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Norm Emergence in the Cases of the Yugoslavia and Rwanda Tribunals: testing the norm life cycle and the spiral model

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1. Introduction

Before the 1990s, the issue of sexual violence in war was largely invisible. And if it was not invisible, it was trivialized or it was considered a private matter or the by-product of war.[1] Thus, historically there has been a lack of prosecution of such gender-based crimes, and as a consequence the impunity of such crimes.[2] Norms that forbid sexual violence against women in conflict situations have existed for a very long time however, already being in place during the American Civil War. Within international organizations, this norm has previously been explained in way that diminishes the actual violent act towards women, or it was not mentioned at all. The Hague Convention of 1907 and the Geneva Conventions characterized sexual violence in the context of war as an offence against "family honor and rights", as "outrages against personal dignity" or as "humiliating and degrading treatment". It was also not mentioned in the list of "grave breaches" subject to the universal obligation to prosecute under the Geneva Convention of 1949, and the Additional Protocols of 1977 named it as "humiliating and degrading treatment".[3] Moreover, it has not been addressed in international criminal tribunals before the 1990s.

After World War II, although it was well-known that sexual violence had occurred regularly, the Nuremberg trials did not address gender-based violence in their indictments.[4] The Nuremberg Tribunal failed to adequately address sexual violence as a war crime, neither in its charter or as separate offences. Although it was listed as a crime against humanity, there were no charges filed. It is sometimes thought that the reason for this, was that Allied powers were also guilty of sexual violence.[5] This connects to one of the criticisms to transitional justice systems, the issue of victor's justice.[6]

At the International Military Tribunal for the Far East in Tokyo, sexual violence was addressed in the World War II context, with some of the defendants being charged and prosecuted with rape. However, the prosecution of these crimes was only established in combination with the prosecution for other, "greater", war crimes. It is thought by scholars that this historical lack of prosecution of gender-based violence in international criminal courts and tribunals has been due to the fact that gender-based crimes in war were not considered as

[1] R. Copelon, "Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law", *McGill Law Journal* 46 (2000), 220-221.
[2] J. Campanaro, "Women, War and International Law: The Historic Treatment of Gender-based Crimes", *Georgetown Law Journal* 89 (2001), 2561-2562.
[3] Copelon, "Gender Crimes as War Crimes", 220-221.
[4] Campanaro, "Women, War and International Law", 2559-2560.
[5] Copelon, "Gender Crimes as War Crimes", 222.
[6] F. Hisakazu, "The Tokyo Trial: Humanity's Justice v Victor's Justice", in: Y. Tanaka, T.L. McCormack & G. Simpson, *Beyond Victor's Justice? The Tokyo War Crimes Trial Revised* (Leiden 2011), 3-4; 17-20.

severe as other war crimes.[7] Moreover, as stated above, sexual violence was sometimes seen as a private matter, and not as a matter of international law.[8] This could partially be explained by the fact that men have historically been on the decision-making end in international law issues.[9]

From the 1990s onwards, there has been a shift in the weight awarded to such crimes in international criminal tribunals. The Yugoslavia conflict being the first in which sexual violence against women was considered a "weapon of war", and the first to have subsequent indictments on this basis in the International Criminal Tribunal for the Former Yugoslavia. Sexual violence received this label as a "weapon of war" when it became widely known that it was being used as a means for ethnic cleansing in the Former Yugoslavia. This specific framing of certain actions transformed sexual violence from a private matter to a public and political matter, and helped to change public attitudes and foster condemnation thereof.[10]

The position taken towards sexual violence in genocide situations was followed in the subsequent International Criminal Tribunal for Rwanda. There, a landmark judgement for the consideration of sexual violence in conflict situations was given in the Akayesu case. This was the first ever judgement to recognize rape and sexual violence as constitutive acts of genocide, and broadened the definition of rape as any physical invasion of a sexual nature. Moreover, the previous failure to charge these crimes as war crimes was recognized here.[11]

With gender-based crimes being charged in these Tribunals as violations of the laws or customs of war, genocide, crimes against humanity, and grave breaches of the 1949 Geneva Convention and the 1977 Additional Protocols, the indictments represent the progression of international norms on gender-based crimes.[12] Moreover, after the judgements in these ad hoc international criminal tribunals, the norm against gender-based violence against women in conflict situations has been codified in UN Security Council Resolution 1820.[13] Finally, the Rome Statute of the International Criminal Court has brought these norms under its jurisdiction.[14] The question remains however, if these ad hoc international criminal tribunals are responsible for the emergence of the norm against gender-based violence. Thus, this thesis will attempt to answer the question: *To what extent did the norm against gender-based violence emerge through the ad hoc international criminal tribunals of Yugoslavia and Rwanda?*

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[7] Campanaro, "Women, War and International Law", 2561-2565.
[8] Copelon, "Gender Crimes as War Crimes", 220-221.
[9] G. Nelaeva, "The Impact of Transnational Advocacy Networks on the Prosecution of Wartime Rape and Sexual Violence: The Case of the ICTR", *International Social Science Review* 85 (2010), 1-4.
[10] Copelon, "Gender Crimes as War Crimes", 223.
[11] Ibid., 227.
[12] K.D. Askin, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status", *The American Journal of International Law* 93 (1999) 1, 122; 98-99.
[13] United Nations Security Council, *Resolution 1820 on Women and peace and security* (2008).
[14] Copelon, "Gender Crimes as War Crimes", 235-237.

Norm emergence in international law has been a subject of extensive interest in International Relations scholarship, and various complementary or contradictory theories have tried to explain this phenomenon. The two most frequently used theories in this respect are the theory of the norm life cycle and the spiral model. The theory of the norm life cycle explains the three phases in which a norm comes into existence. It starts with a first phase in which norm entrepreneurs start advocating a certain norm, which moves on to the second phase of a tipping point when a critical number of states accept the norm, and is finally established in the third phase when it has been internalized by states. The norm life cycle model is a macro model of a norm, meaning that it depicts the entire biography of the norm.[15] The model starts with norm emergence, consisting of advocacy by norm entrepreneurs and reaching a so-called "tipping point", and ends with its internalization and norm-compliant behavior.[16]

The spiral model, on the other hand, is a meso model of norms. This means that it focusses on a specific stage, in this case enforcement, not being the emergence stage.[17] This model gives the five stages for enforcing state compliance with human rights norms. Although the model itself doesn't aim to establish a theoretical framework for norm emergence, it can be said to do so, as it is commonly accepted in the field of international law that norm compliant behavior enables norm emergence.[18] The case studies of Yugoslavia and Rwanda will then examine if in reality norm emergence can be observed through phases of norm entrepreneurship and subsequently reaching a tipping point or through behavioral changes by states.

[15] E. Rosert "Norm emergence as agenda diffusion: Failure and success in the regulation of cluster munitions", *European Journal of International Relations* 25 (2019) 4, 1103-1105.
[16] M. Finnemore & K. Sikkink, "International Norm Dynamics and Political Change", *International Organization* 52 (1998) 4, 893-904.
[17] Rosert "Norm emergence as agenda diffusion", 1103-1105.
[18] B. Simmons, "Chapter 14: International Law", in: W. Carlsnaes, T. Risse & B. Simmons (eds.), *Handbook of International Relations* (2012), 353.

2. Literature review

There are several theories about international norm change and emergence within International Relations literature. The following section will address the two theories most commonly used to address this subject, namely the theory of the norm life cycle and the spiral model. These theories are both from the constructivist strand of International Relations theory, and were chosen because constructivism is more adequately equipped to examine change and to account for the social dynamic of international interactions. Finally, international norms will be defined here as the international standards that define the behavior expected of states and other international actors.[19]

2.1 Norm life cycle

To examine the emergence of the norm on gender-based violence in the Yugoslavia and Rwanda tribunals, the theory of the norm life cycle, as explained by Finnemore and Sikkink, will be examined below. It will provide the argument, that for a norm to emerge norm entrepreneurs have to convince states or international organizations that the norm is necessary. If the promotion of the norm is successful, a tipping point is reached, in which a critical mass of states accepts the norm. The norm life cycle model has three stages. This section will address in debt the first and second stage of the norm life cycle, which assess norm emergence.

The first stage of the norm's life cycle is the stage in which norm entrepreneurs try to convince a critical mass of states that a new norm should be accepted.[20] Various international actors can behave as norm entrepreneurs. However, the most important ones are NGOs, transnational advocacy networks and epistemic communities. These various types of international actors are often interrelated. For example an NGO can be part of a transnational advocacy network and a transnational advocacy network can also be an epistemic community.[21] Because these actors are not homogeneous in their structure and composition, the norm (that may eventually be diffused through international organizations or states) might be subject to strategic bargaining and frame disputes among members of the advocacy network before it enters the international arena.[22]

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[19] K.P. Coleman, "Locating norm diplomacy: Venue change in international norm negotiations", *European Journal of International Relations* 19 (2011) 1, 167.
[20] Finnemore & Sikkink, "International Norm Dynamics and Political Change", 893-902.
[21] S. Park, "Theorizing Norm Diffusion Within International Organizations", *International Politics* (2006), 2.
[22] M.L. Krook & J. True, "Rethinking the life cycles of international norms: The United Nations and the global promotion of gender equality", *European Journal of International Relations* 18 (2010) 1, 107-108.

The norms that are most likely to find international support and be influential in the international sphere are norms involving bodily integrity and prevention of bodily harm for vulnerable or innocent groups, especially in cases where a short causal chain assigns responsibility.[23] This follows from empirical research done by Keck and Sikkink. However, what constitutes bodily harm and who is vulnerable or innocent can be contested. The causal story here is important because it determines who is responsible or guilty.[24]

Norm entrepreneurs can have the aim to convince states to accept or internalize a new norm in this first stage. However, in some cases, norm entrepreneurs may try to socialize international organizations to accept the new norm.[25] Depending on the type of international organization, these norm entrepreneurs can use various tactics. The possible tactics to be used in processes of persuasion and socialization are information politics, symbolic politics, leverage politics or accountability politics.[26]

The choice for a certain tactic and the level of susceptibility of the international organization depends on if the international organization is open or closed. An international organization is open when it is susceptible to influence from its external environment, and it is closed when only states are involved in the decision-making process, and the decisions take place without consultation of non-state actors. When the international organization is closed, a tactic of direct socialization might be most effective. This entails an attempt to influence through for example lobbying, dialogue and persuasion, and protests or demonstrations. When the international organization is open, a process of indirect socialization is most effective. Here, norm entrepreneurs may first try to socialize member states of the international organization, who in turn socialize the international organization itself. Through these processes of socialization international organizations are influenced to take into account alternative norms.[27]

More generally, norm entrepreneurs can use a strategy of framing to call attention to or create issues. In this process they frame issues in a certain way that makes them susceptible to implementation by states and international organizations.[28] For example, norm entrepreneurs can construct their frames by being explicitly inappropriate (which can be seen either as a strategy of persuasion or of coercion),[29] as to challenge the appropriateness of the existing norm. However, they can also connect their issue to already existing normative frames. This is considered especially effective. Hereby they try to persuade international actors to

[23] Finnemore & Sikkink, "International Norm Dynamics and Political Change", 905-908.
[24] M.E. Keck & K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998), 27.
[25] Park, "Theorizing Norm Diffusion Within International Organizations", 16.
[26] Keck & Sikkink, *Activists Beyond Borders*, 16.
[27] Park, "Theorizing Norm Diffusion Within International Organizations", 15-16.
[28] Finnemore & Sikkink, "International Norm Dynamics and Political Change", 893-902.
[29] R.A. Payne, "Persuasion, Frames and Norm Construction", *European Journal of International Relations* 7 (2001) 1, 46-47.

accept their norm.[30] However, persuasion to norm acceptance is not always enough. Negotiation of the norm is also likely to take place, and contested and fluid meanings and ideas can arise during the shaping of the norm. This fluidity means that a norm's life cycle doesn't end in a fixed norm. What makes norms diffuse is that they encompass different meanings and can be used in various contexts during the full duration of their "life".[31] This persuasion or negotiation of the norm in the first stage takes place through an organizational platform, also called a "venue".[32]

These venues are not organizational platforms for particular actors, but are the institutional setting in which a variety of international actors interact.[33] They can be platforms that are created specifically for the purpose of promotion of the norm or they can be international organizations.[34] The most important dimension in the use of a venue is the content of the emerging norm and the international support for it. This is because the effectiveness of the venue depends on the membership rules, mandate, legitimacy, and output status of the venue. With regards to membership rules, it can be said that limited membership produces strong norms, while larger venues produce more ambiguous or undemanding norms. This effect however, can be mitigated by the mandate. A limited mandate (a single-issue focus) can create strong norms, while venues with multiple mandates create more potential for bargaining the norm's content.[35]

Finally, when norm entrepreneurs are successful in their promotion of the norm, a tipping point is reached, where a critical mass of states accepts the norm. Before a tipping point is reached, change can only occur when it is supported by a significant domestic movement. After the tipping point, however, countries start to adopt the new norm without domestic pressure for change. This process can be called the 'norm cascade'. It is also important here which states accept the norm, as states influence each other in the norm acceptance through a process of 'contagion'. Norm entrepreneurs, international organizations and their networks can play a role in the process of contagion by pressuring targeted actors and monitoring compliance with international standards.[36]

I argue that the tipping point itself can also be reached through an international organization. Here the level of international support, and thus, the questions of legitimacy and output status are important. Legitimacy means that the international organization is perceived by the

[30] Finnemore & Sikkink, "International Norm Dynamics and Political Change", 897-907.
[31] Krook & True, "Rethinking the life cycle of international norms", 104-108.
[32] Coleman, "Locating norm diplomacy", 167.
[33] Ibid., 164.
[34] Finnemore & Sikkink, "International Norm Dynamics and Political Change", 899; Coleman, "Locating norm diplomacy", 167.
[35] Coleman, "Locating norm diplomacy", 167-170.
[36] Finnemore & Sikkink, "International Norm Dynamics and Political Change", 893-904.

international community as the accepted negotiation venue for a particular norm.[37] The level of legitimacy depends on the independence and neutrality of the international organization.[38] A venue is perceived more legitimate if it has dealt with similar issues in the past. This connects to the question which international organization is trying to diffuse the norm, and if this is an organization that may have extensive knowledge on the subject matter, for example because it's part of an epistemic community or because it's issue-specific on the topic. Moreover, for the analogue use of the idea of a 'critical mass', I also consider the number of member states an important aspect. The more states worldwide are a member of the international organization diffusing the norm, the more legitimate the norm is.

With output status it is meant that the level of international acceptance of the norm will be higher when the output documents of the international organization are legally or politically binding.[39] I consider judgements by international criminal tribunals to be, at least politically, binding documents in the sense of output status.[40] Although the functions of these courts don't have the same precedent effect that domestic courts have, they do legitimize or delegitimize certain behavior and promote community values, and their decisions have important moral authority.[41]

The aspect of independence of the international organization is also important. Independence means that the international organization is able to, to a certain degree, act autonomously. An important aspect of this independence is that international organizations also need to be neutral. This neutrality is especially important when it comes to norm diffusion, since a neutral actor can increase the legitimacy of collective actions. Moreover, community institutions (those institutions that promote community values and norms), which courts are, have to be especially independent and neutral, as they express community policy, strengthen underlying norms, and act in the common interest. Thus, the international organization that promotes norm diffusion needs to posit a level of independence and neutrality to the extent that it is perceived as the legitimate norm diffuser by the international community.[42]

The third and final stage of the norm life cycle will not be discussed here in debt. This is the phase in which norm internalization takes place, meaning that there is no longer a broad public debate about the desirability and quality of the norm.[43]

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[37] Coleman, "Locating norm diplomacy", 168.
[38] K.W. Abbot & D. Snidal, "Why States Act through Formal International Organizations", *The Journal of Conflict Resolution* 42 (1998) 1, 4-25.
[39] Coleman, "Locating norm diplomacy", 164-170.
[40] Coleman, "Locating norm diplomacy", 164-170.
[41] Abbot & Snidal, "Why States Act through Formal International Organizations", 25.
[42] Abbot & Snidal, "Why States Act through Formal International Organizations", 4-25; Coleman, "Locating norm diplomacy", 168.
[43] Finnemore & Sikkink, "International Norm Dynamics and Political Change", 893-904.

In summary, the argument made here is that norm emergence starts with the attempt of norm entrepreneurs to convince a critical mass of states to accept the new norm.[44] Norm entrepreneurs can be transnational advocacy networks.[45] The norms that are most likely to find international support are those involving bodily integrity and the prevention of bodily harm for vulnerable or innocent groups.[46] Transnational advocacy networks might try to socialize international organizations, as well as states.[47] Here, they can use strategies of information politics, symbolic politics, leverage politics, or accountability politics.[48] If an international organization is susceptible to this socialization process depends on if it is an open or closed organization. This also determines if transnational advocacy networks will use a tactic of indirect or direct socialization.[49]

All norm entrepreneurs frame their issues.[50] The most effective way to do so is by connecting an aspiring norm to an already existing normative framework.[51] Norm entrepreneurs can promote and negotiate their norms through venues, which can be an international organization.[52] The effectiveness of the venue depends on its membership rules, mandate, legitimacy and output status.[53] Norm entrepreneurs are successful in their promotion of the norm if a tipping point is reached, where a critical mass of states accepts the norm.[54] This tipping point, again, can also take place through international organizations. In that case, the questions of legitimacy, output status and independence are again important.[55] Moreover, the number of member states of the international organization is important.

2.2 Spiral model

This section will examine the spiral model, as created by Risse, Ropp and Sikkink. The spiral model focusses on international norm socialization through five phases, with respect to human rights norms and the related changes in domestic human rights practice.[56] The following

[44] Finnemore & Sikkink, “International Norm Dynamics and Political Change”, 893-902.
[45] Park, “Theorizing Norm Diffusion Within International Organizations”, 2.
[46] Keck & Sikkink, *Activists Beyond Borders*, 27.
[47] Park, “Theorizing Norm Diffusion Within International Organizations”, 16.
[48] Keck & Sikkink, *Activists Beyond Borders*, 27.
[49] Park, “Theorizing Norm Diffusion Within International Organizations”, 15-16.
[50] Finnemore & Sikkink, “International Norm Dynamics and Political Change”, 893-902.
[51] Ibid., 897-907.
[52] Finnemore & Sikkink, “International Norm Dynamics and Political Change”, 899; Coleman, “Locating norm diplomacy”, 167.
[53] Coleman, “Locating norm diplomacy”, 167-170.
[54] Finnemore & Sikkink, “International Norm Dynamics and Political Change”, 900-902.
[55] Coleman, “Locating norm diplomacy”, 164-170; Abbot & Snidal, “Why States Act through Formal International Organizations”, 4-25.
[56] T. Risse & K. Sikkink, “Chapter 1: The socialization of international human rights norms into domestic practices: introduction”, in: T. Risse, K. Sikkink & S.C. Ropp, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press 1999), 1-5.

section will focus primarily on the first three phases of the spiral model, in which I argue a process of norm emergence can be observed.

As was stated in the introduction, the spiral model is a meso model of norms, meaning that it focusses on the specific stage of, in this case, enforcement, and not so much on the emergence of the norm.[57] However, borrowing from international legal theory, it can be said that an enforcement stage also encompasses an emergence stage. As will be further elaborated below, norms are subject to constant contradiction and contestation. This is especially the case in international law, where norms are easily established and contested.[58] For a norm to become binding in international law, states have to behave in accordance with the norm,[59] otherwise it will not become a norm at all.[60] As such, enforcement of norm-compliant behavior can enable norm emergence.

In the first phase of the spiral model there needs to be a case of repression in what will be the target state for behavioral change. Following this repression, the target state is put on the agenda of a transnational advocacy network.[61] An important aspect there is the agency of the state. The state is an agent of human actions, because human political activity takes place within its structure. Thus, the agents that are eventually being socialized are the individuals that hold office in the states' structures, because since behavior is an important aspect of norm emergence, they have to be convinced of and behave in accordance with the emergent norm.[62]

For the target state to be put on the agenda of a transitional advocacy network it is necessary that the transnational advocacy network is able to gather enough information about the state and its human rights abuses. This is most common to happen when the violation of human rights is particularly severe.[63]

Transnational advocacy networks can function as socializing agents, but international organizations can also act as such.[64] This is because they have the ability to form international agendas, and spread norms.[65] They can "teach" norms to state, by pointing out their value and

[57] Rosert "Norm emergence as agenda diffusion", 1103-1105.
[58] W. Sandholtz, "Dynamics of International Norm Change: Rules against Wartime Plunder", *European Journal of International Relations* 14 (2008) 1, 103-109.
[59] Simmons, "Chapter 14: International Law", 353.
[60] A. Wendt, "Anarchy is what states make of it: The Social Construction of Power Politics", *International Organization* 46 (1992) 2, 411-417.
[61] Risse & Sikkink, "Chapter 1: The socialization of international human rights norms into domestic practices: introduction", 12-25.
[62] T. Flockhart, "'Complex Socialization: A Framework for the Study of State Socialization", *European Journal of International Relations* 12 (2006) 1, 89-93.
[63] Risse & Sikkink, "Chapter 1: The socialization of international human rights norms into domestic practices: introduction", 22.
[64] S. Park, "Norm diffusion within international organizations: a case study of the World Bank", *Journal of International Relations and Development* 8 (2005), 119; A.P. Jakobi, "Global education policy in the making: international organizations and lifelong learning", *Globalization, Societies and Education* 7 (2009) 4, 476.
[65] Park, "Norm diffusion within international organizations", 112-113.

utility, and persuade a state to adopt a new understanding of appropriateness.[66] The international organization can do this by using a language of universality. Thus, international organizations can be the socializing agents themselves.[67]

Where the socializing agent is a transnational advocacy network, the network may try to socialize the international organization to influence behavioral change in states.[68] This socialization entails that international organizations internalize alternative norms.[69] The way in which an international organization diffuses norms through the international system is based on its identity and its social environment.[70] Transnational advocacy networks may try to change this identity to make sure that they are impacted by the international organization in the desired way.[71] As part of its social environment, transnational advocacy networks can try to socialize these international organizations by persuasion, social influence, or coercive pressure.[72] If the issue is put on the agenda the spiral moves on to phase two.[73]

In the second phase, in order to gain support in the condemnation of the target states' behavior, the advocacy network lobbies other states and international organizations. In this lobbying, they use tactics of moral persuasion – to justify the norm and entail identity-related arguments –, and shaming.[74] However, other strategies such as information, symbolic, leverage and accountability politics can also be used.[75]

The target state often responds to these pressures by entering a stage of denial, meaning it contests the validity and jurisdiction of the advocated norm. Contestation by the target state can mean either one of two things. Either, the fact that the state feels the need to publicly deny the charges means that its aware of the problem, and as such that the process of socialization is underway. Or, it can mean that the norm is still in its emergence phase and is overall internationally contested, in which case the target state engages in this contestation.[76]

Here, the transnational network needs to be adequately mobilized to enable the next phase of the spiral model.[77] This mobilization and the pressure and persuasion it exercises from

[66] M. Finnemore, "International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy", *International Organization* 47 (1993) 4, 566.
[67] Flockhart, "'Complex Socialization", 97.
[68] Park, "Norm diffusion within international organizations", 117-120.
[69] Park, "Theorizing Norm Diffusion Within International Organizations", 1-3.
[70] Park, "Norm diffusion within international organizations", 117-120.
[71] Park, "Theorizing Norm Diffusion Within International Organizations", 13-15.
[72] Park, "Norm diffusion within international organizations", 117-120.
[73] Risse & Sikkink, "Chapter 1: The socialization of international human rights norms into domestic practices: introduction", 22.
[74] Ibid., 12-25.
[75] Keck & Sikkink, *Activists Beyond Borders*, 16.
[76] Risse & Sikkink, "Chapter 1: The socialization of international human rights norms into domestic practices: introduction", 22-24.
[77] Ibid., 24.

below is most effective in a transitional society.[78] Moreover, the target state needs to be vulnerable to international pressures, and value membership of the community of liberal states.[79] Otherwise, socialization is not possible.[80] The idea of wanting to belong to a community connects to this idea of establishing identity through a framework of 'other' and 'self'/'we'. This identity is constructed by looking at the 'other', who the target state does not want to be, and what Flockhart conceptualizes as the 'significant we', which is what the target state wants to become. If the dominant in-group is considered the 'significant we', then the target state will strive to become a part of that group.[81] The same reasoning can be used for determining which norms will come into being. For norms or behavior, we can use the terms normal versus abnormal. Norms that are accepted and internalized, and thus considered 'normal', are always weighted against a prior norms or behavior that was considered 'abnormal'.[82]

The third phase of the spiral model entails that the targeted state will make some tactical concessions. It does so with the goal of diverting the international attention. Usually these tactical concessions do not entail a lasting improvement of the state's behavior. A more important feature here is the mobilization of domestic human rights activists, for whom a space in the international arena was created by the transnational advocacy network.[83]

A possible tactical concession are trials prosecuting individual human rights violators.[84] This means that individuals are held criminally accountable for human rights violations through, for example, international tribunals.[85] It is argued by some that this is ineffective in preventing future human rights abuses, because the threat of prosecution could be counterproductive in achieving transition.[86] In contrast, Kim and Sikkink, come to the conclusion that human rights trials and prosecutions have a deterring effect on human rights abuses, even when a conviction does is not established. Moreover, these prosecutions and trials have material, as well as normative effects, as that they communicate norms but also threaten with material

[78] B.A. Simmons, "Chapter 3: From ratification to compliance: quantitative evidence on the spiral model", in: T. Risse, C. Ropp & K. Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013), 56.
[79] Risse & Sikkink, "Chapter 1: The socialization of international human rights norms into domestic practices: introduction", 24.
[80] Flockhart, "'Complex Socialization", 97.
[81] Flockhart, "'Complex Socialization", 94-95.
[82] L. Hägstrom, "The 'abnormal' state: Identity, norm/exception and Japan", *European Journal of International Relations* 21 (2015) 1, 125.
[83] Risse & Sikkink, "Chapter 1: The socialization of international human rights norms into domestic practices: introduction", 25
[84] Ibid., 53.
[85] T. Risse & K. Sikkink, "Conclusions", in: T. Risse, C. Ropp & K. Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013), 281.
[86] Risse & Sikkink, "Conclusions", 282-283.

punishment.[87] As such, this may be an effective way to socialize the individuals acting through the state.

Not only do trials foster norm consistent behavior by states, it is also a mechanism for changing or creating a norm. Norms can change over time, cease to exist or acquire different meaning in different situations.[88] Because there is always a tension between norms, and between norms and behavior, norms always remain in development. This process begins with a dispute about the norm. All norms can be disputed, because of their inherently incomplete and contradictory nature. A norm cannot give the behavioral requirements for or anticipate every situation. Thus, if an act is in violation of the rule is sometimes subject to debate.[89]

When this incompleteness or contradiction is accompanied by norm violating behavior, the norm violator will try to convince the other actors in the normative structure that his explanation of the norm is the correct explanation. The best way then to create legitimacy for certain behavior, is by adhering to a precedent, which means that an analogy is drawn between a previous case and the current case. The precedent will then show what behavior was or wasn't considered acceptable in the past.[90] The outcome of the dispute can modify the norm, by making it for example, more or less specific, or broader of narrower.[91] In the international realm a small number of precedents can already establish a norm.[92] Moreover, long-term, uncontested, or even followed, norm-violating behavior can create a new norm or modify an existing one.[93]

The fourth and fifth phase of the spiral model will not be discussed in debt here, as they concern not the emergence of the norm but its final establishment, but for the sake of completeness they will be shortly addressed. The fourth phase is the prescriptive phase, in which the target state starts to use human rights norms language which means he no longer contests the norm. Finally, in the fifth phase, the norm has been internalized, and the target state acts in a norm consistent manner.[94]

In summary, the following argument was made in this section. The spiral model starts with a case of repression. Due to this repression, by target state, this target state is put on the international agenda of a transnational advocacy network.[95] Since the state can be seen as

[87] H. Kim & K. Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries", *International Studies Quarterly* 54 (2010), 940-957.
[88] Krook & True, "Rethinking the life cycle of international norms", 105-108.
[89] Sandholtz, "Dynamics of International Norm Change", 103-106.
[90] Ibid., 106-107.
[91] Ibid., 103-104.
[92] Sandholtz, "Dynamics of International Norm Change", 107.
[93] Ibid., 109.
[94] Risse & Sikkink, "Chapter 1: The socialization of international human rights norms into domestic practices: introduction", 29-33; Flockhart, "'Complex Socialization", 97-98.
[95] Risse & Sikkink, "Chapter 1: The socialization of international human rights norms into domestic practices: introduction", 12-25.

the individuals acting for the state, the transnational advocacy networks will try to socialize the individuals behind the state.[96] For the target state to be put on the international agenda it is necessary that the transnational advocacy network is able to gather enough information. This is most common to happen in cases of severe human rights violations.[97] The socializing agent can also be an international organization. In that case, the international organization has to have the ability to form international agenda's and teach norms to states.[98] If the socializing agent is a transnational advocacy network, it may try to socialize the international organization to internalize and diffuse new norms.[99]

In the second phase of the spiral international attention for the target states' behavior increases, and in order to gain support the advocacy network lobbies other states and international organizations, using primarily a tactic of moral persuasion and shaming. The target state often responds to these pressures by contesting the validity of the norm. This contestation is especially important for the emergence of a norm in the third phase of the spiral. In this third phase, the target state will make some tactical concessions as a means of diverting international attention.[100] One of the possible tactical concessions is carrying out human rights trials in which individuals are held criminally responsible for human rights violations.[101] These trials will then communication of norms.[102] The contestation on which the trials are inherently based thus enables norm emergence. Moreover, if norm-violating behavior is not contested within the normative structure at all, it can create a new norm or make an existing one disappear.[103] As such, the spiral model can be used as a model for norm emergence.

[96] Flockhart, "'Complex Socialization", 89-93.
[97] Risse & Sikkink, "Chapter 1: The socialization of international human rights norms into domestic practices: introduction", 22.
[98] Park, "Norm diffusion within international organizations", 112-119; Jakobi, "Global education policy in the making", 476; Finnemore, "International Organizations as Teachers of Norms", 566.
[99]Park, "Norm diffusion within international organizations", 117-120.
[100] Risse & Sikkink, "Chapter 1: The socialization of international human rights norms into domestic practices: introduction", 12-25.
[101] Risse & Sikkink, "Conclusions", 281.
[102] Kim & Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries", 940-941.
[103] Sandholtz, "Dynamics of International Norm Change", 103-107.

3. Research design

This thesis will examine two case-studies and test them through qualitative research against the explanations found in the literature with a method of process-tracing, to observe if norm emergence in these cases occurred. The cases examined are the international tribunals of Yugoslavia and Rwanda. These cases have been selected because they are the first two international criminal tribunals that have effectuated the norm against gender-based violence. The question, however, is if this norm has in fact been effectively established. The answer can be found in the literature on the basis of two theoretical explanations for norm emergence, namely the norm life cycle and the spiral model.

The case studies selected here are both international tribunals, that have been set up as systems of transitional justice, being legal responses to human rights violations in societies transitioning from conflict to peace.[104] These tribunals in both cases have been set up in response to human rights violations, namely genocide, during a situation of civil war. Both tribunals also addressed a norm that was previously not addressed, or at least not addressed in its own right, namely the norm against gender-based violence. However, although the Yugoslavia Tribunal consistently put gender-based violence on its agenda, this was not the main focus of the Rwandan Tribunal, especially in its earlier years.[105] Since the Tribunals differed with respect to their focus on the norm in question, the process-tracing method can help understand if a norm actually emerged in either or both Tribunals, and if so which factors are decisive. This process-tracing will be done by examining some of the observable implications that follow from the literature on norm emergence.

The theory of the norm life cycle as I've explained it in the previous section creates the following observable implications. First, there have to be *norm entrepreneurs* to *promote* a *norm*. Although not a necessary condition, the content of the promoted norm might be of influence on its promotion. The promotion can take the form of socialization or persuasion, among either states or international organizations. Second, for their promotion, norm entrepreneurs should use a *strategy of framing*, meaning they create or call attention to an issue. The most effective (but not the only) way of framing is to connect the new norm to an already existing normative framework. Besides framing the issue, norm entrepreneurs can also use strategies such as information politics, symbolic politics, leverage politics, or accountability politics. Third, the norm should be promoted trough a *venue*. This venue can be an international organization, and it can also be a site of negotiation. Depending on the venues

[104] N. Roht-Arriaza, "The new landscape of transitional justice", in: N. Roht-Arriaza & J. Mariezcurrena, *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge 2006), 1-2; R. Nagy, "Transitional Justice as Global Project: critical reflections", *Third World Quarterly* 29 (2008), 276-278.
[105] Haddad 110

membership rules, mandate, legitimacy and output status, the promotion will be more or less successful. Finally, a *tipping point* should be reached, meaning that a critical mass of states or international organizations accept the norm. If the tipping point takes place through an international organizations, the implications for assessing its effectiveness are again legitimacy and output status. Moreover, independence and the number of member states of the international organization are also important here.

The spiral model also gives some observable implications for assessing norm emergence. First, there has to be a case of *repression*, a *target state*, and a *socializing agent*. The socializing agent can be either a transnational advocacy network or an international organization. This socializing agent then puts the target state on the international agenda for its repression by gathering information about the state and its behavior. The target states' actions can also be seen as actions of the individuals holding official positions in the state structures. Second, socializing agent uses a tactic of *moral persuasion* or *shaming* to try to force the target state to comply with the norm. Third, in reaction to these tactics used by the socializing agent, the target state *contests* the norm. Contestation of a norm in international law can point to the situation where the norm has not been adequately established or will cease to exist (if enough other states also contest the norm). Fourth, after contestation, the target state makes some *tactical concessions*. It does so the regain good standing within the international community. This, however, does not yet mean that the state accepts the norm or behaves in compliance with it. The tactical concessions can be for example reparations for prior human rights violations and trials. The latter can be especially important in the context of norm emergence, as opposed to merely norm compliance, since the outcome of a trial could determine if a norm is established or not. Meant by trial in this context is a criminal trial holding individuals responsible for human rights violations.

Whether the implications set out above can be observed in the case studies will help determine which model for explaining norm emergence is most accurate. As both models give different observable implications, it might also be that both are able to explain norm emergence, but that one is able to do so in for example more specifically or that some of the observable implications are more decisive than others.

4. The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda

In 1993, the Yugoslavia Tribunal was established to address the war crimes committed during the Yugoslavia conflict, especially the genocide committed by the Serbs against Bosnian Muslims and Croatians. During this genocide, gender-based violence was widespread and was used as a weapon of war. A year later, the Rwanda Tribunal was established for the same reasons. During the Rwandan genocide there was also an excessive amount of gender-based violence, which constituted an important part of the genocide. Because the norm on gender-based violence has been largely marginalized and ignored in international law, these Tribunals were seen as the ideal institutions to create change. To examine whether they were actually able to make a norm on gender-based violence emerge, this section will examine both Tribunals and their attempts at norm diffusion through the two theoretical models of the spiral and the norm life cycle.

4.1 The norm life cycle

In this section, the observable implications that have been put forth in the research design section for norm emergence through the norm life cycle should be observed. If these observable implications are observed in these cases, it means that a new norm has emerged. To recap, the implications to be observed should be (1) norm entrepreneurs that promote a norm, (2) a strategy of framing, (3) the use of a venue, and (4) reaching a tipping point. As these case studies are only tested for norm emergence, it does not address the question if the new norm was adequately established.

Norm entrepreneurs that promote a norm

Norm entrepreneurship on the issue of gender-based violence was widespread in the context of the Yugoslavia Tribunal. When it became clear that the United Nations Security Council would establish the Yugoslavia Tribunal, coalitions of women's rights advocates urged it to make sure the Tribunal would take into account gender-based violence. The first coalition formed in this respect was the Ad Hoc Women's Coalition Against War Crimes in the Former Yugoslavia, including women's and human rights organizations such as Equality Now, Amnesty International, the Fund for Feminist Majority, Women's Action Coalition, the Center for Women's Global Leadership and the Center for Reproductive Policy and Law. Other women's rights groups, such as the International Women's Human Rights Clinic, urged the

United Nations Security Council that the establishment of the Tribunal presented an important opportunity for the recognition of gender-based violence as a violation of international law.[106]

Moreover, after its establishment, the Tribunal was urged by the transnational advocacy network to incorporate rules and procedures relating to the issues of gender-based violence, as to secure the effective investigation and prosecution thereof. As a result of these pressures, the Tribunal provided for an open rule-making process, in which transnational advocacy networks and states could provide suggestions. The final rules and procedures of the Tribunal incorporated largely a draft submission focusing on gender-based crimes drawn up by the International Women's Human Rights Law Clinic and the Harvard Law School Human Rights Program.[107] As such, the adopted rules and procedures provided for the prevention of harassment and discrimination against victims and witnesses of gender-based violence, their protection, especially through a victim and witnesses unit, and evidentiary rules for crimes of gender-based violence.[108]

Even after the actual trial work began, advocates remained involved with the Tribunal's proceedings. Various amicus curiae briefs were submitted to the Tribunal on the content of the indictments, witness protection measures, and defense conduct. The most important one for the norm on gender-based violence was already sent at the very beginning of the Tribunal's work, in a response to the Prosecutor's downplaying of gender-based violence in the case of Tadic.[109] The amicus curiae brief emphasized this failure to treat gender-based violence as an international crime.[110] With the help of one of the two elected female judges on the Tribunal, Judge Odio-Benito, a motion was accepted to address gender-based violence in the Tadic case.[111]

As much as transnational advocacy networks mobilized around the establishment of the Yugoslavia Tribunal, so little did they do the same in the case of the Rwandan Tribunal. For the first two years of the Rwandan Tribunal, it was thought that, as both Tribunals had the same Prosecutor, the same procedures and strategies would be executed.[112] However, gender-based crimes were at first absent from the indictments before the Rwandan Tribunal.[113] When this became clear, a transnational advocacy network promoting the norm of gender-based violence became involved.

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[106] H.N. Haddad, "Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals", *Human Rights Review* 12 (2011), 120-121.
[107] Haddad, "Mobilizing the Will to Prosecute", 122.
[108] Copelon, "Gender Crimes as War Crimes", 228.
[109] Haddad, "Mobilizing the Will to Prosecute", 122-123.
[110] Copelon, "Gender Crimes as War Crimes", 229.
[111] Haddad, "Mobilizing the Will to Prosecute", 122-123.
[112] Ibid., 123.
[113] Copelon, "Gender Crimes as War Crimes", 224.

Human Rights Watch was one of the first NGOs to involve itself with the issue of gender-based violence in Rwandan Tribunal. In an aim to have sexual violence incorporated in the indictments before the Rwandan Tribunal, Human Rights Watch published a report, *Shattered Lives*, describing the gender-based violence endured by Tutsi women during the genocide, and giving recommendations to the Rwandan Tribunal. These contended that the Tribunal should make more of an effort to investigate and prosecute sexual violence, that this sexual violence should be treated by the Tribunal as having the same weight and gravity as other war crimes, and that the existing indictments should be amended to incorporate sexual violence.[114]

A particularly important moment for the norm entrepreneurship of transnational advocacy networks in this context was the Akayesu case. Although in this case sexual violence was also not included in the original indictments, it became included through internal and external advocacy. The only female judge on the Tribunal, Judge Pillay, after hearing a witness who, as part of her testimony on other crimes, testified on gender-based violence, urged that the trial be postponed for the Prosecutor to be able to investigate these accusations.[115] Meanwhile, a coalition of NGOs decided to submit an amicus curiae brief[116] to the Tribunal.[117] This coalition consisted of The International Centre for Human Rights and Democratic Development, The Working Group on Engendering the Rwanda Tribunal, The International Human Rights Law Clinic, and the Center for Constitutional Rights, calling themselves the Coalition on Human Rights in Conflict Situations.[118] In the amicus curiae brief, the coalition urged the Tribunal to include sexual violence in its indictments, and to treat these crimes as just as severe as other crimes.[119]

Framing

In order to gain attention for the gender-based violence perpetrated during the Yugoslavia conflict, various actors engaging with the conflict framed the issue in certain ways. Because the Yugoslavia conflict was broadcasted largely in the media, they were a primary constructor of the frame for gender-based violence.

One frame posed by the media on gender-based violence connected the Yugoslavia conflict to the historical event of the Holocaust. This analogy with the Holocaust also extended to the so-called “rape camps” in which Bosnian women were being held. Subsequently, the advocacy

[114] Human Rights Watch/Africa Human Rights Watch Women’s Rights Project, Fédération Internationale des Ligues des Droits de l’Homme, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (USA 1996), 1-8.
[115] Haddad, “Mobilizing the Will to Prosecute”, 123-124.
[116] Invited or uninvited recommendations, arguments or advice by “friends of the court”: those who are not party to the proceedings.
[117] Copelon, “Gender Crimes as War Crimes”, 225-226.
[118] G. Nelaeva, “The Impact of Transnational Advocacy Networks”, 10; H.F. Carey & O.P. Richmond, *Mitigating Conflict: The Role of NGOs* (Portland 2003), 95.
[119] Copelon, “Gender Crimes as War Crimes”, 225-226.

for women's rights in Bosnia was compared to the resistance in World War II. By framing the issue this way, the media connected it to the European idea of "never again" when it comes to the Holocaust, pressing for international action.[120]

The amicus curiae brief in the Tadic case, however, took a more legal stance towards the Tribunal's inadequate addition for gender-based violence in the indictments. Tadic, at the time, was being transferred from German custody to the custody of the Yugoslavia Tribunal. The brief expressed the failure to address gender-based crimes by the Yugoslavia Tribunal, and stated that if the Tribunal wouldn't be able to deliver justice on this issue, it shouldn't request the extradition of Tadic from Germany. Subsequently, the brief connected the issue of gender-based violence to the idea of universal justice,[121] since justice for women would not be delivered this way.

Finally, after incorporating the issue on gender-based violence in the indictments against Tadic, the Tribunal connected the issue to an existing normative framework, namely crimes against humanity, as prohibited by the Geneva Convention. Making the Tribunal incorporate gender-based crimes in its indictments can be seen as a process of socializing by transnational advocacy networks, to enable the Tribunal to internalize the norm. Although gender-based crimes were not admitted to the list of crimes against humanity as adopted in the Statute of the Yugoslavia Tribunal, the Tribunal created its ability to prosecute such crimes by connecting them to crimes against humanity.[122]

Because media coverage was largely absent in the case of the Rwanda genocide, the framing here depended primarily on transnational advocacy networks. This framing process was done by various actors at various times, and was finally done by the Rwandan Tribunal itself, as it was socialized by the transnational advocacy network to internalize the promoted norm.

Human Rights Watch was the first to frame the act of gender-based violence during the genocide and the lack of prosecution thereof in the Rwanda Tribunal. It stated that women and girls were routinely subjected to gender-based violence during armed conflict. Although these atrocities happen in many armed conflicts, adequate attention for it by the international community was lacking. In line with this, Human Rights Watch connected the issue of gender-based violence to already existing normative frameworks, stating that there was in fact a legal basis to prosecute these crimes. This basis, they said, was formed by the international prohibitions against war crimes, crimes against humanity or acts of genocide, as provided in the Geneva Conventions and the Genocide Convention. Moreover, they stated that the Rwandan Tribunal had the jurisdiction to prosecute these crimes under these conventions and

[120] Haddad, "Mobilizing the Will to Prosecute", 126.
[121] Copelon, "Gender Crimes as War Crimes", 229.
[122] Campanaro, "Women, War and International Law", 2576-2577.

their own Statute. As such, they claim that the Tribunal must adequately investigate and prosecute these crimes, and treat them with the same gravity as other crimes that fall under these conventions and their statute.[123] However, it should be noted that sexual violence is not explicitly included in said conventions,[124] thus it would be for a judge to interpret the conventions in this manner. The amicus curiae brief framed the issue of the lack of prosecution in a similar manner to Human Rights Watch, arguing that there were grounds to add gender-based violence to the indictment.[125]

Subsequently, socialized as such by the norm entrepreneurs, the Rwanda Tribunal changed the indictments in the Akayesu case to incorporate gender-based violence. In the following prosecution of Akayesu, the Tribunal, as the norm entrepreneur, did connect its decision to an existing normative framework. However, the Rwanda Tribunal choose a different framework than was chosen by the Yugoslavia Tribunal. The Akayesu decision connected the gender-based violence to the crime of genocide. The Tribunal found that this genocide through gender-based violence rested on the fact that it was committed with the intend to destroy the Tutsi community.[126] Although this decision was widely applauded in the international community, there is significant problem with this frame. By connecting the issue of gender-based violence to the crime of genocide, Hutu women, who had also experienced sexual violence for various reasons connected to genocide, were left out of the justice system.[127]

Venue

The observable implication of the venue can be shortly addressed in the cases of the Yugoslavia and Rwanda Tribunals, as they were both set up by the same actor – the United Nations –, to address the same kind of issues, in different, albeit similar conflicts. Venues are used for the promotion of norms by norm entrepreneurs. For a venue to be successful in promoting a certain norm is dependent on various indicators, namely its membership rules, mandate, legitimacy and output status. Only membership rules and mandate will be addressed here, as the other two indicators will be examined in the next section. With regards to the membership rules, it can be said that, as the Tribunals were organizations of the United Nations, they were large venues. This indicates that they would produce more ambiguous norms. However, since the Tribunals had a limited mandate, namely the prosecution of crimes committed during the Yugoslavia and Rwanda conflicts, their focus was on a single issue, mitigating the effects of large membership.[128]

[123] Human Rights Watch, *Shattered Lives*, 1-22.
[124] Campanaro, "Women, War and International Law", 2576-2577.
[125] Carey & Richmond, *Mitigating Conflict*, 95-96.
[126] Campanaro, "Women, War and International Law", 2583-2584.
[127] D.E. Buss, "Rethinking 'Rape as a Weapon of War'", *Feminist Legal Studies* 17 (2009),
[128] Coleman, "Locating norm diplomacy", 167-170.

Tipping point

A tipping point can be reached through an international organization when it is perceived to be the legitimate diffuser of a particular norm, if it has dealt with similar issues in the past, has extensive knowledge on the issue, is issue-specific, has a large number of member states and/or if it can provide (politically) binding documents. In the case of both Tribunals, it's a given that they have extensive knowledge on the issues brought to their attention, as they are presided by judges. Moreover, they are issue-specific, in a sense that they are dealing with specific conflicts, albeit all crimes committed during that conflict. They can also be perceived to be the legitimate organization to do this, as they were set up by the United Nations, of which almost all states are members, with specifically this purpose, and although the Tribunals were ad hoc, and thus had not dealt with similar issues in the past, they were dealing with somewhat the same issues in each case. Finally, they can provide documents that are at least politically binding.[129] Although the functions of these courts don't have the same precedent effect that domestic courts have, they do legitimize or delegitimize certain behavior and promote community values, and their decisions have moral authority.[130]

As these Tribunals have roughly the same set up, it seems so far that they would produce the same tipping point. However, their judgements differed importantly with respect to defining concepts of rape and sexual violence and the connection of those definitions to the ones present in the domestic jurisdictions in the international community. As there is no definition of rape in international law, both Tribunals had the task of creating a definition, for which both looked at domestic jurisdictions. In most traditional domestic jurisdictions rape is defined as sexual intercourse without consent. This definition was followed in the Furundžija case before the Yugoslavia tribunal, albeit without the requirement of non-consent. The non-consent requirement was later added by the Yugoslavia Tribunal in the case of Kunarac, bringing it in line with the traditional definition. In the Akayesu case before the Rwandan Tribunal, however, judges choose not to follow what they saw in national jurisdictions, but instead focused on the requirement of violence and aggression. This is a more modern approach to which many domestic jurisdictions have now reformed their laws.[131] However, the Yugoslav Tribunal produced a lot more successful convictions than the Rwandan Tribunal. Where 92% of the indictments on gender-based violence before the Yugoslavia Tribunal resulted in successful convictions, this was the case for only 25% of such cases before the Rwanda Tribunal.[132]

Thus if we take the tipping point to be an explanation that connects to increasingly accepted modern conceptions of the norm by a significant number of states within the international

[129] Coleman, "Locating norm diplomacy", 164-170.
[130] Abbot & Snidal, "Why States Act through Formal International Organizations", 25.
[131] C. Eboe-Osuji, "Rape as genocide: some questions arising", *Journal of Genocide Research* 9 (2007) 2, 251-256.
[132] Haddad, "Mobilizing the Will to Prosecute", 117-118.

community, the tipping point is provided by the Rwandan Tribunal and not the Yugoslavia Tribunal. Although the Yugoslavia Tribunal provided a traditional definition that at the time seemed to be followed by the most states, states have increasingly been amending their national laws to fit the Akayesu decision, thus making that norms the one to be followed by the mass of states. However, if we find the number of successful convictions to be an implication for reaching the tipping point, the Yugoslavia Tribunal was more successful in promoting the norm on gender-based violence.

Analysis and conclusion

In this case study, both cases were able to follow the steps of the norm life cycle. However, the Yugoslavia Tribunal seems to provide the stronger case for norm emergence. This follows primarily from the fact that it has provided more convictions than the Rwanda Tribunal, and moreover, although the Rwanda tribunals legal definition of rape is more common today, this was not the case when the Akayesu judgement was given. Thus, at the time the Rwanda Tribunal did not follow the definition of most states while the Yugoslavia Tribunal did connect its judgement to the opinion of the international community. This implicates that connecting an issue to the common ideas of the international community is an important factor for norm emergence.

Moreover, the Rwanda Tribunal's framing of the issue under the normative framework of genocide, did not provide a universal norm for gender-based violence in conflict situations. Under the interpretation of the Rwanda Tribunal, women are only protected against such crimes if they are part of a certain targeted group. Women who are not part of this targeted group fall outside of the scope of the norm.

By judging that the norm emerged primarily from the Yugoslavia Tribunal, there is also an implication for the theory of the norm life cycle. It seems that the main difference between the Tribunals was early advocacy for incorporation of gender-based violence in the Tribunals' proceedings. It could well be that the lack of early norm entrepreneurship in the case of the Rwanda Tribunal led to the lower amount of successful convictions. This would imply that advocacy is the primary requirement for norm emergence.

4.2 The spiral model

This section will address the observable implications of the spiral model and test them against the two cases. If these observable implications are seen in these cases, it means that norm-consistent behavior, and thus norm emergence can be observed. The observable implications for the spiral model are (1) repression, target state and a socializing agent, (2) tactic of moral persuasion or shaming, (3) contestation, and (4) tactical concessions.

Repression, target state and a socializing agent

In both cases of the Yugoslavia and Rwanda Tribunal we can clearly see the repression and the target state. Both conflicts consisted of genocide, which is the (human rights) issue which socializing agents have tried to bring to international attention. The target states than, are Yugoslavia and Rwanda. Although this section will show some of the advocacy directed against the states, the main focus is the advocacy directed towards the international organizations, the Yugoslavia and Rwanda Tribunal, in an attempt by transnational advocacy networks to socialize these organizations to diffuse the preferred norm. Subsequently, these organizations became socializing agents themselves.

A critical requirement for being able to put the target state on the international agenda, is for the socializing agent to be able to gather enough information about the target and the repression. The gender-based violence during the Yugoslavia conflict was widely broadcasted in international media, and followed the outbreak of mass rapes shortly and lasted for almost the entire duration of the conflict. The media reports ranged from calls to intervene to stop the gender-based violence, to testimonials of survivors thereof, framing gender-based violence as a weapon of war, and more related issues. Documents were also released by Amnesty International, and the broad range of popular information sparked the mobilization of advocacy groups on the issue of gender-based violence.[133]

The transnational advocacy networks engaged in demonstrations through vigils outside of the United Nations, protests by marching against widespread sexual violence in Bosnia, and fund-raising to send volunteers to the affected areas. Moreover, they created pamphlets with the contact information of high United Nations officials with the call to contact them to advocate the faith of the female victims in Bosnia.[134]

While the widespread media coverage of the Bosnian situation helped to focus attention on gender-based crimes in conflict,[135] the media coverage of the gender-based violence committed during the Rwandan genocide was much more scarce, even though sexual violence was even more widespread in this case. Media coverage of the gender-based violence committed during the Rwandan genocide only sparked when children of rape started to be born, and discussed the gender-based violence through that context. Moreover, although Amnesty International provided a vast range of documents during the Rwandan genocide, none of these addressed the issues of sexual violence in the conflict. It is possible that this lack of coverage was due to the fact that the conflict was taking place in Africa, where conflicts arise more frequently than in Europe, where the Yugoslavia conflict was taking place. Either

[133] Haddad, “Mobilizing the Will to Prosecute”, 125-126.
[134] Ibid., 120-121.
[135] Human Rights Watch, *Shattered Lives*, 19.

way, the lack of media attention for the gender-based nature of the genocide caused a failure to mobilize early advocacy on the issue in the context of Rwanda and prevented the spread of awareness about the issue.[136]

As elaborated in the previous chapter, the Yugoslavia Tribunal was socialized to diffuse the norm on gender-based violence. As such, it became a socializing agent itself. In its aim to prosecute the crimes of gender-based violence, however, the information for the Tribunal was more scarce. Bosnian Muslim women who had experienced sexual violence found themselves in a culture where they were now dishonored.[137] As a result, they feared that if they were to testify to the atrocities committed against them, they would be ostracized in their families and communities.[138] However, the Yugoslavia Tribunal's rules and procedures were sensitive to gender issues, enabling the Tribunal to prosecute such crimes. These rules and procedures protected the safety and integrity of the witnesses, which made them feel safe, and encouraged them to come forward with their stories.[139]

The Rwandan Tribunal dealt with the same issues of scarce witness testimonies as the Yugoslavia Tribunal. Here too, witnesses were reluctant to come forward due to the repercussions they might face as a result of their testimony. Although the Rwandan Tribunal had the same Prosecutor and procedural rules, its focus was not on the prosecution of gender-based crimes. Moreover, it didn't follow the procedural rules for dealing with victims of sexual violence as closely as the Yugoslavia Tribunal. There even have been instances where witnesses were misled by the Prosecutor in order to give their testimony.[140] The fact that the convictions on gender-based violence before the Rwanda Tribunal were much lower than those before the Yugoslavia Tribunal could indicate that, besides the lack of focus, there just wasn't sufficient evidence to charge the crimes, as witnesses were relucted to come forward in such an environment.

Tactic of moral persuasion or shaming

In the context of the Yugoslavia conflict, both tactics of moral persuasion and shaming were carried out. The tactic of shaming was directed mostly towards the target state and the international organizations, and states that would be able to intervene in the conflict. This shaming took place during the demonstrations and protests concerning the conflict. One example of such shaming was done through the distribution of stickers in the form of stop signs with the text "RAPE" on them. The moral persuasion on the Yugoslavia conflict was directed

[136] Haddad, "Mobilizing the Will to Prosecute", 117-127.
[137] L. Sarlach, "Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda", *New Political Science* 22 (2000) 1, 96.
[138] Campanaro, "Women, War and International Law, 2571.
[139] Campanaro, "Women, War and International Law, 2574.
[140] Haddad, "Mobilizing the Will to Prosecute", 116.

more specifically towards the Yugoslavia Tribunal. As such, the letter sent to the Secretary-General of the United Nations by the International Women's Human Rights Clinic stated that the establishment of the Yugoslavia Tribunal presented the perfect opportunity to address the historical lack of attention for the prosecution of sexual violence under international law.[141] Moreover, the amicus curiae brief expressed that prosecuting sexual violence in the Yugoslavia context could finally amount to the recognition of universal justice.[142] By way of this, socializing agents were able to socialize the Yugoslavia Tribunal into diffusing the norm on gender-based violence.

As there was no such widespread advocacy in the case of the Rwandan genocide before the establishment of the Rwanda Tribunal, the tactics of shaming and moral persuasion were directed primarily at socializing the Tribunal. With a tactic of shaming, the report produced by Human Rights Watch stated that the goal of the Hutu's during the genocide was "the destruction of the Tutsi as a group", and that the Hutu's "therefore bear responsibility for these abuses."[143] Moreover, with regards to morally persuading the Rwanda Tribunal to try crimes of gender-based violence, the report stated that "the Tribunal must ensure that the issue of violence against women is treated with the same gravity as other crimes against humanity within its jurisdiction".[144] The report also gave countless testimonies of female survivors of the Rwandan genocide.[145] Finally, the amicus curiae brief that was submitted to the Tribunal stated that the Tribunal had a responsibility to amend its indictments to include gender-based violence.[146]

Contestation

The contestation of repression committed by the state has been widespread in the case of the Yugoslavia conflict. In general, the genocide is framed by Serbs in a way in which they are the victims, and that the Muslims committed the atrocities of genocide themselves, within their own ethnic group. If atrocities are admitted, they are admitted as an act of self-defense. Moreover, one of the key figures in the conflict and (previously) accused under the Yugoslavia Tribunal, Slobodan Milosevic, has been honored in the Serbian parliament, even after his death. Accompanying this, is that many of the accused before the Yugoslavia Tribunal were viewed as wrongly accused war 'heroes'.[147]

[141] Ibid., 121.
[142] Copelon, "Gender Crimes as War Crimes, 229.
[143] Human Rights Watch, *Shattered* Lives, 2.
[144] Ibid., 8.
[145] Ibid., 27-41.
[146] Carey & Richmond, *Mitigating Conflict*, 95-96.
[147] S.P. Ramet, "The denial syndrome and its consequences: Serbian political culture since 2000", *Communist and Post-Communist Studies* 40 (2007), 47-53.

With regards to the gender-based violence committed during the genocide, Serbian leaders content that no instructions from higher up were given to commit this violence,[148] even though it has been widely accepted that genocide through gender-based violence was an official policy during the conflict.[149] Moreover, besides denying the official nature of the gender-based violence, some government officials even deny that this violence happened at all. As such, Bosnian-Serb led media have also announced that, after investigation, none of the rape accusations made by Bosnian Muslim women turned out to be true. This latter claim was made even after the Yugoslavia Tribunal had issued its indictments.[150]

Contestation can lead to norm consistent behavior, and thus in the international sphere, to norm emergence.[151] This happens through the tactical concessions made, especially if these concessions are trials. However, in this case contestation remained prevalent throughout the trial period, meaning that the outcomes thereof are not perceived as legitimate, but as trials against falsely accused 'heroes'.

For the case of Rwanda, no such contestation can be found. The country has even implemented laws in 2003 that criminalize the denial of the genocide. Although the Rwandan government has also been using these laws as a way of preventing free speech on the issue of genocide, the implementation of these laws does show that no contestation of the repression or the criminality thereof has been posed by Rwanda.[152]

Tactical concessions

The Rwandan government made various tactical concessions following the genocide. They agreed to the Rwanda Tribunal, and prosecuted genocide through their domestic judicial system and local gacaca courts.

During the Rwandan Tribunal state officials of various ranks, for example Jean-Paul Akayesu who was the mayor of the Taba commune, and Pauline Nyiramasuhuko, who was the minister of family and women's affairs,[153] were held criminally responsible for gender-based crimes in the context of the genocide. Thus, the aim here is to socialize the state through its actors. However, charging these crimes was not the main focus of the Rwanda Tribunal, and witness protection procedures designed to provide for adequate prosecution of these crimes were often ignored. Moreover, after providing the landmark Akayesu decisions, the Rwanda

[148] Sarlach, "Rape as Genocide", 97.
[149] Campanaro, "Women, War and International Law, 2570.
[150] Sarlach, "Rape as Genocide", 97
[151] Sandholtz, "Dynamics of International Norm Change", 103-109.
[152] Y. Jansen, "Denying Genocide or Denying Free Speech? A Case Study of the Application of Rwanda's Genocide Denial Laws", *Northwestern Journal of International Human Rights* 12 (2014) 2, 192.
[153] Sarlach, "Rape as Genocide", 101.

Tribunal did not produce many other convictions relevant to gender-based crimes.[154] The aim of a trial as a tactical concession is to deter further human rights abuses. Although convictions are not necessary for the aim of deterring future violations,[155] the sheer impunity of gender-based crimes in the Rwanda Tribunal could lead to a sense of impunity for such crimes, making the deterrence effect of the Tribunal questionable.

However, the fact that the tactical concession made by the government was unsuccessful doesn't necessarily mean that the concession itself was not genuine. It seems to me that it is possible that a state makes an inadequate tactical concession, albeit still believes the norm to be valid and believes that behavior in accordance with the norm is desirable, thus adding to norm emergence. In the case of Rwanda, the will to provide norm compliance follows from the conduct in local and community courts.

The gacaca courts are traditional community courts, and were being used by the Rwandan government to relieve some of the burden off the domestic judicial system. With regards to the use of domestic (or community) courts in conflict situations, some concerns have been raised, namely that there may still be some religious or ethnic bias among the community court staff, as leftover of the conflict, and that it's questionable if community courts, in their prosecution of international crimes, are able to maintain standards of international human rights law. Moreover, specifically for women, it's questionable if a community court, having a traditional view on gender, could try crimes against women without being discriminatory.

Gender-based crimes in Rwanda in the domestic courts were first considered crimes of the same severity as for example common theft. Due to advocacy by women parliamentarians, however, the crime of rape during genocide was uplifted to the level of most severe offences. This shows the will of the state, who again has been socialized by advocacy, to not only adhere to the calls of women for justice, but also to practically try these crimes as serious offenses. Although the domestic courts in Rwanda have had trouble to adequately prosecute gender-based crimes,[156] the incorporation of such crimes into the enumeration of the most severe crimes provides for the idea that the state does seem to agree with the legitimacy of the norm.

Although this change has an important moral and normative implications, the downside of this is that the gacaca courts are only equipped to address the less serious crimes. By increasing the legal severity of gender-based crimes, they can no longer be tried in the gacaca courts, but the domestic courts were too overwhelmed.[157] Thus, again the tactical concessions – both the concession to try genocide crimes in local and community courts, and the

[154] Haddad, "Mobilizing the Will to Prosecute", 115-116.
[155] Kim & Sikkink, "Explaining the Deterrence Effect", 940-958.
[156] Human Rights Watch, *Shattered Lives*, 4-5.
[157] E. Rehn & E. Johnson Sirleaf, "Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building", *United Nations Development Fund for Women* (2002), 100-101.

concession to increase the legal severity of gender based crimes – were ineffective. However, they do show the will of the state to act in a norm compliant manner and, as norm compliant behavior can lead to the amendment of existing norms or the rise of new norms, to norm emergence.[158]

This was different in the case of the former Yugoslavia. After the partition of the country into (the in this case relevant) countries of Serbia, Bosnia Herzegovina and Croatia, the perpetrators (Serbs) and victims (Bosnian Muslims and to some extent Croatians) of the gender-based violence were not part of the same domesticity anymore. Thus, trials in domestic courts in Bosnia are not tactical concessions made by the target state, as the target state that carried out the repression was Serbia. However, some form of domestic justice was set up in Bosnia Herzegovina that also included Bosnian-Serbs.

The judicial system in Bosnia Herzegovina was divided into State Courts and Entity Courts, of which the Entity Courts were mandated to try the sensitive cases, and the State Courts were mandated to try the 'very sensitive' cases, among which are the rapes committed during the genocide. The State Courts have a special division for war crimes, and in their approach they follow the conduct of the Yugoslavia Tribunal closely.[159] However, the domestic court has not been especially successful in its prosecution of gender-based crimes due to staff and budget constraints. Moreover, the disadvantages of trying war crimes in domestic courts as named above, turned out to be the true for the Bosnian State Courts. There have been cases of corruption, ethnical bias, and a lack of fair trial.[160]

The Yugoslavia Tribunal has been more adequate in diffusing the norm on gender-based violence. Substantial numbers of indictments have included an accusation of gender-based violence, and these levels have been sustained throughout the Tribunal's mandate. This has resulted in a large number of successful convictions, meaning that the convictions have also withstood appeal. This is especially important, because when a decision is overturned on appeal this usually speaks to inadequate evidence or legal foundations, meaning that the Yugoslavia Tribunal has provided a strong legal basis for the incorporation of gender-based crimes. Moreover, the Tribunal was the first international judicial body to carry out a trial based solely on sexual violence. In the Foca cases, the Prosecutor choose to construct the case on this basis and this basis only, to provide for new legal grounds on which such crimes could be prosecuted.[161] These indictments were the first in the history of international law to prosecute

[158] Sandholtz, "Dynamics of International Norm Change", 103-109.
[159] Y. Ronen, "Bosnia and Herzegovina: The Interaction Between the ICTY and Domestic Courts in Adjudicating International Crimes", *DOMAC* 8 (2011), 16-38.
[160] C. Ginn, "Ensuring the Effective Prosecution of Sexually Violent Crimes in the Bosnian War Crimes Chamber: Applying Lessons from the ICTY", *Emory International Law Review* 27 (2013) 1, 590-594.
[161] Haddad, "Mobilizing the Will to Prosecute", 112-115.

rape as a crime against humanity on its own, without it being indicted in conjunction with other war crimes.[162]

As such, it seems that at least one of the tactical concessions made in the Yugoslavia case has been successful in diffusing the norm on gender-based violence. During its trials, the Yugoslavia Tribunal acted as a socializing agent for the norm on gender-based violence, not only with the goal of changing the target states' behavior, but by setting (for the first time) a precedent for the international community that sexual violence committed during conflict could be tried independently from other war crimes, thus amounting to the same severity as these other crimes.

Analysis and conclusion

Here too, the Yugoslavia Tribunal can be seen to have set the most powerful norm on gender-based violence. It seems here that some factors of the theory create a stronger case than others. For the Yugoslavia conflict, information was much wider spread than for the Rwanda conflict, thus enabling activists to start socializing the international organization already before it was established, in its early stages and throughout its existence. Socialization of the Rwandan Tribunal, however, only started years after the Tribunal was set up. As such, transnational advocacy networks were only on rare occasions able to socialize the Tribunal into focusing on norms of gender-based violence. It seems that as a result of this ability of socializing agents to continuously socialize the Yugoslavia Tribunal into focusing on gender-based violence, the Tribunal also produced stronger norms on gender-based violence.

Moreover, the observable implication of contestation seems of lesser importance in the context of international tribunals. Contestation of the accusation has been widespread in Serbia. However, this did not obstruct the Yugoslavia Tribunal to produce the norms on gender-based violence. As such, the Tribunal set a precedent that can be appealed to whether a state argues the existence of the norm or preferred behavior, or not. The Rwandan Tribunal, however, provided only a small amount of such precedents, even though the state does not deny the genocide, and even acknowledges the committed atrocities through its own legal system. Thus, it seems that contestation is not a necessary variable for norm emergence (or maybe even norm consistent behavior) when there is an international tribunal involved.

[162] Campanaro, "Women, War and International Law, 2580.

5. Case study analysis

The previous section has discussed the debate in the literature on norm emergence by examining the cases of the Yugoslavia and Rwanda Tribunal with the use of the model of the norm life cycle and the spiral model. Following these case studies it can be said that the most effective model for assessing norm emergence in these cases has been the spiral model.

Both cases could easily follow the stages of the norm life cycle. However, it still followed from both models that the Yugoslavia Tribunal was more effective in diffusing the norm on gender-based violence. The norm life cycle doesn't account for this difference in effectiveness. I believe the main indicator for this difference is the amount of information available to a norm entrepreneur or socializing agent, which is an indicator given in the spiral model. An adequate amount of information seems to be critical for the emergence of a norm. As seen in the case of the Rwanda tribunal, a lack of information caused a lack of mobilization of advocacy networks, and ended in limited advancement of the norm on gender-based violence. Taking a closer look at the norm life cycle theory, it is noticeably that the theory doesn't explain where the norm entrepreneurship comes from. Where or how did these norm entrepreneurs obtain the idea that a certain norm should be incorporated in international law? The answer, I argue, can be found in the spiral model, through the indication of information in the process of a socializing agent targeting a repressive state. It follows from the case studies, that if information is adequately diffused, socializing agents are able to put the issue on the international agenda. If there is no information on certain undesirable behavior by states, advocacy on the issue will not be activated.

Although I consider the spiral model to be the adequate answer for norm emergence, there are some notes to be made on this model as well, albeit they do not constitute limitations of the model as is the case with the norm life cycle model. First, the tipping point considered in the norm life cycle model seems to be a good indicator of international opinion on a certain norm. As stated before, behavior and norm emergence are closely related in the field of international law, and I argue that adding some form of tipping point to the spiral model could strengthen the model itself. The advocacy in the spiral model is directed at socializing non-violating states and international organizations to agree that the target state is in violation of international norms. However, if other states don't care about the violations or are in disagreement over if there is a violation at all, the socialization fails and a norm will not emerge. Thus, it can be important here as well to assess if, after socialization efforts, a critical mass of states considers the behavior of the target state to be a violation. As such, it can be assessed if the socialization was successful or not.

Second, contestation doesn't seem to be an important constituting factor of norm emergence in the context of international tribunals. As stated above, the difference in

contestation between the two cases didn't provide for weaker norm emergence. Even more so, the tactical concessions of the contesting state created stronger norms than those of the non-contesting state. Moreover, even if a state continues to contest the norm after its emergence, it is still bound by the precedent set by the international court, thus its contestation won't sort a lot of effect.

6. Conclusion

This thesis set out to examine the theories on norm emergence and to consider which one is more likely to be effective. Although International Relations literature devotes a lot of attention to the advocacy by transnational advocacy networks and norm entrepreneurs in the process of norm emergence, this cannot be considered the most important factor constituting norm emergence. As it follows from this thesis, information gathering is a much more important indicator for norm emergence than was previously thought. Without information, norm advocacy might come too late or be too limited, and the norm might emerge in a weaker manner than it could have or it might not emerge at all. Thus, I argue that the spiral model, although originally created for assessing norm compliant behavior, is the more effective model for assessing norm emergence in my case studies.

This can be seen from these cases specifically. These cases had similar conflicts, with similar objectives and violations, and similar institutions were established to address the violations. As norm advocacy on the Yugoslavia conflict was swift and continuously, we can assume that, had the norm entrepreneurs known about the issues in Rwanda, they would have acted in the same manner. However, they did not react to the Rwanda conflict until years after the establishment of the Rwanda Tribunal, simply because there was no information available on the conflict and its gender-based violence. This also implicates that a lot of power comes to international media to present such atrocities and mobilize advocacy. Following research could possibly focus on this influence of media in the decision of which norms emerge and which do not.

It should be noted, however, that this thesis has only addressed norm emergence in the context of international criminal tribunals, albeit ones that are similar in scope and issues, and that the characteristic of being an international criminal tribunal also played a crucial role in the assessment of some of the observable implications. Thus, this thesis is not constitutive for the full range of possibilities of norm emergence in international law, nor for the outcome were a different kind of international organization assessed or a different kind of conflict. Norms can emerge in many ways in international law, and emergences through international criminal tribunals is only one of them. Other ways of norm emergence may unveil other shortcomings in the employed theories, or the theories may be an even better fit for assessing norm emergence in a different context. However, this thesis does show how a seemingly marginalized or non-existent norm of international law can gain broad international attention through a specific type of international organization functioning as a norm promotor or diffuser. As such, finally, it can be concluded that international organizations can function as important vessels for norm emergence.

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