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Thomas, Dorothy Q. and Regan E. Ralph. Rape in War: Challenging the Tradition of Impunity. Rape in War: Challenging the Tradition of Impunity (hrw.org) Yuki Tanaka, "War, Rape, and Patriarchy: The Japanese Experience", The Asia Pacific Journal, Volume 18 | Issue 1 | Number 1 | Article ID 5335 | Dec 31, 2019, p. 18. Ibid. Human Rights Watch, Kosovo: Rape as a Weapon of "Ethnic Cleansing", 1 March 2000, D1203, available at: <https://www.refworld.org/docid/3ae6a87a0.html> [accessed 21 March 2022]. Patricia Viseur Sellers, The Prosecution of Sexual Violence in conflict: the Importance of Human Rights as Means of Interpretation, [https://www2.ohchr.org/english/issues/women/docs/Paper\\_Prosecution\\_of\\_Sexual\\_Violence.pdf](https://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf) (accesses 22/03/2022), p. 4. Patricia Viseur Sellers, p. 6. Patricia Viseur Sellers, p. 6-7. Tackling Impunity For Sexual Violence p. 685. . Jean Mari Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, Cambridge University Press, New York, 2005, p. 327. Richrad J Goldstone Hon, "Prosecuting Rape as a War of Crime" dalam Case Western Journal of International Law, Volume 34, Issue 3, 2002, p. 279. Ibid. Christine Levy, The Women's International War Crimes Tribunal, Tokyo 2000: a Feminist Response to revisionism, 6 p. 127. Yuki Tanaka, Rape, and Patriarchy: The Japanese Experience", The Asia Pacific Journal, Volume 18 | Issue 1 | Number 1 | Article ID 5335 | Dec 31, 2019, p. 1. Richard J. Goldstone Hon. z, Op. Cit., p. B. V. A. Roeling and C. F. Rueter (eds.), The Tokyo Judgment: The International Military Tribunal for the Far East, (1977) I, at 385. Sandra Fabijanić Gagro, The Crime of Rape in the icty's and the ictr's Case-Law, Zbornik PFZ, 60, (3) 1309-1334 (2010), p 1310 Katharine T. Bartlett, Feminist Legal Scholarship: A History Through the Lens of the California Law Review, 100 CAL L. REV. 384, 381-429 (2012). Ibid. Sandra Fabijanić Gagro, p. 1315 Tom Post et al., A Pattern of Rape, NEWSWEEK, Jan. 4, 1993, at 32. Alexandra Adams, "The Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and Their Contribution to the crime of Rape", The European Journal of International Law Vol. 29 no. 3, p 751. United Nations Department of Peacekeeping Operations, REVIEW OF THE SEXUAL VIOLENCE ELEMENTS OF THE JUDGMENTS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, AND THE SPECIAL COURT FOR SIERRA LEONE IN THE LIGHT OF SECURITY COUNCIL RESOLUTION 1820, p. 29. Ibid., p 46. Mark Ellis, "Breaking the Silence: Rape as International Crime", Case Western Reserve Journal of International Law, Vol 38, Issue 2, 2007, p. 232 Ibid., p. 231. Ibid., p. 237. Alexandra Adams, Op. Cit., p. 754. Ibid., p. 753. Mark Ellis, Op. Cit., p. 234-235. Rwanda's women Make Strides Towards Equality 20 Years After Genocide, The Guardian, 7 April 2014. Patricia Wildermuth and Petra Kneuer, Addressing the Challenges to Prosecution of Sexual Violence Crimes before International Tribunals and Court", in Morten Bergsmo, Alf Butenscon Skre and Elisabeth J. Wood (editors), Understanding and proving International Sex Crimes, 2012, Torkel Opsahl Academic EPublisher, Beijing, 2012, p. 67. Morten Bergsmo and Alf Butenscon Skre, "Toward a More Comprehensive Understanding and Effective Proving of International Sex Crimes, in Op. Cit., p. 3. Campbell R. The psychological impact of rape victims. Am Psychol. 2008 Nov;63(8):702-17. doi: 10.1037/0003-066X.63.8.702. PMID: 19014228. Patricia Wildermuth and Petra Kneuer, Op. Cit., p. 92. CIPEV, Report of the Commission of Inquiry into Post-Election Violence, p. 249, [http://www.communication.go.ke/documents/CIP\\_EV\\_FINAL\\_REPORT.pdf](http://www.communication.go.ke/documents/CIP_EV_FINAL_REPORT.pdf), accessed at 23/03/2022 NoCole Cvercko, Analysis: the ICC's Treatment of Sexual and Gender-Based Violence Crimes", <https://globaljustice.queenslaw.ca/news/analysis-the-iccs-treatment-of-sexual-and-gender-based-violence-crimes>, Juli 18 2018, p. 4. Article 54 Statute of ICC states: "take into account the nature of the crime, in particular where it involves sexual crimes, gender violence or violence against children". Patricia Wildermuth and Petra Kneuer, Op. Cit., p. 138. Rosie Fowler, "Great Expectation, A Critique of the International Criminal Court's commitment to victims of sexual gender-based violence", Gender of International Criminal Law, Vol 2, 2021, p. 42. A Senior Investigator in the ICC Xabier Agirre Aranburu, "Beyond Dogma and Taboo, Criteria for the Effective

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# FEMINISM AND THE BIRTH OF SEXUAL CRIME AS INTERNATIONAL CRIME AND THE CHALLENGE OF ITS IMPLEMENTATION IN THE FUTURE

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## Abstract

*The existence of international sexual crimes in international court jurisprudence and the international law instruments have evolve as an extensive crime from the abundance crime of outrages upon personal dignity; yet still have to front some challenges to attain triumph in its enforcement. This article aims to observe the sexual crimes as international crime in some aspect, namely, its development and the contribution of feminism, the challenges on the law enforcement against international criminal law and the position of feminism in addressing those challenges. In every stage of sexual crimes evolution as international crimes, feminism hold important contribution. Their impact made up in building international community opinion, sounding and criticizing, and engage in making court decisions through judges with a feminism paradigm. The success in ICTY and ICTR landmark decision and the determination of extensive sexual crimes in Rome Statute, renounce some obstacle which might eliminated by feminism ideas and movement. Once again through pressures and criticisms, awareness of sexual crimes shall increase so that come the incriminating in the completion of sexual crimes cases before international court. The role of feminism is also vital through the presence of prosecutors and judges with a feminism paradigm so that, as before, landmark decisions as produced in the ICTY and ICTR can be issued at the ICC.*

**Keywords:** *sexual crimes, international crimes, feminism*

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## I. INTRODUCTION

History have proved that sexual crimes, particularly for “rape” often occurred along with arm conflict or genocide. This crime is not bound by geographic area or even politic viewpoint. Sexual crime frequently take place for every arm conflict without considering to where it occurs, from America to Africa, Europe even Asia experiences the same situation. Not like the other types of crime within the arm conflict, such as extermination and torture that was considering to be the war crime since formerly decade. Before the 1990s, sexual violence in war was,

with rare exception, largely invisible.<sup>1</sup> It is even underestimated only as poor circumstances, but as other unavoidable effect due to having the men in the battlefield. Therefore, it is resulted the failure on prosecution and punishment of war crime in the Nuremberg Tribunal.

The Tokyo tribunal was established to adjudicate the military officials and the Japanese executive servant concerning their international crime during the second world war. However, this court even absent to try the rape crime as part of international crimes. Even though there are several proves and witnesses concerning the rape which was systematically done by the Japanese military in the occupation area of Southeast Asia, China and Korea. The court did not affirm the rape crime as an international crime.

There is misconception on the rape assessment at the situation of arm conflict. A rape is seen as a private crime which derived from the disregard action of a soldier.<sup>2</sup> However, the fact shows that rape as collective actions or more as a gang rape. The victim usually treated as a spoil of war also strengthen the exclusive bound between the armies.<sup>3</sup> This is according to the testify by a soldier who was back from the Vietnamese war, he stated that:

*“They only do it when there are a lot of guys around. You know, it makes them feel good. They show each other what they can do—‘I can do it,’ you know. They won’t do it by themselves” (Brownmiller 1975: 107).<sup>4</sup>*

The facts from the arm conflict in the whole world shows that sexual assault during the war is simply as a private act or even as a crime which occurs accidentally. This crime is done as a war strategy or even as instrument to reach military purposes. For example, the rape which occurred in former Yugoslavia where the rape as part of war and ethnic cleansing instrument. The research found that rape and other types of

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<sup>1</sup> Muhammad Irfan, “Gender: Integrating Crimes Against Women into International Criminal Law,” *Jurnal Pembaharuan Hukum* 5, no.1 (2018):105.

<sup>2</sup> Thomas, Dorothy Q. and Regan E. Ralph. Rape in War: Challenging the Tradition of Impunity. Rape in War: Challenging the Tradition of Impunity (hrw.org), (accessed March 23, 2022)

<sup>3</sup> Yuki Tanaka, “War, Rape, and Patriarchy: The Japanese Experience,” *Asia Pacific Journal* 18, No. 1 (2019): 5.

<sup>4</sup> *Ibid.*

violence which happen in Kosovo in 1999 was used as a weapon and equipment to do the ethnic cleansing systematically. In the area, the sexual assault which done individually by the Serbian or Yugoslavia's army is not a separate action and rarely happen. The rape was used to terrorize the civilians, extorting money from the family and push the society to flee from their house.<sup>5</sup>

Recent international criminal law has acknowledged rape and other sexual crimes as an international crime. The recognition of this crime as international crimes evolves from the "simple acceptance" that acknowledge sexual crimes as part of crime of outrages upon personal dignity to the affirmation of sexual crimes as an independent crime in war crimes, crimes against humanity and genocide as established in ICTY-ICTR judgement, and the latest evolution is the adoption of the extensively sexual crimes in Rome Statute. Those evolution happens due to intensify pressure and solid voice from feminist scholar and movement. However, there are some obstacles in the enforcement of this crime. Those obstacles challenge the effective enforcement against sexual crimes that give disappointed record in international court jurisprudence concerning sexual crimes. Those obstacles shall be eliminated to acquire triumph in law enforcement against international sexual crimes. To embody the legal framework of sexual crimes into effective law enforcement should we stood back feminism ideas and movement? Does the feminism still important in the effort to enforce international criminal law regarding sexual crimes as it once has an important contribution in the adoption of sexual crimes in international law instrument? This article aims to observe the sexual crimes as international crime in some aspect, namely, its development and the contribution of feminism, the challenges on the law enforcement against international criminal law and the position of feminism in addressing those challenges.

This study using doctrinal legal method to determine the legal issue appointed in this article. Under this approach, researchers gather data which comprise of international law convention, particularly that regulated international crimes and international court decisions

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<sup>5</sup> Human Rights Watch, "Kosovo: Rape as a Weapon of 'Ethnic Cleansing'," 1 March 2000, accessed 21 March 2022, <https://www.refworld.org/docid/3ae6a87a0.html>

concerning sexual crimes. We identify rules which regulated international crimes generally, and specifically sexual crimes, and international court decision which describe further those positive rules. Doctrinal or scholar opinion and argumentation also incorporated in discussing and criticize the legal issue.

## II. THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAWS ON RECOGNIZING SEXUAL ASSAULT AS SEXUAL CRIMES

One of the gender basis crimes is in the form of rape crime. This offense rooted from the patriarchal views which made someone become an object of crime because of their gender. This assault particularly pointed to the woman and female child, only because they are female gender. This violence often occurs in the middle of arm conflict even in the national emergency. Several reports from UN reporter identifies the increase of sexual violence during arm conflict as well as national emergency and resulted in the destruction of human rights protection, especially concerning woman and female children.<sup>6</sup>

The evolution of sexual crime as international crime cannot be separated from international humanitarian law. The regulations concerning arm conflict and protection to the arm conflict victims is the first regulation which prohibited the sexual crime. Subsequently, in the end also recognize as crime against humanity and genocide. The law and customary concerning war have regulated the prohibition on the action that demean humans, it is including the crime on rape.

The army code which emerged from the first centuries and entered in the army code in the XVIII centuries have been regulated the regulations that contains protection to the innocent person such as students, trader, farmer, priest/religious leader, women and children from the war coercion including sexual assault at the time of the war. Even though this interdiction concept might be similar with the modern human rights in matter of recognizing the individual rights. However,

<sup>6</sup> Patricia Viseur Sellers, *The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation*, 4, accessed 22 March 2022 [https://www2.ohchr.org/english/issues/women/docs/Paper\\_Prosecution\\_of\\_Sexual\\_Violence.pdf](https://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf).



the prohibition on sexual violence purpose is to guarantee the safety of non-military society, which is in functions during the war. That is the case on rape which is prohibited in order to guarantee the productivity sustainability and conserve the society as one political entity.<sup>7</sup>

Normatively, even though there are prohibition on sexual assault during the war, however from de facto perspective many of this prohibition denied. The sexual violation proved be reign. It is not only end to the action of neglection, but more over there is justification and hypocrisy when the military campaign is on the run, with promises to protect and spread the social values and west religion or to include the racial superiority under the holy obligations to cultures some of the group in the society which then called as a primitive or backward society. The fact even shows the effect of sexual crime which occurs in the arm conflict starting from the Crusade, Colonial war, war of conquest, raid on the land of Indigenous people even any other form of the military invasions, are not considers as an exception from jus in bello, however it is accepted as the rights of the winner in the battlefield.<sup>8</sup>

The prohibition in the action of sexual assault is continuously develop through several military manual even international conventions. For example, the Lieber Code year of 1863 which was arranged by referring to the international custom is one of the military manuals which emphasizes the prohibition on rape. As mentions under article 44 and 47 of the code. For the international law, the first prohibition on sexual assault implanted in the Den Haag Convention year of 1899 and Den Haag Convention year of 1907.

Furthermore, the sexual violence including rape have relisted in the Geneva Convention year of 1949. From the fourth of Geneva conventions the year of 1949, however, only the fourth of the convention concerning the protection to the civilian during the war as the only provision which stated the prohibition on the sexual violence explicitly, namely rape, forced prostitution, also any form of immoral attack. Nevertheless, the language that was used to describe the sexual violence was gain critics. According to article 27 of the Geneva convention stated that:

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<sup>7</sup> *Ibid.*, 6.

<sup>8</sup> *Ibid.*, 6-7.

*“Women shall be especially protected against any attack on their honors, in particular against rape, enforced prostitution, or any form of indecent assault”, thereby placing such violence in a protection framework rather than expressly prohibiting this conduct. Furthermore, the violence is identified as attacks on women’s ‘rather than as violent crimes’.*

The term on “woman as an individual who needs respect and special protection” emerges again in the additional protocol terms I. article 27 on the addition protocol I concerning international armed conflict stated that:

*“Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”*

As for the additional protocol concerning non-international armed conflict using neutral-gender approach to regulates the sexual crime. By virtue of article 4 paragraph 3 of the additional protocol II on the fundamental guarantee which prohibited the violence to the life, health and physical or mental well-being of persons...[;] cruel treatment such as torture, mutilation’: and ‘outrages upon personal, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault’.

As reported done by the ICRC studies found that the prohibition on sexual crime also as a form of international customary law. The Rule Number 93 of ICRC study mentions that Rape and other forms of sexual violence are prohibited. To support this matter, ICRC have served any state practices which prohibited the sexual violence, whether in the situation of international armed conflict or even non-international armed conflict. The state practice could also be found in the military manuals, as well as national case law. Other than that, this prohibition has been listed in various international conventions which ratified by the member state. One of important note from the ICRC result in the Rule number 93 is that the character of sexual violence is non-discriminative, which is a state of men and woman, as for children and mature person may gain the same protection from this crime.<sup>9</sup>

<sup>9</sup> Jean Mari Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (New York: Cambridge University Press, 2005), 327.

### III. SEXUAL VIOLENCE IN INTERNATIONAL MILITARY COURTS OF TOKYO AND NUREMBERG

The international military courts of Tokyo and Nuremberg were established by the allied countries in the post of World War two, as well as the military court for the further east. It is often praised as development in international law, especially for the international criminal law. After previously the international tribunal was established through the Versailles agreement in the post of world war I was failed to brought Wilhelm Caesar II and German military officer to be tried in front of a courts which established by the allied countries, the Nuremberg court could be said as the first tribunal which tried the subject of international crime. The court laid the strong foundation for the concept of individual responsibility which become the basis to sue the perpetrator of international crimes in front of the court, whether by way of mechanism on national law and international law. However, the sharp criticism often be given concerning both of the court's establishment. Apart from being an embodiment of victorious justice, this court deserved to be criticized for its failure to confess rape crime as an independent international crime.

The London Charter on August 8 1,945, or also be known as Nuremberg Charter or Charter of Military Court for the further east which also be called as Tokyo Charter, did not mention the sexual crime as an international crime, which is war crime, crime against humanity or even genocide. Both of the courts served various evidence in the matter of sexual crime, even though the plaintiff from France and Uni Soviet filed the rape evidence as a crime against humanity, however none of the court decision point out to the rape.<sup>10</sup>

Many proofs of rape crime emerged in the Court of Tokyo. One of the significant cases is "the rape of Nanking". This case referred to the massacre of Nanking in December 1937 by the Japanese soldiers which involved assassination, torture and rape of thousand Chinese woman. The court recorded around 20.000 of rape cases which happen in Nanking at the first month of Japan invasion.<sup>11</sup>

<sup>10</sup> Richard J. Goldstone, "Prosecuting Rape as a War of Crime," *Case Western Journal of International Law* 34, no. 3 (2002): 279.

<sup>11</sup> *Ibid.*

Other than the evidence of Nanjing rape, the plaintiff from Holland, China and France also filed evidence of the comfort woman which spread around Indonesia, Timor Timur, China and Indo China.<sup>12</sup> Even the existence of comfort woman was the Policy which came from the Japanese Government during the Second world war. The terms of “comfort woman” receive criticize from the author Yuri Tanaka, as a refinement term from an action that should be called as “Japanese Sex Slave”. For a long time and unmoving, this term as one of significant factors that hinder the Japanese in understanding the truth of violence which was done by the Japanese army to the woman.<sup>13</sup>

Even though, the number of comfort woman or more than that exactly called as Japanese sex slave is big and exist in many areas which invaded by Japan, but their existence was not really considers under the decision of Tokyo Court. The only rape cases sued in the Tokyo court was the rape of Nanking. It is as if illustrated that the Tokyo Court was not really point the woman who forced to be the sex slave by the Japanese armies as a criminal victim, but only as a comfort woman who does not need the protection of the law.

The rape crime file in the general charges concerning the responsibility of commander in the Nanjing Massacre.<sup>14</sup> The Tokyo Court tried general Toyoda and Matsui based on the commander responsibility for violating the law and war customary which was done by their soldiers in Nanjing, including the rape and sexual assault. Former Japanese foreign minister “Hirohito” also punished for the same crime.<sup>15</sup> Even though the Tokyo court have tried the rape crime particularly for the Nanjing rape, the court is not optimal in understanding rape as an international crime. According to Tokyo Court, the rape crime is not stand on its own, this crime was seen under an umbrella of the rest humanity crime particularly for inhuman treatment.<sup>16</sup>

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<sup>12</sup> Christine Lévy, “The Women’s International War Crimes Tribunal, Tokyo 2000: a feminist response to revisionism?” *Clio* 39, (2014): 127, doi: 10.4000/cliowgh.508.

<sup>13</sup> Tanaka, “War, Rape, and Patriarchy,” 1.

<sup>14</sup> Goldstone “Prosecuting Rape as a War of Crime,” 279.

<sup>15</sup> B. V. A. Roeling and C. F Rueter, eds., *The Tokyo Judgment: The International Military Tribunal for the Far East* (Amsterdam: University Press Amsterdam, 1977), 385.

<sup>16</sup> Sandra Fabijanić Gagro, “The Crime of Rape in the ICTY’s and the ICTR’s Case-Law,” *Zbornik PFZ* 60, no. 3 (2010): 1310.

Feminism, particularly as a movement, seem did not have great contribution on the Tokyo Tribunal. The Tokyo Tribunal that was held at 1946 coexisting with the first wave of feminism. Generally, western literature divided feminism history into three waves. The first wave came about nineteenth and early twentieth centuries, the second wave came around in the early 1960, and the third wave begin in 1990. The first wave of feminism known as the women movement for suffrage right. In addition to the suffrage, the first wave also concerns about as equal rights within the family (the end of the authority of the father and husband), equal pay, access to higher education and the professions, workers' rights and a range of other rights as well.<sup>17</sup> Nevertheless, this period criticized as the “white-women”centered movement. Despite that this period marked by the feminism theories and movement dominated by middle class women from Western Europe and North America, this period also distinguishing as it lacks inclusivity. Some record for this period showed discrimination against nonwhite women namely Black women and Asian women.<sup>18</sup> Hence the issue of sexual crimes, particularly in the Tokyo Tribunal, was concerning women in the colonized territory, this issue may not become a major concern of women movement on that day. Therefore, we cannot see any major influence of women movement in the Tokyo tribunal.

#### IV. FEMINISM AND ACKNOWLEDGEMENT ON SEXUAL CRIME AS INTERNATIONAL CRIME

Post -World War II, the issues on human rights became one of the central issues under the development of international law. Began with the positive trend on the existence to strengthen the concept of criminal responsibility for individual on the international crime, which then followed by the presence of human rights instruments internationally and regionally, as well as the formation of human rights institutions.

<sup>17</sup> Maxine Molyneux, Adrija Dey, Malu A.C. Gatto, and Holly Rowden, Discussion Paper: New Feminist Activism,

Waves and Generations, 64th Session of The Commission on The Status of Women (UN Women: 2021), 6, accessed 22 June 2022 <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2021/Discussion-paper-New-feminist-activism-waves-and-generations-en.pdf>.

<sup>18</sup> Tonny Odhiambo and Faith Mbeka Matuku, *History of Feminism*, 4, accessed June 2022 [https://www.researchgate.net/publication/358376186\\_History\\_of\\_Feminism](https://www.researchgate.net/publication/358376186_History_of_Feminism).

This momentum gains positive response in recognizing the human rights issues also take part to become period to strengthening women's issues.

The women's issues generally including any form of physical abuses, mental or even sexual assault as well as marginalization to the role of women in the social, politic as well as economic life, derived the background of movement or even though regarding the matter of women, one of which is the thought of legal feminism. The steppingstone of legal feminism theory came from a view that the legal theories could not be able to bear the understanding of women situation *vis a vis* law.<sup>19</sup> Law have an important role in the women subordination under the man. Therefore, the legal feminism theory effort to reform the woman status through the legal modification and using the gender approach.<sup>20</sup>

Various feminism thought generally viewing the law as neutral thing. Law as a patriarchy product which emerges the regulation that contains gender discrimination. This matter even applicable to the international law as applied to domestic rules, international law even shows how strong the men domination even though the law especially international human rights law and international criminal law have established the positive development to the law which take aside to the woman, however the branch of the law is not merely set off from the sharp critical thinking of feminist thinker.

Since previously the sexual crimes was not gaining much attention during the armed conflict from the wider and highest international communities, the rape then arises during the conflict in the ex of former Yugoslavia area and become the first momentum to attract the international community concerning rape crime and other form of sexual abuses. For long of armed conflict in former Yugoslavia there are thousands of women who became victim of rape and sexual assault. Estimated around 10.000-60.000 of women and female children who was raped, stand off from their ethnic or even their nationality. The rape was held in houses, school or even major camp which spread in the whole area. The result of secret report from the expertise who was send

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<sup>19</sup> Katharine T. Bartlett, "Feminist Legal Scholarship: A History Through the Lens of the California Law Review," *California Law Review* 100, (2012): 384.

<sup>20</sup> *Ibid.*

by the Europe community found that at the first year of 1993, estimated that the soldier of Serbia-Bosnia has raped 2000 of the Bosnian women.<sup>21</sup>

The rape cases were occurred in the ex-Yugoslavia shows that there was ethnic cleansing pattern. The Serbian soldiers specifically choose the Bosnian Muslim woman as an object of rape with purpose so that they get pregnant. The victims of the rape are detained under the authority of Serbian soldiers until they passed the possibility to abortion time. This is to ensure that they deliver the unwanted Serbian babies.<sup>22</sup>

Learn from the bitter experiences of Nuremberg international court and Tokyo court which did not paid attention as it should be to the victims of rape, several woman movements marches to push the enforcement of the law concerning the sexual crime as part of international crime. ICTY and ICTR are two international ad-hoc courts which had significant roles in the acceptance of sexual crimes which fall under the qualification of war crimes, crimes against humanity and genocide. These two trials have left a taboo in a society that views rape as an inseparable and inevitable part of every armed conflict. These tribunals were the first to affirm and condemn sexual violence in time of war.

The court's judgement showed that number of rapes conducted during the war were the same amount as torture and murder victims. Suffer which felt by the sexual crime' victim has the same pain as the others crime victims. Even the impact of the crime of rape can be felt longer, both by the victim and to the community. The courts have thus shown the truth about the number of crimes of rape during war and its devastating impact on victims and society.<sup>23</sup>

There were 75 cases which had been solved before the ICTY. From those number, there were 24 cases that contained sexual abuse facts, 16 cases were found that sexual crime was part of the widespread and systematic attack which addressed directly to civilian.<sup>24</sup> However, in

<sup>21</sup> Gagro, "The Crime of Rape in the ICTY's and the ICTR's," 1315.

<sup>22</sup> *Ibid.*

<sup>23</sup> Alexandra Adams, "The Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and Their Contribution to the Crime of Rape," *European Journal of International Law* 29, no. 3 (2018): 751, <https://doi.org/10.1093/ejil/chy043>.

<sup>24</sup> United Nations Department of Peacekeeping Operations, *Review of The Sexual Violence Elements of The Judgments of The International Criminal Tribunal For The*

the ICTR, there were 24 cases had been solved in total. From those cases, there were 13 cases which contained sexual fact findings, 9 cases also found as the part of widespread and systematic that aimed at civilian.<sup>25</sup>

Case Prosecutor v Akayesu which convicted before ICTR, is a landmark decision in the development of sexual crimes as international crime. This case was the first case before international case which showed relation between rape and genocide. Akayesu was declared guilty according to Art. 3 (g) ICTY Statute which prohibited “rape committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”<sup>26</sup> In this case, the court had also set a definition of rape that goes beyond the usual definition of rape which emphasizes one part of the body. The Court has taken this a step further by asserting that attacks of a sexual nature against victims are not limited to physical invasion of the body but may also include acts that do not involve penetration or even physical contact.<sup>27</sup>

<sup>23</sup> Rape as a war crime was confirmed in the Furundjiza v Prosecutor case. In this case, the prosecutor charged Furundjiza based on Article 3 of the ICTY Statute which stated that the prohibition of violating the laws and customs of war, that the defendant had committed an act that was outrages upon personal dignity including rape. Apart from being an act that outrages upon human dignity, ICTY has also affirmed rape as a war crime in the form of torture as well as cruel and inhumane acts (torture, inhuman or cruel treatment).<sup>28</sup> Important point in the ICTY and ICTR’ judgement is in affirming rape as a war crime is the recognition of rape as an independent war crime.<sup>29</sup> Rape no longer requires interpretation of the Geneva Conventions on the protection of human dignity.

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*Former Yugoslavia, The International Criminal Tribunal For Rwanda, And The Special Court For Sierra Leone In The Light of Security Council Resolution 1820*, New York: United Nations, 2010, 29.

<sup>25</sup> *Ibid.*, 46.

<sup>26</sup> Mark Ellis, “Breaking the Silence: Rape as International Crime,” *Case Western Reserve Journal of International Law* 38, no. 2 (2007): 232

<sup>27</sup> *Ibid.*, 231.

<sup>28</sup> *Ibid.*, 237.

<sup>29</sup> Adams, “The Legacy of the International Criminal Tribunals,” 754.



Even though there were rapes of hundreds of Bosnian women, the lack of strong evidence to show that there was intent to rape as part of genocide made the ICTY unable to prosecute rape as a crime of genocide. The ICTR has become the first court to prosecute rape as a form of genocide. The ICTR's legal findings confirm that rape constitutes genocide because it results in living conditions that can bring about the physical destruction of a group in whole or in part. Moreover, this action leads to another action that prevents births in the group.<sup>30</sup> In addition, in the Akayesu case, the ICTR emphasized that rape is a crime against humanity under Article 3 (g) of the ICTR Statute. In this case, the court found that the rapes were committed as part of a widespread and systematic attack against a group of civilians, and that Tutsi women were targeted for rape attacks merely because of their ethnicity. Akayesu's judgement was followed by ICTY in the Kunarac case which found the defendant guilty of crimes against humanity. This ruling was the first ICTY decision to convict someone for crimes against humanity.<sup>31</sup>

Various judgement from ICTY and ICTR became important contributions in the development of rape as an international crime. Rape was not considered as an independent international crime in Tokyo Trial, but today it got strong recognition as an independent international crime. If in previous, rape had to be interpreted as a crime that degrades human dignity thus it can become an international crime, but today rape itself is an international crime.

ICTY and ICTR shall be laudable for it successful in define sexual crimes as an independent international crime regardless of its failure in some cases. This accomplishment closely related to feminism whether as a movement or as legal theory. As a movement, feminism have mobilized footstep for international agenda regarding sexual crimes in an armed conflict. It was activism and networking of the local women that bring sexual crimes in former Yugoslavia into public and political sphere, and legal debate. This movement not only appealing for material and financial support to set up provision of care for women survivors of sexual violence in war, but also looking for political pressure on

<sup>30</sup> *Ibid.*, 753.

<sup>31</sup> Ellis, "Breaking the Silence," 234-235.

12 international institutions so that they would act, one of which was law enforcement against such crimes.<sup>32</sup> This movement which initially driven by local women brought about women movement internationally which then affirmed women human rights in number of international instrument. The acknowledgement of women human rights and sexual crimes including rape, sexual slavery and forced pregnancy is a grave violation of human rights enumerated in Beijing Declaration 1995. Previously, Women's Caucus for Gender Justice have written issue concerning women into human rights for 1993 Vienna Convention on Human Rights. That work then incorporated into Vienna Declaration and Program of Action 1993. This Declaration have affirmed the equal status and human rights of women. Moreover, women movement also mobilized to support the election of women judges.<sup>33</sup> Presence of women in the bench of ICTR and ICTY was a critical hence they have adopted feminism perspective in their judgement which impelling advancement in the international framework sexual crimes matter.

25 ICTR and ICTY practices and jurisprudences had paved the way in the establishment of permanent international court. During the drafting process of ICC statute, it was an opportunity for feminist groups to play a larger role in regulating sexual crimes and other gender-based crimes. To accommodate this, the Women's Caucus for Gender Justice was formed, in 1997. Although there were debates in the Women's caucus, especially the opposition from groups with different views, in the end the ICC statute was accepted. This statute can be seen as a landmark especially for sexual crimes and other gender-based crimes. This Statute succeeded in codifying sexual crimes and other gender-based crimes, as well as establishing structures and procedures to ensure that these crimes and their victims remain on the agenda and are treated appropriately in the judicial process.

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<sup>32</sup> Maja Korac, "Feminists against Sexual Violence in War: The Question of Perpetrators and Victims Revisited," *Social Sciences* 7, no. 10 (2018): 182, doi:10.3390/socsci7100182.

<sup>33</sup> Irfan, "Gender: Integrating Crimes Against Women," 109.

## V. CHALLENGES IN THE SEXUAL CRIMES CONVICTION AND LAW ENFORCEMENT

Feminism movement has been successfully in pushing the changes the view of sexual crimes during wartime or in violent situations which lead to the genocide or crimes against humanity acts. Voices from women group, critics, and ideas are drives the born of regulations or jurisprudences which convict sexual crimes offender as international crime. However, law enforcement efforts should not be finish only until regulations or jurisprudence may provide legal basis to convict the offender. There are some challenges in order to punish the offender of sexual crime.

In Rwanda, for example, there were at least 250.000 females who raped during the genocide. However, the ICTR only charged less than 11 people of this crime.<sup>34</sup> The same matters occurred before the ICTY. Despite of these contributions from the ICTY and the ICTR on the development of sexual crimes as an international crime, there are some critics related to the obstacles in the judicial process which needs serious attentions. Statute of the International Criminal Court (ICC) is viewed as the ultimate succeed in the efforts of regulation sexual crimes but did not show any important records in the conviction of sexual crimes offenders. Huge expectations which placed by various parties towards the ICC in the law enforcement process of sexual crimes is not fulfilled yet.

Different with the progress of legal framework which generated in the ICC' Statute, ICC' practice is disappointing. From lots of indictments which issued before the ICC, one sexual crime was failed in the appeal process, while another indictment had been proposed for appeal process. ICC jurisprudence only note one succeed in the sexual crime' charged.<sup>35</sup>

We noted some factors which might be the obstacles and challenges in the sexual crime law enforcement, there are related to the court resources- both material and human- proof process problem, and social

<sup>34</sup> "Rwanda's women Make Strides Towards Equality 20 Years After Genocide," *The Guardian*, 7 April 2014, accessed 1 June 2022, <https://www.theguardian.com/global-development/2014/apr/07/rwanda-women-empowered-impoverished>.

<sup>35</sup> Tanja Altunjan, "The International Criminal Court and Sexual Violence: Between Aspirations and Reality," *German Law Journal* 22, no. 5 (2021): 884, <https://doi.org/10.1017/glj.2021.45>. 878–893.

and cultural issues. Those three factors are connected to one another.

#### A. COURT RESOURCES

Basically, challenges in the law enforcement on sexual crimes covers general challenges in the other international crimes' law enforcement processes, for instance, murder or torture. General obstacle related to the law enforcement mechanism may including adequate budget. Inadequate budget will affect to the faint or failure in the judicial process. This can be seen from the failure of conviction sexual crimes before ICTY and ICTR. One of critical note address to the courts- ICTY and ICTR- was collective indictment for several rape cases on various victims which were conducted by some defendants. Those cases were concluded in one indictment. For example, in the Kunarac Trial Chamber, multiple rapes on one victim or many different victims together as a single act become one indictment. In other conviction, rape was put with other criminal act namely murder, torture and assault as one count of persecution.<sup>36</sup> Economic factor was the cause of this situation. Through reduction of multiple charges into one charge, the prosecutor was hoping that defendant will cooperate by provide confessions thus the court will be ended sooner which one valid charge. Even though this strategy seems economically and timely profitable, but it will obscure the extent and the severity level of the crimes. In addition, it will decrease or even eliminate the justice for all victims.<sup>37</sup>

Issue concerning budget of the International Court or International Tribunal relating with the expected result is a controversy. In the case of the ICC, some state parties were asked the effectiveness of the ICC on spending their budget that relies from the states party's contribution. Some state parties looking to constraint the budget, and even intended for zero growth budget. On the other hand, the ICC insisted that the limitation of the budget may lead to the ineffective of the court 'mandate.

Some writers have discussed the issue whether the international trial need a huge budget in implemented their mandate. Rupert Skilbeck expressly stated that war crimes trials are expensive. Hence the international crimes far more complex than ordinary crimes, the

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<sup>36</sup> Adams, "The Legacy of the International Criminal Tribunals," 754.

<sup>37</sup> *Ibid.*

cost for law enforcement of the international criminal may cost million dollars. For example, the crimes against humanity which shall prove the systematic and widespread elements in it may require evidence for thousands of individual incidents, frequently supporting with scrumpy resources compare to an ordinary murder in a wealth country.<sup>38</sup> Therefore he concluded that the huge budgets of the ICTY and ICTR have produced unsustainable and un-repeatable models. He further recommended to consider the right model of future international justice that shall learned from the Bosnia and Herzegovina Court (BIH Court) and the Extra Ordinary Chamber of Cambodia Court (ECCC).<sup>39</sup> Those two-hybrid court seem less budget consuming than the two-previous ad hoc tribunal.

One of the controversies concerning budget for international justice is the inefficiency term of budget. This was and maybe still will a problematic matter between the ICC and the state parties. In 2011 the ASP (Assembly of State Parties) allocated 108.8 million Euros to the Court for the 2012 budget. The budget was increased that reach 115.12 million Euros in the next year. In 2014, the Prosecutor's Office regained increasing in its proposal budget which raised up to 26,5% from the 2013 budget. The Prosecutor's Office plans to grow the size of investigative teams, increase legal aid and update the technologies used by the Court was the justification for increasing the budget.<sup>40</sup> However, the CBF warns that if the overall increase in the proposed budget is 9.5% or a 10.95 million Euros increase, totaling to 126.07 million Euros, the Court might need to limit some of its activities. These limited activities may have a negative impact for the victims of any human rights violations.<sup>41</sup> The ICC Registry affirmed that the limited budget may led to the impair and sufficient performance. This noted by the ICC in the Proposed Programme Budget for 2013 of the International Criminal court.<sup>42</sup> It may seem as an answer for the state

<sup>38</sup> Rupert Skilbeck, "Funding Justice: The Price of War Crimes Trials," *Human Rights Brief* 15, no. 3 (2008): 10.

<sup>39</sup> *Ibid.*, 10.

<sup>40</sup> Katarina Uhalova, "The Financial Challenges of the International Criminal Court," *Quid Justitiae*, 14 November 2013, accessed 23 June 2022, <https://www.quidjustitiae.ca/fr/blogue/financial-challenges-international-criminal-court>.

<sup>41</sup> *Ibid.*

<sup>42</sup> Proposed Programme Budget for 2013 of the International Criminal court (Assem-

parties concerning the effective use of budget by the ICC and to remind the state parties the importance to not reduce ICC's resources.

Leaving the debate regarding the huge budget for international tribunal or international court, we still assume that reasonable budget that led to the sufficient resources – whether human resources nor supporting facility – is one of the important factor in the enforcement of international justice. This opinion onward on a complex activities and duties of the international tribunal and international court. It must perform not only judiciary task but also the supporting task to ensure the judiciary duties, such as the translation task. In ICTY office, there was “The Conference and Language Service Section (CLSS) department” which supported the courtrooms by providing simultaneous interpretation into English, French, Bosnian/Croatian/Serbian. It also translated into Kosovo and Macedonia, Albanian and Macedonian when the cases related to those languages. CLSS also translates all Tribunal documents such as decisions, orders, and judgements, as well as thousands of pages of witness statements and other documents which are entered into evidence at trial. Without this department, the judicial proceedings could not perform. The Office of Prosecutor (OTP) of the ICTY must gather evidence and interview witness that may located in more than one country. The ICTY also has its own legal aid system and manage its own detention unit.<sup>43</sup> All of those task and judicial process in ICTY requires extra budget. Compared to ICTY and ICTR, ICC has a more complex duty in pursuing its mandate. Different from ICTY and ICTR that accounts over crimes that situated only in a certain territory, ICC have jurisdiction over crimes that take place in the territory of its member which cover over 100 states that located all around the world. This makes the ICC investigators must travel around the world to gather evidence and witnesses which might cost extra budget. In addition, the procedures in the ICC might slower and more complex then the ICTY hence the court gives the opportunity for the victims and their representatives to participate in process. The trial process that engaged

bly of State Parties to the Rome Statute of the International Criminal Court, Eleventh Session, Official Records, The Hague, 14-22 November 2012) ICC-ASP/11/20, volume II, part A at Table 3 [hereafter “Proposed Programme Budget for 2013”]

<sup>43</sup> Osvaldo Zavala, “The Budgetary Efficiency of the International Criminal Court,” *International Criminal Law Review* 18, no. 3 (2018): 461-488, doi: <https://doi.org/10.1163/15718123-01803004>.

the victim is one of the advancements of the ICC. However, this have slowed down the court process that causing the court cost increase.<sup>44</sup>

## B. THE OBSTACLES RELATED TO PROOF PROCESS

In specific, sexual crime has different characteristics with other international crimes, such as murder and torture. Therefore, this specific character is cause specific challenges in the process of law enforcement of sexual crimes. In sexual crimes, witness (in this matter is victim) play important role in the preparations of indictment. However, the victim frequently refuses to provide evidence without proper support from experts and also lack of mechanism to protect them from harassment and ostracization.<sup>45</sup>

In sexual crimes, victims are vulnerable from humiliation and harassment from their neighborhood.<sup>46</sup> In fact, some victims who speaks out of the crimes that befell them can be rejected by their families or neighborhood. This causing the difficulties to get witnesses from victims. Besides of the difficulties to get the witness, unspecified or not detail witnesses contribute in weaken the case. However, not detail not-substantive information, especially in sexual crimes should not make the charges legally weak. Not-substantive details such as dates, times or places of the rape- especially if the indictment was arranged years after the rape- should not be normative standard. However, in some cases unspecific information were cause the charge was withdrawn, eliminated or even stated unproven thus the offender was free. In *Prosecutor v Semanza*, witnesses from four women which declared they had been raped, and the court was found that the rape was occurred, ICTR Court (trial chamber) declared that the offender was not guilty. The offender was declared not guilty on rape as crime against humanity, because the charge was considered legally weak since it was not mention date, place

<sup>44</sup> Stuart K Ford, "How Much Money Does the ICC Need?" in *The Law and Practice of the International Criminal Court*, Carsten Stahn, ed. (Oxford University Press, 2015): 20.

<sup>45</sup> Morten Bergsmo and Alf Butenscon Skre, "Toward a More Comprehensive Understanding and Effective Proving of International Sex Crimes," in *Understanding and Proving International Sex Crime*, Morten Bergsmo, Alf Butenscon Skre, and Elisabeth J. Wood, eds. (Beijing: Torkel Opsahl Academic Publisher, 2012), 3.

<sup>46</sup> Rebecca Campbell, "The psychological impact of rape victims," *American Psychologist* 63, no. 8 (2008): 702, doi: 10.1037/0003-066X.63.8.702.

and time of the rape clearly.<sup>47</sup>

The failure of sexual crime cases in international tribunal is because of “lack of evidence”. This is in line with the findings of experts which mentioned that whether in the ICTY or ICTR, there were tendencies to charge with high standard of proof in the sexual crimes’ indictments or gender-based crimes.<sup>48</sup> High standard of proof also found in the Katanga case in the ICC. In this case, prosecutor was prepared a comprehensive charge, but failed. The court argue it was needed a deliberate intent or high standard of proof related to the contribution of Mr. Katanga of the sexual crime compared to his other crime’ charges.<sup>49</sup>

Attain victim witnesses in the sexual crime is not easy. Understand of their psychological burden or probability of social impact which might be get by victim witness is urgently required. However, guarantee of victim protection and understandings of psychological state of the victim is not optimally realized yet, even though in the International Criminal Court’s mechanism that have been provided special regulation for victims and witnesses of sexual crime. Statute<sup>50</sup> and Rules of Procedure ICC are designed to protect those parties. ICC provide one special unit, is the Gender and Children’s Unit (GCU) which will assist office of prosecutor in develop questions for victims and interview’s method to decrease victim’ trauma when providing information.<sup>51</sup>

Although ICC sexual crime regulation is more developed compared to ICTY and ICTR, but in some cases the ICC unable to convict sexual crime offender optimally. It can be seen in these three cases, are

<sup>47</sup> Patricia Wildermuth and Petra Kneuer, “Addressing the Challenges to Prosecution of Sexual Violence Crimes before International Tribunals and Court,” in *Understanding and Proving International Sex Crime*, Morten Bergsmo, Alf Butenscon Skre, and Elisabeth J. Wood, eds. (Beijing: Torkel Opsahl Academic Publisher, 2012), 92.

<sup>48</sup> Kenya Government, *Report of the Commission of Inquiry into Post-Election Violence*, 2008, 249, accessed 23 March 2022, <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report>.

<sup>49</sup> Nicole Cvercko, “Analysis: The ICC’s Treatment of Sexual and Gender-Based Violence Crimes,” *Global Justice Journal*, 18 July 2018, accessed 23 March 2022, <https://globaljustice.queenslaw.ca/news/analysis-the-iccs-treatment-of-sexual-and-gender-based-violence-crimes>.

<sup>50</sup> Article 54 Statute of ICC states: “take into account the nature of the crime, in particular where it involves sexual crimes, gender violence or violence against children”.

<sup>51</sup> Wildermuth and Kneuer, “Addressing the Challenges to Prosecution,” 138.



Lubanga, Katanga and Bemba. This failure is because the victims were reluctant to testify. Rosi Fowler noting that there were huge risks which has to be faced by the victims to come to ICC. She have to travel to Den Haag, give information related her private part in the court room, back to her village and realize that she will be divorced by her husband, expel from her land and field, being alienated and humiliated in her home, and finally she will not able to work anymore to support her family.<sup>52</sup>

### C. OBSTACLE RELATED TO THE AWARENESS OF SOCIAL AND CULTURAL VALUES ALSO IDEOLOGICAL VIEW

Xabier Agirre Aranburu mentioned that there are two obstacles in the investigation of sexual crime, first is the lack of awareness and sensitivity of the investigators, it is because the senior investigator mostly man.<sup>53</sup>

The strong sensitivity and awareness in sexual crime is required in legal practice to support legal framework which was designed progressively. As stated by Tanja Altunjan, consider ICC jurisprudence it is shows that, a progressive legal framework will be in vain if it is not translated properly into legal practice. One of the most important factors in the prosecution or court process of sexual crime or other gender-based crime is a highly gender sensitivity.<sup>54</sup>

In addition, Xabier also note that embarrassment and taboo also influencing the witness when they must discuss sensitive part of the body, also man mind become another obstacle factor in sexual crime investigation.<sup>55</sup> Social and culture values within societies have a certain view on sexuality, thus it become taboo and sensitive. These values will affect investigators and judges. Therefore, unaware investigators of the nature of sexual crime, will find difficulties when interact with

<sup>52</sup> Rosie Fowler, "Great Expectation, A Critique of the International Criminal Court's commitment to victims of sexual gender-based violence," *Journal of International Criminal Law* 2, No. 1 (2021): 42.

<sup>53</sup> Xabier Agirre Aranburu, "Beyond Dogma and Taboo, Criteria for the Effective Investigation of Sexual Violence," in *Understanding and Proving International Sex Crime*, Morten Bergsmo, Alf Butenscon Skre, and Elisabeth J. Wood, eds. (Beijing: Torkel Opsahl Academic Publisher, 2012), 271.

<sup>54</sup> Altunjan, "The International Criminal Court and Sexual Violence," 892.

<sup>55</sup> Aranburu, "Beyond Dogma and Taboo," 271.

things related to the crime. Ideological values will impact judges and investigators in the international court, which will affect their interpretation on facts and laws<sup>56</sup> which eventually will affecting the court verdict.

## **VI. CHALLENGES ON THE SEXUAL CRIME LAW ENFORCEMENT: ONCE AGAIN, HOPING FOR A CONTINUOUS CONTRIBUTION FROM FEMINISM**

Even though ICTY and ICTR have produce landmark judgement in sexual crimes matter, and ICC have an extensive rule regarding sexual crimes, several failures in the process and judgement of sexual crimes shall examined and found solutions. As noted in the previous sub charter, we identify three problems that may hinder the progression of law enforcement against sexual crimes. We put court resources as the first problem that should addressed. Hence the international tribunal and international court established and funded by state parties, then states policy concerning this matter is significant. State's support by providing sufficient fund may lead to the success of sexual crimes process. Investigation and court process, especially huge scales cases in the conflicted countries requires a large amount of funds. In addition, strengthening and elevating personnel's ability from prosecutor, clerk and judge also need special fund. Budget limitation can cause not optimal court process, and encourage conditioned court process, which makes the indictments into one indictment for economic purposes. Thus, the court processes are unable to provide charges and judgement which describe the real situations.

State willingness in providing fund for international court presumably weaken. Hesitation concerning effectiveness of budget use by the ICC made many of the ICC's largest contributors, including Japan, Germany, France, Britain and Italy, have been calling for zero growth budgets.<sup>57</sup> Other reason for budget limitation is the economic reason. Global economic crisis in 2008, and recently the COVID-19 that cause decrease in economic trend, causing states parties argue that they can not afford to pay more. In response to this state political policy,

<sup>56</sup> *Ibid.*

<sup>57</sup> Ford, "How Much Money Does the ICC Need?" 22.

feminism movement shall regain world awareness about the sexual crimes as an international crime.

Another aspect which needs immediate improvement in the court process of sexual crime as international crime is related to the proof process. Efforts to provides specific investigation mechanism and court process in favor to the victim in general has been provided in Statute of ICC and its rules of procedure. However, ICC's jurisprudence shows that a progressive legal framework is insufficient in making a successful charge. Despite of victim-sensitive regulation towards the victim, procedure of international criminal law remains "blutant tool": it too is violent.<sup>58</sup>

An available progressive legal framework might be supported by legal practitioners who has a highly sensitivity and awareness on nature of sexual crime and its victims. They are still and will express and advocate sexual crime as international crime, can expand and increase the awareness of this crime existence. Feminist movement can be one important tunnel to voice this matter. As stated by Xabier Aranburu that "the feminist critique is still need today to keep adequate awareness and focus on sexual violence".<sup>59</sup>

The presence of feminist view hold by court resources will generate positive impact in the law enforcement process for sexual crimes. Some evidence shows that feminist-oriented judge in the international court or tribunal had been success in produce important decision in the development of sexual crimes into international crime. Judge Carmen Argibay in Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, Navanethem Pillay in in the ICTR, and Elizabeth Odio Benito also Florence Mumba in the ICTY had been against the gender-based stereotype to change the way of international law in observe sexual abuse during war or conflict. It was their roles which made rapes as a crime which is similar to torture or war crimes or other crimes against humanity. This verdict was a big breakthrough in international law, because it was the first time a sexual crime adopted as an individual crime as previously only seen as part of a crime against women's dignity. In Akayesu's verdict stipulated that rape

<sup>58</sup> Fowler, "Great Expectation, A Critique of the International Criminal Court's," 42.

<sup>59</sup> Aranburu, "Beyond Dogma and Taboo," 269.

as a genocide is also the product of a judge who sided with female victims, Judge Pillay who was willing to carefully listen to the stories of female victims.<sup>60</sup> Women judges also have a more sensitive notion towards victims and witnesses. Judge Gabrielle Kirk McDonald and Judge Elisabeth Odio Benito, admit evidence of prior sexual conduct or permitting unexamined consent defence in sexual violence cases. This initial rules of evidence and procedure may protect victims and witnesses from harassment and discrimination.<sup>61</sup>

The presence of female judges- especially who have feminist perspective- have been proven give major influence on final decisions on a case which they will side of sexual crime victims. The same impact will bring by other court human resources such as female prosecutors during the sexual crime's investigation process. Their absences will cause charges failures during the court process of sexual crimes, which can be seen in the cases before Nuremberg and Tokyo tribunals. Even though there were occurred massive sexual crimes during the WWII, no crimes were accepted as list of crimes which became court jurisdiction. Nuremberg' prosecutors did not charge any sexual crimes to the offenders. Although NAZI's lower-level soldiers there were available regulations in Allied Local Council Law No. 10 which accommodate rape as crimes against humanity, but no offender been charge for that crime.<sup>62</sup>

The lack of sensitivity towards female witnesses also their reluctance to be presence before the court can be handled by the presence of female judges, female prosecutors and female lawyer. Their presence could facilitate victim's willingness to cooperate with the court and their testimony is being heard in the process of international criminal law. Female judges have a high sensitivity on sexual crimes also they have ability to work with the victims. Considering most of sexual crimes victims are female, thus forced them to work with male court officers

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<sup>60</sup> Rosemary Grey, Kcasey McLoughlin, and Louise Chappell, "Gender and Judging at the International Criminal Court: Lessons from 'Feminist Judgment Projects,'" *Leiden Journal of International Law* 34, no. 1 (2021): 490, doi:10.1017/S0922156520000588.

<sup>61</sup> Irfan, "Gender: Integrating Crimes Against Women," 109.

<sup>62</sup> Milena Sterio, "Women as Judges at International Criminal Tribunal," *Transnational Law and Contemporary Problem* 29, no. 2 (2020): 243.

can give additional trauma during the court process.<sup>63</sup>

The presence of female judges or male judges with feminist perspective are crucial in the process of international criminal court, but if they are not majority in number, another obstacle will rise during the process. Since the verdict is decided by court assembly, judge individual voice does not automatically will be accepted by the assembly.<sup>64</sup> Therefore in this matter, it is required an increase of female court resources or have feminist perspective internally, and support from female groups and feminist activist externally. These groups also contribute to the gender-perspective regulations in Rome Statute, thus in the process of law enforcement, the same lobbies and pressures remain needed. As mentioned by Milena Sterio, without these lobbies and pressures "...and it is unlikely that one gender-sensitive prosecution will be pursued or ruling will be handed down without ongoing pressure from external activists". The presence of external parties with feminist perspective is vital for the judge who is feminist activist to push and to convince others judge in the assembly, which has lower gender awareness.<sup>65</sup>

## VII. CONCLUSION

The existence of an extensive sexual crimes as regulated in the Rome Statute has gone through a fairly long process. The development started from the Tokyo Tribunal which paid little attention to sexual crimes cases. This trial is certainly far from satisfactory considering the number of female sexual slaves of the Japanese army during World War II who did not get justice. The triumph on the recognition of sexual crimes as international crimes began in the judgement of the ICTR and ICTY. Those two ad-hoc tribunals yielded landmark decisions for establishing rape as an independent war crime, as a crime against humanity and as a genocide. The highest success was recorded when sexual crimes were included in the Rome statute with an extensive scope. At every stage of the development of the sexual crimes in the international criminal

<sup>63</sup> *Ibid.*, 243.

<sup>64</sup> Grey, McLoughlin, and Chappell, "Gender and Judging at the International Criminal Court," 490.

<sup>65</sup> *Ibid.*, 493.

law framework, were found significant role of feminism thought and movement. Their impact made up in building international community opinion, sounding and criticizing, and engage in making court decisions through judges with a feminism paradigm.

The success of ICTY and ICTR in their landmark decisions still leaves many unsolved sexual cases. Likewise, the ICC jurisprudence has been criticized for failing to implement the Rome Statute in punishing sexual crimes. Several obstacles become challenges in enforcing the law on sexual crimes, consisted of the limited court resources, both materially and the availability of human resources who are specifically competent in dealing with sexual crimes, problems related to evidence and the existence of socio-cultural values and ideological views that can influence law enforcement on sexual crimes.

Although the Rome Statute can be seen as a major achievement in establishing a legal framework for sexual crimes, the ICC's failure to implement it reminds us that the feminist movement is still an important factor in achieving success in law enforcement. Once again through pressures and criticisms, awareness of sexual crimes shall increase so that come the incriminating in the completion of sexual crimes cases before international court. The role of feminism is also vital through the presence of prosecutors and judges with a feminism paradigm so that, as before, landmark decisions as produced in the ICTY and ICTR can be issued at the ICC.

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