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Book Review of *Sex and International Tribunals: The Erasure of Gender from the War Narrative* by Chiseche Salome Mibenge

Ruth Montiel¹

Throughout history, sexual violence has been pervasive in wars, but international humanitarian law has only recently recognized such violence as a crime. Largely as a result of human rights advocacy, international human rights treaties, declarations, and protocols have begun to address the unique issues of rape in armed conflict and gender-based violence as a tool of war. The newly adopted international treaties, declarations, and protocols encourage states to employ an analysis of the role of gender identities in conflict in transitional justice and conflict resolution strategies. The human rights movement has thus made significant strides in bringing a nuanced gender perspective into armed conflict. Unfortunately, transitional justice bodies have not kept pace with these international instruments.²

In *Sex and International Tribunals: The Erasure of Gender from the War Narrative*, Chiseche Salome Mibenge evaluates the failures of international justice mechanisms to provide an effective narrative of gender-based violence. In particular, she focuses on the International Criminal Tribunal for Rwanda (ICTR), the Truth and Reconciliation Commission for Sierra Leone (TRC), and the Special Court for Sierra Leone (SCSL). She argues that these justice processes have remained mired in the “first tier” of international human rights law.

First tier instruments support formal equality between men and women. They protect women’s private roles, namely their biological reproductive potential, but fail to recognize the realities of gender discrimination and the range of identities that women hold. They thus universalize the experience of women.³ For example, by focusing on the physical pain and biological damage that an individual woman experiences when she is raped, international justice bodies have failed to recognize the long-term social consequences of this violence, such as the damage to their unique

1. Yale Law School, J.D. expected May 2016.

2. CHISECHE SALOME MIBENGE, *SEX AND INTERNATIONAL TRIBUNALS: THE ERASURE OF GENDER FROM THE WAR NARRATIVE* 57 (2014).

3. *Id.* at 26.

roles as caregivers of children.⁴ Through a critique of the way that these judicial or quasi-judicial bodies have treated gender-based violence, Mibenge argues that the reduction of women to sexual victims defined solely by their biological capacities fails to recognize the depth and breadth of the harms suffered by both women and men in armed conflict. Such an “essentializing” process only reinforces stereotypes of African men as “abusers” and African women as “victims.”

Mibenge argues that the ICTR’s treatment of gender-based violence inaccurately creates a narrative that the only true victims of sexual violence are Tutsi women. The Tribunal failed to engage in a thorough analysis of the way that sexual violence was employed during the conflict and how it affected gender relations. The exclusive focus on the persecution of Tutsis, particularly the rapes of Tutsi women by Hutu men, inappropriately prioritize the victim’s ethnic identity over her other identities that contribute to her vulnerability.⁵ The emphasis on ethnicity and the physical effects of widespread rapes on the Tutsi population fails to recognize the gendered dimensions of the act. This is deeply problematic, because “Tutsi women occupied identities outside of their ethnicities, and this fact exaggerated vulnerability or even provided temporary immunity from violence depending on the circumstances.”⁶ In most cases, Hutu women were entirely prevented from testifying before Tribunals, because they were not members of the group who suffered genocide. The ICTR also limited the narrative by failing to address the gendered nature of violence against men. Its refusal to treat castration as a sexual crime suggested that only women could be the victims of gender-based violence.⁷

Although it is true that the narrative that emerges from the ICTR is not a complete and accurate representation of the experience of gender-based violence during the genocide, this is not necessarily a shortcoming of the trials. The ICTR, like all international tribunals, is limited in its jurisdiction and resources. For better or for worse, the tribunal has focused primarily on genocide. Indeed, the Statute of the International Criminal Tribunal for Rwanda (ICTR Statute) states that the tribunal is responsible for “prosecuting persons responsible for genocide and other serious violations of International Humanitarian Law.”⁸ In order to constitute genocide, a crime must be targeted against “a national, ethnical, racial or religious group.”⁹ Furthermore, the ICTR Statute states that crimes against humanity must be similarly directed against one of these groups. Consequently, Mibenge’s argument that the experiences of male victims of sexual violence should have been incorporated into the trials has a solid grounding in the ICTR Statute.

Nevertheless, Hutu victims generally fall outside of the jurisdiction of

4. *Id.* at 70.

5. *Id.* at 76.

6. *Id.* at 76.

7. *Id.* at 80.

8. Statute of the International Criminal Tribunal for Rwanda, SC res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994).

9. Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9.

2014]

Book Review: Sex and International Tribunals

207

the Tribunal. Mibenge argues that the limited jurisdiction of the ICTR necessarily excludes Hutu men and women from the narrative of gender-based violence and diminishes their experience. However, she fails to recognize that a court whose jurisdiction is limited to a small percentage of crimes perpetrated during the genocide cannot possibly provide a complete and nuanced record.

Furthermore, Mibenge's claim that the trials result in immunity for perpetrators who raped for non-ethnic reasons is unfounded. The ICTR was not intended to be the sole body to try perpetrators of violence. The Rwandan government tried many rape cases in conventional courts and later the Gacaca courts. Although these systems certainly have their own failings, the expectation that an international criminal tribunal should be responsible for providing a complete narrative of gender-based violence is impractical. It may well be a valid critique that the ICTR was intended to be the sole representation of the victims' experience of the genocide. However, a more thorough analysis would examine the narrative that emerges from the local and international justice processes in conjunction with the ICTR experience, in order to evaluate whether sexual violence has been dealt effectively post-conflict.

Mibenge also criticizes the SCSL for essentializing women as rape victims without individual agency. The Prosecutor's categorization of crimes and choice of witnesses resulted in a narrative in which men are combatants who perpetrate sexual violence while women are victims whose experiences of conflict are unavoidably sexualized. Although many girls did serve as combatants, both on the front lines and in critical support roles, they were almost never called as witnesses in cases on child soldiers.¹⁰ Furthermore, Mibenge argues that the Prosecutor's use of the crimes of forced marriage and sexual slavery (primarily applied to female victims) as distinct from the crime of enslavement (primarily applied to male victims) unnecessarily sexualized the experience of women and limited the tribunal's ability to create a narrative that included the gender based nature of the crimes perpetrated against men who were enslaved. In reality, Mibenge claims, the crime of enslavement already incorporates the sexual violence experienced by enslaved women, and so should be applied to both men and women; there is no need for a distinct category of sexual slavery crimes.¹¹ These prosecutorial choices restrict the representation of women's experience in conflict to sexual violence and preclude the prosecution of the sexual nature of men's enslavement during the war. They thus "maintain and indeed reinforce a patriarchal construction of African women as rape victims or potential rape victims. Women in conflict societies are cast in a perpetual state of sexual vulnerability and passivity."¹²

The implications of Mibenge's critiques of the SCSL are deeply troubling. If the state limits women's experiences in armed conflict to sexual violence, women are likely to be deprived of the benefits of demobilization

10. Mibenge, *supra* note 2, at 132.

11. *Id.* at 148.

12. *Id.* at 153.

programs. Women's unique needs as ex-combatants are often ignored because they have been excluded from the child soldier narrative. If men's experience of sexual violence in enslavement is ignored, rehabilitative programs will undoubtedly exclude many male victims in need of assistance.

However, the critique of the crime of sexual slavery seems to be a problem of application rather than definition. Distinguishing sexual slavery from enslavement seems to benefit constructing an accurate narrative and ensuring the efficacy of post-conflict programs. For example, women who were enslaved chiefly for sexual purposes may have had children while in captivity, and will thus need different forms of support than those who were enslaved for labor. Although a distinct crime of sexual slavery may not be necessary from a legal perspective, if applied without neglecting the possibility that men may experience sexual slavery, it may facilitate a deeper understanding of the experiences of those who were enslaved. Mibenge's categorical rejection of the crimes of enslavement and forced marriage may thus be misplaced. The court's reluctance to consider the possibility that men and women can experience both sexual and nonsexual enslavement is the core of the problem.

Of Mibenge's three critiques, her analysis of Sierra Leone's Truth and Reconciliation Commissions (TRC) is most compelling. As they are not required to comply with the legal requirements of trial, TRCs are better suited to the creation of a nuanced narrative of gender-based violence in armed conflict. They permit a more thorough and culturally grounded evaluation of conflict. However, Mibenge argues that, like the tribunals, Sierra Leone's TRC essentialized the experiences of men and women and has created a narrative of "absolute and perpetual victimhood for women and girls in war and peace."¹³ By focusing on the failure of Sierra Leonean culture to prevent violence against women and equating early marriage during peacetime with sexual enslavement during war, the TRC report failed to recognize nuances in the experiences of men and women. It thereby neglected any discussion of the ways that women exercise power and agency on a daily basis in their relationships with their husbands and the community.¹⁴

Mibenge focuses on the way this narrative furthers stereotypes of women as victims and delegitimizes culture by associating traditional marriage practices with sexual violence. But she fails to note that the wholesale rejection of customary law and cultural practices can also impede access to justice. Local justice mechanisms are critical to establishing a thorough and nuanced narrative of the harms suffered in armed conflict. Mibenge acknowledges that customary law could vitiate the human rights of women. A better response, however, would be a critical evaluation of customary law that suggests areas of improvement, rather than merely focusing on the TRC's degradation of culture and essentialization of gender roles.

Sex in International Tribunals provides a compelling argument for the failure of international transitional justice mechanisms in Rwanda and Sierra Leone to construct a nuanced narrative of gender based violence in

13. *Id.* at 89.

14. Mibenge, *supra* note 2 at 89.

2014] *Book Review: Sex and International Tribunals* 209

armed conflict. Mibenge clearly illustrates the inadequacies of these systems to address the variety of experiences of conflict and the complexity of victim identities. Her discussion of the multitude of experiences of civil war and the gendered experiences of violence is certainly enlightening. However, her failure to examine additional narratives of gender-based violence and to provide any practical suggestions for incorporating a more individualized and culturally sensitive perspective limits the effectiveness of the argument. Although Mibenge illuminates the challenge of creating nuanced transitional justice processes, legal scholars and proponents of transitional justice will need to move beyond critique to find realistic solutions.