

## **Justice on Whose Terms?**

### **A Critique of International Criminal Justice Responses to Conflict-Related Sexual Violence**

**Abstract:** This article argues that the international criminal justice system fails to sufficiently address conflict-related sexual violence in two critical ways: [1] by advocating a pro-prosecution, “end impunity” approach (defined as holding perpetrators accountable through criminal, civil, administrative or disciplinary proceedings) which applies the prevailing Euro-American model of justice designed to prosecute one man for the rape of one woman to post-conflict zones where widespread sexual violence occurred, and [2] by identifying conflict and post-conflict zones as both discursive and practical sites of pathology that require intervention by elites who strongly identify with a Euro-American liberal individualistic vision of justice. We argue that the international community can no longer conveniently refuse to address the inequalities characterizing the international criminal justice system, in which a tiny minority of self-congratulatory elites uses the noble principles of human rights and justice to advance an agenda that works in their own best interests. To explore possible alternatives to a prosecution-centered approach to conflict-related sexual violence, we employ two African case study examples of community-led gender justice initiatives that have successfully shifted legal discourse while simultaneously transforming wider cultural frameworks.

#### **Introduction**

The past two decades have been replete with instances of success for those who would take the passage of international law and dramatically increased media attention as indicators of progress with respect to efforts to end conflict-related sexual violence. In just over ten years, the United Nations has passed two Security Council Resolutions that explicitly urge women’s

increased participation in peace and security efforts (UN, 2000) and draw attention to women's need for protection from sexual violence in conflict (UN, 2008). The implementation of international criminal tribunals to prosecute the war crimes that took place in the mid-1990s in Rwanda and the former Yugoslavia also represented a success, with the latter issuing, in 1995, the first success indictment of rape as a war crime in modern history (ICTY, 2012a). Conflict-related sexual violence is now standard fodder in most North American and Western European media, so that many residents of these countries can now identify the Democratic Republic of Congo, in the words of both diplomats and well-intentioned reporters, as "the rape capital of the world" (Wairagu, 2012; Lloyd-Davies, 2011).

These hard-won gains certainly constitute cause for celebration, but they also present feminist scholars with an occasion to pause for thought. Closer analysis reveals that international criminal tribunals have produced relatively few rape convictions since their inception. The International Criminal Tribunal for the former Yugoslavia, for instance, has issued only sixty convictions in seventeen years, while the International Criminal Tribunal for Rwanda has issued forty-five (ICTY, 2012b; ICTR, 2012). Services and funds allocated to assist victim-survivors of conflict-related sexual violence remain limited (ICC, 2009; Women's Initiatives for Gender Justice, 2011), and it remains fundamentally unclear whether all of this attention has actually served to diminish instances of conflict-related sexual violence or to provide justice that victim-survivors might find meaningful.

This article argues that the international criminal justice system fails in two critical ways. First, this system is inherently flawed in its application of the prevailing Euro-American model of justice used to prosecute one man for the rape of one woman to post-conflict zones where widespread sexual violence occurred. This pro-prosecution approach, which its proponents often

refer to as the “end impunity” model, seeks to hold perpetrators accountable through criminal, civil, administrative or disciplinary proceedings that cannot provide justice to the numerous victims of conflict-related sexual violence. Second, the international criminal justice system fails because it identifies conflict and post-conflict zones as both discursive and practical sites of pathology in which essentialized notions of oppressive “local” gender norms serve as a mandate for intervention by elites who strongly identify with a Euro-American vision of justice.

We argue that, in its current form, the prosecution-driven approach of the international criminal justice system cannot hope to provide justice to the post-conflict communities it purports to serve. This is because such vision of justice not only relies upon the prosecution of one individual for one crime, but also the idea that culpability lies in individuals rather than in communities and broader circumstances, an ineffective approach in a situation characterized by widespread social breakdown. Our argument unfolds in five key sections designed to illuminate the broader gendered context in which the three most significant international criminal justice institutions, the International Criminal Court (ICC), International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Tribunal for the former Yugoslavia (ICTY), respond to conflict-related sexual violence.

The first section provides a concise overview of international criminal justice system that enabled the creation of the ICC, ICTR, and ICTY as organizations with a mandate that included the prosecution of conflict-related sexual violence. In the second section, we discuss how existing feminist legal perspectives allow us to challenge the current trend toward addressing conflict-related violence solely through international criminal prosecutions. The third section, “Importing Flawed Solutions”, documents the causes and consequences of this near-exclusive reliance upon prosecution as a means to achieve justice. This lays the foundation for this article’s

argument, in section four, that the current international criminal justice model is so heavily biased toward individualistic understandings of justice drawn from a Euro-American framework that it is inherently incapable of adequately addressing systemic and widespread instances of conflict-related sexual violence. We critique the post hoc prosecution approach to argue that the ultimate goal of any initiative designed to address conflict-related sexual violence should center upon social transformation. Accordingly, in section five, our argument concludes with two African case study examples of community-led gender justice initiatives that, in their successful shifting of legal discourse and transformation of wider cultural frameworks, may serve as alternatives to a prosecution-centered approach to conflict-related sexual violence.

### **A brief introduction to the work of the ICC, ICTY, and ICTR**

The large-scale expansion of international criminal justice institutions in the past twenty years has roots in the ad hoc bodies created to deal with atrocities related to World Wars I and II, specifically the 1919 War Crimes Commission, Nuremberg War Crimes Tribunal (Fox, 1993), and the Tokyo Tribunal (Futamura, 2006). In the wake of what the United Nations determined to be “widespread and flagrant violations of international humanitarian law...mass killings, massive, organized and systematic detention and rape of women”, U.N. Security Council Resolution 827 established the International Criminal for the former Yugoslavia in The Hague to prosecute war crimes committed in the territories of the former Yugoslavia between 1991 and 1995 (UN, 1993).

The ICTY prosecutes individuals accused of war crimes as defined by the Geneva Conventions, a series of four post-World War II treaties signed by nearly two hundred countries regarding the treatment of civilians and prisoners during conflict, and which include specific mention of rape as a crime against humanity (Borch & Solis, 2010). Three appointed

international judges, none of whom are from the same country, hear cases before the ICTY, during which they are bound by the standards outlined in the Universal Declaration of Human Rights, particularly prohibitions on trial in absentia, presumption of guilt, or imposition of the death penalty (UN, 1948). To date, the ICTY has issued charges against 160 individuals who committed war crimes between 1991 and 2001 in the areas of the former Yugoslavia; it has issued 60 convictions and 30 individuals are currently being tried (ICTY 2012b). The ICTY has found nearly half of all individuals convicted guilty of elements of crimes involving sexual violence (ICTY, 2012c).

A year after U.N. Security Council Resolution 827 created the ICTY, Resolution 955 established the International Criminal Tribunal for Rwanda to prosecute individuals for war crimes committed between January 1, 1994 and December 31, 1994 (UN, 1994). The structure and mandate in place for the ICTR are otherwise nearly identical to those described above for the ICTY. To date, the ICTR has completed 72 cases, including 45 convictions (17 of which are pending appeal) and 10 acquittals (ICTR, 2012). As with the ICTY, more than half of these convictions included elements of crimes involving sexual violence (UN, 2010).

In 1998, just a few years after the passage of the Security Council Resolution that enabled the creation of the ICTY and ICTR, 111 states became party to the Rome Statute, which created the International Criminal Court that commenced operation in 2002 (Schiff, 2008). The Rome Statute provided the ICC with a mandate to prosecute conflict-related sexual violence as a crime against humanity and also recognizes as crimes against humanity sexual slavery, trafficking, forced prostitution, and forced sterilization (UN, 1998). The ICC currently has sixteen cases from Uganda, the Democratic Republic of Congo, Darfur, the Central African Republic, Kenya, Liberia, and Côte d'Ivoire (ICC 2012). The ICC issued three charges of sexual violence against

five senior members of the Lord's Resistance Army (Luping, 2007); however, the ICC has not issued any convictions for crimes of sexual violence. This caused Judge Elizabeth Odio Benito, following the conviction of Congolese militia leader Thomas Lubanga Dyilo for the forced conscription of child soldiers, to note that the Court's decision against convicting Lubanga of sexual crimes "disregards the damage caused to the victims and their families, particularly as a result of the harsh punishments and sexual violence suffered by the victims of these crimes" (ICC, 2012). Given that the Lubanga case represented the ICC's first conviction, the Court's failure to convict Lubanga for sexual crimes sets a troubling precedent.

The judge's cause for dismay and concern with respect to inadequate attention paid to conflict-related sexual violence is not unique to the ICC. That more than half of the convictions at the ICTY and ICTY included elements of sexual violence (ICTY 2012c; UN, 2010) may not be cause for celebration at all given the widespread and systemic nature of rape in during the conflicts in both Rwanda and the former Yugoslavia. The Tribunals have issued a combined total of 105 convictions, meaning that just over 52 involved sexual violence. While the mandate of both Tribunals focuses upon prosecuting those who played leading roles in the conflict, we must ask the question of what these mere 52 convictions might mean to the 500,000 women in Rwanda (Wood, 2005, 215) or the 20,000 women in the former Yugoslavia (Wagner 2005, 216) who were raped during the conflicts. In order to responsibly do so, an overview of feminist legal perspectives on sexual violence is in order.

### **Feminist legal perspectives**

Feminist theoretical approaches comprise multiple and often contradictory ways of understanding conflict-related sexual violence. Feminist legal scholars have long argued that, "provisions are needed in international humanitarian law that take women's experiences of

sexual violence as a starting point rather than just a by-product of war” (Askin 1997, p. 8-9). Feminist scholarship demonstrates that victim-survivors of conflict-related sexual violence have rarely been consulted about the form, scope, and modalities that would be meaningful to them as individual women seeking accountability for harms done to them. This was evident in Rwanda, where hundreds of thousands of women were raped and tortured (Nowrojee 2005), and only a few of the survivors have testified to the sufferings they enduring or have seen any attempt to hold the perpetrators accountable (Rehn and Johnson Sirleaf, 2002). Victim-survivors’ stake in these processes have been minimized or denied, and in many cases crimes against them go unrecorded and unprosecuted (Askin, 2003; Olujić, 1998).

Bartlett’s (1990, 1995) work on feminist legal method—asking the woman question, feminist practical reasoning and consciousness raising— heavily informs the basis for incorporating feminist perspectives into contemporary approaches to international criminal justice prosecution of conflict-related sexual violence. Feminist legal theory acknowledges that the commonalities in the questions feminists ask about women’s situations in different contexts provides a deeper understanding of how law affects what gender means, or could mean, in society (Bartlett 2000).

While feminist approaches may be diverse, most would agree that feminist analyses of the law should remain attuned to the tenets of critical race theory by embedding intersectionality throughout the process of formulating questions and understandings of complex social issues (Crenshaw, 1993; Matsuda, 1991). Feminist scholars working in the field of international criminal law have built upon the work of critical race theorists such as Angela Davis, who exposed the tension between the basic tenets of feminism, democracy, and the philosophy that animates the U.S. penal state (Davis, 2005). Feminist legal scholar Doris Buss, for instance,

draws connections between the racialized nature of the North American penal system and the fact that the vast majority of international criminal indictments fall disproportionately upon men of color (Buss, 2011).

Gender bias within the judicial process prevents women from receiving fair treatment as witnesses, as complainants, and in investigations. In their independent assessment of the impact of armed conflict on women, ICC Trust Fund for Victims board of directors chairperson Elisabeth Rehn and Prime Minister of Liberia Ellen Johnson Sirleaf present a rather damning indictment of the challenges victim-survivors of conflict-related sexual violence have faced in their interactions with the international criminal justice system. Rehn and Johnson Sirleaf note that even when international criminal law practitioners bring forth indictments for war rape, they often do so hesitantly and face inner-court resistance. Witnesses have been intimidated and humiliated at international courts, pressured into testifying through false promises, disrespected by court employees, and had their stories published against their will, leaving them intimidated or disillusioned by the international justice system. Further, support services and legal aid are rarely provided to women, who may not have enough money to travel to a trial or the ability to leave their families and communities, which sometimes blame them for the crimes committed against them (Rehn & Johnson Sirleaf, 2002, pp. 93-97).

These issues have not gone unnoticed; in fact, the United Nations' dissatisfaction with this approach to justice became emphasized in U.N. Security Council Resolutions 1820 (UNSCR, 2008) and 1888 (UN, 2009), both demanding more accountability in the international criminal justice system. Feminist scholars' ambivalence toward the criminal prosecution of conflict-related sexual violence also has roots in earlier feminist theory. Political theorist Hannah Arendt, for instance, believed that the protection of human rights could never come through



formal legal means or institutional structures (Arendt, 1970). Feminist legal scholar Catherine MacKinnon characterized the problem as a situation in which “the liberal state coercively and authoritatively constitutes the social order in the interests of men as a gender” (MacKinnon, 1983, p. 635).

Some feminist legal theorists argue that the formal enshrinement of equality as a legal principle has in fact systematically ignored and worsened the position of the already marginalized. Martha Albertson Fineman, for instance, contends that the criminal justice system’s commitment to equality before the law presupposes that “the state is a neutral and level backdrop for a competition of presumed equals” (Fineman 2009, p. 253). Fineman further argues that equality only exists when “individuals have the basic resources that enable them in their particular circumstances to act in ways that are consistent with the tasks and expectations imposed upon them by society” (2010, p. 61). Yet criminal justice efforts effectively ignore the ways in which privilege (and its lack) influence these “particular circumstances” of individual lives.

The international criminal justice system in its present form lacks a consideration of privilege, particularly of the factors that discourage the direct inclusion of victim-survivors of conflict-related sexual violence. Hence it misses opportunities to further inquire “into how societal resources are channeled in ways that privilege and protect some while tolerating the disadvantage and vulnerability of others” (Fineman, 2010, p. 59). Indeed, numerous feminist legal analyses have determined that national and international legal systems frequently fail to be respectful of the needs, cultural rights or concerns of individuals from marginalized communities. Such critiques hold that dominant legal narratives surrounding victimization obscure individual’s diverse experiences and characteristics, such that individual life realities

must become dramatically oversimplified in order to fit the dominant legal narrative (Segrave, Milivojevic & Pickering 2009).

Critics of the U.S. criminal justice system likewise note how focusing exclusively upon the creation of anti-discrimination and hate crime laws fails to support or encourage transformative social change. Such legislation, these critics argue, does nothing to change negative attitudes or beliefs toward marginalized groups precisely because they fail to address the “long-term patterns of exclusion and exploitation” that characterize some communities’ experiences of life in the United States (Spade, 2011, p. 86). Such patterns of exclusion, these critics argue, become obscured through a focus on overt discrimination as part of legal frameworks that focus exclusively upon equality. Indeed, these frameworks envision a “perpetrator perspective” in which individuals, rather than broader social systems, perpetuate acts of racism, sexism, or other forms of exclusion (Freeman, 1996).

These accounts of criminal justice systems’ failures to effectively address racial and sexual justice issues stress how prosecution-oriented legal strategies ignore the harmful intersections of race, culture, and sexuality (Richie, 2012). Yet self-identified feminists can also perpetuate the kinds of exclusion and erasure wrought by the equality model of justice through their imposition of a dominant and excluding consciousness that privileges international legal discourse and procedure while disregarding work done by grassroots feminists throughout the world (Alexandre, 2001). Hence feminist legal scholar Sonia Lawrence notes that “without a clear-eyed appraisal of our victories, we will inevitably fail to see that some women have been left behind, and indeed that some women are being harmed by initiatives that have benefitted others” (Lawrence, 2004, p. 10).

Feminist scholarship conducted in conflict zones amply demonstrates that women often experience conflict very differently from men and, indeed, vary enormously in their responses to the ruptures it creates in their communities. Work that foregrounds the voices of victim-survivors carefully articulates these differences in women's lived experience, underscoring that women's greater responsibility for children and the elderly, more limited education and employment prospects all contribute the gendered nature of conflict (Gardner & El Bushra, 2004; Green, 1999; Lyons, 2004; Mehreteab, 2004).

One would hope that this substantial body of feminist legal scholarship and accounts of the experiences of victim-survivors would inform international criminal justice approaches to conflict-related sexual violence. Sadly, evidence indicates otherwise in the case of the substantive recommendations contained in the best practices manual issued by the ICTR's Office of the Prosecutor (ICTR, 2008), which very closely mirrored the set of recommendations provided by victim-survivor advocacy groups at the very start of the ICTR more than a decade previously (Bianchi, 2010). Yet, as we shall see in the next section, this case of too little too late seems quite characteristic of the international criminal justice system.

### **Exporting flawed solutions**

We now turn to an exploration of the limitations of current prosecution-oriented responses to conflict-related sexual violence. Many of these limitations stem from the fact that these responses have given precious little attention to the gendered geographies, histories, and cultures to which they have disseminated. It is not surprising, then, that feminist legal scholars redoubled efforts to develop feminist theory on conflict-related sexual violence in the wake of conflict in Rwanda and the former Yugoslavia in the mid-1990s, and an extensive body of literature now documents the gendered nature of conflict (Coulter, 2005; Mazurana & McKay,

2003; Mazurana, Raven-Roberts & Parpart, 2005; Meintjes, Turshen & Pillay, 2002). This followed close on the heels of a major achievement for some feminist legal activists: the rape law reform movement of the early 1980s, which sought to destigmatize the victim status of women who had been raped by shifting the focus from the reputation of the victim to the crime committed by the rapist. It is no coincidence that the vast majority of international law and policy initiatives designed to address conflict-related sexual violence stem from this rape law reform movement (Halley, 2008). Rape law reform's legal agenda called for criminal punishment as the ultimate solution to sexual violence. These tenets remain deeply entrenched in the "end impunity" paradigm that drives international criminal law (Del Ponti & Sudetic, 2009; Spees 2003).

Political scientist Kristin Bumiller sharply critiques the rape law reform movement for its lack of feminist sensitivities, noting that programs and initiatives designed to address sexual violence "are implemented according to gender-neutral standards, both formally and in terms of the state's interest in the problem" (Bumiller, 2008, 12). Put another way, even if rape law reform is good in theory, it fails in practice because its practitioners reify gender neutrality in ways that do not reflect reality. Legal scholar Aya Gruber (2009) cautions careful consideration of "any purported benefits of reform against the considerable philosophical and practical costs of criminalization strategies before considering making further investments of time, resources, and intellect in rape reform" (Gruber, 2009, p. 581).

Elsewhere we have detailed how the North American and Western European rape law reform movement advocated a pro-prosecution approach as a way to remove the stigma attached to rape and hold perpetrators accountable. In this work, we documented the export of this approach to the international criminal justice system despite dubious evidence of its success in

North America and Western Europe (Dewey & St. Germain, 2012). Criminalization and the prosecution approach, the “end impunity” model, have been exported to the ICTY, ICTR, and ICC despite the fact that the communities served by these institutions have vastly different gender, cultural, and legal norms.

The rape law reform movement, from its inception, emerged largely as a response to sexual assault cases involving one man and one woman. Yet the dynamics of sexual violence in conflict zones differ significantly from assaults in peacetime: most U.S. rapes occur in seclusion between two people who know each other, with 73% perpetrated by a person the victim-survivor already knows, including 38% by a friend or acquaintance, 28% by an intimate partner, and 7% by a relative (U.S. Department of Justice, 2005). The vastly larger scale of rape in conflict zones often means a dramatically larger number of both perpetrators and victim-survivors, and the criminal justice system cannot hope to provide such individualized justice to each of them using a prosecution-oriented model.

To elaborate upon this point, we have already established that sexual violence is widespread within conflict zones and often perceived by perpetrators as a particularly effective weapon of war. In terms of method, war rape is used to subdue, punish, or take revenge upon entire communities rather than to exert power over individual women, as in many peacetime rapes. While sexual violence in conflict zones has certainly included individual rapes and sexual abuse, reported instances of conflict-related sexual violence more often include gang rapes, genital mutilation, and rape-shooting or rape-stabbing combinations, at times undertaken after family members have been tied up and forced to watch (Mezey, 1994; Milillo, 2006).

One extensive study conducted in the Democratic Republic of Congo documented the experiences of 492 victim-survivors of conflict-related sexual violence and found that 57.3% of

those surveyed reported extreme sexual violence and cruelty inflicted by armed soldiers, “proof that there was a plan to exterminate...the communities these women belonged to” (RFDA, RFDP & International Alert, 2005). 72% of the women reported that armed soldiers tortured them during the rape itself by being beaten, wounded with machetes, genitally mutilated or burned with liquefied plastic melted by flame, and 12.4% stated that soldiers had forced objects into their vaginas, including sticks, bottles, unripe bananas, chili-coated pestles, and rifle barrels (RFDA, RFDP & International Alert, 2005). Those interviewed also told of other women who, after being raped, were killed by shots fired into their vaginas (RFDA, RFDP & International Alert, 2005).

Many women who participated in the study believed that armed soldiers engaged in these rapes as a deliberate means to spread HIV, forcibly impregnate, and otherwise incite fear so extreme as to force entire communities from their homes (RFDA, RFDP & International Alert, 2005). This strongly resembles strategies employed by soldiers in the Rwandan conflict (Rehn & Johnson Sirleaf, 2002, p. 49), and soldiers engaged in similar patterns of violent rape and forcible impregnation in the former Yugoslavia as well (Stiglmayer, 1994). These similarities in terms of extremely violent and systemic conflict-related sexual violence in otherwise extremely disparate cultural and geographical areas indicate that a liberal, individualistic legal model which is male-identified, biased toward Euro-American cultural norms, and created to manage sexual violence in countries with highly centralized and functioning peacetime governments, cannot serve as an effective prototype for survivor redress in conflict or post-conflict zones.

It is perhaps not surprising, then, that some feminist legal scholars have been able to draw such powerful “theoretical force from immediate experience of the role of the legal system in creating and perpetuating the unequal position of women” (Charlesworth, Chinkin & Wright,

1991, p. 613). This unequal position is even further complicated in cultures that do not operate with the same sociocultural or economic frameworks. Fionnuala ni Aolain notes that promises of justice and legal transformation in the form of “liberal Western guarantees...may frequently operate to cloak women’s ongoing repression and inequality with the blessing of the rule of law and the embrace of international legal instruments” (ni Aolain, 2011, p. 288).

Hence, the purported cultural and utilitarian benefits arising from a pro-prosecution approach become even more destructive in the international criminal prosecution arena when cultural beliefs about gender, sexuality, and violence differ tremendously from Euro-American social norms. This is equally true of ethno-religious identity which is, at best, a fraught endeavor in a post-conflict zone. Anthropologist Jennie Burnet, for instance, notes the way that post-conflict systems of social classification in Rwanda “make certain Rwandan women invisible”, particularly unmarried women who have given birth to children born of rape (Burnet, 2012). And, just as international criminal justice lags in prosecutions and real impact on affected communities despite real advances in international criminal law, conflict-related sexual violence continues to be perpetuated throughout the world in the perilous and craggy chasm between legal principles and local practices.

### **Justice on whose terms?**

We have argued that the chasm between international criminal law and its practice stems from the fact that the current international criminal justice model retains a heavy bias toward a Euro-American framework that is inherently incapable of addressing systemic and widespread instances of conflict-related sexual violence. Hence, we argue, the ultimate goal of any initiative designed to provide justice to survivors of conflict-related sexual violence must center upon social transformation and prevention. This section accordingly explores the consequences

stemming from the international criminal justice system's discourse of pathology surrounding conflict and post-conflict zones, before turning to a discussion of possible alternatives to a Eurocentric prosecution-oriented approach to conflict-related sexual violence.

As a legal scholar and an anthropologist well into several years of a successful collaborative relationship, we have come to understand the way in which international criminal law exists in a world with its own set of norms, beliefs, and realities. Anthropologists have only relatively recently begun to explicitly analyze the ways in which law is itself a product of the culture from which it emerges (Rosen, 2008), although legal scholars have, understandably, considered this issue previously (Mezey, 2001). Earlier in this article we drew heavily upon feminist legal theory to understand why the international criminal justice system fails in its wholesale importation of a Euro-American pro-prosecution approach originally designed to deal with sexual violence as a crime perpetrated by one man against one woman. In this section we employ an anthropological approach to understand how the international criminal justice system is fundamentally flawed in its identification of conflict and post-conflict zones as both discursive and practical sites of pathology in which essentialized notions of oppressive "local" gender norms serve as a mandate for intervention by elites who strongly identify with a Euro-American liberal individualistic vision of justice.

Although most anthropologists have long since abandoned the use of "the West" or "the Global North" as cultural or geographical descriptors due to their inability to capture the diversity of places contained within these vague phrases, such terms still hold cultural weight. And in the context of international criminal justice, these remain even more salient. In his work on what he calls "military orientalism", historian Patrick Porter observes that, "the very idea of 'the West' continually replenishes itself through war" (Porter, 2009, p. 4). Feminist



anthropologists and ethnic studies scholars similarly observe that this reification of an otherwise vague identity can take complex forms, including the way that Euro-American gendered cultural identities may be mobilized as a model in discourses of rescue regarding supposedly less-empowered women (Abu-Lughod, 2002; Nguyen, 2011).

Likewise, scholars in political science and international relations observe the ways in which the relatively recent emergence of “failed state” discourse positions North American and Western European nations as progressive and highly functioning in direct opposition to most of the rest of the world. Political scientist Mary Manjikian, for instance, notes that “in both the discourse of health care and that of the ‘failed state’ there exists a binary system of order/disorder in which one mode of being (the healthy or secure mode of being) serves as the default or ‘normal’ mode of being, while its inverse is defined as the broken or dysfunctional version of that state” (Manjikian, 2008, p. 341). This critique is by no means new; in 1965, Frantz Fanon criticized this pathologization of what was then known as “The Third World”, arguing instead that colonialism was itself a pathogen (Hughes & Pupavac, 2005, p. 886).

We argue that the international criminal justice system similarly relies upon a lawless, brutal Other in the form of pathologized state requiring North American and Western European intervention. The result, political scientists Caroline Hughes and Vanessa Pupavac observe, is a “portrayal of conflict as emerging from the darkest realms of the psyche of the Other, who must be protected and healed by Western instrumental rationality and care” (Hughes & Pupavac, 2005, p. 889). Ratna Kapur argues that such discourse has an additionally problematic gendered component in international law as part of “victimization rhetoric” that leaves “no space in this construction for...the articulation of a subject that is empowered” (Kapur 2003: 30).

In the case of conflict-related sexual violence, this pathologization is especially

problematic because it further builds upon broader (and unfortunately cross-cultural forces) that may already work to stigmatize or otherwise silence victim-survivors. These forces, as noted earlier in this article, account for the frequency with which conflict-related sexual violence serves as a means by which military or other armed contingents exact harm upon entire communities as they exert sexual power over individual women. Hence victim-survivors of conflict-related sexual violence potentially face a double set of marginalizing forces, first at the time of their assault and then later via an international criminal justice system that, as argued earlier in this article, draws its main operating tenets from a prosecution-oriented approach that has met with little success in its Euro-American places of origin.

This failure is particularly evident in Bosnia-Herzegovina. Ten years after its inception as a tribunal, the ICTY prosecutor decided that, as part of efforts to localize justice, cases involving “mid and lower-level accused” should be tried at the War Crimes Chamber (ICTY, 2005). The ICTY has not issued any new indictments since 2004 due to its impending closure and continues to transfer “intermediate and lower-ranking accused” to Sarajevo for trial (ICTY 2011). As part of this transfer of authority to the War Crimes Chamber of the Court of Bosnia-Herzegovina, the ICTY has “facilitated the implementation of international standards and best developed practices within the local judiciaries,” a process that includes training Bosnian legal professionals and numerous other activities designed to enhance the “ability of local judiciaries to continue adjudicating war crimes cases in accordance with the highest international standards after the Tribunal closes its doors” (ICTY, 2011).

Such noble intentions could not have presented a more dramatically different effect: indeed, the first criminal case the ICTY transferred to the War Crimes Chamber in Sarajevo resulted in a dramatic prison escape just six months after sentencing. The prison break occurred

the day that one of this article's co-authors arrived in Sarajevo to begin her fieldwork with the International Organization for Migration (Dewey, 2012; 2008). In her interviews and informal conversations with individuals involved in various capacities with postwar civil society initiatives, individuals expressed a near-unanimous disgust with the way that this localization of justice had been undertaken, particularly given the fact that sexual violence had featured so prominently in Stanković's conviction.

Judge Shireen Avis Fisher, a U.S. legal practitioner serving a three year appointment at the War Crimes Chamber, blamed Bosnia-Herzegovina's Ministry of Justice for the mishandling of the case. "The people of Bosnia and Herzegovina have been let down by this, because this court should never have started without a prison. We don't choose the prison, the Ministry of Justice does, and clearly they have made choices based upon ethnicity to ensure [adherence to] human rights standards." Indeed, many individuals in Sarajevo commented that the War Crimes Chamber sentenced Stanković, an ethnic Serb, to a predominantly ethnic Serb prison in order to protect him from violence. A Bosnian Muslim one of the co-authors worked closely with during her fieldwork put this somewhat more bluntly when he explained that, had Stanković been placed in a predominantly non-ethnic Serb prison, "the Muslim prisoners would have cut off his balls and laughed while he died" (Dewey, 2008).

This sense of disgust with the international criminal justice system permeated many of the informal conversations one of the co-authors had during her fieldwork. "You know", she said, "this street was the front line during the war. I think about all those women, the young girls especially, who were raped, I can only imagine how they feel every day. They will always be looking around, wondering if some harm will come to them. And why? Because they were so brave to testify, and for what? So he [Stanković] could escape and haunt them for the rest of their

lives.” After a moment of chilly silence despite the summer heat, one of the co-authors asked if she felt any justice had been done. “Absolutely not”, she continued, “We’re being ignored all over again, just like during the war. We are no longer the problem of the West.”

### **Envisioning Potential Alternatives**

Yet there are potential alternatives that could avoid conceptualizing conflict or post-conflict zones as pathological in nature and thus inherently incapable of assisting or providing justice to victim-survivors. In order to explore such potential, we now turn to the examples of programs designed by GROOTS Kenya and the South African Sonke Gender Justice, two African organizations that have employed localized gender justice frameworks in ways that have shifted legal discourses while transforming wider cultural frameworks. The work of these organizations presents much possibility for translation to anti-violence against women initiatives in conflict or post-conflict zones, particularly in their incorporation of some elements of international human rights discourse on terms deemed appropriate by local women and men.

GROOTS, an acronym for “Grassroots Organizations Operating Together in Sisterhood”, is an international network that unites “grassroots” women’s groups from a number of countries as diverse as Papua New Guinea, Cameroon, Germany, and the United States. It provides a platform for women to share information on community development initiatives and to focus international attention upon the needs of women who do not normally have the privilege of engaging in dialogue at the national or international levels. Founded in 1985 at the United Nations World Women’s Conference in Nairobi in response to concerns about the rather systematic way in which women face exclusion from these proceedings, GROOTS lists among its goals, to respect various forms of diversity as sources of strength, and to publicize the “the practical knowledge, skills, and expertise that grassroots women acquire from their real life

experiences as mothers, wives, daughters, income generators, community caretakers, and day-to-day problem solvers, in money scarce situations” (GROOTS, 2012).

GROOTS Kenya, an autonomous member of GROOTS International, links approximately 1,000 women’s groups in different regions of Kenya with projects and services. Envisioning itself as a kind of clearinghouse for ideas and resource-sharing strategies around issues of gender justice, GROOTS Kenya actively engages in dialogue with regional organizations to determine their needs. GROOTS Kenya’s co-founder Esther Mwaura notes that, “Most NGOs come in and position communities as those who require resources – ask us for this and the community does not get a chance to ask, what do we already have?” (Okech 2008: 3).

One of the organization’s most significant initiatives involves women’s property rights, particularly those of widows. Most women in Kenya become landowners via inheritance, a process strongly influenced by community elders who envision themselves as custodians of traditional cultural practices. These elders routinely disenfranchise women by refusing to acknowledge their needs or by accepting gifts or bribes in exchange for judging in favor of male relatives who wish to inherit land, particularly in cases where women have become widows because of HIV/AIDS. GROOTS Kenya works with local women’s group to address this serious social problem via community mapping exercises, in which women members work together to analyze the needs and desires of different individuals in their community. Most notably, they engage in locally meaningful forms of justice through work with community paralegals who have received legal, mediation, and advocacy training, and in mock tribunals where cases are tried before the community, with residents playing the role of jurors or audience. Doing so repositions poor women from beneficiaries to active agents of social change and partners with local government and development agencies (Asaki & Hayes 2011).

The sort of partnership pioneered by GROOTS Kenya directly enables women to organize as leaders and achieve change in their communities, even in cases where doing so seems to defy local cultural norms. By engaging in dialogue with local community elders and holding those who would seek to strip women of their land rights accountable, local women become active agents of social change through their engagement with a national network with international information-sharing ties. This kind of work pioneered by GROOTS and organizations like it has great potential for success in dealing with conflict-related sexual violence as well, particularly through the local to local dialogue model, in which grassroots women's groups initiate and engage in dialogue with local authorities on issues of concern to them (Goldenberg 2008).

One model for how a local to local dialogue initiative might work in the case of conflict-related sexual violence can be found in the Women in Conflict Zones Network (WICZNET), which united women researchers to share information while living in active conflict zones in Sri Lanka and the former Yugoslavia in the mid-1990s (Giles et al. 2003). As researchers on conflict in their home countries, the WICZNET members united across fraught and potentially deadly divides to share information and wartime survival strategies. The work of GROOTS Kenya demonstrates that this could also be possible for less-privileged women through some amount of loose network affiliation with information-sharing potential. Conflict-related sexual violence could be addressed in much the same way that land rights have been contested, with justice initiatives arrived at through dialogue and engagement with authorities on the terms of victim-survivors.

Without diminishing the importance of the work done by women-led initiatives to address issues that disproportionately negatively affect women, such as that of GROOTS Kenya,

The ultimate goal of any initiative that addresses conflict-related sexual violence should involve the transformation of wider cultural frameworks in ways that actively engage men as partners rather than adversaries. The South African organization Sonke Gender Justice, founded in 2006, works toward social change by employing an international human rights framework to engage government, civil society, and individuals in preventing violence against women (Sonke Gender Justice Network 2012).

Most notably, Sonke Gender Justice's "One Man Can" campaign directly engages men in these initiatives by challenging culturally embedded gender norms holding that men should be aggressive, drink heavily, have many sexual partners, and dominate decision-making in relationships. The toolkit created by this campaign consists of easy to read materials in South Africa's three main languages (English, Afrikaans, and Xhosa) that support men and boys in challenging gender norms that encourage violence against women. By linking these initiatives to broader state-level transformations surrounding inclusivity and democracy in South Africa, Sonke Gender Justice sought to reduce violence against women and associated heightened risks of HIV/AIDS by actively mobilizing men as partners (Sonke Gender Justice 2009).

Sonke Gender Justice aimed their efforts to incorporate men into anti-violence work at all levels of society, including traditional leaders, community members, civil society, and government. Through community events, workshops, collaboration with existing networks, and peer education, the project formulated community action teams that worked to educate and mobilize men about violence. This evidence-based project began with collection of data on men's attitudes and beliefs about violence in communities, followed by capacity-building of local NGOs to ensure sustainability and local ownership, training local stakeholders on strategies to involve men, developing media materials, including murals, digital stories, and PhotoVoice, to

share anti-violence message, monitoring and evaluation (Nkosi et al. 2009).

Sonke Gender Justice does not embrace public health discourse that, in response to the increased feminization of HIV/AIDS and poverty, describes “men in broad brushstrokes as inevitably violent, irresponsible, and uncaring...stereotypes common in global north about men and women in the global south” (Peacock et al. 2009: S119). Instead, the organization advocates for a rights-based approach that has both national and international relevance, thus holding governments accountable for their human rights commitments.

This approach could be particularly effective in a post-conflict zone, where norms may be in a state of flux, as was the case in the “One Man Can” campaign, which directly invoked national discourses of post-apartheid democracy. Post-conflict zones can also be spaces of transformation, and alternative initiatives to address conflict-related sexual violence might directly draw upon the strengths and goals of community rebuilding efforts. Instead of envisioning conflict or post-conflict zones as sites of pathology in need of treatment that only a Euro-American criminal justice framework could provide, the international community might do well to rethink the existing strengths possessed by local communities.

### **Some concluding thoughts**

What might constitute a move toward greater inclusivity, equality, and representation in the international criminal justice system? While we do not pretend to have offered an answer to this weighty (and perhaps unanswerable) question in this article, we have drawn upon the work of feminist legal scholars to clearly demonstrate the inherent inability of the international criminal justice system to address the systematic and widespread nature of conflict-related sexual violence. We have also employed case studies that suggest possible alternative strategies for approaching this pressing issue in more inclusive ways with greater local relevance. Hence it is



our sincerest hope that analysis presented here can be part of formulating that solution, as the present state of the international criminal justice system is clearly refusing to actively to accept the voices and perspectives of victim-survivors on equal terms.

In this article, we have detailed how the work of the international criminal justice system, specifically in the form of the ICC, ICTY, and ICTR, have systematically failed in their mission to “end impunity”. We argue that these institutions’ limited number of convictions, wholesale importation of a Euro-American pro-prosecution approach, and heavy bias toward Euro-American cultural norms render them unable to succeed in this mission due to the fact that the system is, by its very nature, unable to address the widespread nature of conflict-related sexual violence. In closing, we argue that the international community can no longer conveniently refuse to address the realities that form the international criminal justice system, in which a tiny minority of self-congratulatory elites use the noble principles of human rights and justice to advance an agenda that works in their own best interests. Instead, post hoc efforts to address conflict-related sexual violence must strive for inclusivity and aim for social transformation on local terms.

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