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The American University in Cairo  
School of Global Affairs and Public Policy

# An Environment of Impunity: Criticisms of Current Approaches to Sexual Violence

A Thesis Submitted to  
The Center for Migration and Refugee Studies  
in partial fulfillment of the requirements for  
the degree of Master of Arts

By Margaret Natalie Konstanski

Under the supervision of Dr. Ahsan Ullah

April 2011

## DEDICATION

I would like to dedicate this thesis to my family and friends. Many members of my family have supported me throughout this entire process including parents, siblings, grandparents and aunts. I want to dedicate this to my parents, for their wisdom, encouragement and support. The past two years have been full of challenges and I want to thank them for always supporting me and my decision to pursue my graduate studies in Cairo, Egypt.

I want to dedicate this to my wonderful friends at home—for all the phone calls at strange times due to time differences and always offering encouragement. Thanks for listening to me in the midst of challenges and for being a constant source of laughter and love.

To my friends in Cairo who became like family—the list could go on for pages but thank you for all the personal, professional and academic support. The past two years have been an incredible experience but also full of disruptions and unexpected challenges. We started this experience with disruptions due to H1N1 and ended it with the disruption of a revolution. The completion of this MA would have been impossible without the support of my “Cairo family.”

I want to dedicate this to my neighborhood and community here in Cairo. A special thanks to the people of Egypt who renewed my belief in the power of unity and perseverance.

I also want to dedicate this to the refugee community in Cairo, specifically to my colleagues at Saint Andrew’s Refugee Services. My experience in Cairo would not have been the same without you.

Finally, this thesis is dedicated to two young girls who will remain unnamed. I met them in Mexico when I was eighteen-years-old. They opened my eyes to the reality of sexual violence and their struggle and resilience came to define my personal, academic and professional life. Over the past six years it is their courage that has been the source of my motivation to pursue this field of study. This thesis is for them. I hope that this thesis is only the beginning and that I will have the opportunity to combat sexual violence as I seek to discover prevention mechanisms so that other young girls do not have to endure the same experience. These young girls never received the justice they deserved and I hope that the silence and fear that they lived under for so long will finally be broken.

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Thank you to my Egyptian hosts, who graciously welcomed me into their communities over the past two years. A special thanks to the refugee community in Cairo for welcoming me and serving as a constant source of support and inspiration.

## **ABSTRACT**

Sexual violence permeates all sectors of society worldwide. Sexual violence can come in many forms, occur against a diversity of victims and be perpetrated by a variety of individuals. Despite a degree of increased attention on specialized forms of sexual violence such as sex trafficking, sexual violence against women has been largely approached with apathy and denial. States have failed to create responsive systems that both protect women from sexual violence and prevent continued sexual violence against women. The exclusive focus on sex trafficking has resulted in a fragmented approach and detrimental hierarchy to sexual violence legislation and initiatives. While some argue that improvements have been made in the fields of criminal law and human rights with regards to sexual violence, this thesis argues that these approaches fail to be effective as they do not consider other social or institutional barriers that prevent women from accessing the legal system. By using Kenya as a case study, this thesis will look at the consequences of this narrow focus and argue that a more comprehensive and prevention-centered approach is needed to successfully combat sexual violence and promote women's rights. This thesis will conclude by offering a possible framework for a prevention approach to sexual violence in Kenya.

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# Chapter One: Introduction

At the Gender Violence Recovery Center (GVRC) at the Nairobi Women's Hospital, women and children from a diverse demographic background come for medical help and treatment.<sup>1</sup> Their stories share many similarities. They are stories of rape, violence and exploitation. The GVRC, which used to see an average of four new cases a day, now reports seeing around ten cases a day. Almost half of those who come to the clinic are under the age of eighteen, with their youngest client being only two-years-old.<sup>2</sup>

According to a national survey conducted at the GVRC reports that a woman is raped every twenty-five minutes in Kenya.<sup>3</sup> However, despite the magnitude of cases entering the GVRC, the staff knows that the majority of victims of sexual violence in Kenya will never enter their doors. Hidden behind locked doors, shame and fear, the majority of victims of sexual violence will never be known.

The women described above are sadly, not an anomaly. According a widely disseminated study by the World Health Organization, one in three women worldwide will suffer from sexual violence during her lifetime.<sup>4</sup> Sexual violence is not limited to one context or form, it can occur in a wide variety of contexts such as the home, at school, in the workplace, in the community and in situations of war. Although sexual violence can happen to both men and women, women are disproportionately affected. Sexual violence is widespread and holds serious consequences for its victims. However, despite the extent and impact of sexual violence, it fails to be a priority for legislators or policy makers. Violence against women has been described as one of history's greatest silences.<sup>5</sup> The threat and act of violence against women prevents women from enjoying some of their

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<sup>1</sup> The Gender Violence Recovery Centre is a division of the Nairobi Women's Hospital that specifically assists survivors of gender based violence and sexual assault. The provide medical and psychological support to survivors.

<sup>2</sup> "Gender Violence Recovery Centre," *Nairobi Women's Hospital*, accessed 15 March 2011, <http://www.gvrc.or.ke/>.

<sup>3</sup> "Gender Violence Recovery Centre," *Nairobi Women's Hospital*, accessed 15 March 2011, <http://www.gvrc.or.ke/>.

<sup>4</sup> UNFPA, "Ending Widespread Violence Against Women," *United Nations Population Fund*, <http://www.unfpa.org/gender/violence.htm>.

<sup>5</sup> UNFPA, "Ending Widespread Violence against Women," 1.



most basic human rights. The United Nations Population Fund (UNFPA) described this problem calling violence against women, “the most pervasive yet least recognized human rights abuse in the world.”<sup>6</sup> The pervasiveness of the problem does not translate into the attention and intervention sexual violence merits.

Despite the seemingly worldwide disregard of violence against women, in the past decade there is one issue: sex trafficking, which has been at the forefront of global policy, academic discourse and moral campaigns. Using stories of atrocity and abuse against the innocent and has captured public sentiment, political imagination and made a case based on appeals to morality. Framing the issue within a moral framework that was difficult to contradict, it quickly became a mainstream topic in international discourse. This mainstreaming came with relative ease, despite the fact that statistics on trafficking are hard to find and often misrepresented. With very little reliable data, figures are either grossly exaggerated or remarkably understated. The clandestine nature of the majority of criminal enterprises makes the necessary research component of access a challenge. Many of the numbers and statistics related to trafficking are journalistic, not empirical in nature. The UN estimates that there are somewhere between ten to thirty million people trafficked annually.<sup>7</sup> The estimates for sex trafficking are around two million women and children per year.<sup>8</sup> However, these statistics are increasingly the source of much debate as they are perceived by many to be uncorroborated conjectures. In some cases, this has delegitimized research that was accused of being unsubstantiated. Despite the debates and research surrounding the figures, accurate and verifiable data is rarely collected.

The majority of the discourse on sexual violence has centered on sex trafficking and initiatives focused in the field of criminal law. Criminal law approaches constitute the majority of initiatives to combat sexual violence. The criminal law approach and existing legislation represent a component of this study, but other approaches will also be discussed. Apart from the justice system there are many other contributing factors that allow sexual exploitation and violence to increase at an alarming rate. The institutional and legal focus of sexual violence research is warranted, but incomplete if not understood

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<sup>6</sup> UNFPA, “Ending Widespread Violence against Women,” 1.

<sup>7</sup> Kathryn Farr, *Sex Trafficking*, (New York: Worth Publishers, 2005): 11.

<sup>8</sup> Ibid 3.

in conjunction with research on social, political and economic factors that exacerbate vulnerability. This thesis will suggest that criminal law approaches are incomplete if not situated within a larger, more comprehensive prevention framework.

The case study in this thesis will be focused on Kenya, thus there is a regional emphasis on Sub-Saharan Africa. There are particular circumstances in Sub-Saharan Africa that contribute to the extent of sexual exploitation and violence in the region. Minors generally constitute large percentages of populations in Sub-Saharan Africa.<sup>9</sup> In Kenya, over half the population consists of children under the age of eighteen. This disproportionate percentage of children compared to adults is only growing in light of the HIV/AIDS epidemic, poverty, natural disasters and conflict on the continent. This leaves a large percentage of children vulnerable to exploitation. Many of them lack a parent figure and stable livelihoods. Young children are forced to find work or shelter and this search often places them at high risk for sexual violence and exploitation.<sup>10</sup> With a lack of social services aimed at youth living in poverty, children must find their own source of incomes. Due to limited resources, using one's body as a means of generating income is sometimes viewed by women and children as the only viable option. Therefore, they enter into sexual transactions as a means of survival.<sup>11</sup> Women and children exchange sex for food, shelter, gifts and school fees.<sup>12</sup> Some women and children involved in transactional sex are not in direct situations of exploitation. However, individuals who are actively participating in the sex industry are at increased risk for sexual exploitation and violence. Studies indicate that child prostitutes are generally, but not always, from low income homes and regions.<sup>13</sup> Therefore, socioeconomic status plays a role in the vulnerability of women and children to sexual exploitation and violence. Region specific institutional barriers and social constructs allow sexual violence in Sub-Saharan Africa to occur and grow. The inferior position of women in society in combination with social practices, economic discrimination and institutionalized legal barriers prevent women

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<sup>9</sup> Karen Jullien, "The Recent International Efforts to End Commercial Sexual Exploitation of Children," *Denver Journal of International Law and Policy* 31, No. 4 (2002-2003): 583.

<sup>10</sup> Carol Plummer and Wambui Njunga, "Cultural protective and risk factors: Professional perspectives about child sexual abuse in Kenya," *Child Abuse & Neglect* 33, (2009): 525.

<sup>11</sup> Lalor, "Child Sexual Abuse and HIV Transmission in Sub-Saharan Africa," 101.

<sup>12</sup> Lalor, "Child Sex Abuse in sub-Saharan Africa: A literature review," 449.

<sup>13</sup> Jullien, "The Recent International Efforts to End Commercial Sexual Exploitation of Children," 582.

from having full access to basic rights and equal recognition in law. Legislation on sexual violence in Sub-Saharan Africa serves as indicator for the gender-specific barriers women face when seeking redress for sexual crimes.

Increased war and internal conflict in SSA forces large populations to flee their homes. Conflict related flight and displacement puts women and children at even greater risk for sexual violence. The UN recognized that there is a concerning number of reports of sexual violence during flight and upon arrival in host countries.<sup>14</sup> Women and children are disproportionately impacted by conflict. During transit and in a refugee or refugee like situation they lack protection, provision and are often at risk for sexual violence.<sup>15</sup> The absence of law and presence of chaos during times of conflict creates a context in which there are limited risks or barriers for traffickers and enhanced opportunities. Smugglers can easily exploit people who come to them for safe passage and traffickers can recruit from camps and on transit routes with relative ease using promises of safe passage and security.<sup>16</sup>

With growing HIV/AIDS rates in SSA, children are at even greater risk for sexual violence. There are widespread myths in the region that sex with a virgin will cure HIV/AIDS. Others believe that sex with a virgin will bring you good fortune.<sup>17</sup> This often means that men will seek out younger girls to ensure their virginity. Not only are these myths false, but children are actually more vulnerable to HIV/AIDS exposure.<sup>18</sup> UN estimates that more than 50% of new HIV infections occur in 15-24 year olds and 10% in children under fifteen.<sup>19</sup> Women are disproportionately affected by HIV which is often attributed to sexual violence.<sup>20</sup> HIV/AIDS and sexual violence are described as coexistent epidemics. Exposure to sexual violence translates into increased risk of HIV/AIDS.<sup>21</sup> Economic instability in SSA has led many to seek out dangerous forms of employment.

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<sup>14</sup> UN Security Council, "Women, Peace and Security Resolution 1889," (2009)

<sup>15</sup> Kathryn Farr, "Armed Conflict, War Rape and the Commercial Trade in Women and Children's Labour," *Pakistan Journal of Women's Studies* 16, No. 1&2, (2009): 17.

<sup>16</sup> Ibid 17.

<sup>17</sup> Lalor, "Child Sexual Abuse and HIV Transmission in Sub-Saharan Africa," 100.

<sup>18</sup> Ibid 99.

<sup>19</sup> Shirley Koshin Wang, "Violence & HIV/AIDS: Violence against Women and Girls as a Cause And Consequences of HIV/AIDS." *Duke Journal of Gender Law and Policy* 17, (2010): 313.

<sup>20</sup> Ibid 313

<sup>21</sup> Wang, "Violence and HIV/AIDS," 314

Many women and children engage in survival sex in an effort to stay alive, feed their families and have a roof over their heads.<sup>22</sup> These issues will be further explored in the case study on Kenya. One of the most serious indicators for increase in sexual violence is the powerlessness of victims to report abuse.<sup>23</sup> Despite the variety of legal instruments created to address the issue of sexual violence in Kenya, it remains underreported and little precedent has been set to indicate that the laws are functioning and translating into prosecution.

Kenya offers a unique case study for sexual violence in Sub-Saharan Africa. Sexual violence is prolific in Kenya and is perpetrated against a diversity of victims. Kenya has implemented new laws and policies aimed at protecting women from sexual violence, but these attempts have had minimal impact. The focus of efforts has been on specialized forms of sexual violence such as sex trafficking and sex tourism. Not only have these efforts failed to prevent specialized forms of sexual violence, they have had minimal impact on promoting the rights of women and preventing sexual violence in a more holistic manner. Kenya is a relevant case study because it highlights both the barriers to effectively combating sexual violence but also offers possible initiatives to improve current approaches. Kenya has implemented legislation and initiatives that seek to address some of the shortcomings of current approaches and offer an improved prevention model.

### ***Significance of Study***

Current frameworks that claim to prevent sexual violence against women are almost exclusively focused on sex trafficking or other systematic forms of sexual violence. The issue of sexual violence is primarily situated within discourses on migration and criminal law. However, neither field has offered effective prevention mechanisms that both protect women from sexual violence while also promoting women's basic human rights. Sex trafficking has captured public sentiment, political interest and moral consciences. Consequently, anti-trafficking initiatives receive the majority of funding and the focus of legislation and policy has been centered on anti-trafficking measures. The attention sex

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<sup>22</sup> Lalor, "Child Sexual Abuse and HIV Transmission in Sub-Saharan Africa," 100.

<sup>23</sup> Ibid.

trafficking receives is disproportionate to the scope of the problem, as sex trafficking is a minimal percentage of sexual violence against women. This has resulted in an “undeserved privilege” in which only the victims of what has been defined as the most violent forms of sexual violence have access to legal redress.<sup>24</sup> Furthermore, anti-trafficking initiatives can serve as a façade for laws and policies that can serve to further disadvantage women and justify gender-specific discriminatory policies. Centralizing efforts within the field of criminal law have led to a system in which legislation is only enacted after the harm has occurred. This has prevented the international community from pursuing preventative measures and approaching the issue of sexual violence in a strategic and holistic manner. Other issues outside of law, such as economic, political and social discrimination, inhibit the rights of women and increase their vulnerability to sexual violence. International efforts must be directed towards comprehensive prevention policies of not just sex trafficking, but of sexual violence outside of this narrow context. This thesis offers a critique of current approaches and argues that criminal law approaches must be adapted to serve as a component of a larger, more holistic prevention model that engages multiple stakeholders.

### ***Objectives of Research Study***

Current approaches to sexual violence are too narrow in focus and result in a fragmented approach to women’s rights that fail to protect women and can serve to further marginalize them within society. While the discourse remains centered on sex trafficking and initiatives focused on criminal law, sexual violence will continue to affect women worldwide. A more comprehensive approach needs to combat all forms and contexts of sexual violence and seek to enact prevention mechanisms that will prevent sexual violence, not just prosecute it. The objectives of this thesis are to:

1. Critique the exclusive attention on victims of sex trafficking which distracts the international community from efforts to uphold the rights of women who continue to face gender-specific barriers to accessing rights.

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<sup>24</sup> James Hathaway, “The Human Rights Quagmire of ‘Human Trafficking,’” *Virginia Journal of International Law* 1(2008): 45.

2. Review recent developments in international, regional and domestic legislation pertaining to violence against women and assess if this legislation has improved women's visibility in the discourse or further removed them.
3. Explore the ways in which the exclusively criminal law approach struggles to successfully prevent sexual violence by using the case study of Kenya. The case study will highlight social and structural barriers to combating sexual violence in Kenya and serve as evidence for the need for prevention mechanisms.
4. Make recommendations on how the international community can create systems that are more responsive to crimes against women and better promote women's rights in all sectors. This thesis advocates that international efforts must be directed towards comprehensive prevention policies against all forms of sexual violence by guaranteeing women their social, political, economic and legal rights.

## **Chapter Two: Methodology and Theoretical Framework**

The introduction to this thesis establishes the research question and what topics will be explored in this thesis. Due to the worldwide nature of sexual violence and its related issues, there are many possible approaches this thesis could take. This chapter outlines the methodologies that went into this research study. Methodologies, the theoretical framework and important terminology will be discussed. This chapter will present methodology to highlight why certain directions were chosen and why the topics of this thesis were selected.

### ***Methodology***

Conducting research projects for various academic assignments raised questions over the laws and policies that are often hailed as improvements for the rights of women with regards to sexual violence in the study of forced migration. Throughout my undergraduate and graduate career I have worked in communities with organizations addressing issues of sexual violence. In conjunction with my practical experience, during my academic career I researched and wrote papers on various aspects of sexual violence. During this research process, I became aware of the many gaps that existed in the research. My own research was highly focused on sex trafficking. After doing more exploratory studies on widespread sexual violence, I questioned the value of researching solely sex trafficking. This led to me researching sexual violence in a variety of contexts. The reading of secondary sources raised questions over whether emerging laws and policies were indeed improvements or whether they could actually be viewed as hindrances to women's rights. To explore these questions about sexual violence I developed a systematic method of analyzing the sources. I constructed a content analysis in which I organized my research into sections. My original goal of research was to identify the gaps that exist in current approaches to sexual violence and the possible impacts of research being disproportionately focused on the issue of sex trafficking and the criminal law approach. I wanted to explore what barriers, aside from purely legislative models, existed that prevented women from accessing the legal justice system.

Ultimately, the research led me to explore the potential for prevention models for sexual violence.

To explore my research question I first developed questions based on previous research. Over the course of my academic career in forced migration and refugee studies, I had conducted the majority of my research on sexual exploitation and violence. My focus had been on Southeast Asia where I specifically focused on sex trafficking. After learning of the possible decrease in sex trafficking in Southeast Asia, once the hub of trafficking, I became curious as to why this was not consistent with global figures indicating it was on the rise.<sup>25</sup> Some scholars hypothesized that sex trafficking in Southeast Asia had not slowed but had merely been displaced.<sup>26</sup> With strong crackdowns in Southeast Asia due to international pressure, the trafficking syndicate had simply moved to an area where they would incur less risk.<sup>27</sup> This led me to shift my focus of research towards a region where less research and policy work had been conducted. I chose East Africa, as the region is starting to recognize the consequences of sex trafficking and sexual violence. The region is experiencing an increase in sexual violence and has implemented a number of new laws and initiatives that offer interesting research material. I focused my attention on East Africa and on how refugee flows and economic migration in the region fueled sex trafficking, specifically in Kenya.

I selected Kenya because it represents a convergence of issues related to sexual exploitation and violence. While sexual violence is a worldwide problem, the Kenyan context allows for a wide variety of research topics to be explored. I also chose Kenya because I hope to continue my professional career in Kenya and focus my research on sexual exploitation and violence. While researching sex trafficking, it became evident that despite the international attention given to it, it was not representative of the majority of women's experiences with sexual violence. These women still suffered from sexual violence and exploitation, yet they lacked the services, research, legal recourse and funding afforded to trafficked women. The focus on enforcing only laws related to sex trafficking is incomplete when trying to address sexual violence against women. By

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<sup>25</sup> Josh Ruxin, "Asia is Not Alone: Child Sex Tourism in Mombasa", *New York Times*, January 13, 2009, Opinion Section, 1

<sup>26</sup> Ibid

<sup>27</sup> Ibid.



diverting attention away from widespread sexual violence against women and focusing solely on trafficking, some of the more difficult questions regarding the rights of women are ignored. By confronting solely the issue of sex trafficking, one can focus in on successful efforts and mark it as an achievement. Sex trafficking has won over public opinion with dramatized stories capturing the hearts and wallets of individuals around the world. This same type of violence suffered by victims of trafficking is endured by women worldwide but without the same attention or outrage. However, I also seek to critique the existing language and portrayal of sexual violence. Academics, policy makers and legislators have relied on hyperbole and unreliable research to make a humanitarian appeal. By casting survivors of sexual violence as damaged and desperate, their inclusion in the legislative and policymaking process becomes more unlikely. I will explore some of the impacts this hyperbolic language has on the perception and inclusion of women.

Sex trafficking in Kenya has grown to be a profitable business, especially along the Kenyan coast. Women are trafficked internally within Kenya, from outside of Kenya and Kenyan girls are trafficked out of Kenya, all for the purpose of sexual exploitation.<sup>28</sup> However, women who do not meet the UN's definition of trafficking suffer the same sexual violence in a different setting within Kenya. Instead of a brothel or a club, they endure it within their communities, schools, workplaces and homes. Instead of being purchased by a customer they are attacked by neighbors, family and random strangers.

Kenya also has large numbers of refugees within its borders. After the post-election violence in 2007, many Kenyans also fled their homes and are now located in IDP camps.<sup>29</sup> Despite the official closure of those camps in July 2010, many Kenyans remain in those camps. Many of the women in both the refugee and IDP camps suffered and continue to suffer sexual violence in some form. Due to the limited research on sexual violence in Kenya, the majority of research on sexual violence is related to refugees in these camps. The sexual violence against refugee women can serve as an indicator for the widespread violence against women in Kenya. With the strong focus on

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<sup>28</sup> United States Department of State, "Trafficking in Persons Report" (2010).

<sup>29</sup> More information about the post-election violence, IDPs and refugees can be found in the case study of Kenya in Chapter Four. Please refer to that section for more information on the topic.

sex trafficking, other forms of sexual violence are trivialized. Therefore, women continue to be sexually assaulted and have little social, legal or medical services at their disposal.

Kenya provides a diverse context for a study on sexual exploitation and violence. Numerous crises in Kenya such as; war, economic problems, internal conflict, widespread corruption and the marginalization of women create a context in which sexual violence of many forms can go unnoticed and unpunished. While this is a problem in all countries in the world, Kenya has recently launched a number of initiatives and enacted legislation that make an interesting country to study. Kenya allowed me to not just research the problems of current approaches, but also the opportunity to explore potential initiatives and laws that could improve current approaches. In that way, Kenya presents both the challenges of current approaches and potential of new approaches. When analyzing the gaps in services and laws, Kenya is a context in which all possible relevant circumstances are present. Furthermore, the impact of these gaps can be seen and their potential to further marginalize instead of defending women becomes evident.

Another reason for selecting Kenya was their legal system. First, Kenya is party to all relevant international treaties that address sexual violence in many forms. This includes all major UN Conventions, African Union Conventions and other regional agreements. Additionally, as of 2006 Kenya has implemented its own domestic legislation on sexual violence. The Sexual Offenses Act creates a legal framework which should better serve the rights of women who have suffered sexual violence. However, reporting sexual violence is minimal and prosecutions remain rare. These factors pose questions that can help identify the gaps and analyze their impact.

Kenya's social context allows for a thoughtful analysis of potential gaps in effective means of protecting women from sexual violence. Kenya is facing economic crisis, political turmoil and widespread corruption and violence. Corruption in its police force has gained international recognition and the recent election violence is the topic of significant research. Furthermore the convergence of crises such as poverty, HIV/AIDS, oppression, war, internal displacement and increased migration flows creates a diversity of approaches to looking at sexual violence. This thesis does not seek to explore all the

social issues in Kenya, however it will look at how various social issues are related to sexual violence.

After selecting Kenya I constructed a research design and method for organizing content. Sources were gathered through a variety of means including online research, library research, recommendations and existing laws and policies. I selected sources based on the reputation of the journals and the recommendation of professors, existing research and practitioners in the field. All sources come from reputable and reliable journals, databases and books. The legal documents were read and deconstructed to outline the definitions, rights and beneficiaries of each article. These laws were cross-referenced with cases and other sources of emerging jurisprudence to examine how these laws were used in cases and research. Information was gathered on how the laws had been used and how prosecutions had been made. Furthermore, analysis was conducted of existing research and theories related to sexual violence against women. Sources were chosen from legal institutions, academic institutions, international organizations and local efforts. Sources from a variety of differing backgrounds and sources were chosen to allow for thoughtful research and arguments.

Descriptive analysis was also used by gathering statistics and percentages from a variety of research studies. These include statistics on sexual exploitation and violence in its various forms, statistics on cases reported and statistics on prosecutions. This information was gathered and used to identify potential gaps and analyze their meaning. I analyzed the argument and counterarguments of each paper. Before including a source in my text I actively researched the criticisms or counterarguments other authors made against a particular approach.

The problem of sexual violence permeates every society worldwide. It is a symptom of the marginalization of women around the world as they are barred from opportunities and rights afforded to men. Some of the recent efforts being touted as improvements in women's rights have questionable impact. The focus in the field of forced migration and refugee studies is to create specialized definitions and criteria for violent sexual crimes. However, this has detracted attention from the widespread sexual violence against women. This calls into question whether the improvements in the field

are actually improvements or whether or they are serving to further the disempowerment of women.

It should be noted that the focus on women and children in this study is done with the recognition that men are also victims of sexual violence. Sexual violence against men is a growing and widespread problem but its incorporation is outside the scope of this study. This is not in any way meant to deny, devalue or detract attention away from the atrocities men suffer. However, due to the availability of research and issues explored in this study, the focus will be on female victims of sexual violence.

### ***Theoretical Framework***

Sexual violence is a worldwide problem and occurs with concerning frequency in every country in the world. Specific regional factors make the problem of sexual violence particularly prolific in Sub-Saharan Africa. Despite the fact that laws and policies have been implemented to address the problem of sexual violence, the impact of these laws and policies has been limited. Programs have rarely been successful in curbing sexual violence rates and criminal law does not serve as a deterrent. Therefore, sexual violence continues to be a problem in every country in the world. There are social, political and economic factors that can create an environment that exacerbates sexual violence; in general sexual violence can occur against a person in any context.

As will be explored detail in the upcoming chapter, many scholars, legislators and policy makers have researched and problematized sexual violence and sex trafficking. In the upcoming chapter this research will be presented, analyzed and criticized. Current research is primarily focused on sex trafficking and other specific contexts in which sexual violence occurs. Current approaches to sexual violence are generally camped in the field of criminal law, where criminalization or legalization has been seen as the means for combating sexual violence. This thesis will explore the existing literature and offer a critique. Ultimately, this paper argues that the criminal law approach, while necessary, is incomplete if not done in conjunction with other efforts. The narrow focus of current research and approaches has created fragmented attempts to combat sexual violence.

Due to the widespread nature of sexual violence and the minimal impact of efforts aimed at combating sexual violence, this thesis offers a different framework for approaching the problem of sexual violence. There are two main arguments within this thesis. First, it approaches the issue of sexual violence from the perspective that current approaches are misguided. Currently, efforts to combat sexual violence are aimed almost entirely at forms of sexual violence that only happen in a very narrow context, such as sex trafficking. These efforts have resulted in misguided efforts that are focusing too much on forms of sexual violence that represent only a small fraction of the greater worldwide problem. These approaches are not representative of the actual problem. Furthermore, it argues that current approaches are only aimed at protecting someone after the harm has occurred. Even if there was a sound criminal law approach, cultural, political and institutional barriers also prevent survivors of sexual violence from accessing the legal justice system. Even efforts focused on giving people access to prosecuting sexual violence are only enacted post-facto. This thesis argues that sexual violence needs to be approached holistically and preventatively, with efforts aimed at addressing root causes of sexual violence.

### ***Terminology and Conceptualizing Sexual Violence***

When writing on the topic of sexual violence and exploitation there are a number of terms that need to be defined. People have a wide variety of interpretations of terminology, what terms mean and how they should be applied. The most important terminology in this thesis is defined below along with some discussion on how these definitions were developed and applied. Terminology is important because it is an essential part of any dialogue and framework surrounding an issue. Because of the various interpretations of these terms, this thesis will define the terms as understood in the field as well as operationalize definitions suited for this thesis. Definitions are not the focus of this study but a necessary component to be able to understand a discussion on current approaches to sexual violence and analyze the existing research.

## **Survivor vs. Victim**

Originally it was intended that the word “survivor” would be used in place of “victim” in this study. This choice was made because the word victim serves to further disempower women, who have proven their resilience throughout history. Women who survive sexual violence are not damaged or undignified, rather they are resilient and courageous women with agency. They deserve justice and protection from such crimes. However, though the intention was to use the term “survivor” throughout the paper it is at times used interchangeably with victim. This decision was made simply to be consistent with existing research and terminology. However, when the word “victim” is used it should be remembered that survivors of sexual violence are not passive, anonymous victims, but women with a story, a face and a contribution.

## **Trafficking**

A key concept in this paper is the controversial term trafficking. Trafficking is defined by the United Nations as:

The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.<sup>30</sup>

This definition of trafficking codifies the elements that must be present for the term trafficking to be applied. The first element is that of movement. The definition does not exclusively imply that there has to be actual physical movement of a person to apply the term trafficking, but rather control of movement. This is therefore inclusive of people who are not physically transferred from one location to another but rather restricted from moving of their own free will. Criticism is warranted over the fact that the Trafficking Protocol focuses on trafficking of a transnational nature. This is not representative of trafficking worldwide as trafficking also takes place within the boundaries of a marked territory. By not defining domestic trafficking the protocol failed to cover the active

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<sup>30</sup> United Nations, “Protocol To Prevent, Suppress and Prevent Trafficking in Persons,” 2000.

domestic trafficking syndicates.<sup>31</sup> The second element is that of coercion. The term consent is notably absent from the definition of trafficking. This is because consent is problematic in the context of trafficking. Usually victims of trafficking willingly put themselves into the hands of the traffickers under false assumptions of employment or travel. For these reasons, the idea of coercion is the focus rather than consent. However, coercion is a rather ambiguous term. Is coercion only present through lies or deceit or could economic hardship be considered coercive?

There is no guidance as to how coercion is defined and how it should be applied. Could a woman who willingly puts herself into the hands of a trafficker because she has no way of feeding or protecting her children fall under the definition of coercion? It is questions like these that remain unanswered in the discourse and complicate the enforcement and application of these definitions. The final element is the purpose of exploitation. Exploitation itself does not need to be present; there has to be intent, which is more difficult to prove. The absence of exploitation itself raises some interesting questions. Some argue that the term trafficking could be removed from discourse all together and rather the focus of research and efforts should be entirely on exploitation. If the end result is exploitation, the means by which a person is exploited becomes irrelevant. Furthermore, if the exploitation is the same, people who do not fall under the definition of trafficking could be better protected if efforts and legal instruments were focused on exploitation.

## **Sex Trafficking**

Sex trafficking is the recruitment and sale of women and children for the purpose of sex. It is the same as the definition of trafficking but with an addendum to the final clause “for the purpose of exploitation.” Sex trafficking is trafficking for the purpose of sexual exploitation.

## **Commercial Sexual Exploitation**

Defined at the First World Congress against Commercial Sexual Exploitation of Children in Stockholm, Switzerland, Commercial Sexual Exploitation (CSE) was defined

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<sup>31</sup> Marta Iniguez de Heredia, “People Trafficking: Conceptual Issues with the United Nations Trafficking Protocol 2000,” *Human Rights Review* 9, (2008): 301.

as, “sexual abuse by an adult and remuneration of cash in kind to the child or a third person or persons. The child is treated as a sexual object and as a commercial object.”<sup>32</sup> The Congress went on to further describe the channels through which children could be exploited for commercial sex. This included prostitution, pornography, sex tourism and in some cases child marriages. While this definition is limited to children, for the purposes of this paper it will also apply to women regardless of age. The same elements can be applied to women of all ages, as can the means by which they are exploited commercially. Therefore, the term will be applied to both women and children.

### **Child Sexual Abuse**

Child Sexual Abuse (CSA) for the purposes of this paper will be defined as “Any act where a child is used for sexual gratification.”<sup>33</sup> In coherence with international standards, a child is defined as someone less than eighteen years of age.

### **Rape**

The evolution of a working definition for rape is a complex one. Originally the definition of rape was very narrow, inclusive only of instances of violent physical trauma and penetration done by a stranger. Defining rape has been a challenge for scholars and legal systems. The International Criminal Court in its statute refrained from offering a clear definition of rape. This ambiguity is a common problem, as there is hesitation to codify rape for fear of excluding certain acts, but the lack of specificity can lead to loopholes in legal systems. Until the International Criminal Tribunal for Rwanda, definitions of rape relied heavily on the idea of consent. However, at the ICTR the court opted to remove the element of consent and instead defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”<sup>34</sup> By focusing on coercion, instead of consent, it placed the burden on the perpetrator and not the victim. The focus on consent is evidence of the influence of morality in discussion on rape and the assumption that the victim may have done something to invite the attack. Despite this

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<sup>32</sup> *First World Congress against Commercial Sexual Exploitation of Children* (Stockholm, Sweden: 2001).

<sup>33</sup> Ibid.

<sup>34</sup> “Prosecutor v. Akayesu.” Trial Chapter, International Criminal Tribunal for Rwanda. (1998): Case No. ICTR-96-4.



landmark decision to remove the element of consent, the definition was still rather ambiguous. Others have sought to define the elements of the physical attack that constitutes rape. In the United Nations Commission on Human Rights' report on contemporary forms of slavery, rape was defined as follows:

“Rape” should be understood to be the insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim’s vagina or anus; or the insertion, under conditions of force, coercion or duress, of a penis into the mouth of the victim. Rape is defined in gender neutral terms, as both men and women are victims of rape.<sup>35</sup>

The above definition is representative of the international community’s attempts to create a well-defined, inclusive definition. However each domestic legal system has their own working definition of rape. Based on legal proceedings and international efforts, the definition of rape is still unable to effectively applied when prosecuting perpetrators and protect women. This led the ICTR to expand their definition even further and state that sexual assault “is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical conduct.”<sup>36</sup> This expanded definition allows for more inclusion of sexual crimes that are not limited to the standard definition of rape. This definition would be influential in Kenya’s efforts to codify sexual crimes in the Sexual Offences Act of 2006.

## **Sexual Violence**

Violence against women as defined by the General Assembly Declaration of the Elimination of Violence Against Women is stated as follows:

“Violence against women shall be understood to encompass, but not be limited to, the following:

- a. Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related

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<sup>35</sup> McDougall, “Contemporary Forms of Slavery.”

<sup>36</sup> “Prosecutor v. Akayesu.” Trial Chapter, International Criminal Tribunal for Rwanda. (1998): Case No. ICTR-96-4.

- violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- b. Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- c. Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.<sup>37</sup>

The UNHCR recognizes five forms of Sexual and Gender Based Violence: Sexual violence, physical violence, emotional and psychological violence, harmful traditional practices and socio-economic violence. While these five forms of violence often overlap and are codependent problems, sexual violence remains the focus of this thesis. At times it is necessary to consider other related forms of violence but an in-depth analysis of all of these elements is outside the scope of this thesis.

## **Sex Tourism**

For the purposes of this thesis sex tourism will be defined in accordance to the subgroup against Sexual Exploitation of Children for the Convention on the Rights of the Child which states, “The commercial sexual exploitation of children by men or women who travel from one place to another, usually from a richer country to one less developed, and there engage in sexual acts with children, defined as anyone under the age of 18.”<sup>38</sup>

However, because this thesis is not based solely on children, the term will also be applicable to women over eighteen. Furthermore, sex tourism is also applied to clientele who are away from home but still in their home country. Therefore, internal sex tourism, which is prolific on the Kenyan coast, is included in this definition. This is in recognition of the fact that the overwhelming majority of patrons at commercial sex establishments are nationals.<sup>39</sup> However, this term is not applied to all nationals who purchase sex. It is applied only to those who have are visiting a sex establishment outside the region of their residence.

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<sup>37</sup> UNHCR, “General Assembly Declaration of the Elimination of Violence Against Women,” (1994).

<sup>38</sup> “CSEC Terminology.” *ECPAT International*. [http://www.ecpat.net/ei/Csec\\_cst.asp](http://www.ecpat.net/ei/Csec_cst.asp)

<sup>39</sup> Elbieta M. Godziak, “On Challenges, Dilemmas, and Opportunities in Studying Trafficked Children,” *Anthropological Quarterly* 81, No. 4 (2008): 908.

## **Sexual Exploitation**

Sexual exploitation is defined in the IASC guidelines on gender based violence as:

Any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.<sup>40</sup>

The above definitions will all be used throughout this paper. Definitions are exceedingly important. They are used to define a person's situation and that definition can impact the services provided and the legal channels available to a person. These definitions can serve to create distinctions between crimes committed, applicable laws and services provided. These definitions will be essential in exploring the impact of the gaps created by discourse on sexual violence.

## ***Limitations and Scope***

The scope of this thesis has obvious limitations. The first limitation is that this thesis lacks empirical field research. Due to problems with funding the planned field work in Kenya had to be canceled. Findings based solely on secondary sources and pre-existing research should not be considered representative of problems or be used to make policy decisions. However, one of the greatest limitations is the lack of existing research on sexual violence. There is very little systematic or evidence based research on sexual violence. This is true for research on the fields of trafficking, sexual violence in war, child sexual abuse and other categories of sexual violence.<sup>41</sup> There is an overall lack of funding and resources for conducting reliable research on these issues.<sup>42</sup> The lack of data is representative of a general lack of interest in academia on researching these issues.<sup>43</sup> Research studies related to sexual violence are usually focused on sexual knowledge, behavior and focused on HIV/AIDS, not stand alone sexual violence.<sup>44</sup> It is important that research on sexual violence be placed in a socio-cultural context, but this is rarely

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<sup>40</sup> Inter-agency Standing Committee, "Guidelines for Gender Based Violence in Emergency Settings," (2005) 23.

<sup>41</sup> Elbieta M. Godziak, "On Challenges, Dilemmas, and Opportunities in Studying Trafficked Children," *Anthropological Quarterly* 81, No. 4 (2008): 908.

<sup>42</sup> Kevin Lalor, "Child sex abuse in sub-Saharan Africa," 440.

<sup>43</sup> Francesca Bettio and Tushar K. Nandi, "Evidence on women trafficked for sexual exploitation: A rights based analysis," *European Journal of Law* 29 (2010): 16.

<sup>44</sup> Lalor "Child sex abuse in sub-Saharan Africa," 440.

done.<sup>45</sup> The majority of research on sexual exploitation and violence is journalistic or project oriented. Lacking cohesion and collaboration the research exists in a vacuum and without a clarified purpose.<sup>46</sup> Therefore much of the research used by institutions and governments are not statistically significant. Some of the research is missing values and has small sample sizes.<sup>47</sup> Furthermore, definitions are often confused in research. Researchers employ terms without defining them and often their definitions differ from previous research. This becomes especially confusing when terms such as sex work, sexual abuse and sexual exploitation are often conflated and used interchangeably. In doing so, research fails to distinguish exploitative sexual relationships from non-exploitative.<sup>48</sup>

Researching children presents its own dilemmas, as questions of agency and vulnerability pose ethical considerations. Voluntary consent is a necessary component of ethical research but can become problematic when interviewing children, especially about sexual assault or exploitation.<sup>49</sup> Furthermore, most research on related issues such as war and migration remains gender blind.<sup>50</sup> The final research limitation is the inability to access hidden populations. Getting access to people in situations of exploitation or sexual violence is extremely difficult. Most participants are interviewed after the exploitation has occurred. Furthermore, many victims never come forward about sexual assault thus limiting the pool of applicants.<sup>51</sup> Because of these limitations, caution should be taken when evaluating the research and impact of this study. Though it will draw its conclusions based on critical analysis of existing policies and literature, it is limited in scope due to this lack of original research. It recognizes these limitations and therefore does not seek to create applicable generalizations. It is also important to note that it is one limited and study should not set precedent for programs or legal frameworks. It is meant to be an in-depth exploration of existing literature and seek to do a gap analysis according

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<sup>45</sup> Laura Maria Agustin, "The Cultural Study of Commercial Sex," *Sexualities* 8, No. 5 (2005): 619.

<sup>46</sup> Lalor, "Child sex abuse in sub-Saharan Africa," 441.

<sup>47</sup> Bettio and Nandi, "Evidence on women trafficked for sexual exploitation," 16.

<sup>48</sup> Olivera Simic, "Rethinking 'sexual exploitation' in UN Peacekeeping operations," *Women's Studies International Forum* 32 (2009): 293.

<sup>49</sup> Andrew Morrison, Maurice Schiff and Mirja Sjoblom. "Overview." In Andrew Morrison, Maurice Schiff and Mirja Sjoblom, Eds., *The International Migration of Women* (2008): 2.

<sup>50</sup> Ibid, 1.

<sup>51</sup> Godziak, "On Challenges, Dilemmas, and Opportunities," 911.

to existing literature, laws and case studies with the hopes of raising possible suggestions for future research.

## **Chapter Three: Sexual Violence or Sex Trafficking: The Consequences of Distinctions in Discourse**

The previous chapter identified the methodology, theoretical framework and terminology used for this thesis. An essential component of a research study is an analysis and review of existing research and legislation. This chapter will include a review of existing literature related to topics relevant to this thesis. Information relevant directly to Kenya will be further discussed in a case study. This chapter is a broader discussion of the sources and current debates in the discourse.

In order to address the potential gaps and weaknesses in current approaches to sexual violence, it is first important to solidify an understanding of sexual violence against women. Sexual violence against women is perpetuated in a variety of contexts. Some of these contexts offer unique insights into the scope of the problem and the factors that allow sexual violence to exist. To set a framework of understanding, this chapter will explore existing concepts and literature regarding sexual violence as well as some of its particular forms. It will begin by addressing sexual violence against women worldwide before transitioning into an in depth exploration of sex trafficking and the reasons this particular form of sexual violence has been the focus of the discourse. The focus on sex trafficking is limited in scope and carries negative consequences for efforts to address widespread sexual violence and the rights of women worldwide. Sexual violence will be contextualized within the main frameworks of the discourse and three specific criticisms of sexual violence and sex trafficking discourse will be made.

### ***Sexual Violence against Women: Conceptualization and Extent of the Problem***

As previously mentioned in the introduction, sexual violence against women is a worldwide problem of alarming proportions. In what many consider a low estimate, the

UN estimates that one in three women will endure sexual violence during their lifetime.<sup>52</sup> According to a study conducted by the United Nations Population Fund, women aged 15-44 are more likely “to be maimed or die from male violence than from cancer, malaria, traffic accidents and war combined.”<sup>53</sup> Sexual violence is a problem of worldwide dimensions and carries a widespread impact. The disregard of sexual crimes is indicative of the lack of rights enjoyed by women. As mentioned in the introduction, the widespread extent of sexual violence has been reduced to a narrow focus on sex trafficking. Despite the prolific nature of the problem, the tendency is discourse and research is to focus only on a specific context in which sexual violence occurs, rather than address the issue at large. This has served to distract attention away from widespread sexual violence and allow the international community to only focus on one clearly defined context for the problem.

### ***The Spotlight on Sex Trafficking and the Related Criticisms***

Sexual violence can occur in a wide variety of contexts and in many forms. One form of sexual violence that has received significant international recognition is sex trafficking. Sex trafficking has acquired an enviable yet contested place in academic discourse and human rights policy. Debates surround the topic on issues such as consent, legitimate migration flows, terminology and root causes. The current internationally accepted definition of human trafficking has three key components: coercion, transport and exploitation.<sup>54</sup> Disagreement abounds on who constitutes an actual victim of trafficking and if the term itself is relevant or, in some cases, destructive. Sex trafficking won over public sentiment with stories of unimaginable atrocities committed against those the world considered most vulnerable. As scholar Vanessa Munro described, sex trafficking has “captured the political and moral imagination” of people worldwide.<sup>55</sup> Since 2003, country specific legislation related to trafficking has more than doubled.<sup>56</sup> However, despite its prominent place in media and discourse, the attention has had rather

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<sup>52</sup> UNFPA, “Ending Widespread Violence,” 1.

<sup>53</sup> UNFPA, “Ending Widespread Violence,” 1.

<sup>54</sup> United Nations, “Protocol to Prevent.”

<sup>55</sup> Vanessa Munro, “Of Rights and Rhetoric: Discourses of Degradation and Exploitation in the Context of Sex Trafficking,” *Journal of Law and Society*, Vol. 35, No. 2 (2008): 263.

<sup>56</sup> UN Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons* 24, (2009).

ambiguous results. The appeal to public sentiment has served as a platform for movements that some argue inhibit women's rights, rather than defend them. Trafficking discourse has been incorporated into the field of human rights and portrays trafficking victims as being violently coerced and abused. Discourse rarely engages in a more comprehensive investigation into trafficking that includes the sociology of crime, issues of freedom of movement and other fields outside of human rights.

Trafficking is a multi-faceted issue that functions with the involvement of multiple stakeholders. Similarly, anti-trafficking initiatives won the support of a wide variety of interest groups. The UN estimates that the total value of human trafficking is around thirty-two million US dollars, making it the third most profitable criminal industry following drugs and arms.<sup>57</sup> However, unlike drugs and arms, which can be sold once, people can be sold multiple times. In the case of sex trafficking, people are sometimes sold as many as twenty times a day.<sup>58</sup> Sex trafficking is a profitable business because it incurs minimal risk for perpetrators. It is a crime that is difficult to prosecute and many traffickers, pimps and customers face little to no legal consequences for their actions. With growing HIV/AIDS rates there is an increased demand for younger girls. Young girls are thought to guarantee purity from disease and myths that sex with a virgin can cure HIV perpetuates the increased demand for younger girls.<sup>59</sup> Young girls are being recruited into sex trafficking at even earlier ages, some as young as five years old.<sup>60</sup>

### ***The Protocol to Prevent, Suppress and Punish Trafficking in Persons***

The majority of discourse on trafficking revolves around the three components given in the Trafficking Protocol. The discourse on these three areas offers an incomplete picture of the complexities of trafficking. The definition of trafficking created by the Trafficking Protocol has been an issue of much dissent and has even been accused of creating barriers to effectively address trafficking.<sup>61</sup> The focus of programming and research is on the actual event of trafficking; however, the causes and consequences of trafficking cannot

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<sup>57</sup> United States Department of State, "Trafficking in Persons Report," (2010).

<sup>58</sup> Kevin Bales, *Disposable People*, (Berkeley: University of California Press, 2004).

<sup>59</sup> Wang, "Violence & HIV/AIDS," 315.

<sup>60</sup> Gary Haugen, *Terrify No More*, (Nashville: W Publishing Group, 2005): 161.

<sup>61</sup> De Heredia, "People Trafficking: Conceptual Issues," 300.



be fully understood by focusing only on movement.<sup>62</sup> The focus on movement as the primary component of trafficking distracts researchers from the end result of exploitation. From the standpoint of legislation and programming, the focus on movement has benefits. Under the definition of trafficking, a person who has not yet been exploited, but was moved for the purpose of exploitation, can still qualify as a victim. Some negative consequences have also resulted from the focus on movement. Anti-trafficking legislation can be used as a façade for xenophobic and anti-immigration legislation.<sup>63</sup> Policy and programming have focused on border control and securitization of migration; however, these efforts have proven largely ineffective. The trafficking syndicate has learned how to adapt to efforts to combat human trafficking. “Current anti-trafficking efforts primarily seek to crack down on modern-day slave traders, resulting in little more than adjustments in routes, larger bribes to border guards, and the procurement of false travel documents.”<sup>64</sup> Efforts have failed to produce tangible results with regards to curbing sexual exploitation and trafficking of women and children. By simplifying trafficking down to an issue of transnational movement, the complexities of the industry and criminality of the acts of traffickers have failed to be addressed. Until sexual exploitation and trafficking are viewed as multi-faceted issue, anti-trafficking efforts will continue to be futile. Researcher Diane Tudorache said,

Trafficking has many different dimensions: it is an issue of violence against women, an example of serious human rights violations, an economic and development issue with consequences for entire regions and their individual societies and ultimately, a criminal matter.<sup>65</sup>

Trafficking does not occur in a vacuum. It functions because of certain social, political and economic conditions. Trafficking requires the collaboration, or at least apathy, of governments and individuals. Despite the outcry against sex trafficking, it remains a low

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<sup>62</sup> Siddhartha Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (New York: Colombia University Press, 2009), 4.

<sup>63</sup> Richard Black, *Breaking the convention: researching the “illegal” migration of refugees to Europe*, 39 *Antipode* 34, 40 (2003).

<sup>64</sup> Black, “Breaking the Convention,” 5

<sup>65</sup> Diane Tudorache, “General Considerations on the Psychological Aspects of the Trafficking Phenomenon,” *The Psychosocial Notebook*, edited by Guglielmo Schinina (2004): 19.

priority for law enforcement and the perpetrators are rarely criminalized.<sup>66</sup> In many cases, law enforcement officials are an integral part of allowing the business to survive.

Sex trafficking is viewed as a migration related issue because of the international community's focus on the component of movement. While movement and migration are vital to the trafficking industry, trafficking must also be recognized as a criminal industry. Trafficking violates numerous international laws and basic human rights standards. The autonomy of victims is violated, which is a violation of some of the most basic human rights defined by human rights conventions.<sup>67</sup> Sex trafficking is illegal in international law and in most domestic legislation but this rarely translates into effective prevention or prosecution. The sociology of the criminality of the industry is often overlooked or trivialized in research, with the focus being on morality and victimization. Traffickers are reduced to "bad guys" that have to be punished and victims are cast as helpless young women in need of rescue. Such simplistic terms may seem misplaced but academic discourse continues to function using this continuum. Often ignored is the fact that sex trafficking is an extremely profitable criminal business. Estimates place the annual revenue of sex trafficking at 12-30 billion US Dollars.<sup>68</sup> Not only is it a profitable industry, but it is also highly cost effective. The commodity is cheap and easy to acquire in countries plagued by poverty, unemployment and internal conflict. Beyond just profitability, it is also an economically secure industry. Even in times of economic hardship, the demand for sex stays high.<sup>69</sup> After the initial acquisition of the product, unlike other transnational criminal industries such as drugs and arms, the product can be sold multiple times. Furthermore, because the commodity is cheap and easily replaceable, it requires little investment. Women and children who are trafficked are regarded as disposable and little effort is put into their well-being.<sup>70</sup>

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<sup>66</sup> Farr, "Armed Conflict, War Rape and the Commercial Trade," 4.

<sup>67</sup> Tudorache, "General Considerations on the Psychological Aspects," 27.

<sup>68</sup> Farr, "Armed Conflict, War Rape and the Commercial Trade in Women and Children's Labour," 4.

<sup>69</sup> Gillian Caldwell, Steve Galster, Jyothi Kanics, and Nadia Steinzor, "Capitalizing on transition economies: The roles of the Russian mafiya in trafficking women for forced prostitution," In *Illegal immigration and commercial sex: The new slave trade*, ed. Phil Williams (London/Portland: Frank Cass 1999).

<sup>70</sup> Kevin Bales, *Disposable People* (Berkeley: University of California Press, 2004), 59.

People are recruited into sex trafficking through a variety of means. A small minority of recruits are kidnapped, others sold by friends and family and others are lured by the false promise of a job.<sup>71</sup> Many others voluntarily place themselves into the hands of a trafficker but are unaware of the level of exploitation they will ultimately endure.<sup>72</sup> Although they willingly took the risk of being trafficked in hopes of finding employment or financial sustainability, they were unaware of the conditions and exploitation that awaited them.

### ***Trafficking in Persons as a Criminal Industry: The Business Model of a Criminal Enterprise***

What is often ignored is that sex trafficking is an extremely well organized and resourceful criminal industry. The trafficking syndicate has created a sophisticated yet decentralized system that international efforts have failed to effectively combat. Leaving arguments of morality and criminality aside, the business dynamic of trafficking is revealed. Exploitation and sexual assault are not just an end result of trafficking, but a business technique to create a submissive commodity. Exploitation happens during the entire process of trafficking and is done with intention. The business of trafficking follows a particular business model that could be of use in future research. More comprehensive approaches to trafficking are needed in order to better understand one of the world's most profitable entrepreneurial enterprises.

### ***Defining Trafficking: Controversy of Terms and the Issue of Consent***

The issue of consent is one of the most contested definitions in the discourse on sex trafficking. Discourse on sexual violence often calls into question if the act was consensual. How consent is defined and proven is notably absent from most laws and policies, yet it remains central to definitions of sexual violence and exploitation. Consent becomes particularly important in debates on prostitution and its tumultuous relationship with sex trafficking. In situations of trafficking consent is difficult to establish; the notion of consent was purposefully left out of the Trafficking Protocol. This served as an

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<sup>71</sup> Levisda Douglas. *Sex Trafficking in Cambodia* (Victoria: Monash University Press, 2003), 7.

<sup>72</sup> Douglas. *Sex Trafficking in Cambodia*, 6.

anomaly because up until this point the issue of consent was at the forefront of the trafficking debate.

Many feminist groups disagreed on how sex trafficking should be defined and what constituted a victim. Some groups felt that the focus on sex trafficking and exploitation delegitimized sex workers who had voluntarily entered the field. They argued that people were using sex trafficking as a disguise for criminalizing prostitution and argued that legitimate sex work was threatened by efforts to mitigate trafficking flows.<sup>73</sup> A women's right to choose a profession was inhibited by the outcry against prostitution. Prostitution was blamed for being the root cause of sex trafficking; on the other hand, many argued that sex trafficking merely exploited prostitution for its own criminal purposes.<sup>74</sup> Other groups argue that there is no such thing as consensual sex work. They argue that only women in desperate circumstances would enter such a profession, and therefore their economic or social situation could constitute coercion.<sup>75</sup> The rationale behind removing consent from the Trafficking Protocol is that a person can never consent to being trafficked. They can consent to smuggling or the offer of a job, but if the crime of trafficking can be established, consent is irrelevant.<sup>76</sup> The end result of exploitation is something that is never consensual and therefore the protocol focused on coercion.<sup>77</sup> While the feminist arguments on both sides of the consent debate are interesting, this paper focuses on the end result of exploitation, and therefore a larger discussion on the topic is outside the scope of this paper.

For the definition of trafficking to be applicable, a specific process must take place. A person must be recruited, transported, and coerced for the purpose of exploitation. The focus on exploitation is to account for people who may willingly enter into sex work, but are unaware of the exploitative result of this decision. With the focus being on exploitation, not consent, some scholars are advocating for a rights based

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<sup>73</sup> Anne Gallagher, "Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway," *Virginia Journal of International Law* 49 (2008-2009): 832.

<sup>74</sup> Svitlana Batsyukova, "Prostitution and Human Trafficking for Sexual Exploitation," *Gender Issues* 24 (2007): 46.

<sup>75</sup> Katherine Farr, *Sex Trafficking*, 137.

<sup>76</sup> Navenethem Pillay, "Sexual Violence: Standing by the Victim," *Case Western Reserve Journal of International Law* 49 (2009-2010): 466.

<sup>77</sup> Pillay, "Sexual Violence: Standing by the Victim," 466.

analysis for determining exploitation. Exploitation, like many terms in the field, is incredibly difficult to define. Some use a more standard dictionary definition of exploitation whereas other organizations such as the International Organization for Migration create their own criteria for establishing exploitation.<sup>78</sup>

In a study conducted by Bettio and Nandi, they argued that determining exploitation should be done by analyzing women's access to basic human rights. Bettio and Nandi used a woman's agency as a framework for deciding on whether or not the situation was exploitative. A woman's agency was determined by looking at her freedom of movement and her freedom to choose clients and negotiate the terms of that transaction.<sup>79</sup> This approach accounts for women who enter into sexual transactions of their own free will. This is done with the acknowledgement that consensual sexual transactions that are not exploitative exist.<sup>80</sup> However, it was also done with the acknowledgement that many situations that begin as consensual can result in exploitation. The authors found that the majority of the women they interviewed did not have access to basic rights such as the freedom of movement, the freedom to negotiate the terms of the contract or decline clients.<sup>81</sup> They found that there was a pattern of violation of certain human rights that indicated that the woman had been trafficked for sexual exploitation.<sup>82</sup> They argued that trafficking could be seen along a continuum of contractual agreements that could be used to determine if rights were either enforced or violated.<sup>83</sup>

One of the most interesting findings of their study was that women's freedom of movement was severely restricted in clubs and massage parlors and that woman trafficked locally often experienced greater risks of exploitation.<sup>84</sup> This challenges some current notions of trafficking that imply that transnational trafficking is the most prolific and exploitative. This misconception is related to the narrow focus on only transnational

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<sup>78</sup> "The Nature of Human Trafficking," *International Organization for Migration*, <http://www.iom.int/jahia/Jahia/pid/676>.

<sup>79</sup> Bettio and Nandi, "Evidence on women trafficked for sexual exploitation," 21.

<sup>80</sup> Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 *Harvard Law Journal & Gender* 29 (3006): 335, 337.

<sup>81</sup> Bettio and Nandi, "Evidence on women trafficked for sexual exploitation," 16

<sup>82</sup> *Ibid* 16.

<sup>83</sup> *Ibid* 21.

<sup>84</sup> *Ibid* 34.

sex trafficking. As will be further discussed in relation to sexual violence, narrow conceptualizations of the issue of sex trafficking has led to an imbalanced understanding of the issue. The majority of research and information available on the issue is focused on the transnational nature of trafficking. However, in many parts of the world, particularly in Sub-Saharan Africa, internal trafficking networks recruit locally and use the same exploitative business techniques that are associated with transnational sex trafficking syndicates. This becomes further relevant when addressing sex trafficking in Kenya, where the majority of victims of trafficking are Kenyan nationals. This serves as evidence that the narrow focus of research can lead to conclusions that are not representative of the actual scope and dimension of a problem.

### ***Disequilibrium in the Discourse: The Consequences of a Narrow Focus***

The first critique of the discourse is the disproportionate and unilateral focus on victims of trafficking in research. The subjects of research are almost entirely victims and very rarely are other stakeholders included in research. The discourse is focused on all the debates that directly impact the victims of trafficking, such as consent and exploitation. In an effort to create a more complete understanding of trafficking it is important to address the demand side of the issue. With the research focus being on women, little attention is paid to men who consent to take part in the industry, whether they are facilitators of sex trafficking or the actual customers.

According to some scholars, trafficking can be linked to the increased commoditization of the female body. Sexual exploitation has grown along with the demand for prostitution and pornography.<sup>85</sup> This demand is what drives the steady supply of women and children needed to fill commercial sex establishments.<sup>86</sup> Anti-trafficking initiatives are often focused on providing services and legal instruments to women after the exploitation has occurred while simultaneously implementing restrictive immigration policies that discriminate against women. These initiatives combined with strong anti-

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<sup>85</sup> Bettio and Nandi 16.

<sup>86</sup> Vidyamali Samarasinghe, “‘Two to Tango’ Probing the Demand Side of Female Sex Trafficking,” *Pakistan Journal of Women’s Studies* 16, No. 1&2 (2009): 34.

trafficking legislation have proven to be inefficient in mitigating the demand for commercial sex.

The international community tends to simplify the issue of human trafficking by relying heavily on moral justifications and humanitarian appeals rather than doing an in-depth analysis of all the stakeholders and facilitators of sex trafficking.<sup>87</sup> Due to worldwide conflicts of poverty, war, gender and ethnic bias, corrupt legal systems and other social problems, the supply of potential sex trafficking victims seems limitless.<sup>88</sup> Women continue to be disenfranchised worldwide and with limited opportunities and growing economic and social problems, women remain at risk for this type of exploitation. These social factors are incredibly difficult to overcome due the scale of the problem. While it is important to address the factors that serve to subjugate women, it is also important to probe the demand side of sexual exploitation and violence. For the act of sexual exploitation to occur, at least two parties must be involved. By focusing only on the woman, and not the perpetrator, research only represents 50% of the issue. This one-sided research can result in misinformed conclusions and incomplete policy recommendations.

### ***The Other Half of the Equation: Exploring the Demand Side of Trafficking***

One of the key stakeholders in the trafficking industry are the customers themselves. Customers come from all ages, nationalities and socioeconomic backgrounds. The commercial sex industry is dependent on men with disposable income.<sup>89</sup> Many of the johns are foreign sex tourists that come to a country with spending money to live out their sexual fantasies.<sup>90</sup> Southeast Asia was long considered the hub of sex trafficking. Studies revealed that sixty-five percent of all visitors to Cambodia and 2/3 of tourists to Thailand are unaccompanied men and 1/5 of them travel with "the express purpose to have sex."<sup>91</sup> However, sex tourists make up only a small percentage of patrons. Local demand for

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<sup>87</sup> Batsyukova, "Prostitution and Human Trafficking for Sexual Exploitation," 47.

<sup>88</sup> Kara, "*Sex Trafficking: Inside the Business of Modern Slavery*," 13.

<sup>89</sup> Thomas Steinfatt, "Southeast Asia," Encyclopedia of Prostitution and Sex Work. Ed. Melissa Hope Ditmore. Vol.2. (Westport: Greenwood Press, 2006) 453.

<sup>90</sup> "Johns" is the term used to refer to the clients of brothels or commercial sex establishments.

<sup>91</sup> David Batstone, *Not for Sale* (San Francisco: Harper Collins, 2007), 60.

commercial sex far outweighs international demand.<sup>92</sup> Regardless, recent research suggests that there is an undeniable link between trafficking and tourism. Growing tourism markets and increased markets for leisure have led to an increased demand for commercial sex.<sup>93</sup> Military establishments or the presence of international personnel consistently creates an increased demand for sex workers.<sup>94</sup> Despite the complicity of men in these crimes, the actions of male customers are often overlooked. Either condemned for immorality or dismissed under the expression “men will be men,” little attention is paid to role that social construction plays in men’s decision to take part in the sex industry.<sup>95</sup> Like any business, sex is marketed to a specific audience. Like any well-run business, the industry of commercial sex knows its customers. Women are marketed in such a way that customers will feel legitimized in their actions. Therefore, women working in commercial sex establishments are carefully trained and broken in so that they are inviting and submissive, creating a façade of desire.

Very few male patrons are aware of the level exploitation endured by some sex workers.<sup>96</sup> They have to construct a perception of the sex worker in order to justify their actions. However, despite these men’s complicity in the industry, they remain anonymous in research and discourse.<sup>97</sup> They rarely agree to take part in studies and very little research is conducted on the customers of sex establishments.<sup>98</sup> By focusing only on the victims, it is impossible to fully address the issue of sex trafficking which can only exist as long as there is demand. Despite the focus on women in trafficking discourse, they actually comprise the lowest level of the sex industry hierarchy and have limited agency and even less influence. The most powerful players who actively choose to participate in the sex industry remain invisible in the discourse, which is to the field of study’s detriment.<sup>99</sup>

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<sup>92</sup> Sara K. Andrews, “U.S. Domestic Prosecution of the American International Sex Tourists: Efforts to Protect Children from Exploitation,” *The Journal of Criminal Law and Criminology* 94, No. 2 (2004): 419.

<sup>93</sup> Samarasinghe, “‘Two to Tango’ Probing the Demand Side,” 44.

<sup>94</sup> Ibid 45.

<sup>95</sup> Samarasinghe, “‘Two to Tango’ Probing the Demand Side,” 36.

<sup>96</sup> Ibid 36.

<sup>97</sup> Ibid 37.

<sup>98</sup> Emily Troshynski and Jennifer K. Black, “Sex Trafficking: an exploratory study interviewing traffickers,” *Trends in Organized Crime* 11 (2008): 31.

<sup>99</sup> Ibid 50.



Sex trafficking exists and is perpetuated because of the support of a number of intermediaries that serve to facilitate the industry. This can involve a wide variety of players such as pimps, brothel owners, criminal groups and drivers.<sup>100</sup> Often intermediaries can also be government officials, border control officers and policemen. These people facilitate the movement or sale of the women and children but are not the direct profiteers. Those who profit directly are part of a “very decentralized but highly sophisticated network.”<sup>101</sup> That network relies on intermediaries who directly connect the commodity with the buyer. These profiteers can either be those responsible for the initial purchase and transport of the victim, or they can be the victim’s owner who benefits directly from the girl’s sale.<sup>102</sup> The profit made by public officials that serve as intermediaries is a deterrent to effective law enforcement.<sup>103</sup> With the complicity of public officials in facilitating exploitation, efforts to combat sex trafficking are inhibited. Successful anti-trafficking efforts require the involvement of public officials from a variety of public sectors. However, because many public officials profit from sex trafficking they rarely invest in anti-trafficking initiatives and at times, have been known to directly interfere in these initiatives by tipping off pimps and brothel owners about a raid or dropping legal complaints against perpetrators.

While individuals often serve as intermediaries, states are often complicit in the sexual exploitation. Whether they explicitly allow sex trafficking to exist, or encourages sex trafficking by apathy and omission, the state remains one of the most powerful players in the industry, but also notably absent from discourse. States create laws and policies that can legitimize trafficking flows. At times their apathy or allowance of certain crimes creates a context in which it can flourish. Until the discourse is more willing to look at all sides of the trafficking industry, initiatives and legislation will continue to be inefficient.

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<sup>100</sup> Troshynski and Black, “Sex Trafficking: an exploratory study,” 40.

<sup>101</sup> Ibid 41.

<sup>102</sup> Ibid 41.

<sup>103</sup> Andrews, “U.S. Domestic Prosecution of the American International Sex Tourists,” 246.

### ***Barriers Inhibiting Current Responses to Sex Trafficking***

Despite the wide array of efforts underway to prevent or curb sex trafficking, the industry continues to grow. Abolitionist Siddharth Kara stated that the reason for this was simply, “immense profitability with minimal risk.”<sup>104</sup> Sex trafficking is illegal in every country in the world but the criminality of the industry is rarely the focus of research, programs or interventions. As long as risk remains low, supply remains limitless and demand remains high, the sex industry will continue to grow. Kara argued that anti-trafficking initiatives need to focus on incurring high risks in order to be effective. However, while terms remain ambiguous, efforts will continue to be confused and contradictory. “Confusion over what trafficking is results in blunted purpose, diffracted focus, and the exclusion of important components of trafficking related crimes.”<sup>105</sup> Corruption that facilitates trafficking goes largely unpunished and even for the rare few who are prosecuted for trafficking, the sentences are not severe. To fight sex trafficking requires coordination of efforts and strong political will, both which remain absent from most anti-trafficking initiatives. A coordinated local and global response is needed in order to successfully combat sexual violence on a local and global level.<sup>106</sup> This calls into question the reasons for this lack of will. Despite public outcry, legislation and research on trafficking, tangible change has been difficult to attain. This allows for the question of gender bias. Perhaps the reason that trafficking initiatives have been largely ineffective is that women remain absent from the process and are still marginalized within every country in the world. The individual rights of women are often overlooked and until their agency and voice are present in the debates and legislation, current efforts will remain ambiguous.

### ***What’s in a Name? The Power of Definitions and Categorizations***

Worldwide attention on sexual violence against women has become almost exclusively focused on sex trafficking. Sex trafficking discourse has manipulated perceptions of morality and innocence as a tool to win over public opinion, pressure politicians and

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<sup>104</sup> Kara, *Sex Trafficking: Inside the Business of Modern Slavery*” 37.

<sup>105</sup> Ibid 38.

<sup>106</sup> Laura Barnitz, “Effectively Responding to the Commercial Sexual Exploitation of Children: A Comprehensive Approach to Prevention, Protection and Reintegration Services,” *Child Welfare*, LXXX, No. 5 (2001): 598.

petition for funding. Relying on emotional, yet vague language, it is victims of sex trafficking that are at the center of discourse, policy and funding opportunities. Examples of this focus in media was recently revealed in the launching of the CNN Freedom Project, where an entire section of the CNN homepage is dedicated to journalistic accounts of slavery.<sup>107</sup> The reliance on moral arguments and innocence makes it difficult for scholars to question anti-trafficking initiatives.<sup>108</sup> Consequently, anti-trafficking movements rarely are the subject of “principled dissent.”<sup>109</sup> Renowned scholars such as James Hathaway offered a harsh critique of abolitionist laced discourse that advocate a heavy-handed approach to trafficking. He articulates the specific risks of the current anti-trafficking initiatives, which he argues are in direct opposition to human rights standards.<sup>110</sup> The discourse on sex trafficking is criticized for the stringent nature of the definitions that operate on a framework in which, based on rigid criteria, a person either is or is not a victim of trafficking. What definition is applied to that person will determine whether or not he or she has access to certain legal channels, funding and programs that are allocated only to victims of trafficking. In reality, determining whether or not a person has been trafficked is not a clearly defined process.

This begs the question of why a victim of trafficking receives so much more attention than victims of other crimes.<sup>111</sup> In comparison to trafficking, the widespread violence against women has received minimal attention. There is simplicity to focusing efforts on a single context of sexual violence. Approaching the issue of sexual violence worldwide would be a difficult task as it crosses borders, cultures and sovereign states. Sexual violence in general, unlike sex trafficking, does not fit into a defined context and can occur in any context, whether it is in the home, school, community or elsewhere. Victims of sex trafficking are easy to cast as vulnerable victims, thus capturing public sentiment and becoming a tool for acquiring funding. Furthermore, victims of sex trafficking experience sexual violence in a context of exploitation that is hard to deny.

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<sup>107</sup> “The Freedom Project,” *CNN*, <http://thecnnfreedomproject.blogs.cnn.com/?hpt=C2>.

<sup>108</sup> Hathaway, “The Human Rights Quagmire,” 4.

<sup>109</sup> *Ibid* 8.

<sup>110</sup> *Ibid* 4.

<sup>111</sup> Rebecca Wharton, “A New Paradigm for Human Trafficking: Shifting the focus Prostitution to Exploitation in the Trafficking Victims Act.” *William and Journal of Women and Law* 16 (2009-2010): 756.

The exploitation of underage girls locked in a brothel with visible signs of injuries and abuse is something that few people would dare challenge. The exploitation is clear and defined within a context that has been described as slavery. Sexual violence in the more widespread sense is still often blamed on the woman or excused based on assumptions about gender norms and social structures. All of these efforts combined make it difficult to gather support for initiatives aimed at addressing sexual violence against women, regardless of the context and form of the violence.

Sex trafficking receives significant amounts of funding when compared to other human rights or women's rights abuses. This led James Hathaway to argue that funding given to anti-trafficking efforts is a misappropriation of funds and will have limited impact on combating trafficking. As anti-trafficking initiatives receive funding, the potential to bring about holistic and sustainable change through addressing root causes remains elusive.<sup>112</sup> He articulated this point saying, "This is a depletion of resources and a redirection of effort that the antislavery campaign can ill afford, because the procedural mechanisms in place to address slavery are woefully inadequate."<sup>113</sup> Ultimately, Hathaway concludes that the narrow focus on trafficking created a small, privileged subset of victims and programs. Their definition as victims of trafficking is rather vague, yet the legislation, programming and funding available to them places them ahead of other individuals who have experienced similar crimes that did not amount to the level of trafficking as defined in law.<sup>114</sup> This creates a perception in which violence against women exists along a continuum, in which only the most violent or recognized crimes receive attention. It creates a system in which an undefined threshold must be crossed for sexual violence to amount to a crime worthy of recognition and efforts. This is in opposition to legal and human rights standards. When sexual violence can be established, the degree of violence should be irrelevant when determining whether or not the crime crosses a threshold. This concept is representative of a long standing barrier to the recognition of women's rights. By placing sexual crimes on a continuum of severity, women are only recognized in law if a system, created by men, recognizes that the crime

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<sup>112</sup> Hathaway, "The Human Rights Quagmire," 15.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid 25.

crossed the necessary threshold. The focus of legislation and programming should not be focused on the degree or context of the crime, but rather the crime itself.

Anti-trafficking efforts are often framed within the context of rescue and protection. As previously mentioned, xenophobic laws and policies that regulate migration and prevent female migration inhibit the rights of women. Hathaway summarizes this problem stating:

As bad as it is that the antitrafficking effort has resulted in a highly selective privileging of a small subset of the slavery problem and as duplicitous as it undoubtedly is for states to trumpet antitrafficking efforts as proof of their strong commitment to fight modern slavery, the failure of the antitrafficking effort has a second dimension. In addition to amounting to a diversion from the core commitment of the international community meaningfully to combat modern slavery, the antitrafficking campaign has also resulted in significant collateral human rights damage by providing a context for developed states to pursue a border control agenda under the cover of promoting human rights.<sup>115</sup>

Under the guise of human rights discourse the opportunities for women to migrate are becoming increasingly restricted.<sup>116</sup> Anti-trafficking efforts have recently advocated for criminalizing smuggling. Not only do proposals stand in opposition to basic human rights standards such as freedom of movement, but smuggling channels do not often end in exploitation.<sup>117</sup> Refugees and migrants alike rely on smugglers to bring them to safety. For refugees, the regulation of smuggling channels could result in preventing their escape which would violate international law, refugee law and human rights law.<sup>118</sup> Furthermore, some have argued that limiting smuggling channels and increasing border controls will not slow migrant flows but rather increase the risk involved in smuggling. The focus on restricting smuggling does not take into consideration the conditions in origin and destination countries that motivate people to undertake the risky process of migration. Without addressing the issues that drive people to migrate, it is possible that restricting smuggling and strengthening border control could lead more people to depend on smugglers. Therefore, people will go to smugglers “as the only credible hope of attaining the political freedoms and economic opportunities we enjoy in the world’s most

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<sup>115</sup> Hathaway, “Human Rights Quagmire,” 26.

<sup>116</sup> Ibid 28.

<sup>117</sup> Ibid 37.

<sup>118</sup> Ibid.

developed countries.”<sup>119</sup> While smuggling sometimes results in exploitation, most smuggling relationships are consensual and are successful mechanisms for reaching a desired location. However, increased border control and regulation of migration could create an environment that makes smuggling more dangerous. As Hathaway articulates:

The agreement of states to criminalize smuggling and to strengthen border control efforts, coupled with inelastic demand for border crossing by mostly less-than-wealthy persons, will logically create the conditions within which traditionally benign forms of smuggling are transmuted into the clearly rights-abusive practices characteristic of trafficking.<sup>120</sup>

The restrictive immigration policies purported by anti-trafficking proponents can result in increasing risk of exploitation, rather than protecting potential victims. This is one of the potential pitfalls of trafficking discourse. The discourse can become a tool of states to enact policies that are contradictory to human rights norms but framed within the context of protecting vulnerable women and children from exploitation. These potential consequences of the discourse must be addressed and critiqued in order to devise effective prevention and protection mechanisms that both uphold human rights and counter trafficking.

### ***Addressing Root Causes of Sexual Violence***

One of the greatest flaws of the sex trafficking discourse is its failure to recognize the social, cultural, political and economic factors that marginalize women and put them at risk for sexual violence. Sexual violence is perpetuated on such a large scale because of the subjugation of women and the gender specific barriers that women face when accessing basic human rights. Women struggle to gain full recognition in law and achieve equity with men. One of the drawbacks of the strong emphasis on trafficking is that anti-trafficking laws and initiatives are only concerned with criminalizing the illegal transport of victims, but it does not create any obligations for states to do anything about the exploitation.<sup>121</sup> Anti-trafficking initiatives can create a context in which the conditions that feed exploitation are never addressed by law and policy. The process of exploitation begins due to the economic, political and social discriminatory policies that place women

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<sup>119</sup> David Kyle and Rey Koslowski, “Introduction,” *Global Human Smuggling: Comparative Perspectives*, edited by David Kyle and Rey Koslowski, (2001): 20-22.

<sup>120</sup> Hathaway, “The Human Rights Quagmire,” 34.

<sup>121</sup> Ibid 11.

in a position of lesser value and create barriers to enjoying their rights. For example, the majority of victims of trafficking and sexual violence are women and children that “are disproportionately affected by poverty, the lack of access to education chronic unemployment, discrimination and the lack of economic opportunities.”<sup>122</sup> Therefore, their rights are not the priority of legislation and policy.

In the discourse, women are still framed as sexual beings and it is that sexuality that must be protected through law and policy. These efforts are shortsighted and often unsuccessful because they fail to address the larger social issues that prevent women from receiving basic human rights. By looking at women as sexual beings and not economic, social and political beings, the efforts made to address sexual violence will be incomplete. Resources are channeled to anti-trafficking initiatives and more holistic approaches to combating sexual violence are overlooked.<sup>123</sup> Hathaway described this saying:

The narrowly framed antiinstrumentalist conception of human rights embraced by key players—an approach very much more limited than the pluralist understanding of human rights codified in international law—explains the lack of attention to the full range of human rights concerns.<sup>124</sup>

In that way, gender based violence, “both reflects and reinforces inequities between men and women.”<sup>125</sup> While legal, political and social efforts tend to focus on these widely recognized forms of sexual violence, the efforts taking place on a local and national level often go overlooked. Sexual violence against women perpetuates patriarchal power, both intentionally and as a consequence.<sup>126</sup> Furthermore, violence against women is not limited to a specific context or socioeconomic status. As outlined in the Beijing Declaration and Platform for Action, violence against women impacts women regardless of age, nationality or socioeconomic status. The Declaration stated,

Violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedom...In all societies, to a

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<sup>122</sup> Meredith Flowe, “The International Market for Trafficking in Persons for the Purpose of Sexual Exploitation,” *North Carolina Journal of International Law and Commercial Regulation* 35, (2009-2010): 671.

<sup>123</sup> Ibid 15.

<sup>124</sup> Hathaway, “The Human Rights Quagmire,” 40.

<sup>125</sup> UNFPA, “Ending Widespread Violence Against Women.”

<sup>126</sup> UNFPA, “Ending Violence Against Women: Programming for Prevention, Protection and Care,” *United Nations Population Fund*, 38.

greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture.<sup>127</sup> Gender based violence flourishes because of a worldwide environment of silence and denial. Efforts hailed as improvements for protecting women from sexual violence have only focused on defined contexts, such as trafficking, in which sexual violence occurs. This has led to a fragmentation of efforts in which only survivors of the crimes recognized as those most violent receive assistance and legal redress. In recognition that sexual violence is both a system and a means of perpetuating widespread gender based inequity, efforts must be focused on sexual violence in general. Efforts to protect women, including protecting them from sex trafficking, will result from focused efforts that allow women full access to the rights afforded to them in law.

### ***Sexual Violence in Migration: An Uneasy Relationship***

In the field of migration and refugee studies, sexual violence is an important area of research. Sexual violence is related to the study of migration and refugees in a number of ways. Sexual exploitation can be the purpose of migration, can occur during the migration process and be the end result of migration. Sexual violence interacts with the field of migration on numerous levels. In the past, migration was usually undertaken by men, but research shows that current trends reveal that female migration is on the rise.<sup>128</sup> Statistics suggest that women compose 50% of all international migrants, thus equaling around 95 million total female migrants.<sup>129</sup> Women are an integral component of migration flows.<sup>130</sup> Migration flows, immigration laws and the types of jobs available create gendered migration flows and have distinct impact.<sup>131</sup> Sending countries tend to encourage migration because of the positive impacts of migrant remittances on GDP.<sup>132</sup> Globalization triggered, “new waves of feminization of migration and work,” which

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<sup>127</sup> Beijing Declaration and Platform for Action, para 112.

<sup>128</sup> Nicola Piper, “Gender and Migration.” *Global Commission on International Migration*. (2005): 3.

<sup>129</sup> Morrison, Schiff and Sjoblom, “Overview,” 1.

<sup>130</sup> Pfeiffer, Lisa and others. “Gender in Economic Research on International Migration and Its Impacts: A Critical Review.” In Morrison, Andrew, Maurice Schiff and Mirja Sjoblom, Eds., *The International Migration of Women* (2008): 15.

<sup>131</sup> Morrison, Schiff and Sjoblom, “Overview,” 1.

<sup>132</sup> Ibid 1.



created a space for trafficking and other forms of transnational crime to grow.<sup>133</sup> With the increased movement of women for the purpose of migration, criminal enterprises such as trafficking could access new channels in acquiring their product. However, the feminization of migration brings concerns and conceptualizations about the vulnerability of women to the forefront of international dialogue. With the strong emphasis in discourse on trafficking, increased flows of female migrants became the center of discourse and debate.

The growing feminization of migration has found a controversial position in debates on migration and the risks involved. There is a tendency in the field to immediately link the feminization of migration to the increased risks of sexual exploitation of migrant workers. Migrating women are thought to be more vulnerable to sexual exploitation and violence than stationary women.<sup>134</sup> Researchers suggest that female migrants are vulnerable because they often do not know the language or culture of their countries of employment, which creates a dependency that is easy to exploit.<sup>135</sup> The demand for female workers is usually for work that takes place in secluded places such as homes, businesses and restaurants. Because of the seclusion of most female migrant's work, they are thought to be more vulnerable to exploitation. UN Resolution No. 98, specifically referencing forced female migrants, cited that there were "distressing reports" of sexual violence against women during flight and upon arrival. This supported the idea that women in transit were by nature at greater risk to sexual exploitation and violence.

The reality is far more complex than the claims that link the feminization of migration with sexual exploitation, especially in the form of trafficking. There are complexities at play beyond the mere movement of women for the purpose of migration. The underlying social, political, economic and legal factors add a dimension of complexity to the debate, as these factors complicate the simplicity of claims that female migrants put themselves in a position of vulnerability. Radhika Coomaraswamy, former UN Rapporteur on Violence Against Women supported this idea saying,

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<sup>133</sup> Samarasinghe, "'Two to Tango' Probing the Demand Side" 33.

<sup>134</sup> Tudoraceh, "General Considerations on the Psychological Aspects" 27.

<sup>135</sup> Ibid 27.

The root causes of migration and trafficking greatly overlap. The lack of rights afforded to women serves as the primary causative factor at the root of both women's migrations and trafficking in women. By failure to protect and promote women's civil, political, economic and social rights, governments create situations in which trafficking flourishes.<sup>136</sup> Coomaraswamy does not deny the intrinsic link between standard migration and sexual exploitation, especially trafficking. However, she does not merely link the two, but suggests that the root cause of sexual exploitation of women is not necessarily the act of migration itself. Instead, she suggests that social, economic and political factors play into the risks women face while migrating. Social, economic and political discrimination can serve as a motivation for women to migrate. As long as these discriminatory practices remain in place, a percentage of women will continue to seek out opportunities through migration.

Often women have limited access to legal and regulated migration channels and therefore seek out illegal channels that place them at greater risk.<sup>137</sup> Governments' attitudes towards women reflected in their policies factors into the means of protection available to women. These factors have less to do with the feminization of migration and more to do with discriminatory policies and attitudes towards women that permeate all layers of society worldwide. These discriminatory policies both directly and indirectly affect a female migrant. Female migrants weigh risks and opportunities before deciding to migrate. This risk assessment is strongly influenced by the opportunities in their home country in comparison to the relative risk of migration. Their decisions are heavily influenced by family, friends and media. However, for many female migrants the risk of migration is worth the potential benefit. This leads to women seeking out migration channels, even if they are unregulated.

Migration could be viewed as a process that facilitates or allows for sexual exploitation and violence. Sexual exploitation and violence can happen against standard migrants, forced migrants, refugees and victims of trafficking. Depending on how an individual is defined, they can be protected under a variety of legal instruments including Refugee Law, International Law, Humanitarian Law, Human Rights Law and a plethora

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<sup>136</sup> United States Department of State, "Trafficking in Person Report."

<sup>137</sup> Hathaway, "Human Rights Quagmire," 32.

of other national and regional legal instruments. There is a variety of definitions under which an individual in transit can be defined. Some are defined as standard migrants, others are smuggled, some may be trafficked and others can be defined as refugees. These categorizations are based on distinct definitions that should be applied to each individual. However, rarely is a person's situation so clearly defined. Refugee flows and forced migration patterns often intersect and overlap with standard migration patterns. These mixed migration flows create challenges for the international community when it comes to creating protocols and programs to assist different groups of people.<sup>138</sup> This holds true for the issue of sexual violence.

Since sexual violence can be prosecuted under a variety of specific definitions depending on the context of the exploitation, how a woman is defined in transit is influential in what legal instruments and programs are available to her. For example, women who meet the definition of trafficking have specific legislation and programs from which they can benefit. Women defined as refugees and survivors of war rape have different sets of legislation and programs available to them as compared to an individual residing in her home country. One of the criticisms of these mechanisms is that people who do not meet the specialized definitions, such as standard migrants suffering sexual abuse, do not have many options in seeking assistance. Therefore, sexual violence is measured along a continuum in which access to certain services and legal channels is only available if the act has crossed a certain threshold. This has led many to question the necessity of these distinctions.<sup>139</sup> The terms themselves are not inclusive of the complexities that exist within migration flows. Furthermore, sexual exploitation and violence are more widespread at the community level when compared to occurrences in migration. The focus on migration related sexual violence has distracted the international community from addressing the more broad issue of sexual exploitation and violence worldwide. By portraying female migrants as vulnerable and incurring great risk, policies

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<sup>138</sup> Assef Bariagaber, "States, International Organizations and the Refugee: Reflections on the Complexity of Managing the Refugee Crisis in the Horn of Africa," *The Journal of Modern African Studies* 37, no. 4 (1999): 60.

<sup>139</sup> Raffaella Di Chio, "The International Protection of Victims of Trafficking in Human Beings and the Geneva Convention Relating to the Status of Refugees," *Pakistan Journal of Women's Studies* 16, No. 1&2 (2009): 100.

hailed as protective can be a method of restricting immigration policies that discriminate against women. As stated by Janie Chuang,

The notion that women make for naive, passive, ignorant migrants risks conflating female migration with trafficking. Purported concern for vulnerable women provides a convenient excuse for restricting women's migration-motivated at best by paternalism, at worst by a deeper antimigration agenda.<sup>140</sup>

Conflating anti-trafficking legislation with anti-migration policy must be avoided.

Women have a right to migrate and the right to have equitable options to men. Many countries are using sexual exploitation and trafficking as an excuse for policies that restrict women from working overseas.<sup>141</sup> Not only are these risk assessments unfounded, but they also misguided. The result would most likely be counterproductive in that women would still seek out migration, but only have unregulated channels to access.

Trafficking is often attributed to the facility of movement and increased international migration flows. Others point to strict immigration laws which have in turn encouraged illegal migration and established a framework for transnational organized crime.<sup>142</sup> With many countries worldwide facing economic downfalls, natural disasters and conflict, people are continuing to seek out migration as an alternative to their situation in their home countries. Traffickers often utilize conflict zones in order to recruit victims who are particularly vulnerable due to their desire to find stability and the lack of protection mechanisms available during conflict. Whether it is the promise of stable work and better income or violence forcing a person to flee, the majority of migrants are using informal migration channels, which are often the only option available.

The process of migration incurs many risks and migrants often consider those risks when making a decision. Many decide that the potential for stable work, better pay or safety outweighs the possible risks of migrating.<sup>143</sup> Even migrants who are well aware of the possible risks often choose to incur those possible risks because of the apparent benefit of migration. Consequently, awareness raising campaigns and efforts aimed at

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<sup>140</sup> Janie Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-trafficking Law and Policy," *University of Pennsylvania Law Review* 158 (2009-2010): 1712.

<sup>141</sup> Di Chio, "The International Protection of Victims of Trafficking," 100.

<sup>142</sup> Ibid 99.

<sup>143</sup> Pfeiffer, Lisa and others. "Gender in Economic Research on International Migration," 15.

discouraging irregular migration fail to have significant impact. As the UN conceded, “awareness only goes so far in communities plagued by chronic poverty.”<sup>144</sup>

Consequently, despite the fact that sexual exploitation and violence is a possible risk associated with migration, it rarely serves as a deterrent. Especially in times of conflict, the risks of migration are thought to be far better than the potential risks of staying at home. Traffickers exploit this and can often easily recruit in conflict zones. Due to reduced security and normal policing, traffickers can often move people with relative ease and minimal risk.<sup>145</sup> Therefore, the focus on legislation that protects people in transit is necessary, but more national legislation is needed to protect women and children collectively from sexual violence. Migration-specific legislation related to sexual violence could be incorporated into laws and policies with wider scope. Consequently, efforts would be focused on protecting women regardless of their country of origin from sexual violence.

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<sup>144</sup> United Nations. United Nations Office for the Coordination of Humanitarian Affairs. Protecting Women and Children from Human Trafficking. New York: United Nations, 2000.

<sup>145</sup> UNFPA, “Ending Violence Against Women,” 12.

## **Chapter Four: Legal Instruments to Combat Sexual Violence: Laws and Emerging Jurisprudence**

Legislation and legal frameworks are essential to guaranteeing women legal rights and access to the legal system. In this section the history of women's visibility in law will be traced. When the frameworks of international law were established, women were absent from the legislative process and in many ways, absent from the legislation itself. The laws reflected a patriarchal perspective in which crimes against women were not viewed as crimes against a distinct individual. In recent years, as will be explored in this chapter, women have achieved some improvement in their status within international law. These changes have been slow and minimal but are important on any discussion on women's rights in relationship to law. This chapter will give a background on the relationship between women and law, including recent developments in laws that are described as improvements for women's legal rights. This chapter will focus primarily on humanitarian law, as it is in this field of law where the most noted changes have been made. The chapter will then transition into a feminist critique of the recent developments in law. Despite recent changes, many still argue that the international legal system has failed to create a system that effectively responds to crimes against women and crimes of sexual violence. Understanding the legal framework and women's access to that framework is essential in any discussion on sexual violence. Law can serve both as a means of giving women their rights as well as an indicator of the barriers women face in accessing the rights afforded to them in law.

### ***Legislating Sexual Violence: Developments in Humanitarian Law and Emerging Jurisprudence***

The field of International Humanitarian Law has undergone significant changes in the past decade with regards to women's rights. Until jurisprudence emerged from the International Criminal Tribunal on Yugoslavia (ICTY), women had remained largely invisible in international law. The majority of victims of war are civilians, mostly women

and children.<sup>146</sup> Sexual violence takes on many forms during conflict and can be perpetrated by a variety of different actors such as troops, government officials, civilians, refugees, gangs, police, staff of international organizations and many others.<sup>147</sup> While women suffer grave consequences as a result of this violence, the perpetrators rarely, if ever, face consequences for their actions.<sup>148</sup> Despite the increased awareness of the atrocities suffered by women and children during war, some argue that what have been championed as progress for women's visibility in international law may actually be doing them a disservice. Women still lack legal mechanisms to address the gender based violence they suffer during war.<sup>149</sup> To explore this topic it is necessary to engage briefly in the history of women and children in war and their place in international law.

Historians of war acknowledge that rape and sexual violence is a long standing tactic of war. When the Geneva Conventions were created women were largely left out of the legislation and entirely left out of the legislative process. However, the Geneva Conventions still serve as the legal framework under which sexual crimes during war are prosecuted. Out of the forty-three provisions in the Geneva Conventions that can apply to women, all of them only address the rights of women in how they relate to others.<sup>150</sup> Women and their place within international law were defined exclusively by how communities were impacted by violence against women. Women and the crimes against them were not perceived as crimes against an individual. This perception was detrimental to women as they still struggle to receive full protection as individuals under law. With regards to women in war there are a few key provisions that apply to them under humanitarian law. For each provision there is significant criticism and even with emerging jurisprudence, many still question how well these provisions represent the rights of women. Women in international legal systems are often portrayed as vulnerable with the focus of law being on sexual crimes. While the focus of this paper is on sexual

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<sup>146</sup> Mary Deutsch Schneider, "About Women, War and Darfur: The Continuing Quest for Gender Violence Justice," *North Dakota Law Review* 83 (2007): 915.

<sup>147</sup> *Ibid.*, 916.

<sup>148</sup> *Ibid.*, 919.

<sup>149</sup> *Ibid.*, 920.

<sup>150</sup> Judith Gardam and Hilary Charlesworth, "Protecting Women in Armed Conflict," *Human Rights Quarterly*. Vol. 22, No. 1 (2000): 159.

crimes, it recognizes that during war women also face economic, political and cultural crimes as a result of armed conflict. These crimes and consequences of war are still largely ignored. For the scope of this paper, the provisions related to sexual crimes will be analyzed but done so with the hope that improvements in this area of law will lead to the better incorporation of economic, political cultural and social rights of women in conflict.

Sexual violence during war is prohibited in all forms under the Hague Regulations, the Four Geneva Conventions, the Two Additional Protocol to the Geneva Conventions, the International Criminal Court's Statute (hereinafter the Rome Statute) and many other international legal instruments. The first provision that covered women in war was Article 46 of the Hague Regulations which reads, "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected." The concept of "family honour" was used to describe crimes of sexual violence. This terminology serves as a powerful indicator of how women were perceived by lawmakers. Rape or sexual violence was not considered a crime against the woman as an individual, but rather as a crime against the family's honor. This euphemism for rape was highly problematic for years to come.<sup>151</sup> This terminology laid a framework for future conventions that continued to link the concepts of rape and honor. Rape was classified as a crime against dignity, rather than being classified as a crime of violence.<sup>152</sup> Furthermore, it reinforced the perception that a raped woman was stripped of her honor and in some way devalued by the act of rape. Chastity became a precondition for a rape being considered dishonorable. The consequences of this perception are still visible in international and national legislation which puts incredible burden of proof on the victim to prove that the crime was not solicited.<sup>153</sup> These practices are evidence that legislators and court officials approach crimes of sexual violence with skepticism. The language used to describe sexual violence in law is an indicator of the inequitable perceptions of women in relation to their position in society and their standing in law.

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<sup>151</sup> Ntombizozuko Dyani, "Protocol on the Rights of Women in Africa: Protection of Women from Sexual Violence During Armed Conflict," *African Human Rights Law Journal* 6, (2006): 170.

<sup>152</sup> Ibid, 171.

<sup>153</sup> Ibid 171.



The concept of rape as a crime against dignity continued in the drafting of the Geneva Conventions. While there are numerous Geneva Conventions that could be applied to sexual violence, there are a few key articles in relation to sexual violence during armed conflict. All of these articles frame sexual violence within the context of dignity. Much like the focus on honor, the focus on dignity in the Geneva Conventions constructs sexual violence as something shameful, but not criminal. The additional protocols to the Geneva Conventions sought to better address violence against women in war by offering a definition of violence against women. However, the protocols still failed to explicitly define it as a crime of violence.<sup>154</sup> There are numerous articles under the conventions that could be applied to sexual violence in war, however, only the key articles and conventions will be discussed.

Sexual violence is covered under provisions in the “Grave Breaches” clause of each of the four Geneva Conventions. It is usually considered a grave breach under the wording “inhuman treatment.” However, the Grave Breaches clauses never defined or identified the elements of rape necessary to be classified under grave breaches.<sup>155</sup> Apart from the Grave Breaches clause there are other articles that are used to recognize crimes of sexual violence during war. Article 27(3) of the 4<sup>th</sup> Geneva Convention states:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Under this terminology sexual violence is considered an attack on honor. This did a disservice to sexual violence by trivializing it as an attack on honour, rather than a violent crime committed against an individual. The original four Geneva Conventions defined sexual violence only through terms related to attacks on dignity, honour and destruction of communities. The majority of the applicable articles were only related to international armed conflict, leaving many gaps in laws with regards to women in internal conflict.

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<sup>154</sup> Dyani, “Protocol on the Rights of Women in Africa,” 179.

<sup>155</sup> Ibid 173.

Improvements were seen in Additional Protocol II to the Geneva Conventions which not only more clearly defined sexual violence in conflict, but also covered persons in internal conflict. Article 4(2)(e) of the second protocol stated:

The following acts against persons *hors de combat* are prohibited in non-international armed conflicts: violence to life, health and physical or mental well-being, in particular cruel treatment such as torture; outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, and slavery.

Similarly in Article 76(1) of the Additional Protocol I, sexual violence was grouped with the term “indecent assault.”<sup>156</sup> The articles used expressions such as “indecent,” “humiliating,” and “degrading,” rather than focusing on the element of violence. Sexual violence continued to be defined as a crime against dignity, not a crime of violence and still focused on how it impacted communities, not how it impacted individuals. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War stated that “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, on any form of indecent assault.” Although the language of this article uses the term rape, it does not “establish the parameters of rape as a war crime in international law.”<sup>157</sup> This hindered the effectiveness of the laws when being applied to court cases. The laws that were created to protect women still did not portray them as individuals. Crimes were viewed only in how they impacted communities or how they were used strategically to accomplish an end. Furthermore, crimes of a sexual nature were and continue to be rarely prosecuted.

### ***Improving Definitions: The International Criminal Court***

A marked improvement was the codification of sexual violence as a crime against humanity. Article 7(1)(g) of the Rome Statute states:

For the purposes of this statute, “Crime against Humanity” means any of the follow acts when committed as part of a widespread or systematic attack directed against any civilization populations with knowledge of the attack: (g) Rape,

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<sup>156</sup> Article 76(1) of the Additional Protocol I of the Geneva Conventions States: “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.”

<sup>157</sup> Nancy Farwell, “War Rape: New Conceptualizations and Responses,” *Affilia* 19, No. 4 (2004): 391.

sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence with comparable gravity.” This article was seen as an improvement for the rights of women in war. However, the two main criticisms of the article are that it is only considered a crime against humanity if it is part of a widespread and systematic attack. Additionally, the phrasing “any other form of sexual violence with comparable gravity” suggests that the act of sexual violence has to cross a certain threshold to be defined as a crime against humanity. While the reasoning behind these distinctions is valid, it created a continuum of sexual violence that has proven problematic outside the realm of international and internal armed conflict. This threshold has to be met under the classifications of Humanitarian Law for it to be prosecuted as such. The two main criteria are that it is planned and systematically perpetuated.<sup>158</sup> Under treaty law, sexual violence in war can be considered a form of torture, a crime against humanity and genocide.<sup>159</sup> Under international customary law, rape can also be prosecuted as a war crime.<sup>160</sup> Some of the classifications under international humanitarian law can prove problematic when protecting women against sexual crimes. In Humanitarian Law there are different rules depending on the nature of the armed conflict.<sup>161</sup> This can create gaps in the law under which certain rules are not applicable in various circumstances. For example, there are differences in wording between sexual assault in international armed conflict versus internal conflict. These differentiations serve to further the idea that rape and sexual violence exist on a continuum in which, depending on the circumstances, the crime can cross the threshold necessary to be classified under certain laws.

One important outcome of this article was that by defining sexual violence that met certain criterion a crime against humanity, a war crime or even in some cases genocide, it established that sexual violence can fall under peremptory norms. Peremptory norms (*jus cogens*) create *erga omnes* obligations, or obligations that are owed to the international community as a whole.<sup>162</sup> This widens the scope under which

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<sup>158</sup> Pillay, “Sexual Violence: Standing by the Victim,” 460.

<sup>159</sup> Dyani, “Protocol on the Rights of Women in Africa,” 166.

<sup>160</sup> Ibid, 170.

<sup>161</sup> Ibid, 173.

<sup>162</sup> Dinah Shelton, “International Law and ‘Relative Normativity,’” In M. Evans (Ed.), *International Law* (2003): 158.

sexual violence can be prosecuted as technically any country in the world can condemn sexual violence during war. This has not been without criticism as some argue this could lead to a fragmented international legal system leading to limited jurisprudence to support this hypothetical legal standard.<sup>163</sup> Consequently, prosecuting rape as a jus cogens violation has never been used in an actual court case.

However, the most relevant legal standards have emerged through jurisprudence and have been incorporated into customary international law. The main sources of precedent for these emerging legal standards with regards to sexual violence come out of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The jurisprudence that came out of these proceedings is marked as a step in a positive direction for creating justice mechanisms that cover sexual violence. The legal decisions of the ICTR and the ICTY attempted to close the gaps in international legal conceptualizations of sexual violence that meets the threshold for being defined as a crime against humanity.<sup>164</sup> The jurisprudence that emerged from the ICTY and ICTR proceedings was marked as groundbreaking. The proceedings at the ICTY recognized that rape was both a weapon and a strategy of war. As a weapon of war, rape “attacks women’s physical and emotional sense of security while simultaneously launching an assault, through women’s bodies, upon the genealogy of security as constructed by the body politic.”<sup>165</sup> As a strategy of war, it used as “an instrument of terror, domination, political repression, torture, intimidation and humiliation.”<sup>166</sup> The ICTY recognized that the widespread and systematic rape of women was used as a strategic means to control civilians and destroy communities. The ICTY was recognized for breaking the silence on rape in war and fill in gaps that had long perpetuated problems in humanitarian law.<sup>167</sup>

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<sup>163</sup> Prosper Weil, “Towards Relative Normativity in International Law?” *The American Journal of International Law*. Vol. 77 (1983).

<sup>164</sup> Farwell, “War Rape: New Conceptualizations and Responses,” 391.

<sup>165</sup> K. Koo, “Confronting a disciplinary blindness: Women, war and rape in the international politics of security,” *Australian Journal of Political Science*, 37 (2002): 525.

<sup>166</sup> Farwell, “War Rape: New Conceptualizations and Responses,” 392.

<sup>167</sup> Wasantha Sneviratne, “International Legal Standards Pertaining to Sexual Violence against Displaced Women in Times of Armed Conflict With Special Reference to the Emerged Jurisprudence at the ICTY and ICTR,” *Sri Lanka Journal of International Law* 20, No. 2 (2008): 14-16.

### ***Relevant Jurisprudence Emerging from the International Criminal Tribunal for Yugoslavia***

There were two main cases to come out of the ICTY that laid the groundwork for eventual customary law regarding sexual violence in war. The first was the ICTY case of Prosecutor vs Dusko Tadic (hereinafter the Tadic Case). Tadic was a leader in the Serbian Democratic Party and was a member of the paramilitary group that attacked the district of Prijedor. Prijedor is known for both its surrounding detention camps and the systematic rape of the women of Prijedor. He was on trial for crimes against humanity, violations of the rules of war and grave breaches of the Geneva Conventions. The judgment from this case would later be incorporated into international customary law. The Tadic case was the first to find an individual guilty of an inhumane act because of his participation in crimes of sexual violence during war. An interesting aspect of the Tadic case is that the acts deemed inhuman were acts committed against male victims. However, this set precedent for sexual acts to be classified as crimes against humanity which was a marked improvement from past proceedings. With regards to the mass rape of the women of Prijedor, the sexual violence against these women was described as a campaign of terror by the ICTY.<sup>168</sup> This case set legal precedent for future court cases and was the first time that the crimes against women were recognized and prosecuted in an international court.

The other important case with regards to sexual violence in the ICTY was the Celebici case. In this trial three men were sentenced for crimes committed at the Celebici Prison Camp in Bosnia. This case was significant on a number of levels and set precedent for a number of groundbreaking legal bases. It established jurisprudence for the concept of command responsibility and was the first case in which persons in de facto positions of power could be prosecuted as such. As pertaining to sexual violence, this was the first case that classified rape as torture. It was classified as both psychological and physical torture. One of the accused, Delic, was convicted on charges of sexual violence by his own actions but also his omission. He was held responsible for the actions of those under

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<sup>168</sup> Mary Deutsch Schneider, "About Women, War and Darfur," 932.

his command. Therefore, he was convicted of the acts he personally committed and those that he allowed by failing to intervene.<sup>169</sup> This conviction was significant as it set precedent for rape being a form of both physical and psychological torture. In proceedings at the ICTY focused on systematic, state sponsored rape which could be classified under the Rome Statute as crimes against humanity.<sup>170</sup> But in order to meet this classification, the sexual violence had to be massive, frequent, large scale action carried out collectively with considerable seriousness and directed against the multiplicity of victims.<sup>171</sup> While legal framework for prosecuting these crimes is important, the scale necessary to be covered by this legislation is not representative of the majority of sexual violence during war.

### ***Defining Rape at the International Criminal Tribunal for Rwanda***

The International Criminal Tribunal for Rwanda (ICTR) built upon the precedent set by the ICTY. The most relevant case in this discussion is the case of Jean Paul Akayesu at the ICTR. Jean-Paul Akayesu was the first to be convicted of genocide by an international court.<sup>172</sup> In this case he was prosecuted for rape as a crime against humanity. He was indicted with crimes against humanity, genocide and violations of Article 3 of the Geneva Conventions as punishable under Article 2-4 of the ICTR Statute.<sup>173</sup> This case was groundbreaking on a number of levels, but in relation to sexual violence, the ICTR defined rape for the first time in international law. It was defined as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive...sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”<sup>174</sup> This is

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<sup>169</sup> Anne-Marie de Brouwer, *Supranational criminal prosecution of sexual violence*, (Mortsel: Intersentia, 482).

<sup>170</sup> Dyani, “Protocol on the Rights of Women in Africa,” 169.

<sup>171</sup> Tara Karkera, “The International Criminal Court’s Protection of Women: The Hands of Justice At Work,” *American University Journal of Gender Social Policy and Law* 12 (2004): 207.

<sup>172</sup> Prosecutor v. Akayesu, Trial Chapter, International Criminal Tribunal for Rwanda, 1998, Case No. ICTR-96-4.

<sup>173</sup> Articles 2-4 of the of the ICTR Statute: Article 2: Genocide, Article 3: Crimes against humanity, including Article 3(g) which codifies rape as a crime against humanity and Article 3(i), other inhumane acts, and Article 4: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, including Article 4(e), “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”

<sup>174</sup> Prosecutor v. Akayesu, International Criminal Tribunal for Rwanda.

important because not only was rape defined in international law, but it was not limited to the act of penetration. This definition tried to be inclusive, allowing for a wide array of sexual offences to be recognized under international law.

However, despite the fact that these cases were considered landmark, they have not been without criticism. It is first important to understand how the emphasis on war rape emerged. War rape is recognized because of the impacts it has on communities. Within communities where chastity and virginity are hallmarks of honor, raping the community's women can serve to destroy solidarity, diminish morale and separate communities.<sup>175</sup> Mass sexual violence can ultimately lead to the destruction of communities and cultures, making it a strategic weapon of war.

For years sexual violence as a practice of war has been notably absent from treaty and customary law. While recognized as a consequence of war, it was not seen as a violation of the rules of war. As said in Farwell, "Seldom prosecuted and rarely denounced, sexual assault of women committed during conflict situations has been viewed as a byproduct of wartime activity, as 'collateral damage' and 'spoils of war', not as a violation of humanitarian law."<sup>176</sup> Recent laws and proceedings have sought to change this history of silence that dismissed crimes against women as an unfortunate byproduct of conflict. This has represented an effort to change the perception that rape is merely a byproduct of violence during war, but to define it as a political strategy and often a powerful weapon during conflict.<sup>177</sup> Despite the widespread recognition of crimes against women during war, there have been limited prosecutions allowing perpetrators to act with impunity.<sup>178</sup> The aforementioned cases resulted in convictions based on acts of sexual violence but only in cases of extreme and systematic violence. While the recognition of crimes against women is important, the legal precedent set has not served as a deterrent. The scale of violence has to be systematic, widespread and recognized by the international community for there to be any chance of indictment. The majority of perpetrators of sexual violence during war will never face prosecution.

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<sup>175</sup> Nancy Farwell, "War Rape: New Conceptualizations and Responses," 396.

<sup>176</sup> Ibid 389.

<sup>177</sup> Ibid 390.

<sup>178</sup> Pillay, "Sexual Violence: Standing by the Victim," 460.

## ***Breaking the Silence on Sexual Violence***

One of the positive aspects of the emerging jurisprudence is that it has broken the long standing silence over the atrocities committed against women during war. While it is recognized that sexual violence can happen to men during war, women are at more risk of being victims of sexually violent crimes and “face gender specific obstacles in seek redress.”<sup>179</sup> Because of these gender-specific risks and institutional legal barriers, special attention should be given to their rights. By increasing the international justice mechanisms at the disposal of prosecutors, there is hope that it will bring an end to the impunity that defines sexual crimes in war.<sup>180</sup> However, despite their efforts to create a context through which victims can receive justice, women are still not actively encouraged to speak out about sexual violence.<sup>181</sup> Some argue that this legislation at least gives survivors and legal advocates the tools necessary to “counteract the widespread denial and silencing of war rape and its victims.”<sup>182</sup>

There are two major criticisms of the existing legislation and jurisprudence on sexual violence. First is the question of whether or not law has been successful in describing the experience of women in times of conflict.<sup>183</sup> A great deal of debate still exists over the concept of consent in relation to rape and questions are often brought forward about the conduct of the woman to determine whether the prosecution of rape is warranted. This reinforces the perception that a woman is to blame if she put herself in a position that may have left her vulnerable. The focus stays on the conduct of the victim and not the perpetrator.<sup>184</sup> This is known as focusing on the *mens rea* and not on the *actus rea* of a crime. Or in other words, the crime of rape is viewed from the perspective of the perpetrator, not the victim.<sup>185</sup> The crime is therefore constructed on the perpetrators terms and with his/her language. So while the legislation may be viewed as means of protecting women, they remain invisible in the actual process of forming the legislation. Rape in

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<sup>179</sup> McDougall, “Contemporary Forms of Slavery.”

<sup>180</sup> Pillay, “Sexual Violence: Standing by the Victim,” 460.

<sup>181</sup> Ibid, 461.

<sup>182</sup> Ibid, 391.

<sup>183</sup> Ibid, 460.

<sup>184</sup> Ibid, 461.

<sup>185</sup> Ibid, 462.



war is still understood from the point of view of men, rather than the actual victims of the crime. Without better tools for understanding rape from the perspective of the women, legislation is going to remain insufficient and out of touch.

### ***Perpetuating Discrimination through Terminology***

Another critique focuses on two problematic perspectives. First is that the widespread attention on sexual violence during war has perpetuated cycles of discrimination against women. Women do not just suffer from sexual crimes during war but often experience social, economic and political oppression as well. Focusing on sexual violence continues to cast women as vulnerable victims whose value is placed in chastity and should therefore be protected. Women in war are not viewed as capable beings with economic, political and social influence. As said by Farwell:

Focusing solely on the patriarchal aspects of war rape tends to essentialize women as victims because they are women. In many conflicts, however, women are selectively targeted to their ethnicity and/or religion to attack the particular social group genocidally through the women.<sup>186</sup>

This speaks to the tendency to focus on crimes being committed against women because they are women. But during war the reasons for the attack can be far more complex. Attacking women serves as a means for destroying a people group. Understanding these complexities is important when drafting legislation to best uphold the rights of women during war.

The final critique will be explored in more detail in the case study and analysis of this paper. However, it is important to briefly note this particular critique in reference to women in war. Sexual violence is used strategically as a weapon during war that specifically targets women.<sup>187</sup> However, rape during international and internal conflicts only scratches the surface of sexual violence against women.<sup>188</sup> The attention being focused on war rape can serve to distract from the more prolific violence against women that takes place at the community level in every country in the world during times of conflict and times of peace. While legislation that promotes the protection of women in

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<sup>186</sup> Farwell, "War Rape: New Conceptualizations and Responses," 395.

<sup>187</sup> Inger Skjelsbaek, "Sexual Violence and War: Mapping Out A Complex Relationship," *European Journal of International Relations* 7, No. 2, (2001): 214.

<sup>188</sup> Pillay, "Sexual Violence: Standing by the Victim," 460.

war is a positive development in international law, it does not begin to cover protecting women worldwide from sexual violence. The lawmakers were careful to create standards of rape in international law that would not violate state sovereignty.<sup>189</sup> However, this legislation is not made to protect women during times of peace. Focusing on it only within the context of war perpetuates the illusion that sexual violence is a consequence of war. In reality, “the use and threat of sexual violence overshadow the lives of all women all over the world, in times of war and peace.”<sup>190</sup> Some argue that the differentiation between rape during times of war versus times of peace has actually hindered the worldwide struggle for women’s rights, especially against sexual violence. The criticism is that by sensationalizing war rape and creating legal definitions only applicable to war rape, “everyday” rape has been normalized and devalued.<sup>191</sup> Rape occurs more frequently during times of peace than times of war. However, war rape remains the focus of legislation and rape in times of peace still lacks responsive legal mechanisms. Creating legislation against war rape can focus on only a specific context for sexual violence. Therefore it does not need to entertain the complexities of rape in times of peace.

Humanitarian Law is only enacted under specific circumstances which isolate the precedent set in cases to be applicable only in times of war. Unlike rape in times of peace, there is less debate about consent and a more defined framework under which to prosecute rape. It is assumed that in times of war, consent and coercion are irrelevant. This has led some people to question whether rape happens in war because of war or if rape happens in war because rape happens to all women during times of peace.<sup>192</sup> The unequal power relationships between men and women worldwide are often exacerbated during times of conflict and war rape can be seen as a symptom of this unequal balance of power. However, it is possible that the existing legislation may actually serve to further marginalize women, as will be explored further in this study. However, the discussion on war rape is important when trying to understand women’s place within legal systems. It is one of the few arenas in law and policy which have seen marked

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<sup>189</sup> J. R. McHenry, “The prosecution of rape under international law: Justice that is long Overdue,” *Vanderbilt Journal of Transnational Law*, 35, (2002): 1249.

<sup>190</sup> Inger Skjelsbaek, “Sexual Violence and War: Mapping Out A Complex Relationship,” 215.

<sup>191</sup> *Ibid*, 216.

<sup>192</sup> *Ibid*, 216.

attempts at improving protection and legal instruments to incorporate women and their rights. These advancements in law have served as precedent for many domestic legal systems and are important in any discussion on sexual violence against women.

### ***Feminist Critique of the Discourse on Sexual Violence***

Sexual exploitation disproportionately affects women. However, women remain invisible in the majority of the discourse, whether the discourse is on sexual violence, trafficking or war rape.<sup>193</sup> Programs, policies, legislation and discourse are rarely centered on a woman's experience.<sup>194</sup> One of first criticisms is the terminology and language used in discourse. The terminology itself, by casting women as vulnerable and damaged victims, can serve to further marginalize women.<sup>195</sup> The discourse likes to use terms to describe women in ways that are comfortable, thus reinforcing social norms. In sexual violence discourse in international law, the crimes against women are framed as crimes against mothers, wives and "beautiful souls."<sup>196</sup> This reinforces the idea that it is their social role, not their status as an individual human being that warrants the outrage over the crimes against them.<sup>197</sup> Using this kind of terminology can perpetuate the invisibility of women in discourse and their complete absence from the legal and policymaking processes. Furthermore, states can hide behind language and misleading terminology to continue to perpetuate de facto discrimination.<sup>198</sup>

Women in theory have rights and legal redress but because of other social factors, are unable to access these rights. The majority of the discourse ignores that women do have a voice and agency. Despite the increased attention on particular issues with regards to sexual violence, this does not necessarily represent increased visibility of women in the discourse:

One might be led to think that it is in this 'war' that women are finally *present*, as both sides declare their respective opinions as to women's treatment, place in society, et cetera. But this impression is illusory. It is

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<sup>193</sup> Farr, "Armed Conflict, War Rape and the Commercial Trade," 2.

<sup>194</sup> Ibid 2.

<sup>195</sup> Susan Ehrlich, "Discourse, gender and sexual violence," *Discourse and Society* 13, No. 1 (2002): 5.

<sup>196</sup> Jean Bethke Elstain, *Women and War*, 2nd edn. (Chicago, University of Chicago Press, 1995).

<sup>197</sup> Ibid.

<sup>198</sup> Joy Asiema, "Gender Equity, Gender Equality, and the Legal Process: The Kenyan Experience," *Transnational Law & Contemporary Problems* 10, (2000): 565.

precisely in this realm of escalated rhetoric and assured contrasts that women are more absent than ever – instrumentalized within a discourse of evil that masks an ideology of hatred and aggression. Women are invoked, but are not present, in this latest international conflict.<sup>199</sup>

Despite the fact that women are being mentioned in the discourse, they have lost their agency within the discourse. This creates a paradox in which by the nature of their inclusion in the discourse, they are excluded.<sup>200</sup> Their voices are silenced as academics and lawyers assume to speak for them. Building upon the work of Giorgio Agamben and his idea of the homo sacer, Ronit Lentin argued that women have become a “femina sacra.” The concept of Homo Sacer, the “sacred man” supports the absenteeism of women in discourse. Agamben’s concept does not sufficiently address the complexity of power and sovereign relationships with regards to women. Lentin argues that:

Rendered as reproductive—as sexual objects—women are used in particular ways in the politics of war. Femina sacra, therefore, helps us to think through the specificity of how war operates on women’s bodies, without reducing women to dominant representation of massifying them as one or many.<sup>201</sup>

Women are rarely seen as individuals in the discourse on war, sex trafficking or sexual violence in general. Women are grouped into one anonymous entity, in which the crimes against them are only recognized en masse. The legislation is not responsive to women as individuals, but only enacted when the crime is thought to threaten the stability or integrity of the larger community. Furthermore, because women are cast as vulnerable and sexual beings, policy makers often hide behind the discourse of “protection” while enacting discriminatory policies. For example, women who migrate are thought to be putting themselves at risk for sexual exploitation even though women should be able to pursue economic opportunities in the same way as men. Because of the discourse that casts them as vulnerable, they are barred from certain opportunities. Lawmakers and policymakers rarely include women in the development of structures that are meant to protect them. Women remain marginalized by discriminatory laws and policies that are done under the guise of protecting them. By being cast as vulnerable victims, their

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<sup>199</sup> Mary Anne Franks, “Obscene Undersides: Women and Evil Between the Taliban and the United States,” *Hypatia* 18, Vo. 1 (2003): 137.

<sup>200</sup> Cristina Masters, “Femina Sacra: The ‘War on/of Terror,’ Women and the Feminine,” *Security Dialogue* 40, No.1 (2009): 30.

<sup>201</sup> Ibid 32.

absence from legislative processes and international efforts remains justified by states and the international community. Portrayal as a group in need of rescue and protection has allowed for their subjugation. Their ability to advocate for themselves and offer input into the legislative process is dismissed. Until women are fully incorporated into the field as agents of change, policy makers and lawyers, they will continue to experience barriers to accessing fundamental rights.

The discourse on sex trafficking and rape has become highly politicized. On both sides of the debate groups are emotionally charged and the issue is becoming increasingly polarized.<sup>202</sup> Sex trafficking and systematic rape have received the attention from a wide variety of institutions, including right wing evangelical groups and far left liberal feminists. Ronald Weitzer described the phenomenon by critiquing what he termed a “moral crusade.”<sup>203</sup> He argued that the majority of discourse on sex trafficking was based on unsubstantiated and problematic claims.<sup>204</sup> He used the social constructionist perspective to prove his point, arguing that social conditions are only raised to the level of “problems” when enough public interest and stakeholders become involved. As a result, the information presented on the subject may not be reflective of the actual social and political conditions.<sup>205</sup> He criticized the anti-sex trafficking movements claiming that they relied too heavily on rigid conceptualizations of good and evil, dramatized tales of atrocities and offered statistics with no verifiable evidence.<sup>206</sup> Despite his own harsh language, aspects of his argument were warranted. The focus on sex trafficking and sexual violence during war has subsumed discussion on other forms of sexual violence. Consequently, these two forms of sexual violence receive the majority of attention, regardless of the limited data on the subjects. Some argue that the reasons for this are that the violence against women agenda is not sufficient in dealing with issues such as sex

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<sup>202</sup> Marie Segrave, *Sex Trafficking: International Context and Response*, (London: Willian Publishing, 2009): 28.

<sup>203</sup> Ronald Weitzer, “The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade,

<sup>204</sup> Weitzer, “The Social Construction of Sex Trafficking,” 448.

<sup>205</sup> Ibid, 449.

<sup>206</sup> Ibid 449.

trafficking and war rape. These scholars argue that violence against women does not properly address the intricacies involved in sex trafficking and war rape.<sup>207</sup>

### ***The Search for an Alternative Framework***

The criticisms on research and theory related to violence against women and specialized forms such as sex trafficking and war rape, have led some scholars to suggest that a different framework should be used when researching sexual violence. This theory is rooted in Friedrich Engels theory of social inequity. According to Engels, social inequity could be determined along class lines, specifically by determining how wealth was distributed.<sup>208</sup> This same model can be applied to determine the social inequity of women. This has been described by scholars as a right based approach to sexual violence.<sup>209</sup> Governments have a long history of ignoring violence against women claiming that it is a matter between individuals, not a human rights abuse that warrants state intervention.<sup>210</sup> This perception is slowly changing and has led many to argue that sexual violence should be measured along a continuum of determining women's access to basic rights. These scholars argue that responses should be centered on the social and economic inequality of women. Under this framework violence against women is viewed as a consequence of cultural and social practices that subjugate women.<sup>211</sup>

Gender inequality normalizes violence against women.<sup>212</sup> Sexual violence is a consequence of an imbalance of power and resources between men and women.<sup>213</sup> Dobash and Dobash described gender inequality as something that is both structural and ideological. The ideological level includes norms, beliefs and values about gender roles. On the structural level gender inequality inhibits women's access to public institutions

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<sup>207</sup> Segrave, "Sex Trafficking: International Context and Response," 214.

<sup>208</sup> Friedrich Engels, "Socialism utopian and scientific."

<sup>209</sup> Celia Banks, "The Sociology of Inequality," *Race, Gender and Class* 14, No. 3/4 (2007): 178.

<sup>210</sup> Ibid 177.

<sup>211</sup> Banks, "The Sociology of Inequality," 178.

<sup>212</sup> Carrie Yodanis, "Gender Inequality, Violence Against Women and Fear," *Journal of Interpersonal Violence* 19, No. 6 (2004): 670.

<sup>213</sup> Ibid 655.

and positions of authority.<sup>214</sup> According to this model, violence becomes a tool of men to maintain power over women.<sup>215</sup> One study found that countries where the status of women was high had less rape than in male dominated societies.<sup>216</sup> Conducting their research by measuring the economic, political and legal status of women the researchers concluded that in male dominated societies, “Rape both reflects the devaluation of women and contributes to their subordinate position in the gender stratification system.”<sup>217</sup> These researchers argue that research has become too narrow. By focusing only on sexual violence and violence against women, researchers do not place the issue within its appropriate social context. This has resulted in a shortsighted approach that merely treats a symptom, but does not address the larger social problem. By advocating for a rights based approach that advocates for women’s social, economic and political rights, issues like sexual violence will simultaneously be addressed by virtue of addressing root causes of sexual violence.

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<sup>214</sup> R.E. Dobash and R. Dobash, “Violence against Wives: A Case against the Patriarch,” London: Open Books (1979).

<sup>215</sup> Yodanis, “Gender Inequality, Violence against Women and fear,” 659.

<sup>216</sup> L. Baron and M.A. Straus, *Four Theories on Rape in American Society*, (New Haven: Yale University Press, 1989): 185.

<sup>217</sup> Ibid 185.

## **Chapter Five: Kenya Case Study: A Convergence of Crises**

Kenya is a country where the debates, severity, problems and extent of sexual violence converge to create an environment of impunity and unresponsive mechanisms. There are specific social, economic and political factors that exacerbate the problem of sexual violence and inhibit women's ability to access the legal system. Kenya has been chosen for a case study on sexual violence because the wide breadth of contexts in which sexual violence occurs and the variety of legal mechanisms in place in Kenya applicable to sexual violence. Kenya is also unique in that it has made progressive domestic efforts to create more effective legal mechanisms. However, despite legislation being passed to prosecute sexual violence, other barriers prevent victims from receiving justice. Kenya reveals the inadequacy of a purely criminal law response to sexual violence when women are facing other social, political and economic discriminatory practices.

This section will describe relevant recent events necessary to understand the current political climate in Kenya. It will then explore the environments in which sexual violence occurs including sexual violence directed at refugees, sex trafficking and sex tourism in the region, the impact of HIV/AIDS and community and familiar based sexual violence. This chapter will explore the relevant legislation and then address the non-legal barriers that prevent women from accessing the justice system. This chapter explores the failures of the Kenyan state in implementing effective responses to sexual violence. This case study will be used in the following chapter as a context for analysis and recommendations for creating more responsive approaches to sexual violence and women's rights.

### ***History of Relevant Recent Events in Kenya***

In December 2007, contested elections in Kenya ignited widespread ethnic and inter-communal violence. The majority of the international community looked on in shock as Kenya, often hailed as a symbol of stability in what was regarded as the volatile African continent, had descended into violence and chaos. While the scale of the violence was shocking to the international community and even Kenyans themselves, it was neither



unprecedented nor new. Decades of strife preceded these acts of violence and the post-election riots could be viewed as the tipping point after decades of struggle, violence and impunity. While the trigger point of the violence was political, it played upon deep seated ethnic rivalries, discriminatory practices, impunity and widespread corruption. With roots both in colonialism and political favoritism, long standing ethnic tensions boiled over into violence that left 1,300 people dead and thousands displaced.<sup>218</sup> While the roots of the violence are somewhat contested, the impact of the violence still carries consequences today. Beyond the obvious negative consequences such as political upheaval and economic hardship, the post-election violence generated 650,000 internally displaced persons.<sup>219</sup> In December of 2010, almost three years after the violence, many have yet to leave the camps which were officially closed as of July 2010. Many of the remaining IDPs have intentionally chosen to stay in the camps rather than take the government's resettlement offer. This is indicative of widespread distrust of the national government, which has a reputation of corruption and impunity.

The post-election violence in 2007 was not an anomaly. In fact, every election in Kenya in the recent decades has been followed by episodes of violence that displaced thousands and resulted in hundreds of civilian casualties.<sup>220</sup> The crisis in 2007 was merely a furthering of these crises on a larger and more violent scale. Beyond just ethnic conflict, there is a long history of the failure of governance in Kenya. Prolific gang violence, the most dominant group being the Kikuyu gang the Mungiki, have wreaked havoc on various communities.<sup>221</sup> Rumors abound that the Mungiki have infiltrated the police force and even government offices.<sup>222</sup> Corruption is widespread and injustices are largely treated with impunity. Sexual violence is on the rise and despite well established laws to prosecute sexual violence, most perpetrators are never held accountable.<sup>223</sup> Kenya has received much criticism for its widespread corruption, but little has been done to

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<sup>218</sup> Internal Displacement Monitoring Centre (IDMC). "Speedy Reform Needed to Deal With Past Injustices and Prevent Future Displacement." (2010): 1-9.

<sup>219</sup> Ibid.

<sup>220</sup> L. Smith, "Explaining Violence after Recent Elections in Ethiopia and Kenya." *Democratization*, Vol. 5, No. 5 (2009): 888.

<sup>221</sup> Michelle Kagari and Sophy Thomas. "The Police, the People, the Politics: Police Accountability In Kenya." *Commonwealth Human Rights Initiative*, 66.

<sup>222</sup> Ben Rawlence, "Ballots to Bullets," *Human Rights Watch*. Vol. 20, No. 1 (2008): 45.

<sup>223</sup> Kenneth Roth, "Justice or Impunity," *Human Rights Watch*, (2009): 3.

address the corruption or impunity. Furthermore, despite economic growth, fifty-eight-percent of the population continues to live on less than \$2 USD per day.<sup>224</sup> The cumulative effect of the social, political and economic grievances has led to widespread unrest among Kenyan citizens.

As a result of the tensions that surfaced during the post-election violence in 2007, a constitutional reform committee was established to reform Kenya's government. In August 2010, Kenyans voted in the new constitution with a 67% majority.<sup>225</sup> In the past power was highly centralized in the executive branch, but the new constitution decentralized that power and created systems of checks and balances.<sup>226</sup> Along with a number of new laws in the past decade, Kenyans are hoping these new changes will be implemented and effectively curb the widespread corruption and impunity. However, change has been slow to come and Kenya has actively resisted the ICC's investigation into the post-election violence.<sup>227</sup> Much reform still needs to take place and the constitution still needs to be fully implemented.

### ***Sexual Violence and Exploitation in Kenya: Converging Crises***

Sexual exploitation and violence in Kenya is a widespread problem. It occurs in many different contexts including the commercial sex industry, sex trafficking, the private sector and in refugee and IDP camps, to name only a few. Kenya is considered a source, transit and destination for trafficking in persons, especially for the purposes of forced prostitution.<sup>228</sup> A UN Study revealed that 30% of the girls aged from 12-18 in four districts on the coast were exchanging sex for cash.<sup>229</sup> It was also found that one in ten children involved in sex work were initiated before they reached puberty.<sup>230</sup> Women and children enter the commercial sex industry through a variety of means. Some are coerced or abducted, others are forced by their family members, others engage in sex work as a means of survival and others willingly enter the industry as an entrepreneurial enterprise.

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<sup>224</sup> Rawlence, "Ballots to Bullets," 11.

<sup>225</sup> Human Rights Watch, "Kenya: Country Report," *Human Rights Watch* (2011).

<sup>226</sup> Ibid.

<sup>227</sup> Ibid.

<sup>228</sup> United States Department of State, "Trafficking in Persons Report 2010—Kenya," (2009).

<sup>229</sup> UNICEF, "Sex Tourism in Kenya," (2006).

<sup>230</sup> Ibid

Many children involved in sex work on the coast were brought from other parts of the country and had been initiated into sex work before they arrived.<sup>231</sup> It is illegal for children to be involved in sex work but in Kenya it is allowed to exist with minimal risk or interference.<sup>232</sup>

The majority of child sex workers come from situations in which their basic needs cannot be met because of financial difficulty or lack of parent figures. However, it is estimated that roughly 50% of the children engaged in sex work on coastal regions are simultaneously attending school.<sup>233</sup> They exchange sex for money that pays their school fees and gives them pocket cash.<sup>234</sup> It is estimated that approximately 30,000 girls under the age of 18 are engaged in prostitution, and many young boys are also thought to be engaged in the commercial sex industry.<sup>235</sup> The majority of the Kenyan sex industry is located in coastal regions or Nairobi.<sup>236</sup> The focus of research in Kenya has been almost exclusively focused on sex trafficking, sexual exploitation and forced prostitution on the coasts. This can lead to misleading figures that account only for victims of sex trafficking, thus excluding the majority of sexual abuse and exploitation in Kenya that takes place outside the realm of sex work and forced prostitution. Widespread rape and exploitation of children takes places in homes, communities and schools. The attention focused on the commercial sex industry distracts lawmakers, NGOs and the international community from the widespread exploitation taking place in the private sector.

In a study conducted at The Gender and Violence Recovery Center of the Nairobi's Women Hospital valuable insights were gained with regards to the demographic of victims of sexual violence in Kenya. For the most part, clients at the recovery center are not victims of trafficking or refugees, but Kenyan nationals. Children composed 43.5% of sexual violence survivors.<sup>237</sup> The mean age of child survivors was ten-years-old with

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<sup>231</sup> C. Sarah Jones. "The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast. *UNICEF*: vi.

<sup>232</sup> *Ibid* vi.

<sup>233</sup> *Ibid*, vi.

<sup>234</sup> *Ibid* vii.

<sup>235</sup> *Ibid*.

<sup>236</sup> Jane Mildred and Carol A. Plummer, "Responding to child sexual abuse in the United States and Kenya: Child protection and children's rights," *Children and Youth Services Review* 31, (2009): 603.

<sup>237</sup> Hassan Saidi, Paul Odula and Kristen Awori, "Child maltreatment at violence recovery center in Kenya," *Tropical Doctor* 38, No. 2 (2008): 87.

20% of the survivors being younger than five-years-old.<sup>238</sup> Incestuous child sexual abuse compromised the highest percentage of sexual violence against children under five-years-old. Furthermore, 71.5% of survivors indicated that they knew the perpetrator.<sup>239</sup> These figures raise some concerns over the prolific nature of child sexual abuse in Kenya. While the focus of research has been on sex trafficking and sexual abuse among refugees in Kenya, these statistics indicate that the problem of child sexual abuse is far more widespread. There is a general lack of empirical studies on child sexual abuse in Kenya, but the existing research and government reports indicate that child sexual abuse rates are high.<sup>240</sup> Due to widespread poverty, lack of educational opportunities, HIV/AIDS related deaths and political and ethnic violence, the vulnerability of Kenyan children is high. In Kenya there are over 250,000 street children who are especially vulnerable to sexual exploitation and violence.<sup>241</sup> Kenya has the 9<sup>th</sup> highest HIV/AIDS prevalence in the world with over 2.1 million people living with HIV/AIDS in Kenya. AIDS orphans experience increased vulnerability to exploitation and trafficking. Furthermore, beliefs about sex with a virgin curing HIV/AIDS increases young children's risk of being sexually abused.<sup>242</sup> There are reports of other widespread forms of sexual abuse such as forced marriage, marital rape and coerced early sex.<sup>243</sup> A study conducted in 2007 surveyed 2,400 Kenyan women and found that around 50% lose their virginity by the age of sixteen.<sup>244</sup> These figures are said to indicate that induction into sexual activity occurs at a young age and can serve as a possible indicator of risk for sexual exploitation. This figure is not contextualized within the cultural context and one could argue that the age of maturity or adulthood may differ in the Kenyan context. Therefore, this thesis draws issue with some of the conclusions drawn from the above statistics but because of the

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<sup>238</sup> Saidi and others, "Child maltreatment at violence recovery centre," 88.

<sup>239</sup> Ibid 89.

<sup>240</sup> Central Bureau of Statistics, Kenya Demographic and Health Survey 2003.

[http://www.cbs.go.ke/downloads/pdf/Kenya Demographic and Health Survey 2003 Preliminary Report.pdf](http://www.cbs.go.ke/downloads/pdf/Kenya%20Demographic%20and%20Health%20Survey%202003%20Preliminary%20Report.pdf).

<sup>241</sup> Consortium for Street Children, "civil society forum for east and southern Africa on promoting and protecting the rights of street children."

<sup>242</sup> L Heise, M. Ellsberg, and Gottemoeller, M. (Eds.). "Population reports: Ending violence against women. Population reports: Series L, No. 11" *Baltimore: Johns Hopkins University school of Public Health, Population Information Programme*, (2009).

<sup>243</sup> African Network for the Prevention and Protection Against Child Abuse and Neglect, "In the shadow of death: HIV/AIDS and children's rights in Kenya," (2001).

<sup>244</sup> Munene, M. (2007). Survey reveals deep silence in sexual matters. Daily Nation, February 9, 2007.

limited research available, the figures themselves are useful when analyzing the Kenyan context.

The high rates of sexual violence in Kenya are not limited to children. There is also widespread violence against adult women in Kenya. One of the reasons for disparities in statistics is that sex trafficking and child sexual exploitation has been the focus of the limited number of research studies that exist. However, sexual violence in other contexts such as the community and home, are rarely studied even though they account for the overwhelming majority of cases of sexual violence. Sexual violence in the home is under researched and undervalued, but constitutes a significant percentage of sexual violence against women in Kenya. However, sexual violence in the home whether it is intimate partner violence or incest is a widespread problem that is rarely criminalized. Women in Kenya report high rates of intimate partner violence. A study conducted by the Kenya Demographic Health Survey indicated 40% of married women reported at least one type of violence and 13% indicated experiencing sexual violence from their intimate partner.<sup>245</sup> Domestic violence receives little legal attention and cultural beliefs reinforce justifications for domestic violence in the marital context. Marriage vows and payment of bride wealth is considered a guarantee of unlimited and unconditional sexual access to a husband for reproductive purposes.<sup>246</sup> Women who are being sexually or physically abused in marriage have limited legal recourse. While this may not directly apply to women outside of marital relationships, it is still indicative of social constructions that allow for sexual violence against women to exist on such a large scale. Domestic violence is an understudied and underreported crime which contributes to the lack of data on the subject in Kenya.<sup>247</sup> Without research on sexual violence in various forms, it impossible to know the extent of sexual violence and exploitation that exists on a national scale.

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<sup>245</sup> Sitawa Kimuna and Yanyi K. Djamba, "Gender Based Violence: Correlates of Physical and Sexual Wife Abuse in Kenya," *Journal of Family Violence* 23, (2008): 333.

<sup>246</sup> Kimuna and Djamba, "Gender Based Violence," 334.

<sup>247</sup> Yanyi K. Djamba and Sitawa Kimuna, "Intimate Partner Violence among Married Women in Kenya," *Journal of Asian and African Studies* 43 (2008): 459.

### ***Limitations and Problems in Sexual Violence Research***

Researchers point to the lack of understanding surrounding the risk factors of sexual abuse and lack of significant data as key barriers to properly being able to address sexual violence in Kenya. Despite its prevalence, it is an issue that is not understood in all its complexities.<sup>248</sup> Consequently, it remains an understudied issue and little significant research can serve as a framework for creating policies for lasting change. Meanwhile gender based violence and discrimination continues to prevent Kenyan women from accessing their rights.<sup>249</sup> The lack of research is problematic, as a better understanding of sexual violence is essential to being able to effectively make recommendations that could lead to more responsive policy and legislation. In critiques of human trafficking research authors often point to the difficulty in researching “hidden populations.”<sup>250</sup> The challenge with hidden populations is that they are often difficult to access. Furthermore, hidden populations are often “hidden” due to taking part in stigmatizing or illegal behavior.<sup>251</sup> While the term “hidden populations” is usually applied to situations of trafficking, criminal behavior and other illicit enterprises, victims of sexual violence could also fit into this category. They are hidden because of the fear of the stigma and shame that can result from coming forward about sexual assault and rape. Furthermore, many are never given the opportunity to report the assault. The barriers of access and social stigma serve to complicate comprehensive and extensive sexual violence research.

### ***Sex Tourism in Kenya: No One Will Know What Happened Here***

Sex tourism is a growing industry in Kenya, especially along the coastal regions of the country. This growth in the sex tourism market can be attributed to many factors. Some argue that the increase over the past few years can be attributed to the increased enforcement of laws against sexual exploitation in other key sex tourism markets in Southeast Asia.<sup>252</sup> Instead of mitigating sexual exploitation, this enforcement has merely

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<sup>248</sup> Mildred and Plummer, “Cultural protective and risk factors,” 531.

<sup>249</sup> UNFPA, “Programming to Address Violence Against Women,” 49.

<sup>250</sup> Aderante Adepoju, “Review of Research and Data on Human Trafficking in Sub-Saharan Africa,” in Frank LAczko and Elzbieta Gozdzia, *Data and Research on Human Trafficking: A Global Survey*, International Organization for Migration (2005): 18.

<sup>251</sup> Ibid.

<sup>252</sup> Ruxin, “Southeast Asia is Not Alone.”

displaced the sex tourism market to other regions. Kenya, with its economic and political instability, loose borders and growing tourism market made it an appealing location for people looking to establish sex tourism businesses.<sup>253</sup> Furthermore, with war and economic conflict making it incredibly difficult for people to have a stable source of income, there seems to be an unlimited supply of women and children to exploit.

Tourism in Kenya is an expanding market and for many it has proved a lucrative business. However, the tourism industry in Kenya is often run by expatriates and the host communities receive little benefit.<sup>254</sup> As people struggle to meet basic needs such as food and shelter, they are at increased risk for sexual exploitation. Tourism itself becomes a pull factor for sexual exploitation.<sup>255</sup> With a high demand for sex workers, young girls are recruited into the industry in an effort to meet that demand. The clientele of sex establishments come from a wide array of backgrounds. Some come with the express purpose of engaging in sexual acts, and others engage in leisure sexual activities without premeditation.<sup>256</sup> The majority of men that are patrons at establishments that sell sex are local men. However, this does not exclude them from being considered sex tourists. Many of these men are at least away from their home in some capacity; therefore they are considered sex tourists.<sup>257</sup> However, sex tourism is only a small percentage of the commercial sex industry as the majority of customers are locals.<sup>258</sup> According to a UN study, 41% of customers who pay children for sex in Kenya are Kenyans. The majority of internationals paying for sex are Swiss, Italian and German.<sup>259</sup> Clients can purchase sex in establishments such as bars, pubs, nightclubs, massage parlors and hotels.<sup>260</sup> This demand for sex has led to an influx of thousands of girls to the coastal areas who are exploited for commercial sex.<sup>261</sup> The economically vulnerable, orphans, internally displaced persons and refugees fleeing violence are at particular risk to sexual exploitation. Research indicates that somewhere between 10,000-15,000 girls are brought

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<sup>253</sup> Ruxin, "Southeast Asia is Not Alone."

<sup>254</sup> Jones, "The Extent and Effect of Sex Tourism," vi.

<sup>255</sup> Ibid 16.

<sup>256</sup> Ibid 15.

<sup>257</sup> Ibid 12.

<sup>258</sup> Ibid vi.

<sup>259</sup> UNICEF, "Sex Tourism in Kenya," (2006).

<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

from conflict torn countries such as Burundi and Rwanda to the Kenyan coast during the high tourist season for the purpose of sexual exploitation.<sup>262</sup> Sex tourism is largely ignored by the local population. Society tolerates child sex tourism and little is done to condemn the perpetrators.<sup>263</sup> However, children are still sometimes prosecuted in Kenya for prostitution, while the perpetrators, exploiters or traffickers often escape prosecution.<sup>264</sup> Buying sex is also very cheap in Kenya. One can purchase standard sexual acts from somewhere between 1,000KSH and 5,000KSH (Approximately 12USD to 60USD). Other sexual acts such as anal intercourse can be bought for between 5,000-10,000KSH.

These prices may seem incredibly low, when held in contrast to the normal daily rate of child labour it is a stark contrast. Children are usually paid between 80-120KSH for a day of labour. Adults only make roughly 300-500KSH.<sup>265</sup> This can serve as an indicator for understanding why sex tourism, commercial sexual exploitation and prostitution are growing in the region. Some women and children knowingly enter into sex work because of the financial benefit. However, many are unaware of the exploitation that follows their initiation into sex work. For traffickers and those responsible for the exploitation, sexual exploitation is good business. A woman can be purchased for a trivial amount of money or be abducted for free and immediately turn an incredible profit. With growing tourism and availability of a steady supply of girls, the tourism industry and sex industry become mutually reinforcing.<sup>266</sup> These factors combined create an environment that allows sex tourism to be a lucrative and growing business in Kenya.

### ***Sexual Violence Against Refugees and IDPs in Kenya: A Story of Injustice***

The post-election violence added pressure to an already growing humanitarian crisis in Kenya. Kenya is home to at least 350,000 refugees with thousands more pouring in each

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<sup>262</sup>Farr, "Armed Conflict, War Rape and the Commercial Trade," 20.

<sup>263</sup> Jones, "The Extent and Effect of Sex Tourism," vii.

<sup>264</sup> Ibid vi.

<sup>265</sup> Ibid *viii*.

<sup>266</sup> Andrews, "U.S. Domestic Prosecution of the American International Sex Tourists," 418.



year.<sup>267</sup> Sexual violence against refugees illustrates the failures of the Kenyan state to properly respond to widespread sexual violence. The reason for focusing on sexual violence against refugees in Kenya is that it is one of the only populations where significant research has been conducted on sexual violence. Because of the concentration of refugees in one main area, sexual violence could be researched within a more narrow and defined context. However, the prolific nature of sexual violence against refugees in Kenya can serve as an indicator of the more widespread sexual violence across the country as well as the failure of the Kenyan state to effectively respond to sexual violence.

The majority of these refugees are Somalis and they are housed in one of three camps in the area of Dadaab, in northeastern Kenya. The camps opened in 1988 and many of its original residents remain there and have little reason to hope they will ever leave the camp.<sup>268</sup> The 650,000 people that were displaced from their homes in 2007 only added to Kenya's failure to properly fulfill its national and international legal obligations to IDPs and refugees.<sup>269</sup> IDPs suffer consequences of lacking clear definitions and rights in international policy and legislation. There is still question as to who is responsible for IDPs and whose obligation it is to protect their rights.<sup>270</sup> Poorly defined and with minimal legal mechanisms to protect them, their plight in Kenya is largely forgotten. In breach of national and international law Kenya has forcibly returned thousands of Somalis to their homeland.<sup>271</sup> This is in violation of international refugee law which gives all asylum seekers the right to non-refoulement. Officers use the threat of deportation as a means of acquiring bribes and those unable to pay the bribe are sent back to their home countries.<sup>272</sup> The border guards wrongfully charge asylum seekers for illegal entry and improper documents. Border guards use the Kenyan Immigration Act to forcibly return asylum seekers even though they asylum seekers are guaranteed the right to seek asylum

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<sup>267</sup> Crisp, Jeff. "A State of Insecurity: The Political Economy of Violence in Kenya's Refugee Camps." *African Affairs*. Vol. 99 (2000): 622.

<sup>268</sup> Gerry Simpson, "Welcome to Kenya," *Human Rights Watch*, June (2010): 14.

<sup>269</sup> Internal Displacement Monitoring Centre (IDMC). "Speedy Reform Needed to Deal With Past Injustices and Prevent Future Displacement." (2010): 7.

<sup>270</sup> UNFPA, "Ending Violence Against Women: Programming for Prevention, Protection and Care," 21.

<sup>271</sup> United Nations High Commission for Refugees, *Convention and Protocol Relating to the Status of Refugees*, 1951.

<sup>272</sup> Gerry Simpson, "Welcome to Kenya," 4.

under the Kenyan Refugee Act.<sup>273</sup> During this time Somali refugees are held in detention facilities, which is also in violation of international refugee law.<sup>274</sup> In detention and at the borders refugees face widespread and serious abuse.<sup>275</sup> In the camps refugees are denied their right to free movement in Kenya and have minimal legal or physical protection in the camps. Despite these blatant violations of international and Kenyan law, rarely are perpetrators of this injustice prosecuted or even reprimanded for their actions.

Around 80% of all refugees in Kenya are women and children.<sup>276</sup> Relevant to this paper is the widespread sexual violence in the refugee and IDP camps. Many of the women and children in the camps experienced sexual violence in their home countries and during flight. Upon arrival in Kenya they continue to face sexual violence at the hand of border guards, policemen, camp personnel and their fellow refugees. Refugees in Kenya have little legal recourse and the crimes against them are treated with impunity. When sexual violence happens in the camp, refugees have to report those crimes to the policemen that are often also responsible for similar crimes. Consequently, they face violence within the refugee camps but are unable to seek protection from the authorities.<sup>277</sup> A Somali refugee described her experience trying to cross the border with her four children to Human Rights Watch. While attempting to cross into Kenya they were greeted by armed Kenyan police officers. Her story as told to Human Rights Watch is as follows:

Three of them stopped me. I told them I had a 12-day-old baby and asked them to leave me alone. They ignored me and one of them kicked me on the right side. I fell over with my baby. Then he raped me, with my baby on the ground close by. Then one of the other two men raped me. The third man stood close by. When they finished, they let me go. I grabbed my baby and ran after the others.<sup>278</sup>

This woman's story is far too common in Kenya. Whether the violence is perpetrated by policemen, civilians or refugees, in all cases, women and children have little to no access to the legal system. "Police have also failed to investigate cases of sexual violence

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<sup>273</sup> Gerry Simpson, "Welcome to Kenya," 5.

<sup>274</sup> Ibid 30.

<sup>275</sup> Human Rights Watch, "Country Report: Kenya," 3.

<sup>276</sup> Central Bureau of Statistics, "Kenya Demographic and Health Survey."

<sup>277</sup> Gerry Simpson, "Welcome to Kenya," 6.

<sup>278</sup> Simpson, "Welcome to Kenya," 26.

between refugees, leading to a climate of impunity for those responsible.”<sup>279</sup> This climate of impunity wreaks havoc on the lives of refugee women and children who face continued abuse and sexual violence but lack adequate legal responses to this violence. They are victims of police abuse yet the only place they can report abuse is the police. Whether violence is perpetrated by civilians or the police, the only outlet for reporting crimes to authorities is the police. Therefore, sexual violence becomes a circular problem that leads to underreporting and widespread impunity.<sup>280</sup> Human Rights Watch described the problem as such:

Although the police in the Dadaab camps are themselves the perpetrators of a range of serious abuses against refugees, it is also the police to whom refugee women and girls must turn for access to justice and protection in the face of sexual violence, whether by other refugees or Kenyans.<sup>281</sup>

The majority of the reports of sexual violence in the camps were against children, according to reports made to the UNHCR. Kenya’s national, regional and international human rights obligations require authorities to investigate crimes of sexual violence, prosecute perpetrators and implement effective prevention mechanisms. Aside from a few small efforts to investigate, numerous institutional barriers restrict people from accessing justice mechanisms. As long as these systems do not change, “Justice for sexual violence survivors in the camps remains the exception and impunity for perpetrators the rule.”<sup>282</sup> This same injustice and impunity has manifested in IDP camps where there are widespread reports of gross human rights violations against the IDPs including sexual violence, excessive use of force and police brutality.<sup>283</sup>

In many cases, survivors have filed reports and complaints with the authorities. However their cases are mostly ignored and rarely investigated.<sup>284</sup> The accused are rarely arrested and often can successfully bribe police in order to prevent an investigation. Furthermore, the burden of proof is on the victim to prove evidence of the crime but the accused are not required to prove their innocence.<sup>285</sup> These issues are symptomatic of

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<sup>279</sup> Gerry Simpson, “Welcome to Kenya,” 4.

<sup>280</sup> Ibid 6.

<sup>281</sup> Ibid 12.

<sup>282</sup> Ibid 7.

<sup>283</sup> Rawlence, “Ballots to Bullets,” 32.

<sup>284</sup> Simpson, “Welcome to Kenya,” 6.

<sup>285</sup> Ibid 6.

Kenya's nationwide problems with properly addressing sexual violence, which will be explored in more detail.

### ***International Law and Regional Conventions Applicable to Kenya***

Kenya is party to numerous international conventions and treaties that contain provisions on sexual violence. The ratification of these treaties creates international obligations, but these treaties have also served as a framework incorporated into national legislation. Some of the relevant treaties are the Universal Declaration on Human Rights (UDHR),<sup>286</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>287</sup> and the UN Convention on the Rights of a Child (CRC). Kenya is also party to the ILO Convention 182 which declares that juvenile prostitution is one of the worst forms of child labor.<sup>288</sup> It is to the Palermo Protocol on trafficking as well as numerous other international agreements, conventions and protocols. Although not all these conventions explicitly make links to sexual violence, they contain articles that should cover sexual violence and the equality of women. However, the most important consequence of the ratification of these treaties has been their core principles' incorporation into national legislation which will be discussed further.

Kenya is a member of the African Union and party to numerous OAU Conventions. This includes the African Charter on Human and Peoples' Rights, the OAU Convention Governing Specific Aspects of Refugee Problems and most relevant, The Protocol on the Rights of Women in Africa. The Protocol on the Rights of Women contains specific provisions regarding sexual violence and the protocol guarantees specific rights and protections. It also urges states to enact appropriate legislation to

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<sup>286</sup> The most relevant articles with regards to sexual violence include Article 3 which provides for the right to life, liberty and security of person; Article 5 which states no one should be subjected to inhuman or degrading treatment and Article 13 on the freedom of movement.

<sup>287</sup> Most relevant articles: Article 3 which guarantees basic human rights and fundamental freedom, Article 6 which includes suppressing all forms of trafficking and forced prostitution, Article 10 on the elimination of discrimination and equality with men.

<sup>288</sup> Article 3: For the purposes of this Convention, the term "the worst forms of child labour" comprises:  
(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;  
(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

protect women from “harmful practices.”<sup>289</sup> The Protocol defines Violence against Women in Article 1(j) stating,

‘Violence against women’ means all acts perpetuated against women which cause or could cause them physical, sexual psychological and economic harm, including the threat to take such acts; or to undertake the imposition of the arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflict and war.

The protocol contains provisions against exploitation,<sup>290</sup> protection from violence,<sup>291</sup> prohibition of forced sex,<sup>292</sup> and provisions to prevent trafficking.<sup>293</sup> The rights outlined in this protocol include prohibitions against discrimination as well as protection from other forms of discrimination and violence. A core principle of the protocol is a woman’s right to access the legal system and afford them equal protection under the law. This includes the right to effective legal services and equipping law enforcement to handle cases of sexual violence. The emphasis on access to legal rights and equal protection under the law is indicative of the gender specific obstacles women face when seeking legal redress. Beyond the gender specific crimes that disproportionately affect women, their legal rights, legal needs, legal access and equality under law are often disregarded. Even when they receive de jure legal recognition, de facto discrimination prevents them from accessing legal protection. International and regional conventions approached women’s rights with an ambiguity that reflected the lack of understanding over issues particular to women. It has only been in recent years that women have achieved improvements in their recognition in law. The efforts of these conventions and protocols are influential in the process of drafting national legislation, and therefore women’s

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<sup>289</sup> Article 2(b): “Enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women.”

<sup>290</sup> Article 3(3): “States shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women.”

<sup>291</sup> Article 3(4): “States shall adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.”

<sup>292</sup> Article (4)(2)(a): “State parties shall take appropriate and effective measures to: enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public.”

<sup>293</sup> Article 4(2)(g): “State parties shall take appropriate and effective measures to: prevent and condemn trafficking in women, prosecute perpetrators of such trafficking and protect those women most at risk.”

incorporation into international and regional bodies carries a widespread impact in national legislation.

### ***Sexual Offences Act of 2006***

In July of 2006, Kenya passed the Sexual Offences Act, a piece of legislation that marks significant changes in the legal system's approach to sexual violence. Kenyan legislators conducted a comparative analysis of legislation against sexual violence around the world which led to the establishment of the Sexual Offences Act of 2006. Kenya's Sexual Offences Act sought to implement rights afforded to individuals through international and regional conventions, into the domestic legal system. Until the Sexual Offences Act, legislation on sexual violence was contained in four different pieces of legislation. The definition of rape as a criminal offense was limited and categorized as a moral issue.<sup>294</sup> All of these factors complicated prosecutions for the victims, the police and the judiciary.<sup>295</sup> The legislation was outdated and not reflective of current social issues such as HIV/AIDS, sex trafficking, child sex tourism and current developments in the field of forensics.

The need for legislative reform regarding sexual violence was evident in Kenya. Sexual violence was rampant and rates indicated that it was growing at a significant rate. Rape was not isolated to one demographic. Survivors of sexual violence in Kenya come from a wide range of ethnic and age demographics. For example, the age of survivors being treated at the Gender Violence Recovery Center ranged from five-months old to eighty-six-years old.<sup>296</sup> At the time of drafting the bill, statistics compiled from hospitals and community based organizations indicated that there were at least 16, 486 rapes in Kenya every year.<sup>297</sup> This translates into a rape occurring in Kenya every thirty minutes. The most concerning aspect of these statistics is that the majority of rapes go unreported in Kenya. The inclusion of unreported sexual assaults in statistics would increase the already alarming figures. Despite the prolific nature of the crimes, prosecutions remained

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<sup>294</sup> Association for Women's Rights in Development, "Legislating against Sexual Violence in Kenya: An Interview with the Hon. Njoki Ndungu," *Reproductive Health Matters* 15, No. 29 (2007): 149

<sup>295</sup> Ibid 149.

<sup>296</sup> Ibid 150.

<sup>297</sup> "Gender and Violence Recovery Center."

rare and very rarely was there significant sentencing of perpetrators. In many cases a woman's claim was dismissed or she was criminalized for prostitution or indecent behavior. Beyond codifying sexual offences, the Sexual Offences Act established a task force for implementing the regulations established in the act and sought to improve the linkages between the medical and legal system's response to rape.<sup>298</sup>

The Act was not passed without significant struggle. Legislators, especially female parliament member and key drafter of the bill, Njoki Ndungu, reported "deep-seated cultural gender biases" in the drafting process.<sup>299</sup> The Sexual Offences Act was the first "woman friendly" legislation to be passed by Kenya's parliament. The Sexual Offences Act was portrayed as a women's rights issue, even though it covers all sexual offences regardless of gender. Portraying the acts as an issue of women's rights does not properly include the extent of the bill. Perhaps the most notable accomplishment was that legislators defined sexual violence as a crime of violence, rather than a crime against morality or a crime of passion.

The Sexual Offences Act codified sexual offenses and reflected current social issues such as sex tourism, sex trafficking and the transmission of HIV/AIDS. The Act intended to establish clear legal definitions in order to minimize ambiguity in the legislation. The Sexual Offences Acts is important because it reflects a number of key improvements in legislation against sexual violence in Kenya. The Sexual Offences Act created a centralized framework for

**A Selection of Offences Codified in the Sexual Offences Act of 2006**

- Rape
- Attempted Rape
- Sexual Assault
- Compelled or induced indecent acts
- Acts which cause penetration or indecent acts committed within the view of a child or person with mental disabilities
- Defilement
- Attempted defilement
- Gang rape
- Indecent act with child or adult
- Promotion of sexual offences with a child
- Child trafficking
- Child sex tourism
- Child prostitution
- Child pornography
- Exploitation of Prostitution
- Trafficking for sexual exploitation
- Prostitution of persons with mental disabilities
- Incest by male or female persons
- Sexual harassment
- Deliberate transmission of HIV/AIDS

<sup>298</sup> Simpson, "Welcome to Kenya," 54.

<sup>299</sup> Association for Women's Rights in Development, "Legislating against Sexual Violence in Kenya," 52.

prosecuting sexual offences. It also sought to be more inclusive of sexual offences beyond rape. The act is intricate and detailed on many fronts, but a few of the most important aspects of the legislation will be highlighted.

The act used the term “indecent act” which it defined as follows:

‘Indecent act’ means any unlawful intentional act which causes—(a) any contact between the genital organs of a person, his or her breasts and buttocks with that of another person; (b) exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration.

The purpose of this definition was to create a more inclusive legal definition that protected people from sexual acts other than just rape. A criticism of this particular article is that it does not address hands as a possible means of sexual assault, which has created some gaps in the legal system. The Sexual Offences Act codified a number of sexual offences and implemented minimum sentencing for each criminal act (For offenses codified in Act see Box on page 80).

Another important definition in the acts was “defilement.” The inclusion of defilement as a sexual offence under Section 8(1) was defined as “A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.” Section 8 proceeds to describe minimum sentences for those guilty of defilement. The inclusion of defilement is important because it recognizes the act of rape beyond the standard definition of penetration of the vagina with a penis. Defilement as defined in Section 8 criminalizes other sexual acts that can result in penetration. Until this definition was established, many cases that are now defined as defilement were rejected due to technicalities of with what object the rape was conducted.

The act was groundbreaking in that it included a wide array of sexual offences that captured the social context of sexual violence in Kenya. Criminalizing child trafficking for the purpose of sexual exploitation, child prostitution and child sex tourism reflects more encompassing law enforcement efforts to address current forms of exploitation. The act created a detailed and centralized framework under which sexual offences could be prosecuted. It codified a wide variety of sexual offences and established mechanisms by which to prosecute sexual offences and gather evidence.



However, one of the weak points in the act is that it failed to criminalize marital rape or domestic violence.

### ***Prosecuting Sexual Violence in Kenya: Barriers to Justice***

Before looking specifically at barriers to prosecuting sexual violence in Kenya, it is beneficial to look at the region. Due to limited country specific research, collecting data from neighboring countries' research studies can serve as indicators for some of the issues that also are present in Kenya. Statistics suggest that only one out of twenty cases of sexual assault are reported.<sup>300</sup> There are a number of factors that influence underreporting in SSA. Rape is a crime in all African legal systems; it is the definitions of rape and sexual assault that are highly problematic. Many discriminatory practices exist that prevent women and children from accessing the justice system. Underreporting only serves to support the prolific nature of sexual violence as perpetrators can largely act with impunity, knowing that the chances of facing any consequences are minuscule.<sup>301</sup> International protocols and laws have a number of varying legal definitions of rape. The same is true in domestic systems, some of which have adopted international definitions and others function under outdated definitions that continue to oppress the victim. Conviction rates are generally low and for those who are convicted, sentencing is usually minimal or non-existent.

Many African legal systems contain discriminatory practices in law. First and foremost, many legal systems put incredible burden of proof on the victim, but none on the perpetrator.<sup>302</sup> The accused is not required to submit any evidence or alibi to support his/her claim of innocence but victims are required to present evidence, some of which is impossible to produce. For example, many legal systems require the victim to have a witness. A woman who had been raped along with her eleven-year-old daughter in Kenya described it like this, "The rape case has been forgotten. [The police] said, 'if you don't have witnesses, we can't solve the case.'"<sup>303</sup> However, the majority of sexual violence

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<sup>300</sup> Christiana McGinley, "Women and the Law in Africa," *University of Miami International and Comparative Law Review* 10, (2001-2002): 139.

<sup>301</sup> Pillay, "Sexual Violence: Standing by the Victim," 462.

<sup>302</sup> McGinley, "Women and the Law in Africa," 138.

<sup>303</sup> Simpson, "Welcome to Kenya," 59.

takes place in the private realm, far away from the eyes of a potential witness. Other legal systems require proof of forceful resistance. This criterion is rooted in the issue of consent, thus placing the burden on a victim to prove that he/she did not want the sexual act to occur. The requirements of showing forceful resistance are often bruises or visible physical harm. This is rooted in issues of morality which still suggest that women act in a provocative manner thus inviting the assault.<sup>304</sup> Other women are required to submit their sexual history as further evidence that their own morality would not invite such an attack. Their sexual history is considered when weighing whether or not they consented to the sexual act. This creates an environment that often humiliates women, which discourages them from pursuing legal recourse. Despite some recent attempts in domestic legal systems to better address crimes of sexual violence, most of these changes still do not criminalize marital rape.<sup>305</sup>

All of the above discriminatory practices serve as evidence that sexual violence legislation in Africa is written from a male perspective and cannot properly address a woman's experience. Women enter the legal system with suspicion, where they are forced to prove their story is true while the accused has to do nothing to prove his/her innocence. This creates an unjust system that leads to few prosecutions, low conviction rates and perpetuates a cycle of underreporting. Countries have begun their own legal reforms in efforts to curb sexual violence and create a legal system capable of convicting perpetrators. The African Union's additional protocol to the African Charter on Women's Rights tried to address the insufficient nature of African legal systems to protect the rights of women.<sup>306</sup> However, change has been slow and difficult. Sexual violence is still often viewed in relation to its impact on honor and the community, rather than viewed as a violent crime against an individual. The problems in the African legal system are unfortunately not unique. Worldwide there is a need to create legal systems that "better ensure that victims of sexual violence obtain full and real justice."<sup>307</sup> This means legal

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<sup>304</sup> Kilonzo and others. "Sexual violence legislation in sub-Saharan Africa," 149.

<sup>305</sup> McGinley, "Women and the Law in Africa," 138.

<sup>306</sup> Rachel Rebouche, "Labor, Land, and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women," *Harvard Human Rights Journal* 19 (2006): 235.

<sup>307</sup> Pillay, "Sexual Violence: Standing by the Victim," 466.

systems must reform discriminatory practices and strengthen laws and definitions to protect people's rights to sexual autonomy and physical integrity.

### ***Confronting the Role of Stigma in Preventing Prosecuting***

Legal reform is only a component of the changes needed to ensure people justice. There is a harmful stigma attached to rape and sexual violence. First, there is still great value placed on a woman's virginity. Women who report sexual violence are openly revealing the loss of their virginity. This can bring both them and their families shame and attach a permanent stigma to them in their communities. There is an undeserved stigma that the woman solicited the sexual assault.<sup>308</sup> The importance of virginity discourages people from reporting sexual assault.<sup>309</sup> As said by Seneviratne, "Therefore they live in silence with the knowledge and consequences of the atrocity committed to them."<sup>310</sup> Many are unwilling to risk the consequences of reporting the crime; therefore, women live in shame, silence and in fear of the perpetrator. One woman living in Kenya reported that she initially planned on hiding the rape from her family but then found out she was pregnant. Her family did not believe that she was raped and she was forced to run away. She expressed this stigma saying, "My father and my brothers chased me away. My father said I cannot live with you because you have ashamed me."<sup>311</sup> Women do not come forward about the crimes for fear of being abandoned by the husbands, relatives and communities. This also means that sexual assault is rarely documented, rarely prosecuted and very few perpetrators are ever convicted.<sup>312</sup> This adds to the fear and shame of survivors who are often forced to interact with their attacker on a daily basis.

Women reported covering their faces out of fear or staying indoors because they did not want to risk seeing the perpetrator.<sup>313</sup> This fear causes increased psychosocial distress and prevents women from leading a normal life. Young girls are sometimes afraid of going to school for fear of their perpetrator or of facing harassment from their

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<sup>308</sup> McGinley, "Women and the Law in Africa," 137.

<sup>309</sup> Ibid 137.

<sup>310</sup> Seneviratne, "International Legal Standards Pertaining to Sexual Violence against Displaced Women," 2.

<sup>311</sup> Simpson, "Welcome to Kenya," 58.

<sup>312</sup> Seneviratne, "International Legal Standards Pertaining to Sexual Violence against Displaced Women," 8.

<sup>313</sup> Simpson, "Welcome to Kenya," 58.

peers.<sup>314</sup> Despite the fact that the victim faces damaging stigma if they acknowledge the rape, the accused faces little to no stigma. They go about their lives without consequence and never have to face prosecution for the crimes they committed. This is a consequence of a patriarchal society in which a woman's testimony is of a lesser value than a man's testimony. The stigma should shift from the victim to the perpetrator.<sup>315</sup> Not only are survivors barred from accessing their legal rights, they face continued stigma in their communities where their reputations are damaged and daily life becomes difficult. Perpetrators of the crimes do not face these same consequences and often are accepted within their communities regardless of accusations made against them. One survivor described the feeling of shame and silence by saying, "Nobody will accept my words."<sup>316</sup>

### ***Sexual Violence and the Public Health Sector***

At the heart of sexual violence legislation is the right of a person to bodily integrity, which is violated in acts of sexual violence. Furthermore, sexual violence is also intrinsically linked with the HIV/AIDS epidemic, making a proper medical response all the more important for a survivor's well-being. The health sector is truly at the nexus of prevention, treatment and in many cases vital to a victim's evidence in court.<sup>317</sup> In order to prove a rape claim in court, medico-legal linkages need to be made to create a credible chain of evidence.<sup>318</sup> Kenya lacks an efficient and adequate relationship between the justice system and medical personnel. A comprehensive response to sexual violence is necessary to not only successfully investigate the crime, but also necessary to protect the woman's well-being and make efforts to prevent lasting medical consequences from the rape.

In context of corruption and police intimidation, proper collection of forensic evidence is incredibly important in making a strong legal case. Despite prosecutors attempts to refute women's stories and discredit a victim, strong forensic evidence could result in more convictions. Kenyan authorities claim that survivors are offered a medical

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<sup>314</sup> Simpson, "Welcome to Kenya," 57.

<sup>315</sup> Pillay, "Sexual Violence: Standing by the Victim," 466.

<sup>316</sup> Simpson, "Welcome to Kenya," 46.

<sup>317</sup> Nduku Kilonzo and others. "Sexual violence legislation in sub-Saharan Africa," 11.

<sup>318</sup> Kilonzo and others, "Sexual Violence Legislation," 15.

examination and treatment when they report sexual violence to a police officer. They also claim that medical staff should be well-equipped to handle medical responses to rape. This medical response should include the administration of Post-exposure prophylaxis (PEP) services, collection of forensic specimens and documentation of the survivor's injuries.<sup>319</sup> After this treatment the health workers should submit technical evidence to the court. However, medical personnel and legal representatives indicated that this process rarely happens and that the system for collecting forensic specimens is not properly understood.<sup>320</sup> Many health workers admitted that collecting forensic specimens was not part of their post-rape medical response. Health workers said it was routine to complete a P3 form, a document which assesses a victim's injuries. The P3 forms are essential in acquiring a proper investigation and possible prosecution. However, proper use of the P3 form includes specimen collection, yet this is rarely done.<sup>321</sup> This is symptomatic of a concerning development that indicates that the system necessary in ensuring prosecutions is broken and misunderstood by those in positions to provide the necessary medical care and evidence. In some cases health workers were not informed about the necessary process or documentation and therefore did not administer a proper post-rape medical response. This includes failure to provide PEP services which can be vital in protecting a survivor from long term consequences such as HIV/AIDS.<sup>322</sup> Health care workers in Kenya indicated that some administrative requirements posed barriers to providing people with proper post-rape medical care. They said police often interfere with the process and tell sexual assault survivors they must first file a police complaint before seeking medical treatment. This can prevent a survivor from receiving PEP services within the necessary seventy-two hour post-exposure window.

In order to make an effective legal case, many governments require proof of three elements: the identity of the perpetrator, an absence of consent to the sexual act and physical proof of sexual assault. In many cases of sexual violence this type of evidence is impossible to produce. Despite the fact that most acts of sexual violence are done by persons known to the survivor, many women never know the identity of their attacker. In

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<sup>319</sup> Joanne Csete, "Policy Paralysis: A Call for Action on HIV/AIDS," *Human Rights Watch* (2003): 63.

<sup>320</sup> *Ibid.*, 64.

<sup>321</sup> *Ibid.*, 65.

<sup>322</sup> *Ibid.*, 72.

Kenya if the perpetrator is in a position of prominence or power, they are often able to have the case dismissed. The issue of consent is particularly problematic. First, it establishes a relationship of power in which the woman's testimony is immediately treated with skepticism. Second, a woman should not be blamed for sexual assault. Requiring a victim to prove that the act was not consensual is unnecessary and difficult to establish. It often becomes a situation in which it is the word of the accused versus the word of the victim. Imbalanced power relationships often result in the victim being discredited and the perpetrator going free. The physical proof of sexual assault is difficult to obtain due to institutional barriers and lack of knowledge about sexual violence cases. Misinformation on the part of police officers and communities can prevent women from taking the necessary steps to produce physical evidence. As a consequence of these requirements, sexual violence is rarely successfully prosecuted in Kenya.

### ***Police Complicity and Corruption as a Barrier to Justice***

Crime in Kenya has long been on the rise, especially in urban centers such as Nairobi.<sup>323</sup> Included in these growing crime rates are increased cases of sexual violence. Aside from the stigma and fear of reporting sexual violence to authorities, the Kenyan police force has a longstanding reputation of corruption and impunity. In Kenya one-third of all crimes are attributable to police criminality and seventy-percent of Kenyans admit to paying a bribe to police under threat of being falsely accused of a crime.<sup>324</sup> Research indicates that "a majority of Kenyans indicate that, at best, they lack confidence in the impartiality and effectiveness of the police, and that, at worst, they fear the police."<sup>325</sup> This only serves to further impede access to the justice system, as many people are either afraid or lack faith in the justice system. With the police being the perpetrators of many crimes, Kenyans perceive the justice system to be incapable of addressing crime.<sup>326</sup> This leads to underreporting, which in turn becomes a circular problem. Underreporting leads to lack of prosecutions and cases against perpetrators which serves to inflate the sense

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<sup>323</sup> JM Migai Akech, "Public Law Values and the Politics of Criminal (In)Justice: Creating a Democratic Framework for Policing Kenya," *Oxford University Commonwealth Law Journal Winter* (2005): 225.

<sup>324</sup> Auerbach, Joshua N. "Police Accountability in Kenya." *African Human Rights Law Journal* 3, (2003): 277.

<sup>325</sup> Ibid, 277.

<sup>326</sup> Akech, "Public Law Values and the Politics of Criminal (In)Justice," 225.

that the police are incapable of dealing with crimes, especially those of a sexual nature. “Corruption disables a state from meeting its obligations to respect, fulfill and protect the human rights of its citizens.”<sup>327</sup> This corruption denies people basic human rights, including rights to water, education, food, health and the ability to access the legal system. People who are unable to afford the bribe required to gain access to these basic rights are therefore prevented from enjoying basic human rights where corruption is rampant.<sup>328</sup> Unfortunately, due to corruption in Kenya, “impunity becomes the rule, rather than the exception.”<sup>329</sup> In this environment of impunity, people are denied their rights and have few mechanisms for gaining those rights.

The distrust of the police force by citizens creates barriers for people in need of accessing the justice system. A human rights report cited that,

Much more criminality is masked by underreporting. According to UN HABITAT ‘reporting levels to police are low because victims do not believe that the police can assist them in dealing with the matter—either there seems to be little or no chance of them resolving the crime, or because they do not believe the police are competent enough to help them.’<sup>330</sup>

Research shows that only a small minority of girls report rape. Reports estimate that at least 40% of rape survivors do not report the crime.<sup>331</sup> This underreporting has many root causes such as police corruption, police complicity in the crime, poor procedures, intimidation and discrimination. Women in Kenya report being intimidated by police officers when trying to report sexual violence. A woman who had been raped multiple times described her attempts to report the crime as this, “The police did not do an investigation [into my rapes]. They do nothing for vulnerable ladies like me. And they abuse me (verbally). They call us prostitutes.”<sup>332</sup> Women who do come forward about sexual violence report that their cases are doubted and rarely investigated. Often they are forced to retell the story of their rape over and over again but with no results.<sup>333</sup>

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<sup>327</sup> James Thuo Gathi, “Defining the Relationship Between Human Rights and Corruption,” *University of Pennsylvania Journal of International Law* 31, (2009-2010): 126.

<sup>328</sup> Ibid 126.

<sup>329</sup> Pillay, “Sexual Violence: Standing by the Victim,” 466.

<sup>330</sup> Kagari and Thomas, “The Police, The People, The Politics,” 16.

<sup>331</sup> Pillay, “Sexual Violence: Standing by the Victim.”

<sup>332</sup> Simpson, “Welcome to Kenya,” 57.

<sup>333</sup> Ibid 59.

Furthermore, police officers have the reputation of not taking these crimes seriously. An incredible burden is put on the victim to prove their story before police will take any initial action. Police are known for tampering with evidence, intimidating victims and changing the outcomes of cases.<sup>334</sup> In interviews of survivors of sexual violence in Dadaab refugee camps, 75% of them had reported the crime to the police. In almost all of those cases, the police did not pursue an investigation. All of this only furthers the perception of police as inefficient and corrupt and “undermines justice and endangers women and girls.”<sup>335</sup> Change must take place not only in laws and discourse, but also in the practice of investigating and reporting crimes. Underreporting allows perpetrators to continue to commit crimes without facing repercussions.

While corruption may seem like an insurmountable issue to tackle, efforts can be made at a more grassroots level to promote proper handling of cases of sexual violence. While criminality and corruption serve as barriers to accessing the justice system, sometimes it is police incompetency that is a problem. Individuals who attempt report crimes of sexual violence often complain of being mistreated, embarrassed or turned away due to lack of evidence. This is not always representative to corruption but often police officers are not equipped with the proper information about crimes of a sexual nature. For example, a woman attempting to report her crime described how she was turned away from the police station and told to return the next time she saw the perpetrator. She followed their instructions but came back and the officers were unable to find her file and disregarded her case. This woman now lives in fear of the perpetrator who she believes will kill her if he ever finds out she went to the police.<sup>336</sup> Organizations across Kenya are seeking to address these issues by training policemen how to recognize sexual crimes, identify victims and handle cases in way that protects and respects the victim. The lack of knowledge on how to handle cases of sexual violence, especially those pertaining to children, only furthers the cycle of underreporting.<sup>337</sup> It is important that initiatives aimed at addressing the issue of sexual violence consider the role that police play in the legal system. Despite being cast as corrupt perpetrators, there is

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<sup>334</sup> Kagari and Thomas, “The Police, The People, The Politics,” 16

<sup>335</sup> Simpson, “Welcome to Kenya,” 52.

<sup>336</sup> Ibid 61.

<sup>337</sup> Kagari and Thomas, “The Police, the People, The Politics,” 16.



potential for training and accountability to change the way cases of sexual violence are handled by police. These trainings are being conducted throughout Kenya with the assistance of local NGOs. The hope is that with proper training policemen will have the skills and will to protect and defend victims of sexual violence.

Another major challenge to prosecuting cases of sexual exploitation is related to requirements for forensic evidence proving “defilement.” After an act of sexual violence, survivors are required to get forensic documentation of the crime. This typically involves going to a police doctor to get necessary paperwork filed.<sup>338</sup> There is concern that these exams are not properly conducted and often women say that the manner of the exam itself feels like another sexual attack.<sup>339</sup> In Kenya, women are required to have a document called the P-3 form, a police form that a doctor has to sign in order for a rape case to be taken in court. This document proves medical examination and evidence of sexual assault. As recently as 2008, there was one doctor in all of Kenya capable of filling out this form and he sees police medical cases ranging from car accidents, beatings and sexual violence.

However, it is acknowledged that forensic evidence is important in cases of sexual violence and Kenya and other countries have received harsh criticism saying that medical care professionals should be able to offer evidence, not just a police doctor.<sup>340</sup> This led to the Post Rape Care 1 Form, which is a significantly more comprehensive form and can be filled out by doctors at national hospitals. These steps are important because it is the beginning of acknowledging sexual crimes and better advocating for the rights of women, whose treatment as second-class citizens interferes with their ability to access the justice system.<sup>341</sup> All of these factors within the legal system threaten psychosocial well-being as it further victimizes women even after an attack has occurred. Public health sectors and law enforcement have to approach sexual violence cases as a joint effort.

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<sup>338</sup> A. Widney Brown, “Obstacles to Accessing Forensic Medical Exams in Cases of Sexual Violence”, *Human Rights Watch*, (2001): 3.

<sup>339</sup> Ibid 7.

<sup>340</sup> Ibid 7.

<sup>341</sup> Ibid 3.

Sexual violence is an issue of both public health and the justice system and the two must share information and establish collaborative systems.<sup>342</sup>

Sexual violence conviction rates remain very low in comparison with reported cases. This is concerning considering how few sexual assaults are ever reported to officials. Far too many cases go unpunished because of mere technicalities involved in prosecuting rape. Another issue of concern is the skepticism with which survivors are treated. In court, children's stories are often doubted and criticized. Children are easy targets because they do not always know how to give a coherent account or are unable to respond to questioning.<sup>343</sup> Corroborative evidence which is needed to confirm the account is difficult to obtain.<sup>344</sup> Furthermore, survivors are fearful of possible retribution from their attacker. This fear is exacerbated by people who fear that discrimination based on class and ethnicity will prohibit them from being treated fairly by police. All of these factors serve to prevent people from seeking legal action.<sup>345</sup>

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<sup>342</sup> Anthony Iton and others, "Preventing Sexual Exploitation of Children and Teens," *The Journal of Law, Medicine & Ethics* (n.d.): 39.

<sup>343</sup> Christiana Ejura Attah, "Criminal Justice and Rape of Minors as Crime Against Innocents," *Pakistan Journal of Women's Studies* 16, Nos. 1&2 (2009): 218.

<sup>344</sup> Ibid 218.

<sup>345</sup> Ibid 218.

## **Chapter 6: Analysis, Recommendations and Conclusions**

The previous chapter used a case study of Kenya to highlight the barriers that exist to successfully combating sexual violence. The chapter discussed how programming and funding is often allocated to criminal law approaches and anti-trafficking initiatives. It addressed the non-legal social and political factors that prevent women from accessing the justice system. This chapter offers an analysis and policy recommendations based on the arguments made in the previous chapters. It will analyze the research within the context of the objectives of this thesis. The case study will be used to contextualize the analysis.

### ***Analysis***

Recent efforts to better incorporate sexual violence into legislation and international law have brought aspects of violence against women to the forefront of discourse. As a consequence of increased international attention sex trafficking has received considerable attention in academic and legal discourse. Its position in discourse is enviable, as it is central to many discussions and debates surrounding the rights of women in international law and policy. However, their prominent position in media and dialogue has had ambiguous results. The issue has gained international attention and consequently, there has been considerable legislation written on the subject in the past decade. However, despite the noticeable increase in national and international legislation on the issue, the problem continues to be widespread and statistics and research indicate that sex trafficking is occurring at increased rates. Furthermore, the efforts focused on sex trafficking have distracted attention away from efforts aimed at worldwide sexual violence, which statistics also indicate is on the rise. The current efforts to protect women are portrayed as improvements in the relationship between international law and women. However, the effectiveness of these self-proclaimed improvements is questionable and further examination may reveal that these improvements may serve to further disenfranchise the very people they seek to promote and protect. Sometimes the

emotionally charged language used to describe these crimes can undercut the credibility of the efforts being made.<sup>346</sup>

For decades sexual violence against women was categorized as an issue of morality and a threat against dignity and family honor.<sup>347</sup> As mentioned in previous chapters, the majority of existing legislation frames sexual violence, including rape, in these terms. As a result of recent conflicts and research, academics and lawmakers criticized this framework for its failure to address gender-specific crimes. Conflicts such as Bosnia-Serbia conflict, the Rwandan Genocide and war in the Democratic Republic of Congo revealed the shortcomings of existing frameworks in protecting women. Furthermore, increased international attention on issues such as sex trafficking highlighted the absence of effective legal mechanisms for women. Capturing public sentiment and imagination these forms of sexual violence became the focus of not just media, but also emerging jurisprudence and international policy. The result was an important shift in legal and academic discourse. Rape and sexual violence were categorized not as crimes against honor and morality, but as crimes of violence. The international community's response to these widespread atrocities was to create a plethora of legislation on the subject. This led to a growth in national legislation pertaining to sex trafficking, with national legislation worldwide nearly doubling.<sup>348</sup> The growth in legislation pertaining to sex trafficking is notable but has had limited measurable results. There was a common trend in legislation to create highly specialized definitions of crimes. For example, a great deal of the legislation focuses on war rape and sex trafficking. Consequently it is only the most violent crimes that get attention and other prolific forms of sexual violence go unnoticed.<sup>349</sup>

This calls into question how supposed improvements for women in law are measured. Research would suggest that applying the term “improvements” is primarily self-proclaimed. Increased incorporation of gender-specific violence into legislation seemed sufficient to warrant the term “improvement.” Improvements were based on the

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<sup>346</sup> Johnny McGaha and Amanda Evans, “Where are the Victims? The Credibility Gap in Human Trafficking Research,” *Intercultural Human Rights Law Review* 4 (2009): 240.

<sup>347</sup> International Committee for the Red Cross, “Geneva Conventions,” 1949.

<sup>348</sup> UN Office on Drugs and Crime (UNODC), Global Report on Trafficking in Persons 24.

<sup>349</sup> Attah, “Criminal Justice and Rape of Minors as Crime Against Innocents,” 218.

mere existence of the legislation but not in any assessments of the legislations true effectiveness. Individual states and the international community at large have failed to establish effective mechanisms to implement the existing legislation. Jonathan Todres described current efforts as “piecemeal measures.”<sup>350</sup> Uncoordinated and incomprehensive, efforts are ineffective in curbing sexual violence. This serves as a basis for questioning the value of a purely criminal law approach to sexual violence. Despite the necessity for a strong criminal law approach, its lack of effectiveness serves as evidence for the need for non-legal approaches.

International efforts claimed to have improved the visibility of women in law, as discussed in Chapter Four. Furthermore, the incorporation of international principles and standards with regards to sexual violence into national legislation was an important improvement. The majority of national legislation related to sexual violence was based on international legislation and jurisprudence and used similar language when conceptualizing the crimes. However, this legislation focused on only the most violence forms of sexual violence, which translated into domestic legislation. Lawmakers described violations such as sex trafficking and mass rape in the strongest of terms and hailed them as the most heinous of crimes. Not only were the acts themselves dehumanizing, but they were occurring against those the international community considered the most vulnerable. Focusing on vulnerable women and children as victims, it becomes hard to imagine who could commit these atrocities against another human being. It was this unimaginable violence that became the center of legislation and jurisprudence. The accounts of sexual violence emerging from the ICTY and ICTR were on a scale that was difficult to capture. The courts sought to create definitions and legislation that would create a framework for prosecuting these grave crimes. In recognition of the shortcomings of existing legislation, the new legislation sought to establish definitions of sexual violence and codify elements in attempt to better describe women’s experiences. By nature, to define is to exclude. With the focus of the legislation being on only the most recognized crimes, the widespread sexual violence against women

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<sup>350</sup> Jonathan Todres, “Taking Prevention Seriously: Developing a Comprehensive Response to Child Trafficking and Sexual Exploitation,” *Vanderbilt Journal of Transnational Law* 43, No. 1 (2010): 5.

remained far from the public eye. There is simplicity to defining sexual violence and legislation in these terms.

Sex trafficking is a narrow term that only applies to a very specific circumstance. Many were content with the supposed improvements and felt that women were finally present in international law. However, when reading the legislation a certain ambiguity is noted. Sex trafficking is still rarely linked directly to a law or policy with specific legal obligations. Therefore, the legal obligations are minimal and easily exploited for other means. As Anne Gallagher criticized, “as long as the law remained unclear, they could keep arguing about it; as long as the law remained unclear, they would not be brought to task for failing to uphold it.”<sup>351</sup> The ambiguity in legislation allows states to operate under the guise of improving women’s rights, where in reality they have done little to actually uphold any form of legal obligation.

The aforementioned lack of legal obligation can be seen in Kenya. Party to all relevant international treaties, regional agreements and with a progressive piece of national legislation, Kenya still lacks the will to implement its laws and policies. Even after the emergence of the Sexual Offences Act, Kenya has rarely prosecuted perpetrators and made little effort to implement programs to protect women and children from various forms of sexual violence. Some efforts in Kenya have targeted sex trafficking with minimal success, but the success is often short lived and with limited widespread impact. The existence of the legislation in Kenya has not translated into action. Therefore, improvement in women’s rights cannot be measured merely by existence of legislation, but rather the degree of its implementation and the impact it has on women must be measured.

Admittedly, current legislation and jurisprudence have improved the criminalization of certain acts of sexual violence. However, criminalizing is not synonymous with preventing. Criminal law applies only after the harm has occurred.<sup>352</sup> In other words, criminal law only addresses sexual violence *ex-post* and does little to address sexual violence *ex-ante*. Some argue that criminal law should have a deterrent effect. They argue that the very existence of laws and minimal sentencing will discourage

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<sup>351</sup> Anne Gallagher, “Human Rights and Human Trafficking,” 793.

<sup>352</sup> Ibid 4.

people from committing these acts. However, research indicates that in cases of sexual violence, criminal law has failed to have a deterrent effect.<sup>353</sup> Due to other social and economic factors, there is still great benefit and low risk to committing acts of sexual exploitation and violence. Criminal law does not properly encompass the complexities of sexual violence against women and has little preventative power.

Beyond the obvious criticism of this highly specialized and exclusive focus, is the lack of incorporation of women and children in the lawmaking and policy making process. The victims of these crimes are key stakeholders in the laws and policies but they are often left out of the process. Their voices are never considered which leads to the increased marginalization. As said by Jonathan Todres, “Devalued conceptions of marginalized populations have facilitated their exploitation.”<sup>354</sup> Their exclusion from the process only furthers the problems that put them in situation of exploitation in the first place. The victims, who know more about the issue than any outside perspective could ever hope to know, are not given the opportunity to present their voices and perspectives. As said by Mike Dottridge,

Children are experts on the factors that make children vulnerable, their reasons for leaving home, and their special needs regarding prevention, assistance and protection. Children and young people have an important role to play in helping to identify areas for intervention, design relevant solutions and acts as strategic informants of research.<sup>355</sup>

The most well-informed experts—the women and children who are victims or vulnerable—are not included in discussions and policies. Many other stakeholders are incorporated into the process but the most important stakeholder remains absent. Consequently, while women and children may be “present” in international law by definition, their real presence is still non-existent. It is this criticism that led Mary Anne Franks to state that “Women are invoked, but are not present, in this latest international conflict.”<sup>356</sup> Adding their voice into the process could allow for better mechanisms to not

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<sup>353</sup> Paul H. Robison and John M. Darley, “The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best,” *Georgetown Law Journal* (2003): 949.

<sup>354</sup> Todres, “Taking Prevention Seriously,” 28.

<sup>355</sup> Mike Dottridge, “Young People’s Voices on Child Trafficking: Experiences from South Eastern Europe,” *UNICEF Innocenti Working Papers*, (2008).

<sup>356</sup> Franks, “Obscene Undersides,” 136.

only criminally prosecute perpetrators but also protect women and children from sexual violence before it occurs.

Laws, policies and programming exist to protect women from sexual violence and yet it continues at an alarming rate. Programming has largely been focused on the effects of exploitation and after-care for the victim. However, even where inclusive and well-written laws exist, sexual violence continues. In the case of Kenya the Sexual Offences Act of 2006 established a groundbreaking framework for addressing sexual violence in Kenya. It incorporated a variety of current social issues related to sexual violence and offered inclusive definitions of sexual crimes to account for many forms of sexual violence. However, prosecutions remain rare but the violence remains prolific.

The narrow focus of sexual violence has been a problem throughout history. It emerged in history as an issue of dignity and honor. Consequently, it failed to address the crimes being committed against women and cast them as vulnerable. As these failures became apparent there was a shift and sexual violence was recognized as a crime of violence, making it a criminal law issue. Sexual violence holds a deserved place in the criminal law discourse. The acts or series of acts that constant to a crime of sexual violence are appropriately described as violent and criminal acts. However, as described by trafficking researcher Janie Chuang, “the criminal justice approach is a limited one. It addresses the consequences of the trafficking phenomenon but not its roots causes.”<sup>357</sup> Not only do current approaches ignore root causes, but the criminal law focus has been rooted almost entirely in criminalizing only the most violent forms of sexual violence. Not only does the focus on criminal law do little to effectively implement prevention strategies, the narrow focus on only the most violent forms of sexual violence can divert attention away from other forms of sexual violence. “The narrow focus of trafficking...belies the complexity of the current trafficking problem, and overlooks numerous victims whose experiences diverge from more traditionally recognized forms of trafficking.”<sup>358</sup> With the focus of efforts almost entirely on sex trafficking, other crimes of sexual violence are completely overlooked. The diverging experiences of women with sexual violence have failed to be properly addressed in legislation and

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<sup>357</sup> Chuang, “Rescuing Trafficking from Ideological Capture,” 1726.

<sup>358</sup> Janie Chuang, “Redirecting the Debate over Trafficking in Women,” 66.



therefore, have “rendered these laws inadequate to prevent and redress” the diversity of contexts and forms of sexual violence.<sup>359</sup>

Sexual violence is representative of an interrelationship among rights and a symptom of the denial of those rights.<sup>360</sup> Sexual violence is appropriately described as a criminal law issue, but it is also a human rights issue. The failure of states to create a system that effectively responds to sexual violence is indicative of the dismissive attitude states have towards the rights of women. While the majority of states acknowledge the importance of women’s rights, few have effectively implemented policies to enhance equity. The international community has failed to adequately incorporate human rights concerns specific to women. Despite declarations that the rights of women are “an alienable, integral and indivisible part of universal human rights,” words have not been consistent with actions.<sup>361</sup>

The very nature of the human rights system excludes actions in the private sphere and those emanating from non-state actors. While state actors can be perpetrators and complicit in sexual crimes, the majority of sexual violence occurs within the private domain.<sup>362</sup> These gendered constructs in law prohibit women from achieving equity and recognition in law, as the priority of most states remains deeply rooted in the public sphere. Discrimination against women and the withholding of basic human rights is justified using relativist approaches that hide behind excuses of culture and religion. However this approach is “a denial of basic principles of universality and indivisibility—serves to obscure violations committed against women, to perpetuate an ideological resistance to the notion of women’s rights and to inhibit a unified response from the international community.”<sup>363</sup> Constructs within legal systems, including the human rights system, can serve to further the marginalization of women and perpetuate cycles of apathy. The international community needs to undertake reforms that are aimed not just at protecting women from sexual violence, but promoting their rights on all levels. This

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<sup>359</sup> Chuang, “Redirecting the Debate over Trafficking in Women,” 66.

<sup>360</sup> Todres, “Taking Prevention Seriously,” 6.

<sup>361</sup> Gallagher, “Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System,” *Human Rights Quarterly* 19 (1997): 291.

<sup>362</sup> Ibid.

<sup>363</sup> Ibid.

approach requires a renewed and inclusive commitment that is wide in scope and relevant to all women.<sup>364</sup> The very laws and institutions must be challenged. Human rights cannot claim to protect and promote the rights of all persons while they actively exclude crimes that are targeted towards half the world's population.<sup>365</sup>

Consequently significant emphasis and physical and financial resources were given to implementing the legislation focused on these specialized crimes.<sup>366</sup> The focus on the "most appalling criminal acts," can result in recognition, public appeal and measurable results that indicate success.<sup>367</sup> However, the specialized focus on the most violent and widespread crimes results in a continuum in which abuses and levels of violence are ranked. This can create an effect in which some crimes are not as regarded as deserving of intervention or prosecution.

Despite the apparent shortcomings of the human rights system, there are frameworks within the human rights system that can be used to protect women from sexual violence. The focus on human rights can lead to a victim-centered approach. This approach has received a great deal of funding and international attention. However, this approach is dependent on the ability to define persons within certain legal criteria. Given the problematic nature of definitions this approach has limits. To be defined as a victim a person must fit a specific list of criteria. However, these criteria are often ambiguous and not able to account for the unique experience of each individual. How an act of sexual violence is defined can lead to what types of legislation, programming and funding can be allocated to a victim. Therefore, if a victim is defined as a victim of trafficking, there are certain rights and opportunities afforded to that person. Furthermore, if an act of sexual violence occurs within a given context, such as mass rape during war, there are other legal criteria that are enacted. These same rights may not exist for a person who does not meet these criteria. This can be seen in Kenya where the type of sexual violence can greatly influence the services you receive. Survivors of sex trafficking have a plethora of available resources such as shelters, legal advocacy, vocational training programs and repatriation services. These same services are not available to victims of

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<sup>364</sup> Gallagher, "Ending the Marginalization," 333.

<sup>365</sup> Ibid.

<sup>366</sup> Todres, "Taking Prevention Seriously," 30.

<sup>367</sup> Ibid, 31.

other forms of sexual violence. This reveals the problematic dichotomy that can result from the ambiguous definitions applied to survivors of sexual violence.

The shortcomings of a law enforcement or victim-centered approach can be filled by a more encompassing approach. Rather than focusing only on victims or criminalization, the issue must be addressed with a wider scope. Violence against women violates women's basic human rights and freedoms that are fundamental according to international and national standards.<sup>368</sup> Recognition of the interrelationship of rights is necessary in creating a comprehensive plan for addressing violence against women. Failure to effectively prosecute, prevent and coordinate efforts is due to the narrow focus of research and legislation. The approach that is needed was described by Jonathan Todres as a "women-centered" approach.<sup>369</sup> In this kind of approach not just victims or perpetrators are addressed, but all women and potential victims are given thought in legislation and programming. Therefore, the concerns of women become a relevant and integral part of the discourse and policy. Relevant to the discussion, research showed that women "described the failure of the state to condemn the violence, to protect women from further violence and to provide redress through the criminal justice system."<sup>370</sup> The key component of the criticism is that issues other than legislation prevented women from accessing the criminal justice system.

Despite the success of the women's human rights movement in highlighting the issue of violence against women, many countries have yet to implement the necessary criminal justice system reform to ensure that, at the very least, women can pursue redress through the criminal justice system. The work must happen in the larger context of dismantling de jure and de facto discrimination against women. It is women's second class status that makes them vulnerable to violence and bars them from receiving effective redress through the criminal justice system.<sup>371</sup>

This de jure and de facto discrimination creates barriers for women in receiving adequate protection of their most basic human rights. In many places worldwide women lack the social capital to seek redress and therefore are left without recourse when sexual violence occurs and lack protective factors against sexual violence.

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<sup>368</sup> A. Widney Brown, "Obstacles to Women Accessing Forensic Medical Exams in Cases of Sexual Violence," 1.

<sup>369</sup> Todres, "Taking Prevention Seriously," 28.

<sup>370</sup> Brown, "Obstacles to Women Accessing," 1.

<sup>371</sup> Ibid 2.

Sexual violence flourishes due to a convergence of social, political and economic factors:

There is not a single reason why children are trafficked, but rather a wide range of factors and layers of vulnerabilities related to children as individuals, their families and the socio-economic context in which they live. Child victims of trafficking are rarely affected by only one factor; rather it is the compounding of several factors that renders them susceptible to being exploited.<sup>372</sup> Despite the fact that this quote pertains to child trafficking, it can be more widely applicable to women and sexual violence in general. Sexual violence exists and is allowed to exist because of a wide variety of factors. A comprehensive approach to these larger issues of discrimination and injustice is necessary to properly address sexual violence. The narrow focus of efforts centered on sex trafficking and war rape can serve to distract attention from widespread sexual violence and solidify women's inability to access proper criminal justice and prevention mechanisms. Furthermore, multiple stakeholders must be engaged in efforts to combat sexual violence. Sexual violence creates a complex human rights dilemma, "which necessarily requires a multifaceted approach to both effectively combat trafficking and to offer protection remedies to victims."<sup>373</sup> Sexual violence demands the involvement of multiple stakeholders and efforts must be made to protect all women, not just assist victims.

The prolific nature of sexual violence in Kenya extends far beyond victims of just sex trafficking. The majority of survivors experienced sexual violence in other capacities and contexts. These women still suffered violent crimes that are covered by legislation and they deserve to be able to access their legal rights. It is not the legislation that prevents them from accessing these rights, but it is social, economic and political factors. Women still face gender specific barriers to accessing their rights. While they have equality in law, in practice they still face numerous barriers to actual equality. This is evident in the skepticism with which they are treated and the ease with which male perpetrators can get away with crimes. The focus on sex trafficking can do women a disservice by diverting efforts and depleting funds that would be better directed towards

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<sup>372</sup> East Asia and Pacific Regional Office, United Nation Children's Fund, "Reversing the trend: Child trafficking in East and South-East Asia," (2009).

<sup>373</sup> Viviana Waisman, "Human Trafficking: State Obligations to Protect Victims' Rights, the Current Framework and a New Due Diligence Standard," *Hastings International and Comparative Law Review* 33 (2010): 388.

addressing root causes, such as poverty and discriminatory institutional mechanisms. Sexual violence requires a holistic approach that both promotes the basic human rights of women, as well as protects them physically and institutionally from violence.

### ***Policy Recommendations***

The scope of this paper is limited and all policy recommendations are offered with the concession that due to limitations, there is a lack of empirical data to support these recommendations. Due to the wide breadth of literature consulted and analyzed a few policy recommendations will be explored. The goal of these recommendations is that international and national efforts will improve how they respond to widespread, worldwide sexual violence. Some recommendations are directed at the international community at large and some, due to the focus on Kenya as a case study, will be specifically for Kenya.

The first recommendation is that greater international attention be brought to sexual violence in general. The worldwide attention on specialized forms of sexual violence has come with both benefits and negative consequences. One of the apparent benefits is that it has brought the issue of sexual violence against women into international dialogue. Laws and policies that resulted from this attention have the potential for making a positive impact on the improvement of women's rights. As a result of this international attention, policies, programming and funding has been channeled to programs that are assisting survivor sex trafficking. This also led to attempts in improving national and international legislation with regards to these atrocities. However, a consequence of the attention is that it has placed the focus on the international community on forms of sexual violence that only occur within a specific context. With the ability to only focus on these forms of sexual violence, the more problematic issue of addressing sexual violence that occurs outside the context of war and trafficking remains understated. Therefore, this paper recommends that greater attention be given to the worldwide problem of sexual violence. Recognizing that women face sexual violence in the home, community, school and in other venues is a necessary step to take in order to better address sexual violence. Addressing sexual violence with a wider scope allows for more inclusionary efforts. The current focus on exclusionary definitions can have

negative consequences for the many women in the world who survive sexual violence but have little legal redress. It is these women who must be better incorporated into the discussion on sexual violence.

In order for any of this to happen, more research is needed to address the growing problems in the field. Research is often journalistic, contains limited data and is often one sided. The focus of research has been on the victims but little research is conducted related to the perpetrators or facilitators of sexual violence. Sexual violence, regardless of context, exists due to the involvement of a wide range of stakeholders. Furthermore, efforts to prevent or prosecute sexual violence include a wide variety of stakeholders. The incorporation of multiple stakeholders is needed to conduct valuable and ethical research. This involvement could lead to a better understanding of sexual violence from a variety of perspectives. Research has also been primarily conducted on the specialized forms of sexual violence, such as war rape and trafficking. There are aspects of these specialized forms that simply research, in that the context narrows the scope of research projects. However, these research projects are often used as the basis of laws, policies and programming which results in a disproportionate focus on these forms of sexual violence. The majority of the research conducted on the issue is done by NGOs or is journalistic in nature. There is often an obvious bias in research and statistics are used to promote a specific goal. More empirical research that is inclusive of multiple stakeholders is needed in order to better understand sexual violence and how it can be prevented.

This leads to the third recommendation which is for research to move beyond a victim-centered approach but to begin to research the political, economic and social factors that perpetuate sexual violence. The majority of research still focuses on victims of sexual violence after the harm has occurred. More research needs to be done on the political, economic and social factors that perpetuate sexual violence and discrimination against women. The focus of research has been on the sexual nature of the crime, and appeals to sentiment rather than addressing how sexual violence is a symptom of the greater injustices against women worldwide. Women need to be viewed within research as individuals with economic, political and social capital. By researching the underlying causes of sexual violence against women, greater efforts could be made to prevent the

harm from ever occurring. Until these roots causes are addressed, sexual violence research will fail to produce effective prevention mechanisms. Research will continue to only inform about the violence after it occurs, rather than offer recommendations that could result in policies and legislation that could prevent sexual violence. This research needs to be approached from many perspectives, including the perceptions that men have of women and how this may influence their willingness or ability to commit acts of sexual violence.

Consequently, better laws and policies must be implemented in order to protect women from sexual violence and prosecute perpetrators. The environment of impunity that exists must be challenged by well defined legislation and justice mechanisms. In the case of countries such as Kenya, where strong legislation exists, steps must be taken to enforce this legislation. This includes addressing the barriers that exist in successfully prosecuting sexual violence. Corruption must be confronted and Kenya should work to implement their national plan of action to prevent sexual violence and exploitation in all forms. Current legislation should continually be evaluated and improved as needed. The legislation must be accompanied by strong programming, training and awareness-raising efforts. Furthermore, Kenya should work to ensure that perpetrators are brought to justice and are unable to buy or threaten their way out of prosecution. Kenya, as well as the international community at large, must acknowledge the institutional barriers that exist to successfully bringing a claim to court. Too often cases fail to be successfully prosecuted due to oversight or misinformation from law enforcement officials.

In order to achieve the above recommendation, there are two specific areas that Kenya should improve. While the Sexual Offences Act of 2006 was a wonderful improvement in Kenya's approach to sexual violence, it must be accompanied by institutional changes. One barrier to successfully prosecuting sexual violence is the need for forensic evidence to prove a claim of sexual violence. Cases are often dropped due to the lack of forensic evidence. This is largely due to the lack of strong medico-legal linkages in Kenya's legal system. This is not unique to Kenya and is a common barrier to successfully prosecuting sexual violence worldwide. First, the medical and legal systems must be trained to identify sexual violence and how to respond to it. Both hospitals and

police staff must be trained in the proper protocol for post-rape response. This involves informing them how specimens should be collected, how medical forms should be filled out and how policemen should inform survivors on the legal process. Often small mistakes are made that discredit a person's claim or the person is given misinformation by police officers which results in the lack of medical evidence. The training of police and hospital staff should be done in conjunction with holding awareness raising seminars with women to inform them about the legal system and their rights.

In the case of Kenya, comprehensive police reform is needed. Until the widespread corruption and impunity within the legal system is properly addressed, even the best legislation will be ineffective in protecting and promoting human rights. The existence of the Sexual Offences Act of 2006 is a positive step forward in that it creates a framework for prosecution. However, while corruption and impunity remain the norm the Sexual Offences Act will have limited impact. Kenya should conduct an investigation into the police force. This should be done by someone outside the police or government in order to prevent corruption or bias. Roots and consequences of corruption must be identified and action steps established to implement reform.

One of the greatest barriers to effectively addressing sexual violence is the stigma women suffer as a consequence. Sexual violence is often still framed within the context of sexuality and morality. The idea of "sex" has to be removed from discussion of sexual violence. Sexual violence is a crime of violence and should be treated as such. Questions about the women's consent, fault and credibility should be removed from the discussion entirely. The stigma should be shifted from the women to the perpetrator. Kenya should seek to implement awareness campaigns that inform people about violence against women. This campaign should actively seek to present sexual violence as a crime and should be addressed to all genders. Women fear reporting sexual violence because of the consequences this stigma carries. Awareness campaigns should focus on directing attention away from discussion on morality and chastity but should frame sexual violence within the context of other criminal acts. Women who report sexual violence often describe retaliating, discrimination and at times are ostracized from their families, communities and schools. They should not be penalized for reporting a crime and should



not be forced to carry shame because of what was done to them. Until the issue of stigma is addressed and efforts are made to defend and encourage women who come forward, underreporting will continue to allow cycles of violence to continue.

All of these efforts must be done in conjunction with legal advocacy. Legal systems can be difficult to negotiate and without the assistance of someone well informed of the process, many cases will never reach prosecution. Kenya, along with other nations, should work to establish legal advocacy for survivors of sexual violence. Legal advocacy should include teams of well informed lawyers and advocates, as well as personnel equipped to address the psychosocial needs of a client.

In closing, efforts to prevent, prosecute, legislate and define sexual violence should be done in coordination with multiple stakeholders. There is a broad range of stakeholders with regards to sexual violence on the state, local, national and international level. Efforts should be done in coordination with human rights groups, legal systems, social services, healthcare, educators and faith based initiatives, all of which have stake in preventing sexual violence. Most importantly, these efforts should be done in collaboration with communities. Legislation and policies are often created without the involvement of those most affected by the outcomes—women. Women and children are experts on the discrimination and violence against them, and the vulnerabilities that put them at risk. They also are the experts on what can be done to bring about durable and sustainable change. It is their voices that must be better incorporated into any decision making process. If legislation and policies continue to be made without the involvement of the key stakeholder, their efforts will continue to fall short.

## ***Conclusions***

This thesis has argued that a prevention framework needs to be implemented in order for the criminal law approach to be successful. As a conclusion, this thesis will offer a brief outline of a potential prevention framework for Kenya. The first step for a prevention framework is to put mechanisms in place to ensure that the legal system will effectively respond to sexual crimes. This goes beyond the mere existence of legislation, but also ensuring that systems are in place so that legislation can be used to effectively prosecute perpetrators. As previously mentioned, the legal system is often perceived as being

incapable of dealing with crimes of a sexual nature. This serves to inflate the perception that reporting crimes is pointless. In order to promote the effectiveness of the legal system there are institutional supports that should be in place. The first step would be to train members of the legal system and police force about the Sexual Offences Act of 2006. This would include information about the legislation itself, how it can be implemented and how individuals reporting crimes should be treated and informed about their rights. In order for the criminal law system to effectively respond to crimes of a sexual nature, the people involved in all steps of the legal process must be informed about the legislation and competent about how it can be applied.

The second step of a prevention framework is improving the relationships between the legal system and the medical system. Because a proper medical response, documentation of injuries and forensic evidence is necessary in making a legal claim, medical personnel should be trained to properly handle post-rape responses. When claims are dismissed from the court because of lack of medical evidence, this inflates the problem of underreporting. Hospital personnel should be trained about the proper medical response to rape. An important component of this is to train medical personnel about what paperwork needs to be completed, what evidence must be collected and how all of these things must be filed with the police department. This needs to be done in combination with training police officers on how to instruct women reporting sexual assault to seek medical help and what they must file in order to bring medical evidence to court. By strengthening medico-legal linkages, women can make legal claims using forensic evidence. This could lead to an increase in successful prosecutions. It is possible that when more prosecutions are successful, more women will be empowered to report sexual crimes and file claims in court.

The above steps must also be done in combination with community awareness raising and education campaigns. Research on the subject of sexual violence is minimal and many initiatives lack strong assessments. This thesis argues that for a successful prevention mechanism to be implemented, a thorough assessment of knowledge, perceptions and cultural understandings of sexual assault must be conducted. After conducting an assessment of community's understandings and perceptions of sexual

crimes, applicable and relevant interventions and awareness raising workshops could be planned. The topics of these interventions would depend on the outcomes of the assessment but possible topics could be addressing the issue of stigma, educating people about sexual crimes and educating people about the legal and medical recourse available should an individual experience a sexual assault. This could lead to an increase in understanding within communities. It could also empower women to report crimes when they have a firm understanding of their rights and the systems they have access to should a sexual assault occur.

While the focus of the majority of interventions is directed towards women, this thesis suggests that there should be programs targeted at men. Addressing men's perceptions of sexual crimes and risks of being a perpetrator could cause men to rethink their actions. More importantly, it could encourage men who are not perpetrators to stand behind the women in their communities and support them, not condemn them, for coming forward about sexual violence. Prevention mechanisms should seek to address multiple stakeholders and encourage entire communities, not just individual women, to take a stand against sexual crimes and educate them about the legal, medical and community response available to survivors of sexual crimes.

In closing, the focus on sex trafficking and specialized definitions of forms of sexual violence has a role within the discourse on sexual violence. These definitions can serve to describe a context in which sexual violence occurs. The act is not what defines the term; it is the context in which the act occurs that distinguishes it from other forms of sexual violence. The terms can serve a useful purpose and fulfill a specific legal and programming need. However, these terms have an uneasy relationship with sexual violence discourse. The tendency to focus on only the specialized forms of sexual violence has distracted research, law and policy from the widespread sexual violence against women all over the world. Specialized terms must be framed within the wider context of worldwide sexual violence.

International efforts to address sexual violence against women and promote protection have been too narrow in focus. By giving disproportionate attention to only a few forms of sexual violence, efforts have become fragmented and ineffective. The

consequence of this diffracted focus has been the further marginalization of women in the international and domestic systems. There is an inextricable link between sexual violence and inequality between men and women. Sexual violence against women is endemic of larger social issues that are consequences of inequality both on the individual and societal level.<sup>374</sup> Short-term interventions and even perpetrator prosecutions will have limited impact if not done in conjunction with change at the institutional and societal level.

Sexual violence is a symptom of a system of gender inequality, both structural and ideological. Rape and sexual violence exist because of a social construction that justifies the violence and is sustained by a culture of denial. Discourse on sexual violence, by focusing on the sexuality of the woman, ignores the economic, social and political discrimination that removes women from the public sphere and denies them basic human rights. International and domestic systems that habitually marginalize half the world's populations will continue to be shortsighted and misinformed. Until women are better incorporated into the legislative process and until their rights are considered of equal value to men's, symptoms of this power imbalance will continue. Efforts to combat sexual violence must be inclusive of all forms of sexual violence and acknowledge the economic, political and social discrimination that serve as root causes of the injustice. Systems need to be responsive and inclusive so that the rights of women are protected and blatant violations of human rights are no longer met with apathy.

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<sup>374</sup> Yodanis, "Gender Inequality, Violence against Women, and Fear."

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