International Law and Sexual Violence in Armed Conflicts. By Chile Eboe-Osuji. Leiden, Boston: Martinus Nijhoff Publishers, 2012. Pp. xvii, 354. Index. $178, €130.

This well-written book by Chile Eboe-Osuji, a judge on the International Criminal Court (ICC), is bound to be influential. It sheds much needed insight on a peculiar kind of evil in armed conflict: sexual violence against women.

The topic of sexual violence during wartime has been a source of renewed scholarly attention and focus since the 1990s. But much of the commentary from that era has focused on the aftermath of conflicts in the former Yugoslavia and Rwanda, where the horrors of mass rapes exposed the inadequacies of international criminal law at that time.[1] The founding statutes for the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda (ICTR) both included the crime of rape as a crime against humanity.[2] The ICTR, where Eboe-Osuji once worked as prosecution counsel and senior legal officer, ruled that wartime rape could qualify as an act of genocide.[3] While these tribunals were hardly the first to recognize rape as a war crime,[4] they marked a sea change in the willingness of the international community to enforce and prosecute perpetrators of this crime. More importantly, these tribunals helped recognize that sexual violence might be deployed independently as a military strategy, and not just reflect an inevitable by-product of war.

Eboe-Osuji's main contribution is to take a more panoramic view of the challenges involved with the enforcement of the various crimes of sexual violence during wartime. For the most part, he points out the deficiencies that plague the current criminal enforcement schemes, at both the international and domestic levels, and proposes concrete and politically pragmatic solutions. He describes the contexts for the decisions on sexual violence by these tribunals and surveys subsequent efforts at the ICC, the Special Court for Sierra Leone, the Office of the High Commissioner for Human Rights, and the United Nations.

International Law and Sexual Violence in Armed Conflicts begins in chapter 1 by describing a general type of evil behavior during armed conflicts and then proceeds to examine more narrowly the type of evils associated with sexual violence. As the author makes clear, he seeks to synthesize the prevailing theories about the nature of evil during wartime to understand how these themes might be fruitfully used to further international law objectives of protecting women during armed conflicts. He casts his net wide and surveys insights on such evil, from situational theorists like Hannah Arendt to eclectic theorists like Arne Johan Vetlesen.[5] This beginning chapter, which is the among the longest in the book (about eighty pages long), is best viewed as a kind of global literature survey of competing theoretical insights about evil during wartime, rather than Eboe-Osuji's unique contribution to the literature of international criminal law.

Chapters 2–8, which preview the various efforts to define and prosecute sexual violence offenses since the 1990s, make the most original and insightful contributions to the ongoing debates. These chapters are the ones most likely to be of interest to practitioners and scholars, especially when Eboe-Osuji makes prescriptive recommendations to fill the lacuna in the current enforcements schemes.

[1] An illustrative but not exhaustive list of book-length contributions to this literature includes KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS (1997); HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (1996); NICOLA HENRY, WAR AND RAPE: LAW, MEMORY AND JUSTICE (2011).

[2] *See* Statute of the International Tribunal for the Former Yugoslavia, Art. 5(g), SC Res. 827, annex (May 25, 1993); Statute of the International Tribunal for Rwanda, Art. 3(g), SC Res. 955, annex (Nov. 8, 1994).

[3] *See* Prosecutor v. Akayesu, No. ICTR-96-4-T, Judgment, para. 731 (Sept. 2, 1998).

[4] As William Schabas's foreword to the book observes, there is evidence that the crime of rape was proscribed in the laws of war as early as the Lieber Code during the American Civil War (p. xvi).

[5] *See, e.g.*, HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963); ARNE JOHAN VETLESEN, EVIL AND HUMAN AGENCY: UNDERSTANDING COLLECTIVE EVILDOING (2005).

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For instance, in chapter 2, he squarely addresses the problems that arise in circumstances when superiors may be held responsible for the alleged rapes perpetrated by their subordinates during armed conflict. Under current law, the superior's legal duty to intervene is triggered only when the subordinate is about to commit rape or is actually doing so. From the author's perspective, this narrow mens rea requirement on the part of a superior is likely to lead to chronic underenforcement of sexual violence offenses committed during armed conflict. In its stead, he recommends a legal duty that would require superiors to take all reasonable measures to prevent rapes by their subordinates, even in situations where no immediate danger exists of a rape taking place. Invoking existing empirical studies that compare various categories of wartime crimes, the author convincingly argues that the frequency of rape is likely to be particularly pronounced during wartime. Thus, Eboe-Osuji believes that a broader duty of due diligence on the part of superiors would be warranted.

In many respects, the author's interpretive route to his proposed solution is both novel and provocative. First, given the state of the current law, how would this new proposed mens rea standard be proven? Would the ICC Statute need to be amended by the member states? In response, he thinks that a more imaginative judicial interpretation of existing legal authority on rape might be all that is required. More specifically, he suggests that the answer might lie in the litany of accomplice liability provisions in the various tribunal statutes, such as Article 25(3)(c) of the ICC Statute. That provision provides for liability when a defendant aids and abets in the commission or attempted commission of a crime and requires that such assistance be rendered for "the purpose of facilitating the commission of such a crime."[6] So what would be the qualifying acts that bring the superior within the orbit of this statute when there is a failure to supervise subordinates properly? "[H]e has done something jointly or severally," the author insists, "to put the subordinate in the position to commit the crime—i.e. enlist, train, equip and mobilise—thence arises his duty to control their actions" (p. 137).

One of the reasons why this proposal is particularly intriguing is that one might tend to view the doctrine of superior responsibility as an alternative to the aiding-and-abetting doctrines, albeit one with a more relaxed pleading standard and evidentiary burden. In other words, one of the reasons why superior responsibility might seem easier to prosecute is that, unlike other forms of accomplice liability, it does not require that the superior assist with the subordinate's crime, but only that the superior know about such crime. But the author turns the tables on this approach by suggesting, as an alternative, that the "assistance" prong of accomplice liability might be a way of getting around the fairly stringent knowledge prong of superior responsibility doctrines. Thus, even if a superior does not necessarily know that his subordinate is committing or about to commit a crime, he may be held liable for aiding and abetting the crime of rape if he actually helped train, enlist, or mobilize the subordinate who committed the crime.

But even if a creative prosecutor manages to overcome these interpretive hurdles, might other policy concerns with expanding superior responsibility arise in the manner that the author suggests? Eboe-Osuji anticipates some of the likely objections, such as the concern that joint criminal enterprise doctrines might risk overextending the scope of international criminal liability in a manner that undermines human rights and transitional justice goals. He argues that past experience before international tribunals and domestic courts indicates that such concerns are overblown. "[E]xperience" he argues, "would suggest that international judges have been very responsible in the way they have applied the doctrine" (p. 113).

Eboe-Osuji might be correct that the doctrines might not pose a risk of misleading judges, but what about prosecutors? More specifically, one concern likely to arise among practitioners in the defense bar is whether such a broad definition of mens rea for superiors for wartime rape is likely to give criminal prosecutors an undue advantage in international criminal trials. After all, under such a rule of superior responsibility, if a wartime rape

[6] Rome Statute of the International Criminal Court, Art. 25(3)(c), July 17, 1998, 2187 UNTS 90.

is committed by a subordinate, wouldn't the burden of proof implicitly shift to the defendant—the perpetrator's superior—to show that he took all necessary precautions to prevent the subordinate from committing wartime rape?

Chapters 3–5 focus on some of the inadequacies of the definition of rape during armed conflicts. For instance, the author worries that the current definition that looks at the question of consent of the victim unwittingly puts the victim on trial by focusing the inquiry on the victim's conduct. He offers, instead, a conception of rape that relies on the broader coercive circumstances in which the sexual incident took place. For instance, it may be reasonable to infer that the victim did not consent to a sexual act if the background circumstances show either the detention of the victim by the alleged perpetrator or an ongoing genocidal campaign against the victim's group (p. 157). Chapter 4 focuses on the definitional issues that arise when rape is considered as an act of genocide and concludes that, given how genocide is construed under current law, it is unnecessary to show that a substantial part of the victim group had actually been raped, provided that the defendant had the intent to commit rape against the group. And in chapter 5, the author frets about the inadequacies of current definitions of the war crime of terrorism, which has been interpreted by various tribunals as requiring the specific intent to spread terror among a population rather than some other military objective. The concern is that, under much of the current jurisprudence, if sexual violence is committed to further ancillary objectives unrelated to spreading terror, it would be deemed a nonterrorist act. He concludes, quite convincingly, that such a narrow definition is both unnecessary and counterproductive given that the primary objective in most acts of sexual violence is the subjugation of the intended victims, while other military objectives are usually secondary.

In chapter 6, Eboe-Osuji argues against the view that grave breaches of the laws of war can only be committed during international conflicts, and he endorses the dissenting view by Judge Georges Abi-Saab in the *Tadić* case that grave breaches might be committed in both *internal* and international armed conflicts.[7] To be sure, the argument pertaining to the scope of grave breaches has clear interpretive and policy implications that are quite broad, but Eboe-Osuji shows that this argument has particular resonance for prosecuting sexual violence offenses since internal conflicts account for as many, if not more, of the incidents of sexual violence during wartime. In chapter 7, the author describes the horrors of forced marriages that occur during wartime, expresses skepticism whether an international criminal norm forbidding such marriages exists, and recommends that the international community create such a norm. Chapter 8 provides some guidance to the issue of prioritizing the prosecution of wartime sexual offenses in postconflict societies, especially when such societies face conflicting demands on their resources and time.

Chapter 9, the final substantive chapter, shifts the focus from the doctrinal issues that often plague enforcement of sexual violence crimes to the question of reparations to victims of such crimes. Here, the author canvasses the main theoretical arguments about reparations for wartime victims of crimes and ultimately concludes that "[a] fine-grained rationalization of the idea of reparation will be of no consequence if it does not assist in improving the lives of the victims in practical terms" (p. 314). He concedes that a first-best approach would be fault-based, focused on actions of the perpetrators. But he also takes on the more challenging and controversial issue of dealing with the fault of omission from those in a position to protect the victims of sexual violence, including the international community, acting severally or through multilateral organizations. He concludes that it might be reasonable to provide a remedy in tort for such victims in order to hold a multilateral organization liable for acts of omission, especially when such an organization's inaction constitutes a breach of its obligations under international law.

Finally, the author discusses the issue of nonfault-based reparations for the victims of these acts, which he recommends when the party at fault

[7] *See* Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT-94-1-AR72, pt. 4 (Oct. 2, 1995) (sep. op. Abi-Saab, J.).

is either unavailable or unable to make reparations. Of course, an underlying concern in any non-fault-based scheme would be how to define the universe of plausible victims who would be eligible to receive compensation, especially when the payer (presumably the state or the international community) might have limited resources. Eboe-Osuji recognizes this problem, and one screening device that he suggests could be employed would be to narrow the relevant category of victims by gender and focus primarily on women. Of course, such an approach is likely to be controversial, but he provides a measured response as to why such discrimination might be appropriate. "Given the fundamentally different effect that armed conflicts tend to have on women," he observes, "it will be inequitable to hold up the matter of reparation of women victims of sexual violence in armed conflicts . . ." (p. 313).

Overall, Eboe-Osuji skillfully illuminates many of the weaknesses in the present jurisprudence surrounding sexual violence, while also recognizing the significant advances made by international criminal tribunals in this area since the 1990s. The book will likely be of significant use not only to prosecutors, judges, and defense counsel who practice in the trenches of international criminal law, but also to scholars who stand to benefit from an insider's account of the various procedural, evidentiary, and doctrinal challenges that tribunals face in enforcing laws against sexual violence during armed conflict.

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