. Depending on the entrenchment of patriarchy in their society, they may have no means for financial security without a male guardian. Beyond obvious trauma, many are also left with other medical issues, such as STIs, vaginal tearing, sexual mutilation, internal bleeding, and pregnancy. They have been ostracized and stripped of dignity. They are left with the social, economic, physical, and psychological burdens. Has justice been served?

Reparations are just one of countless modes of incorporating more restorative practices into ICC proceedings. This field could benefit from much more extensive research on what community reparations could resemble in practice. This paper does not intend to provide clear and detailed instructions for the implementation of reparative policies in transitional justice, but instead to highlight how the evolution of international jurisprudence suggests a need for a greater concentration on restoration over deterrence. Reparations is just one route.

By whichever means, if the ICC reorients its vast resources towards a restorative approach, the victims of sexual violence may be unburdened of this shame and granted the same chance at

reintegration as their offenders, and the tears in the social fabric of the community can be gradually patched.

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