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Human Trafficking as a War Crime: Why it Happens and How to Stop it

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Human Trafficking as a War Crime: Why it Happens and How to Stop it

By: Otion Gjini

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Introduction:

“Look at how many children you can have. Now you are going to have our children. You are going to have our little Chetniks.”¹ Ziba, a 26 year old mother of two, heard these words before a month of daily rape began for her and dozens of other women in Kalinovik, Bosnia and Herzegovina.² Such an experience is not uncommon in times of war where the worst atrocities committed by humans seem to be commonplace. The chaos and turmoil of wartime not only seems to bring out the worst qualities in human beings, but also makes it incredibly difficult for the actors to be found and prosecuted for their crimes.

Human Trafficking

Human trafficking is one of the most challenging and relevant problems in modern times, with an estimated 800,000 people trafficked worldwide in any given year.³ Human trafficking has been classified as a crime against humanity by section 1(c) of Article 7 of the Rome Statute of the International Criminal Court. This section explains that “enslavement,” committed “as part of a widespread or systematic attack directed against any civilian population” is considered a crime against humanity and a war crime in times of war.⁴ Article 7(2)(c) of the Rome Statute further explains that “enslavement” under this statute “refers to the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power

¹ Robert Fisk, The rapes went on day and night, The Independent, <http://www.independent.co.uk/news/world/europe/bosnia-war-crimes-the-rapes-went-on-day-and-night-robert-fisk-in-mostar-gathers-detailed-evidence-of-the-systematic-sexual-assaults-on-muslim-women-by-serbian-white-eagle-gunmen-1471656.html> (last visited May 7, 2014).

² *Id.*

³ Polaris Project, Human Trafficking Statistics, <http://www.cicatelli.org/titlex/downloadable/human%20trafficking%20statistics.pdf> (last visited May 6, 2014).

⁴ Rome Statute of the International Criminal Court art. 7(1), July 17, 1998, 2187 U.N.T.S. 90 [Hereafter Rome Statute]

in the course of trafficking in persons, in particular women and children.”⁵ This definition would encompass most forms of human trafficking aside from instances where someone is being misled and no ownership rights are initially implicated.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, a part of the Palermo Protocols defines human trafficking as:

The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.⁶

Furthermore, the protocol has elaborated upon the intended meaning of “exploitation” by explaining that “Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”⁷ Lastly, the protocol has made the important distinction of invalidating consent as a possible defense to trafficking by positing that exploitation shall include:

prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs⁸ [and that] the consent of a victim of trafficking in persons to the intended exploitation... shall be irrelevant where any of the means set forth [above] have been used.⁹

This definition is very specific and it includes all forms of what we colloquially understand as human trafficking. As it involves the control of people’s right to freedom, it is considered an

⁵ *Id.* 7(1)

⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol].

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

especially heinous crime by most contemporary legal systems. The above definition goes to show the scope of human trafficking and how, apart from it being a crime in its own, it is an element in many other crimes such as sexual slavery, prostitution, forced labor, and organ trafficking - crimes that may, at first glance, seem unrelated to trafficking.¹⁰ Human trafficking is rooted in exploitation and has existed as long as exploitation itself has, and is still a prevalent issue that is being dealt with today.

Enacted by the International Criminal Court in order to prosecute genocides, war crimes, and crimes against humanity, the Rome Statute gives power to the International Criminal Court to try said crimes. While it provides specific sections for the prosecution of genocides, war crimes, and crimes against humanity, the Rome Statute does not directly deal with human trafficking. Instead, the Rome Statute includes provisions for human trafficking in the section dedicated to crimes against humanity, as well as having some elements of human trafficking in the section pertaining to war crimes themselves. The definition of “enslavement” found in the Rome Statute is borrowed from the 1926 League of Nations Slavery Convention¹¹ but it is also expanded by the Statute’s explicit mentioning of human trafficking and emphasis on women and children. Though there is no separate section of the Statute that deals with human trafficking, the intent of Statute seems to encompass human trafficking as we know it. On the other hand, the Palermo Protocol provides a thorough definition of what human trafficking is. The Rome Statute would be vastly more effective in prosecuting human trafficking if the definition found within the Palermo Protocol is used in tandem with it. The Rome Statute and the Palermo Protocol should work hand in hand. This will be explored later in this paper.

¹⁰ *Id.*

¹¹ Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 60 U.N.T.S. 253

At times, human trafficking is even used for the purpose of genocide and many instances of sex trafficking, a subset of human trafficking, have been labeled as genocidal.¹² Genocide has been defined both narrowly and broadly in a variety of ways ranging from only the systematic killing of a group of people with the intent of erasing the existence of the group to broader definitions including any means of social destruction of a group through the demolition of social foundations, cultural traditions, and political structures with the intent of annihilating a group of people.¹³ This second, broader definition also recognizes rape as a tool of genocide and is more encompassing than the narrower definitions that focus only on murder as a means of genocide.¹⁴ This definition was structured in part due to Catharine MacKinnon, a leading international lawyer and feminist. MacKinnon was instrumental in the civil suit against Radovan Karadzic, the former President of the Serbian Republic partially responsible for the Srebrenica massacre in 1995.¹⁵ Her work focuses on recognizing that women are often disproportionately the victims of war crimes especially rape, which she has successfully argued should be considered a weapon of genocide.¹⁶

War Crimes and Crimes against Humanity

¹² Siobhan K. Fisher, Note, *Occupation of the womb: forced impregnation as genocide*, 461. DUKE L. J. 91,127 (1996). (Arguing that rape can be used as genocide).

¹³ FRANK ROBERT CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES* 4 (1990).

¹⁴ *Id.*

¹⁵ *Doe v. Karadzic*, 866 F. Supp. 734, 735 (S.D.N.Y. 1994)

¹⁶ CATHARINE MACKINNON, *ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES* 278 (2006). (Arguing that women are disproportionately affected by war crimes, oppressive laws, and that rape is a crime that is often trivialized). Karima Bennoune, Review, *Why does it Matter if Women are Human: Catharine MacKinnon's Contributions to International Law*, 46 TULSA L. REV. 107, 112 (2010).

War crimes are a relatively new classification within criminal law.¹⁷ There are many different definitions of “war crimes” but the common elements of all contemporary definitions recognize the mistreatment of civilians, slavery, rape and genocide as war crimes, though this was not always the case.¹⁸ One generally accepted definition can be found in the Fourth Geneva Convention which defines a war crime as the

“wilful killing, torture or inhuman treatment, including wilfully causing great suffering or serious injury to body or health, *unlawful deportation or transfer or unlawful confinement of a protected person*, compelling a protected person to serve in the forces of a hostile power, or willfully depriving a protected person of the rights of fair and regular trial, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”¹⁹

Some of the actions listed in this definition, such as “unlawful deportation or transfer” of individuals, refer to human trafficking explicitly.

Another important attribute of war crimes is that they serve to punish people for their individual actions that may have been committed by them in the name of their governments. One of the earliest examples of this principle can be found in the Peter von Hagenbach trial that took place in 1474.²⁰ Von Hagenbach’s trial²¹ is considered to be the first trial for war crimes and even though he acted under direct orders from Duke Charles, von Hagenbach’s actions were

¹⁷ Tarik Kafala, What is a War Crime?, BBC News, <http://news.bbc.co.uk/2/hi/europe/1420133.stm>. Arguing that war crimes are a recent concept. (Last visited May 5, 2014)

¹⁸ Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 Foreign Aff. 122, 127-129 (1993). Karima Bennoune, Review, *Why does it Matter if Women are Human: Catharine MacKinnon’s Contributions to International Law*, 46 TULSA L. REV. 107, 112 (2010).

¹⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August, 6 U.S.T.N. 3516.

²⁰ Edoardo Greppi, *The Evolution of Individual Criminal Responsibility Under International Law*, 835 Int’l. Rev. Red Cross. 531, 553 (1999).

²¹ Gregory Gordon, Comment, *The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law*, 1 N.D.L. Rev. (2012). Peter Von Hagenbach was charged with rape, and murder. This is widely considered to be the first case of war crime prosecution with some even suggesting that this set a precedent for rape as a war crime though modern law does not take this opinion into account.

considered to be overzealous and especially heinous.²² Von Hagenbach was ultimately executed because the defense that he was working under orders was not considered valid.²³ The worst war crime is considered to be genocide and recently, some types of rape are considered to be genocidal in nature.²⁴ Since most wars are not domestic affairs, but rather conflicts between nations, human trafficking and war crimes have significant overlap. It is possible for human trafficking to occur outside of war, but if it occurs in war time, it is clearly considered a war crime.

This paper will focus on how human trafficking works in times of war, what has been done in the past to deal with this issue, and how it can be lessened or perhaps even stopped in the future. First, the paper will provide background on the history of human trafficking and war crimes. The paper will then briefly explain the legal history that accompanies human trafficking as well as war crimes and crimes against humanity and discuss the applicable law. Next, it will look at the sociological and psychological aspects of human trafficking and war crimes. Then, the paper will discuss war crimes committed during the Rwandan and Yugoslavian genocides as two genocides that occurred within a short time of each other and that spawned two important tribunals that have significantly shaped international criminal law as it is understood today. Next, the paper will look at how human rights law has been impacted by these tribunals and various other ones and the legal theory that has developed over time as a result of these tribunals. Finally, the paper will attempt to come to a solution on how the impact of human trafficking in war times can be lowered or even eliminated.

Background

²² Greppi, *Supra* Note 20.

²³ *Id.*

²⁴ Fisher, *Supra* Note 12 at 100.

A Brief History of Human Trafficking

Before any analysis can be advanced in regards to human trafficking in times of war, it is important to understand its origin. Slavery is not a new concept and it has been a factor all over the world for a long time. While some slavery has been domestic, the first instances of slavery involved war captives and other foreigners who had committed crimes, as well as victims of kidnapping.²⁵ There were not many options on what to do with prisoners of war. Either war captives were to be murdered or they were to be enslaved. After a people are defeated in war, the next strategy is to hold them down, usually by degrading them and reducing their status to subhuman.²⁶ It was not until the 1400's where modern ideas of the slave trade began to form.²⁷ For the next few hundred years, slavery reached new levels of brutality and prevalence due to the perceived economic need for slave labor.²⁸

The discovery of the "New World" led to many territorial disputes between the European superpowers, and as a result of the need for cheap labor, Africans began to be trafficked into the Americas. Bartolome de las Casas, considered the author of this idea, argued that the American Natives should not be enslaved and that Africans should be brought to the Americas instead.²⁹ Though he is often blamed for being a catalyst to the transatlantic slave trade, he was also ironically seen as one of the first advocates of human rights for his desire to prevent the American Natives from being abused.³⁰ Human trafficking had a new destination, and it was the

²⁵ Walter Scheidel, Paper, *The Roman Slave Supply* 16 (2007). (Unpublished working paper, on file with Stanford University).

²⁶ Bertram Wyatt-Brown, *The Mask of Obedience: Male Slave Psychology in the Old South*, 93 AM.HIST. REV. 1228, 1229 (1988).

²⁷ *Rutger University Campus Coalition Against Trafficking*, www.eden.rutgers.edu/~yongpatr/425/final/timeline.htm

²⁸ WILBERT ELLIS MOORE, *AMERICAN NEGRO SLAVERY AND ABOLITION: A SOCIOLOGICAL STUDY* 118 (1980).

²⁹ ROBIN BLACKBURN, *THE MAKING OF NEW WORLD SLAVERY: FROM THE BAROQUE TO THE MODERN 1492-1800*, 136 (1998).

³⁰ *Id.*

newly discovered continent of America. Throughout the world, slavery still continued in areas such as Europe, Africa, and South-East Asia but the American slave trade was not only more profitable, but also more severe in the fact that slaves being brought to the Americas were being displaced like never before since they were literally being brought over to a differ, “New World”.³¹

Social and political pressures and the dying need for slave labor in prominent countries like England, led to the gradual abolishment of slavery in many places including many parts of Europe, the Americas, and Asia.³² Vulnerability is a key element in the act of human trafficking.³³ The vulnerability of those trafficked slowly also began to decrease and groups against slavery began to form. After the American Civil War, slavery was abolished in the United States as well with the passing of the 13th amendment to the Constitution in 1865³⁴ shortly after President Abraham Lincoln delivered the Emancipation Proclamation.³⁵ Though chattel slavery was over, new forms of slavery evolved. The main distinction between the “old” chattel slavery and the “new” modern slavery was that under chattel slavery, an individual was the property of another. In the context of human trafficking, sometimes called modern day slavery, the ownership of another human is not legally recognized and is illegal. As a result, human trafficking is an underground, black market industry. This black market is however not as hidden as other black markets, with human trafficking supplying many brothels and bordellos that enjoy legal status and legal protection. The market is neither “black” nor “white” but somewhere in the Gray area between the two commonly understood markets. This “Gray

³¹ PHILIP D. CURTIN, *THE ATLANTIC SLAVE TRADE* 88 (1972).

³² GWYN CAMPBELL, *ABOLITION AND ITS AFTERMATH IN INDIAN OCEAN AFRICA AND ASIA* 9 (2005).

³³ United Nations Office on Drugs and Crime, *UNODC Abuse of a Position of Vulnerability and other "means" within the definition of trafficking in persons* 13 (Vienna: United Nations, 2013).

³⁴ U.S. Const. amend. XIII §1

³⁵ Abraham Lincoln, *Emancipation Proclamation* (Jan. 1, 1863).

Market” as well as the aforementioned differences could lead to a conclusion as to whether human trafficking is in fact slavery or not. In modern times, human trafficking is separated from slavery and seen as its own problem. Different organizations such as Polaris have been created to combat human trafficking specifically.³⁶ The problem of human trafficking has taken a specific locus in the media as well as global politics with instances of human trafficking becoming prevalent in recent military conflicts where the trafficking has involved, among other things, sexual enslavement and military abductions.³⁷ The aftermath of these military conflicts has shaped international law via new conventions and tribunals to deal with human trafficking, as well as other war crimes.³⁸ The history of human trafficking has not yet reached the perfect end that so many desperately seek but it has shaped the law in an attempt to further condemn and prevent human trafficking and other war crimes.

A Brief Review of the Applicable Law

Antonio Cassese’s work on International criminal law serves as a cornerstone in modern human rights law. Cassese asserts that “International crimes are breaches of international rules entailing the personal criminal liability of the individuals concerned [as opposed to the states].”³⁹ Cassese explains that international crimes fall into the categories of "violations of international customary rules such as treaties, rules designed to protect certain values that are considered to be important by the international community. This would include violations of things like the Universal Declaration of Human Rights, or the UN Charter. Cassese further elaborates that the universal impetus to prevent these crimes allows those that commit these crimes to be prosecuted

³⁶ POLARIS, <http://www.polarisproject.org> (last visited April 14, 2014).

³⁷ Sonia Wolte, *Armed Conflict and Trafficking of Women, Sector Project against Trafficking in Women*, Deutsche Gesellschaft für technische Zusammenarbeit, 13 (Jan. 2004).

³⁸ POLARIS *Supra* Note 36.

³⁹ ANTONIO CASSESE & PAOLA GAETA, *CASSESE'S INTERNATIONAL CRIMINAL LAW* 9 (3rd ed. 2013).

by any state with a link to either the perpetrator or the victim. If the perpetrator acts within an official capacity, he or she is barred from the immunity arising from the civil or criminal jurisdiction of foreign states.⁴⁰ The legal history of international criminal law and war crimes reflect the ideas of Cassese. Further, governments are often compelled to do as international bodies instruct them. This obligation comes from the commitment to protect human rights. This is the way that human rights are enforced and also how they evolve.⁴¹

The very nature of human trafficking makes it a worldwide problem and as a result, different international laws can be implicated depending on where the trafficking takes place and who is involved. Specifically, what constitutes acceptable behavior during war has been a debate since early periods of recorded human history.⁴² Though war time behavior has been addressed in the past, the rules were initially very basic and constituted primarily of the notion that conquest is all inclusive, with everything belonging to the winner of a war, invasion or other armed conflict.⁴³ As time progressed, before the conceptualization of codified modern law, some texts started to forbid the killing of prisoners of war. Some of the earliest instances of this include the Qur'an which favored the temporary imprisonment of "disbelievers" with the intention of ransoming them out or simply releasing them.⁴⁴ Other texts forbidding the murder of prisoners of war include Sun Tzu's famous *Art of War* and the Sanskrit *Manu Sriti*.⁴⁵⁴⁶ As soon as the killing of prisoners of war was viewed as excessive and unnecessary, other policies dealing with prisoners of war naturally came into existence. Principally, assimilation into armies,

⁴⁰ *Id.*

⁴¹ DAVID S. WEISSBRODT & CONNIE DE LA VEGA, INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION, 251 (2007).

⁴² Howard S. Levie, History of the Law of War on Land, Int'l Rev. Red Cross

<http://www.icrc.org/eng/resources/documents/misc/57jqhg.htm> (last visited May 10, 2014).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ SUN TZU, THE ART OF WAR (2014).

⁴⁶ MAX F. MULLER, THE LAWS OF MANU (2001).

ransoming, and slavery dominated the fate of those captured in war, all of which would implicate human trafficking.⁴⁷

It was not until the 19th century where a modern attempt to codify the laws of war was made. The Lieber Code, commissioned by President Abraham Lincoln and written by Franz (anglicized as Francis) Lieber, a slave owner amongst other things, attempted to codify protection for prisoners of war as well as civilians, focusing on women and children.⁴⁸ The Lieber Code's attempt to set clear guidelines about how war was to be carried out coincided with the development of new war time tactics developed during the American Civil War, some of which were also ironically supported by President Lincoln. One of these was the concept of "total war" famously implemented by General William Tecumseh Sherman.⁴⁹ This policy emphasized behavior that was to devalue and denigrate public morale through the destruction of resources. The purpose of it was to simultaneously demoralize people while starving them so they could no longer regroup. Lincoln saw the need for a codified set of rules on what was acceptable and what was culpable conduct during war. The limitations of this code were clear in that it was a national code that applied only to the United States but its contributions were also significant in the fact that it was the first attempt to codify such rules. In addition to being a catalyst to the recognition that humanitarian ideologies should not be abandoned, but heightened, in times of war, the Lieber Code also had provisions against using poison and torture. The Lieber Code was the first of many codes attempting to set out guidelines for war time behavior. Later that same year, the first of four Geneva Conventions followed the Lieber Code and since then, the Geneva

⁴⁷ Levie, *Supra* Note 42.

⁴⁸ *Id.*

⁴⁹ JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 191 (2012).

Conventions have served as a leading source of modern international law with respect to the humanitarian treatment of individuals in war time.⁵⁰

Next, the Hague Convention of 1899 accomplished two very important things in the figurative war against war crimes. First, the Convention for the Pacific Settlement of International Disputes, one of the treaties of the Hague Convention of 1899, created the Permanent Court of Arbitration where international disputes are still resolved today.⁵¹ Secondly, the Convention with Respect to the Laws and Customs of War on Land created a list of laws that address the treatment of people in times of war.⁵² Specifically, it forbids killing those that have surrendered, the attack of undefended towns, and the destruction of other property by those that have surrendered.⁵³

After the First World War, the Leipzig War Crimes Trials set the precedent for trying individuals for war crimes.⁵⁴ These trials were seen as ineffective towards their aim⁵⁵ but their importance stood in the fact that they recognized the need to prosecute war crimes, an abstract concept at the time. War crimes and human trafficking came back into the limelight, during and especially after the Second World War, only a few decades later. World War II impacted Europe and the world like never before, partially in part to the extremely cruel and somewhat novel practices of Nazi Germany that brought war crimes to the forefront. World War II saw the large scale collection of “undesirables” including Jews, homosexuals, Gypsies, handicapped, Slavs and

⁵⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]

⁵¹ Convention for the Pacific Settlement of International Disputes art. 16, July 29, 1899, 32 Stat. 1779.

⁵² Convention with Respect to the Laws and Customs of War on Land Oct. 1907, 36 Stat. 2227.

⁵³ *Id.*

⁵⁴ JOHN YARNALL, BARBED WIRE DISEASE: BRITISH AND GERMAN PRISONERS OF WAR 1914-1919 193-194 (2011).

⁵⁵ *Id.*

others for the purpose of genocide.⁵⁶ Adolf Hitler's policies attempted to create a master race through not only selective breeding of "desirable" individuals but also through the culling of those deemed undesirable as a result of unfounded and unscientific practices such as skull size⁵⁷ As the war came to an end, the atrocities committed by the Third Reich were brought to the public attention and the crimes were so heinous that individuals were to be held accountable even though these individuals were working through the orders of their superiors.

In August of 1945, the London Charter gave legal authority to the major allied powers of the United States, the Soviet Union, England, and France to punish those deemed to be major war criminals of the Axis powers.⁵⁸ Eventually the city of Nuremberg was chosen as the place to conduct the trials of hundreds of German war criminals. These Nuremberg trials led to strict punishments including the execution of many German leaders.⁵⁹ Some leaders such as English Prime Minister Winston Churchill thought it best to have summary executions instead of full blown trials, despite this assertion, the trials went on. Aside from the punishment of war criminals, the Nuremberg trials led to the development of the Nuremberg Code, a spawn of the Nuremberg principles, a set of codes that came to be after the culmination of the trials. The Nuremberg Code aimed at controlling and condemning trials involving human subjects; it was created in response to the often deadly medical experiments conducted by Dr. Josef Mengele and other Nazi doctors upon unwilling human subjects.⁶⁰ These crimes were considered to be war crimes and are now considered when subsequent war crime tribunals take place.

⁵⁶ BOHDAN WYTZYCKY, *THE OTHER HOLOCAUST: MANY CIRCLES OF HELL : A BRIEF ACCOUNT OF 9-10 MILLION PERSONS WHO DIED WITH THE 6 MILLION JEWS UNDER NAZI RACISM* 39 (1980).

⁵⁷ WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 241 (2011).

⁵⁸ GEOFFREY LAWRENCE, *THE NUREMBERG TRIALS AND THE PROGRESS OF INTERNATIONAL LAW, ETC* 151 (1947).

⁵⁹ *Id.*

⁶⁰ GEORGE J. ANNAS & EDWARD R. UTLEY, *THE NAZI DOCTORS AND THE NUREMBERG CODE : HUMAN RIGHTS IN HUMAN EXPERIMENTATION: HUMAN RIGHTS IN HUMAN EXPERIMENTATION* 228 (1992).

In the late 20th Century, the Bosnian war and subsequent genocide saw further development in international criminal law. This conflict saw the mass raping of thousands of Muslim women by Serbian forces with the intent of purging the Muslims from the land that was Yugoslavia. Since Yugoslavia was one nation composed of ethnically and theologically different territories, international criminal law might not have reached the crimes committed by the Serbs upon the Bosnians. As a result of the war crimes committed during the Bosnian war, the International Criminal Tribunal for the former Yugoslavia (from here on ITCY) was created. The Tribunal found, in the Prosecutor v. Tadic case, that grave breaches such as rape and slavery apply to civil armed conflicts in addition to international conflicts.⁶¹ Catharine MacKinnon's position that women are disproportionately affected by war crimes, especially human trafficking has gained full momentum and has been instrumental in the recognition of mass rape as an instrument of genocide. The treatment of prisoners of war and civilians during war time continued to grow with the tribunal for Rwanda where rape as genocide was recognized.

In addition, many tribunals and conventions have been created in places like Sierra Leone and Cambodia in order to punish those responsible for war crimes, which often involve human trafficking. These tribunals have risen in order to deal with the specific troubles of those regions and their accompanying conflicts. These tribunals lean on their predecessors and other treaties and treatises that have been written in response to conflicts worldwide. Many of these conflicts have been classified as genocides, and human trafficking has played a crucial role in the commission of these genocides.⁶²

⁶¹ Prosecutor v. Tadic, Appeals Judgment, No. IT-94-1-T (July 15, 1999).

⁶² CHALK, *Supra* Note 13 at 16.

Psychology and Sociology of Human Trafficking and War Crimes

To best address the problem of human trafficking in war times, it is important to look at the psycho-sociological reasons behind why war crimes happen. War happens for many reasons and it often happens because of some territorial dispute or because a certain group feels they are being mistreated by another group, amongst other reasons.⁶³ No matter the cause, war sees an intensification of nationalism, extreme propaganda, and complete demonization of the enemy.⁶⁴ The psychological molding of a group creates a cohesive group identity for the group and “otherises” or separates the opposing party by imposing on them phantom qualities based on pre-existing stereotypes and newly formed biases.⁶⁵ This clear split in identity is also responsible for people, including those that would be labeled as war criminals, following orders from their superiors. This poses a logistical problem in trying war criminals since their propensity to follow orders might not necessarily make the morally culpable. The famous Milgram experiment conducted by Stanley Milgram had volunteers ask a series of questions to what they thought were other volunteers. The ones asking the questions were told to administer an electric shock to the ones answering the questions if the answers were not correct. The answering parties were in fact actors that were told to act as if they were suffering from the pain. The experiment found that most people would administer shocks up to deadly levels if they were reinforced by an authority figure and told they would not be blamed. It was opined that this explained the otherwise “inexplicable” actions of Nazi generals acting under direct orders to exterminate

⁶³ GREG CASHMAN & LEONARD C. ROBINSON, AN INTRODUCTION TO THE CAUSES OF WAR: PATTERNS OF INTERSTATE CONFLICT FROM WORLD WAR I TO IRAQ 22 (2007).

⁶⁴ GERARD GIORDANO, WARTIME SCHOOLS: HOW WORLD WAR II CHANGED AMERICAN EDUCATION 40-41 (2004).

⁶⁵ CHARLES HORTON COOLEY, ON SELF AND SOCIAL ORGANIZATION (1998). Arguing that an individual’s perception of themselves is defined by how others see the individual. In turn, the individual behaves in ways that propagate the perceptions of others.

prisoners in concentration camps.⁶⁶ Subsequent legal theory, including the definition of the phrase “war crime” ignores the psychological findings of Stanley Milgram as a mitigating factor in determining the culpability of heinous acts in times of war, even if said acts were done under supervision or under direct order.⁶⁷

Psychological effects not only affect people during a conflict but also in the stages after the conflict. One of the gravest psychological effects of war is the commonly cited Post Traumatic Stress Disorder or PTSD. PTSD not only affects soldiers but civilian victims as well.⁶⁸ Psychological trauma, like PTSD, can occur as an extension of physical trauma.⁶⁹ The physical act of rape, for instance, obviously traumatizes the body and it is this physical trauma that can lead to psychological trauma as well as “social trauma.”⁷⁰ Social trauma occurs when large scale traumatic events are so severe that usual coping mechanisms have little to no effect on the victims.⁷¹ The trauma of rape is not only psychological and physical but in some cases raises social problems for its victims. The traditions of some Muslim families in Bosnia and Kosovo treat rape as a great shame and as the problem of the victim.⁷² In some instances, the social trauma is so severe that it results in exiling from the community, suicide, or even the victim being murdered by their own family.⁷³ Whereas a single, independent instance of rape might be viewed with some discretion, the large scale rapes create a different social construct and new, sometimes deadly, coping mechanisms. An example of this could be found in the story of an

⁶⁶ STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (2009).

⁶⁷ CASSESE, *Supra* Note 39

⁶⁸ G C Davis & N Breslau, *Post-traumatic stress disorder in victims of civilian trauma and criminal violence*, 17 *PSYCHIATRY. CLINICAL. N. AM.* 289, 289 (1994).

⁶⁹ *Id.*

⁷⁰ JEFFREY C. ALEXANDER, *TRAUMA: A SOCIAL THEORY 2* (2013).

⁷¹ *Id.*

⁷² HELENA GOSCILO & YANA HASHAMOVA, *EMBRACING ARMS: CULTURAL REPRESENTATION OF SLAVIC AND BALKAN WOMEN IN WAR* 234 (2012).

⁷³ KIMBERLY BARRETT & WILLIAM GEORGE, *RACE, CULTURE, PSYCHOLOGY, AND LAW* 212 (2005).

anonymous Kosovar Albanian girl who, after being repeatedly raped in front of her father, was sent to join the Kosovo Liberation Army so she could seek revenge for what had happened to her. Her actual revenge or even her probable death would serve as redemption not only for her, but also for her family and clan.⁷⁴

Psychology has also been used as a tool to control groups of people and further genocidal ideas and practices.⁷⁵ In genocidal conflicts, psychology might be more prevalent since the end goal is to exterminate a people. Two particular genocidal conflicts can be found in the Bosnian war and the Rwandan genocide. The Bosnian war and the Rwandan genocide led to the implementation of the ICTY and the International Tribunal for Rwanda respectively. By looking into these very recent conflicts and the tribunals they created, we can better assess what the next step is in combating war crimes and human trafficking in the future. Comparing the two is also important because it allows us to analyze how the two ongoing tribunals have affected each other as well as international criminal law.

Recent Conflicts and Their Repercussions

Human Trafficking as a War Crime in the Bosnian War

Since the early 1990's, human trafficking has been an issue in the Balkans.⁷⁶ Starting with the Bosnian War which took place from 1992 till 1995 and continuing with Kosovo in the late 90's and early 2000's, the Balkans have seen a lot of turmoil and a lot of bloodshed as well

⁷⁴ Lynda E. Boose, *Crossing the River Drina: Bosnian Rape Camps, Turkish Impalement, and Serb Cultural Memory*, 28 GENDER AND CULTURAL MEMORY, 72-73 (2002).

⁷⁵ MILGRAM, *Supra* Note 66.

⁷⁶ RICHARD H. FRIMAN & SIMON REICH, HUMAN TRAFFICKING, HUMAN SECURITY, AND THE BALKANS 104 (2008).

as crimes involving human trafficking.⁷⁷ Principally a territorial conflict between the Bosnians and the Serbs over Bosnia and Herzegovina's independence, the war evolved to include ethnic cleansing and even the use of systematic mass rapes in order to control, and effectively commit genocide, on the predominantly Muslim population of Bosnia under the guise of creating a "unified Yugoslavia."⁷⁸ Until the Slavic migration in the 7th century, the majority of the Balkans were under Byzantine rule.⁷⁹ The Slavs eventually took a foothold in the Balkans and later developed into Yugoslavia. After the Ottoman invasion of the Balkans which took place in the 1300's, the Islamic influence of the Ottoman Empire was introduced to many of the divided states that would compose Yugoslavia.⁸⁰ One of these states was Bosnia (now Bosnia-Herzegovina). Some Bosnians willingly converted to Islam while others maintained their Christian faith, a vestige of the Byzantine Empire.⁸¹ This theological divide, over the years, led to many disputes involving land and religion. In the late 19th century, Yugoslavia, a predominantly Christian nation began an attempt to "cleanse" the Muslim population of the region, beginning with the Yugoslavian territory of Bosnia, and eventually moving on to Kosovo, a territory historically belonging to Albania and mostly inhabited by Albanians.⁸² Human trafficking came as a result of the rapes and the ethnic cleansing during the war since people were often taken by force to different areas of Bosnia and Serbia in order to be systematically raped and murdered.⁸³

⁷⁷ *Id.* at 41.

⁷⁸ Prosecutor v. Krstic, Trial Chamber Judgment.

⁷⁹ MARK MAZOWER, THE BALKANS: A SHORT HISTORY 41 (2007).

⁸⁰ *Id.* at 47.

⁸¹ IRA M. LAPIDUS, A HISTORY OF ISLAMIC SOCIETIES 252 (2002).

⁸² *Id.* at 250.

⁸³ Prosecutor v. Kunarac, et al., Judgment, No. IT-96-23 and IT-96-23/1 33-35 (June 12, 2000).

The conflict involved the displacement of many people for the purposes of ethnic cleansing. The Commission of Experts, created by the United Nations Security Council.⁸⁴ , in their report, explained that “ethnic cleansing” refers to “a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.”⁸⁵ To a large extent, it is carried out in the name of misguided nationalism, historic grievances and a powerful driving sense of revenge.⁸⁶ This purpose appears to be the occupation of territory to the exclusion of the purged group or groups.”⁸⁷ It is evident that such policy would inevitably overlap with human trafficking in the fact that people are being displaced.

Similar to the goals of ethnic cleansing, the mass, systematic, rapes that occurred during the Bosnian war were designed to thin the Bosnian population.⁸⁸ An estimated 35,000 Bosnian women, most of whom were Muslim, were systematically raped with the intention of impregnating them.⁸⁹ Due to the driving force of the rapes being genocidal, pregnant women were often spared and were not raped, a fact that supports the rapes being genocidal.⁹⁰

The Bosnian War saw the first instance of sexual slavery being prosecuted by a tribunal. In *Prosecutor v. Kunarac*, Dragoljub Kunarac was found guilty of numerous counts of “crimes against humanity” all stemming from rapes that either he himself committed or gang rapes that

⁸⁴ Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780, Para. 130 (27 May 1994).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Andrew Osborn, *Mass Rape Ruled a War Crime*, Common Dreams <http://www.commondreams.org/headlines.shtml?/headlines01/0224-02.htm> (last visited May 2, 2014).

⁸⁹ Maja Zuvella, *Bosnian war rape victims suffer in silence, wait for justice* <http://in.mobile.reuters.com/article/idINDEE8BI03N20121219?irpc=932> (last visited May 2, 2014).

⁹⁰ Fisk, *Supra* Note 1.

he orchestrated and even ordered.⁹¹ This set an important precedent in labeling sexual slavery a crime against humanity and also a war crime, if it occurred in a time of war. Similar to Kuranac, many other individuals were found guilty of war crimes during the war.

The ICTY was erected to try the crimes committed during the Bosnian War and other crimes committed during other armed conflicts involving the former Yugoslavia during the 90's.⁹² Many different people were tried and are still being tried by this tribunal including Albanians, Croats, Bosnians, and mostly Serbs.⁹³

This tribunal, which has yet not ended, is extremely important in shaping the way the world views war crimes and human trafficking. The Nuremburg Charter, which dealt with the war crimes committed during the second World War, did not include special provisions for rape and sexual slavery and it was not until the International Criminal Tribunal for Yugoslavia that rape was identified as a “crimes against humanity.”⁹⁴ These precedents were extremely important at combating human trafficking both during war time and in general since it places rape within the same category as genocide, the crime considered to be the worst crime against humanity. The categorization of rape, which often involves elements of human trafficking, allows for the maximum punishment to be life imprisonment, though this punishment has rarely been given by the ICTY.⁹⁵

While rape has been a consequence of many different military contexts, it was the genocidal element of rape in the Bosnian War that led to it being considered a crime against

⁹¹ Kunarac, *Supra* Note 83.

⁹² International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991: Rules of Procedure and Evidence, U.N. Doc. IT/32 (1994), amended by U.N. Doc. IT/32/Rev.10 (1996). [hereafter ICTY Rules]

⁹³ *Id.*

⁹⁴ Fisher, *Supra* Note 12 at 131.

⁹⁵ Prosecutor v. Kvočka et al., Judgment, No. IT-98-30/1 (Nov. 2, 2001).

humanity. The fact that the rapes were systematic, involved the displacement and detainment of hundreds of women, and was carried out with the intention of impregnating said women is what led to the rapes during the Bosnian War to be looked at as especially heinous.⁹⁶ While it may appear odd that impregnation could be legitimately used as a tool of genocide, it interferes with the reproduction of a group and prevents a generation from being born.⁹⁷ In addition, as mentioned before, rape stigmatizes women and results in them being viewed as “tainted” or “undesirable.”

Some of the most serious criminals tried by the tribunal were given very light sentences despite the categorization of rape as a crime of genocide. Milan Babic, the Prime Minister of the Republic Serbian Krajina, a self-declared Serbian state within Croatia, was indicted for playing a major part in the ethnic cleansing in Croatia and received a sentence of 13 years imprisonment.⁹⁸ Predrag Banovic, a prison guard was sentenced to 8 years for murder and rape in the Keraterm Camp.⁹⁹ Only a handful of those indicted, like Ljubisa Beara were sentenced to life imprisonment, the gravest sentence available.¹⁰⁰ This has been one of the main criticisms of the tribunal. In addition, people have argued that the vast majority of those indicted have been Serbs and that this figure is not representative of the actual climate of the war since Bosnians, Croats, and Albanians also committed many war crimes.¹⁰¹ Another recent armed conflict with serious

⁹⁶ ICTY Rules, *Supra* Note 92.

⁹⁷ Fisher, *Supra* Note 12 at 132.

⁹⁸ Prosecutor v. Babic, Judgment, No. IT-03-72 (June, 2005).

⁹⁹ Prosecutor v. Fustar et al., Judgment, No. IT-95-8/1 (Apr. 2002).

¹⁰⁰ Prosecutor v. Popovic et al., Judgment, No. IT-05-88-T (June 2010).

¹⁰¹ David Harland, *Selective Justice for the Balkans*, N.Y. Times, Dec. 7, 2012. This opinion piece argues that a disproportionate amount of Serbs were tried during the tribunals. Harland’s assertions have been the subject of much criticism. Critics have pointed to the evidence that shows the Serbs were the aggressors in the Bosnian war and that most atrocities were committed by the Serbs. See Marko Attila Hoare, *Genocide in Bosnia and the failure of international justice* (2007) (Working paper, on file with Kingston University in Faculty of Arts and Social Sciences).

war crime and human trafficking implications occurred and is still occurring to some extent in Rwanda discussed below.

War Crimes during the Rwandan Genocide

In 1884, during the Berlin Conference, the European superpowers essentially divided Africa as they saw fit so the colonization of Africa would not result in further disputes between the colonizers.¹⁰² This conference split the existing tribes arbitrarily and forced strangers, and sometimes enemies, to become neighbors. The land that is now Rwanda was given to the Germans and eventually to the Belgians after the First World War.¹⁰³ The European conquerors assumed that the lighter skinned Tutsi population had migrated to the region from Ethiopia and deemed them to be more Caucasian and therefore superior.¹⁰⁴ The majority of the population was composed of the darker skinned Hutus who were ethnically different from the Tutsis.¹⁰⁵ The classification made by the Europeans led to a class difference, with the Tutsis being wealthier than the Hutu majority.¹⁰⁶ After the assassination of Rwandan President Juvenal Habyarimana, the Hutus began a genocide with the goal to exterminate every Tutsi individual.¹⁰⁷ This genocide began mere hours after the death of President Habyarimana, and was especially brutal, with no one being spared.¹⁰⁸

Though the genocide was short lived, the casualties were immense, with some estimates suggesting as many as 800,000 Tutsi deaths, though this figure is disputed since there was no

¹⁰² STIG FÖRSTER, WOLFGANG JUSTIN MOMMSEN & RONALD EDWARD ROBINSON, BISMARCK, EUROPE AND AFRICA: THE BERLIN AFRICA CONFERENCE 1884-1885 AND THE ONSET OF PARTITION 264 (1988).

¹⁰³ *Id.* at 432.

¹⁰⁴ LINDA MELVERN, CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE 4 (2006).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 6.

¹⁰⁷ *Id.* at 150.

¹⁰⁸ *Id.* at 225.

attempt to keep record of the death toll.¹⁰⁹ Since the genocide lasted for 100 days, this brings the death toll to a terrifying 80,000 deaths per day. The Rwandan genocide is noted as being extremely cruel and swift. Rape was used as a weapon of war during the Rwandan genocide not only to impregnate women but to infect them with HIV. The Hutus would get HIV positive patients from hospitals and have them join rape squads with the intention of infecting the Tutsi population with HIV.¹¹⁰ There was not much dispersion of people during the genocide since it occurred very fast but people were still transported to camps where they were killed and raped.¹¹¹ In addition, the soldiers, many of whom were indoctrinated by the propaganda or recruited from hospitals because they had AIDS or HIV, were transported to villages and towns where they raped and killed people that were their neighbors. In addition, many victims sought refuge in neighboring countries.¹¹²

The International Criminal Tribunal for Rwanda (From here on ICTR) was established, similarly to the ICTY, in order to punish the high ranking officers for the war crimes they had committed.¹¹³ Many individuals were indicted on numerous counts of crimes against humanity as well as genocide.¹¹⁴ Amongst these people was Jean Paul Akayesu, the leader of the Taba commune whose trial led to his life imprisonment.¹¹⁵ Akayesu's trial was also the first time in

¹⁰⁹ *Id.* at 252.

¹¹⁰ Rwanda: "Marked for Death", Rape Survivors Living with HIV/AIDS in Rwanda, Amnesty International <http://www.amnesty.org/en/library/asset/AFR47/007/2004/en/56ae3ae0-d5f7-11dd-bb24-1fb85fe8fa05/afr470072004en.html> (last visited April 23, 2014).

¹¹¹ *Id.*

¹¹² Philip Verwimp, *Death and survival during the 1994 genocide in Rwanda*, 58 *Catholic University of Leuven* 223, 238 (2004).

¹¹³ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955, Annex, U.N. SCOR, 49th Sess., Res. and Dec., at 15, U.N. Doc. S/INF/50 Annex (1994). [hereinafter ICTR Statute or Rwandan Statute].

¹¹⁴ *Id.*

¹¹⁵ *Prosecutor v. Akayesu*, Amended Indictment, No. ICTR-96-4-I (Feb. 13, 1996).

history that rape had been successfully tried as a war crime.¹¹⁶ Aside from being listed as a war crime, rape was recognized as an instrument to instill terror during wartime.¹¹⁷ Compared to the Yugoslavian tribunal, the Rwandan tribunal has led to stricter punishments for those found guilty of war crimes. This is not surprising since one of the main criticisms of the tribunal for the former Yugoslavia was that the punishments were strangely lenient.¹¹⁸ While the Bosnian genocide drew worldwide attention with some nations siding with the Bosnians and other siding with the Serbs, the Rwandan genocide did not draw nearly as much attention; at times it was not even referred to as genocide by the media.¹¹⁹ This may be due to the short nature of the conflict, but it is also likely due to the fact that unlike the Balkans, Rwanda does not pique the interest Europe and the United States. While the Balkans are and have historically been seen as a geographically important area for military bases and economy due to its access to the Adriatic Sea, the Ionian Sea, and the Mediterranean Sea¹²⁰, Rwanda does not have such characteristics due to the fact that it is landlocked. The fact that the Balkans are in Europe also adds to their prominence in the news as the conflict directly affects the European nations. It may be that the world's lack of an effective response led to the trials of Rwandans handing out harsher punishments for those accused.

Comparing the two tribunals is key in understanding if they were successful and in order to generate a broader and therefore more applicable set of guidelines for dealing with human trafficking as a war crime. The assessment of the successfulness of the two tribunals can be

¹¹⁶ DAVID P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS 105 (2012).

¹¹⁷ *Id.*

¹¹⁸ The Hague, Ten Years in Prison for Miroslav Deronjic, Sense Tribunal (Mar, 2004).

¹¹⁹ MELVERN, *Supra* Note 104 at 256.

¹²⁰ CRAIG R. NATION, WAR IN THE BALKANS, 1991-2002 9 (2004).

extremely important should the world need to set up future tribunals for future instances of war crimes.

An Analysis on how to Lessen Human Trafficking as a War Crime

Before any new steps can be taken in understanding how to lessen human trafficking, it is important to view the steps that have already been taken, the history of international criminal law, and past instances that have shaped the law. The comparison of these factors can elucidate what has worked already and what, if anything, needs further improvement. Thus far, this paper has focused on the very recent Rwandan Genocide and the Bosnian War. In addition, the paper has explored the applicable law, its sources, and provided a historical and psycho-social background on war crimes and genocides. Before the law can be addressed substantively, jurisdiction needs to be established.

Jurisdiction over International Crime and its Justifications

The first step in lessening human trafficking as a war crime is establishing the jurisdiction over international crime. National sovereignty, a concept that an autonomous nation should have the right to self-governance, and therefore the right to create and enforce its own laws goes against the notion that some sort of international court should exist. Since there is no universally accepted body of international law, it is difficult to find a justification for international tribunals and courts that enforce an abstract law that might not be in accordance with the beliefs of the accused. Antonio Cassese's work with international criminal law provides a justification for the existence of international criminal law.¹²¹ Cassese asserts that international crimes are breaches of international rules and they concern the personal criminal liability of the actors. Cassese

¹²¹ CASSESE, *Supra* Note 39.

explains that there is a universal desire to prevent these crimes from occurring and to protect the international rules that condemn these crimes.¹²² Other sources of international criminal law and its jurisdiction can also be found within the Rome Statute mentioned before.¹²³ The Rome Statute created the International Criminal Court which is meant to try breaches under the Rome Statute.¹²⁴ Article 38 Section 1 of the Statute of the International Court of Justice lays out the different sources of international law to be used by the Court.¹²⁵ Article 38 Section 1 explains that:

the Court shall apply international conventions, whether general or particular, establishing rules expressly recognized by the consenting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; [and] ...judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.¹²⁶

Article 38 Section 1 of the Statute gives weight to international conventions such as the Geneva Conventions as well as treaties and custom in addition to recognizing the work done by experts such as Cassese. The Statute clearly recognizes the ever changing and progressive nature of international law and allows for different sources to shape it. The alternative to a body of international law would be to ignore the crimes and justify them as being subject only to the laws of the relevant nation. Clearly, in order to stop human trafficking in the times of war, this approach cannot be taken since the people responsible for those crimes can avoid prosecution much more effectively if they only have to answer to their own judiciary. Cassese's views are generally accepted and similar justifications have been used when the International Tribunals for

¹²² Cassese, Antonio. Speech at the signing of the Dayton Agreement (14 December, 1995).

¹²³ Rome Statute, *Supra* Note 4.

¹²⁴ *Id.*

¹²⁵ Statute of the International Court of Justice Art. 38 § 1 (1945).

¹²⁶ *Id.*

Yugoslavia and Rwanda were erected. International criminal law is becoming more and more prominent in the world.¹²⁷ The jurisdiction of international criminal courts is justified by the moral conscience and the need for peace as well. With justice comes peace; the need for extra-judicial retribution is lessened when a judicial channel exists for people to use in order to get justice.¹²⁸

Effectiveness of the Tribunals and how they might be improved

The ICTY and the International Tribunal for Rwanda's effectiveness is relative as it would be naïve to expect the tribunals to punish all those responsible. Some commentators, comparing the two tribunals, have suggested that the ICTY was more effective than the ICTR in reaching its goals.¹²⁹ This assertion is premised primarily on the fact that more people were punished by the ICTY.¹³⁰ The two tribunals can both be considered effective as they both have contributed significantly to international criminal law. As mentioned above, the case against Jean Paul Akayesu, tried in front of the International Tribunal for Rwanda, led to rape being considered a war crime.¹³¹ This is extremely important as now rape and consequentially human trafficking during war can be considered to be war crimes and not ordinary crimes committed by an individual and subject only to routine criminal jurisprudence. Naturally, only rapes that are genocidal in nature fall under this category since individual rapes are not crimes against humanity in and of themselves. Human trafficking is implicated in the systematic gathering of

¹²⁷ Paul Tavernier, *The Experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, INT'L REV. RED CROSS (Dec. 1997).

¹²⁸ *Id.*

¹²⁹ Barria, Lillian A Barria & Steven D. Roper, *How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR*, INT'L J. HUMAN RIGHTS 361 (2005).

¹³⁰ *Id.*

¹³¹ FORSYTHE, *Supra* Note 116 at 104-105.

women to be mass raped. In addition, the mass rapes are more likely to be viewed as genocidal and therefore as crimes against humanity.

The Case of Slobodan Milosevic that was tried in front of the ICTY also had important implications for international criminal law though judgment was not rendered. As a result of Milosevic's trial and the pre-trial motions, mass propaganda was taken more seriously as it could be considered a tool of genocide. Milosevic had created a platform claiming to want to protect Serbia and in this quest had fabricated stories about Serbian women being raped, had released prisoners, and had created a political climate conducive to violence.¹³² Though Milosevic's trial was not concluded because of his death on March 11th of 2006,¹³³ he was still charged as a result of his propaganda and the charges suggest that propaganda could be used to incite mass terror and could therefore be considered genocidal.

One major criticism of the effectiveness of ad hoc tribunals such as the ones for Rwanda and the former Yugoslavia is that they aim to selectively punish certain individuals over others.¹³⁴ Though this cannot be empirically corroborated, the concern has found some backing in the work of prominent critics.¹³⁵ Of note is the existence of the International Criminal Court which was created in 2002, after the tribunals with the intent to deal with breaches in human rights.¹³⁶ The creation of one tribunal that is ongoing and exists for the purpose of punishing war crimes is a good step forward. This would narrow down the scope of the influence exerted since every tribunal involves different people with only some overlap. The Rwandan genocide

¹³² Anthony Oberschall, *The Manipulation of Ethnicity: From Ethnic Cooperation to Violence and War in Yugoslavia*, in *ETHNIC AND RACIAL STUDIES* 982, 993 (2000).

¹³³ *Milosevic Found Dead in his Cell*, BBC News (March 11, 2006).

¹³⁴ Lillian A. Barria & Steven D. Roper, How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR, *INT'L. J. HUMAN RIGHTS* 349, 359 (Sept. 2005).

¹³⁵ Harland, *Supra* Note 101.

¹³⁶ Rome Statute, *Supra* Note 3 Art. 11.

happened after the creation of the ICTY yet another separate, yet very similar, tribunal was created in order to deal with the Rwandan genocide; presumably, this will be avoided with the creation of the International Criminal Court. If all relevant matters are tried by the ICC instead of different tribunals the procedure would become more efficient since no new tribunals would need to be created. While both the ICTY and the ICTR were good starting points, one tribunal might have been more effective in dealing with the issues since they are so similar. The ICC could have grown out of the Nuremberg trials and continued to deal with issues that arose in the future in the former Yugoslavia and Rwanda and now that it is created, the ICC could grow and shape itself according to the needs it has and the problems presented to it by other instances of war crimes and crimes against humanity.

The efficiency of one tribunal would be much greater and it would take us one step closer to having a codified body of international criminal law that seeks to punish violations of the rules that serve to protect the common good. If such a tribunal were to grow organically, it would likely evolve into something very effective that seeks to both punish and raise awareness of what is and is not acceptable behavior during armed conflicts. With a raised awareness and the prominence of one tribunal as the authority on international criminal law, it would be likely that there would be at least a minimal deterrence effect since it will be clear what is and is not acceptable behavior during war. The tribunal would grow not only in scope but also in size, to complement the need for more trials if necessary. This efficiency would allow for greater amounts of people to be tried if necessary which would also possibly deter others from

committing similar crimes under the principle of general deterrence which aims to deter others from committing a crime out of fear of prosecution.¹³⁷

As stated earlier, the ICC was created in order to prosecute genocides, crimes against humanity, and war crimes but it has no specific section against human trafficking. The Rome statute, which created the ICC, does not aim to prosecute human trafficking but instead attempts to deal with the issue through the other crimes it is meant to prosecute. Human trafficking continues to be a severe problem for the modern world and it would best be dealt with by a separate tribunal for the prosecution of human trafficking. Since the rights implicated are some of the most important in human rights law, a human trafficking tribunal is justified. In addition, since human trafficking could potentially span many different jurisdictions, a separate international tribunal would likely be more efficient than simply using the courts and law of the jurisdiction. It stands to reason that few countries would be opposed to having a legal standard in regards to human trafficking. This tribunal would function similarly to the ICC except it would use not only the Rome Statute and its components but also the Palermo Protocol definition of human trafficking mentioned earlier in the paper.

Punishment and Deterrence

The International Criminal Tribunals for the Former Yugoslavia and Rwanda were created to hold accountable those that committed crimes against humanity and war crimes in Yugoslavia and Rwanda respectively. At the core of the tribunals is the desire to punish those that have committed these crimes. While punishment serves as retribution to those that were wronged, it also serves as a deterrent to those who committed the crime and others who may be

¹³⁷ RICHARD BONNIE, ANNE M. COUGHLIN & JOHN C. JEFFRIES JR, CRIMINAL LAW 15 (3rd ed. 2010).

contemplating the commission of similar crimes.¹³⁸ A strong link exists between a heightened risk of punishment as well as increased sentences and recidivism and general deterrence.¹³⁹ As a result of this finding, it follows that punishments for those that commit war crimes and crimes against humanity, including but not limited to human trafficking, should be longer and more numerous in order to deter individuals from committing such crimes. In addition, the sentencing should be more uniform and proportionate to the crime, regardless of where it was committed.

As illustrated before, the ICTY has been seen as more effective because more people were prosecuted out of those thought to be responsible while the ICTR involved stricter punishments. The successes of the two tribunals cannot be compared as effectively with this in mind. Keeping in mind that these tribunals deal with crimes considered so heinous that individual culpability is demanded, the punishments for genocide and mass rape should not be less than punishments for national criminal acts. Though sometimes life imprisonment is given for such acts, anything less does not seem to be a justifiable punishment. If the data on general deterrence shows that longer punishments and a greater certainty of punishment deter criminal behavior, it is very important to increase both by making international criminal tribunals more efficient and perhaps larger. Increasing the size of the tribunals will likely require more funds. If resources cannot be found, other strategies can be implemented to lower cost and raise efficiency.

Ideally, everyone responsible should be prosecuted but since this is not feasibly possible in every instance, it becomes even more important to have trials for those that can be prosecuted in the most efficient way possible. One possible way is to introduce provisions for trials in absentia.

¹³⁸ Donald E. Lewis, *The General Deterrent Effect of Longer Sentences*, BRIT. J. CRIMINOLOGY 47, 51 (1986).

¹³⁹ *Id.* at 52.

Trials in Absentia

Neither the ICTY nor the International Tribunal for Rwanda has provisions for trials in absentia.¹⁴⁰ Trials in absentia are trials that occur if the accused is not present.¹⁴¹ Normally seen as unfair trials, these trials would be very effective in instances of violations of human rights such as human trafficking and other war crimes. The tribunals instead seem to put all their focus on cooperation between states in trying to find those that must stand trial. While this has been somewhat successful,¹⁴² it undermines the potential efficacy of the court. While both tribunals have been created in the 1990's, neither one has been completed yet. With so many trials needing to take place and all the subsequent appeals, the tribunals have thus far spanned 3 decades. Since even those individuals that have been eventually found and brought to trial must have the opportunity to appeal, their avoidance of the tribunal has elongated the process even further. If trials in absentia were to be allowed by the tribunals or any subsequent international court, the individuals that do not appear would essentially be missing out on their trial. While it may seem unlikely at first glance, it would logically follow that at least some of the accused would appear if they faced the possibility of losing their opportunity to defend themselves from the charges they face. Subsequently, the appeals process would also be more ineffective once a trial in absentia has occurred. Trials in absentia can also be conducted more swiftly and can free the court to prosecute other matters involving those that are in custody. Ethical considerations in law prevent the existence of such trials but while this proposition may seem a bit extreme, justice should not take a backseat to avoidance. Trials in absentia have occurred in Rwanda for ordinary criminal matters and while this is seen as a shortcoming in the Rwandan legal system, it would

¹⁴⁰ Tavernier, *Supra* Note 127.

¹⁴¹ *Id.*

¹⁴² Status of Cases, International Criminal Tribunal for Rwanda Website <http://www.unictt.org/Cases/tabid/204/Default.aspx> (last visited May 1, 2014).

be less so in cases of war crimes since the violations are much more severe. While this proposition likely will not come to fruition, it provides for a thoughtful alternative.

Culpability for following Orders

The rights of the accused should never be violated and should be preserved in every situation. This includes the presumption that the accused is innocent until proven guilty and the right to be heard. With that being said, certain guidelines should be placed on trials in the tribunal in order to increase efficiency. An important case heard by the ITCY, the case of Miroslav Kvočka, Milošević, Zoran Žigic, and Dragoljub Prcać set a very important precedent that effectively eliminated a possible defense to war crimes.¹⁴³ The case involved the aforementioned men's actions at the Omarska camp. This prisoner camp saw the death of many inmates and all the men were found to be responsible.¹⁴⁴ The precedent set by this case was that while all the men were guilty, it was possible to narrow the focus on each one and find their level of responsibility, and therefore their level of punishment.¹⁴⁵ This was extremely important as it eliminated the defense that these men were acting under orders. Since they all received different punishments¹⁴⁶, the individual culpability was reinforced and the defense of acting as agents was further deconstructed.

Lessons from the Tribunals

While the ICTY and the International Criminal Tribunal of Rwanda have yet to conclude, there is still much that has been learned from them and implemented in other tribunals. The Extraordinary Chambers in the Courts of Cambodia was created with help from Great Britain in

¹⁴³ *Kvočka*, *Supra* Note 95.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

order to deal with the aftermath of the Khmer Rouge regime, a communist regime in Cambodia.¹⁴⁷ Taking many similar approaches to the Tribunals for the former Yugoslavia and Rwanda, the Extraordinary Chambers have also implemented different strategies in their structures. The most important difference is that unlike the tribunals, the Extraordinary Chambers include Cambodian personnel and are also located in Cambodia.¹⁴⁸ Cambodia insisted in this because it thought that such trials should be left in the hands of the people that were affected. While this may be a good decision, it is important to note that an international tribunal, especially a permanent, ongoing one, would likely be more adept at handling cases involving violations of human rights and war crimes than local courts. In addition, after armed conflicts, judicial systems might not be equipped to deal with cases fairly.

Similar to the Extraordinary Chambers, the Special Court of Sierra Leone, is partially composed of natives of Sierra Leone. The Special Court was created to address the war crimes committed during the civil war in Sierra Leone and one of its most important contributions was the finding that forced marriages could be considered a crime against humanity.¹⁴⁹

The efficacy of tribunals and courts in general requires resources which are often not enough to handle the large load of cases. The need for resources can be lessened a bit if the country for which the tribunal is enacted subsidizes part of the cost of the tribunal. The Special Tribunal for Lebanon, which was created to prosecute those responsible for the death of 22 Lebanese individuals including the former Prime Minister Rafiq Hariri, was funded by the

¹⁴⁷ Henri Locard, *State Violence in Democratic Kampuchea (1975-1979) and Retribution (1979-2004)*, in EUROPEAN REVIEW OF HISTORY: REVUE EUROPEENE D'HISTOIRE 121, 125 (2005).

¹⁴⁸ About Section of Extraordinary Chambers in the Courts of Cambodia website <http://www.eccc.gov.kh/en/about-eccc> (last visited April 15, 2014).

¹⁴⁹ Prosecutor v. Brima et al., Judgment, No. SCSL-2004-16-PT (Feb. 2008).

Lebanese government.¹⁵⁰ This ensured that the Special Tribunal for Lebanon had sufficient funds. Since funds are usually a problem for tribunals, this is a very effective method of gaining monies. In the event that one uniform tribunal is enacted as suggested above, a special fund can be set up and the UN as well as other voluntary beneficiaries can contribute to it.

The nuances of the new tribunals seem to show that while the ICTY and the ICTR are important steps in shaping international criminal law, they are not perfect either. With time, tribunals will hopefully built upon each other and become more and more effective.

Conclusion

Human trafficking and war crimes are deeply rooted in human history and seemingly in human nature. It would be presumptuous to assume that they are coming to an end. The trend that appears to exist, is, however, positive. While it is easy to point to contemporary genocides, wars, and human trafficking and be pessimistic, it is important to note the progress that has been made by each tribunal, treaty, and attempt to codify a universally accepted international criminal code. Moral progress does not occur in the form a steady slope but in a jagged line with many ups, downs, and plateaus. The important thing is that moral progress moves upwards. While each tribunal is a reminder what humans are capable of doing, it is also a reminder of the human drive for justice and the demand that those responsible be held accountable for their crimes. Every tribunal builds on the one before it and every tribunal contributes to human rights law. By assimilating what history has told us and taking initiatives that will further the common goal of justice, the law can only get stronger. Human trafficking during war will exist and war crimes will occur but if punishments are increased, if the efficiency of the international judiciary is

¹⁵⁰ About Section of the Special Tribunal for Lebanon website <http://www.stl-tsl.org/en/about-the-stl> (last visited April 15, 2014).

increased, and if international criminal tribunals build upon each other, the amount of human trafficking during war and many other war crimes will likely decrease. Moral progress is an ongoing war towards perfection and while that war may not be won, a few battles surely can be won.