

Defining Gender-Related Crimes Against Humanity Under the Statute of the International Criminal Court

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Introduction

Although article 7 of the Statute of the International Criminal Court (ICC) is an imperfect product of complex negotiations, it is generally hailed as a progressive text that denotes a significant step in the development of effective international criminal law. A unique accomplishment of this Statute is the express recognition that a broad diversity of sexual and gender-based crimes constitute crimes against humanity.

The negotiations at the Rome Conference were clearly influenced by the reports of heinous gender violence in the Balkan conflict and Rwanda, and the relevant indictments and emerging jurisprudence of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).¹ The general progress

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1 The first judgment of the ICTR that addressed gender-related crimes was delivered after the Conference. See *Prosecutor v Jean-Paul Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 Sept. 1998.

achieved in the United Nations system on women's rights and gender-related violence also contributed to a momentum for the Statute to embody references to gender-based crimes in line with recent developments.

Article 7 attends to gender-related crimes in three respects: first, the most prominent feature is paragraph 1 (g) that contains the most extensive list to date of sexual violence constituting crimes against humanity; the second is the incorporation of 'gender' among the grounds of persecution in paragraph 1 (h); and the third is the special reference to women in defining the crime of enslavement in paragraph 2 (c).²

Before addressing the first aspect, it is important to recall the hard-fought definition of the term 'gender' for the purposes of the Statute where it first appears in article 7: "the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above".³ This is compromise language that ultimately accommodated the concerns of both those aspiring to preclude any interpretation of the term that encompassed sexual orientation and those in favour of a definition that embodied biological as well as sociological characteristics — i.e. the roles of men and women in society.⁴

Crimes of Sexual Violence

Paragraph 1 (g) of article 7 enumerates the crimes of sexual violence as "rape, sexual slavery, enforced prostitution, forced pregnancy,

2 The focus is on crimes that reflect a gender-based element in their definition. Thus, issues such as sexual violence connected to the crime of torture are not discussed.

3 Article 7 (3).

4 For an account of the difficult negotiations on this issue, see C. Steains, 'Gender Issues' in R.S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results*, The Hague/London/Boston, Kluwer, 1999, 357-390 at 372-375.

enforced sterilization, or any other form of sexual violence of comparable gravity". For the first time in history, sexual violence crimes other than rape are explicitly recognized in an international instrument as crimes against humanity.⁵ The negotiation of this provision (as well as the corresponding provisions under war crimes)⁶ did not present major difficulties. However, the crime of forced pregnancy engendered disputes from conservative groups that were only resolved after protracted informal consultations entailed a definition of the term declaring the inclusion of this crime in the Statute is without prejudice to national legislation on abortion.⁷

The other crimes of sexual violence are not defined in the Statute nor did such definitions exist in any international legal instrument to guide the negotiators of the Elements of Crimes (EoC). However, both the ICTY and the ICTR have addressed the issue of sexual violence and rendered significant judgments that shall influence the work of the ICC. In the historic precedents of *Akayesu* and *Furundzija*, the ICTR and ICTY respectively articulated new definitions of rape that focus on two essential factors: (a) the physical invasion of a sexual nature and (b) the fact that the act is committed by coercion or force.⁸ The corresponding provision of the

5 Rape was included in the list of crimes against humanity in the Control Council Law No.10 Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity (10 Dec. 1945) (3 Official Gazette of the Control Council for Germany 50, art. II. 1 (c)), the ICTY Statute (UN Doc. S/25704, annex(1993), art. 5 (g)) and the ICTR Statute (SC Res. 955 (1994), annex, art. 3 (g)).

6 Art. 8 (2) (b) (xxii) and (e) (vi).

7 The definition of the term in article 7 (2) (f) reads as follows: " 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy". For an analysis of the negotiations on this issue, see Steains, *op. cit.*, at 365-369.

8 *Akayesu* Judgment, *supra* note 1, para 598 and *Prosecutor v Anto Furundzija*, Judgment, Case No. IT-95-17/1-T, 10 Dec. 1998, para 185. For

EoC integrated these factors with clarifications, such as that coercion is not limited to displays of physical force as it may encompass threats and psychological oppression.⁹ The issue of sexual slavery was addressed in the *Kunarac, Kovac* and *Vukovic* case where the ICTY established a notable precedent in convicting the defendants of enslavement for conduct that embraced, inter alia, sexual violence.¹⁰

As regards the residual clause of other forms of grave sexual violence, the ICTR in the *Akayesu* case identified sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact”.¹¹ The ICTY issued a similar pronouncement in the *Furundzija* case.¹² However, the corresponding provision in the EoC only expressly reflects the first part of the above definition (i.e., it does not refer to the fact that sexual violence is not limited to physical invasion of the body).¹³

An important aspect of the relevant decisions of the ad hoc Tribunals is the recognition that non-physical perpetrators of sexual violence also incur individual criminal responsibility for these acts. An illustration is the sexual violence attributed to Tadic and Akayesu that they had not physically committed but had aided and

a more detailed analysis of the ad hoc Tribunals’ definition of rape, see M. Karayiannakes, ‘The Definition of Rape and Its Characterization as an Act of Genocide – A Review of the Jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia’, 12 *Leiden Journal of International Law* (1999) 479-490, at 481-485.

9 UN Doc. PCNICC/2000/INF/3/Add.2 (2000), art. 7 (1)(g) –1: Crime against humanity of rape. See also the *Kunarac, Kovac* and *Vukovic* case, where the ICTY emphasized the non-consensual aspect of the act (*Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23 and IT-96-23/1, Judgment, 22 Feb. 2001, paras. 457-460).

10 Ibid, paras 745 and 782.

11 *Akayesu* Judgment, supra note 1, para. 688.

12 *Furundzija* Judgment, supra note 8, para. 186.

13 Supra note 9, art. 7 (1)(g) –6: Crime against humanity of sexual violence.

abetted the commission of these crimes with, *inter alia*, their knowing presence, verbal encouragement and sending a clear sign of official tolerance for sexual violence (the ICTR found that Akayesu had even ordered subordinates to sexually abuse, rape and murder Tutsi women).¹⁴ It is beyond the scope of this paper to scrutinize the Tribunals' analysis on the various concepts of participation in sexual violence crimes.¹⁵ Suffice it to say, in light of the Statute's provision on individual criminal responsibility (article 25) it is reasonably expected that the Court will consult this jurisprudence.

It is noteworthy that the Statute and EoC utilize gender-neutral language to describe the crimes of sexual violence (obviously with the exception of forced pregnancy). The terminology recognises that males may also be victims of sexual crimes, even though the vast majority are perpetrated against females. Conversely, the general preconception that perpetrators of these violent crimes are male is challenged by reminders that women may also incur criminal responsibility for such brutality. One patent reminder of this reality is the ICTR indictment of Pauline Nyiramasuhuko on charges that include rape, enforced prostitution and indecent assault.¹⁶

In the context of sexual violence, the Rules of Procedure and Evidence (RPE) are designed to abate the victim's trauma in trials and avert harmful attacks on their sexual history or credibility. The Statute replicates the pattern of the ICTY and ICTR¹⁷ in elaborating

14 *Prosecutor v Dusko Tadic*, Opinion and Judgment, Case No. IT-94-I-T, 7 May 1997, paras 689 and 730; and Akayesu Judgment, *supra* note 1, paras 452 and 692-694.

15 For an analysis on this concept, refer to literature such as P. Viseur Sellers, 'The Context of Sexual Violence: Sexual Violence as Violation of International Humanitarian law', in G.K. McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, vol. I, The Hague/London/Boston, Kluwer, 2000, 263-332, esp. 321-330.

16 See Press Release ICTR/INFO-9-2-196 (11 Aug. 1999).

17 See Rule 96 of the Rules of Procedure and Evidence of the ICTY, Rev. 18, and Rule 96 of the Rules of Procedure and Evidence of the ICTR.

specific evidentiary rules for such cases. Thus, Rule 70 of the RPE¹⁸ stipulates the following principles of evidence to apply in cases of sexual violence :

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking an advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent ;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent ;
- (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual offence ;
- (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

The last element is reinforced by Rule 71 that prohibits the admission of evidence on the prior or subsequent sexual conduct of a victim or witness. Moreover, Rule 72 imparts a special procedure for the situation when the defence intends to introduce or elicit evidence of the victim's consent to acts of sexual violence. The Chamber shall conduct *in camera* proceedings to determine the relevance or admissibility of such evidence, weighing its probative value and the rights of the victim and those of the accused. In performing this task, the Chamber must be guided by the above principles.

The corresponding Rules of the ad hoc Tribunals engage stronger language in explicitly precluding the defence of consent if coercive circumstances for the victim are proved. Before evidence of consent is admitted, the accused must "satisfy the Trial Chamber *in camera* that the evidence is relevant and credible". This higher

18 UN Doc. PCNICC/2000/INF/3/Add. 1 (2000).

standard affords greater protection to victims than the requirement for the ICC to consider whether the evidence “has a sufficient degree of probative value” and the prejudice it may cause.¹⁹ Nevertheless, it remains to be seen how the ICC will interpret and apply Rules 70 to 72 in practice. The Rules of the ad hoc Tribunals further provide that no corroboration of the victim’s testimony is required in cases of sexual assault.²⁰ As the RPE of the ICC are silent on this point, it may be inferred that no corroboration is required. This inference prevails in the case for victims of *any* crime as illustrated by the ICTY in the *Tadic* case.²¹

Other positive features of the Statute are the procedural protections for victims and witnesses of sexual violence that incorporate the experience of the ad hoc Tribunals. First, article 68 (1) requires the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses with special regard to relevant factors such as their gender and whether the crime involves sexual or gender violence. Victims of sexual violence are availed by paragraph 2 of this article that entitles the Chambers of the Court to conduct any part of the proceedings *in camera* and present evidence by electronic or other special means. An exception is thus established to the principle of public hearings, unless the Court orders otherwise (especially when the victim or witness wishes to testify in public). Second, the Statute establishes a Victims and Witnesses Unit within the ICC Registry (article 43 (6)) and requires the appointment of staff with expertise in trauma related to sex crimes. The Unit shall also provide protective measures and security arrangements, counselling and other appropriate assistance. Third, the Statute

19 See Rule 96 (ii) and (iii) for both Tribunals. It is worth noting that the first version of the Rule adopted by the ICTY totally barred consent as a defence. See K. Fitzgerald, ‘Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults under International Law’, 8 *European Journal of International Law* (1997) 638-663, at 639-646.

20 Rule 96 (i) for both Tribunals.

21 *Tadic* Judgment, *supra* note 14, paras 535-539.

requires the presence of legal expertise on gender violence amongst the bench, and the staff in the Prosecutor's Office and the Registry (articles 36 (8) and 44 respectively). Further, a provision instructs the Prosecutor to appoint advisers with legal expertise, inter alia, on sexual and gender violence (article 42 (9)).

The prosecution of sex crimes is greatly facilitated by the Statute not requiring a nexus between crimes against humanity and an armed conflict, and this is correctly regarded as an important achievement of the Rome Conference.²² In theory, the Court can prosecute sexual violence as crimes against humanity when the violence is committed in peacetime as part of a widespread or systematic attack targeting a civilian population. I am slightly apprehensive, however, as to the prospect of this materializing in practice. Clearly, the provision on crimes of sexual violence evolved against the backdrop of atrocities that occurred during the armed conflicts in the Balkans and Rwanda, and that were considered to constitute both war crimes and crimes against humanity. In fact, the definition of sexual violence crimes was negotiated in the context of war crimes and then transposed to article 7. In my view, few negotiators envisaged the provision on crimes against humanity applying to sexual violence perpetrated in peacetime. This perspective is not really an issue for the crime of rape as the criteria for rendering this act a crime against humanity are likely to be met only in the context of an armed conflict. However, enforced sterilization is a phenomenon in regions of the world devoid of armed conflict that is occurring in such a manner as to potentially fulfil the chapeau requirements of article 7. Assuming there were no other jurisdictional problems, can we expect the Court to consider indicting those responsible?

22 Refer to D. Robinson, "Defining 'Crimes against Humanity' at the Rome Conference", 93 *American Journal of International Law* (1999) 43-57, at 46.

Persecution on the Basis of Gender

The second category of gender-related crimes against humanity pursuant to the ICC Statute has express reference to gender persecution. Paragraph 1 (h) of article 7 is the first provision in an international instrument that lists gender explicitly as a ground of persecution constituting a crime against humanity. The international community has thus finally recognized that persecution on this discriminatory ground has legal parity as a crime against humanity with persecution on political, racial or religious grounds — the traditional grounds encapsulated in the Nuremberg Charter as well as the Statutes of the ad hoc Tribunals.²³ The Court will not have the benefit of much prior international jurisprudence on this gender perspective of persecution. However, it is noteworthy that the Trial Chamber in the *Tadic* case recognized that rape may constitute a persecutory act.²⁴ Furthermore, the Court indicted Gagovic in the *Foca* case for persecution on political, racial and/or religious grounds pertaining to the living conditions in a civilian detention center that included the sexual assault of Muslim females²⁵ -his death entailed discontinuation of the case.

Persecution is defined in article 7 (2) (g) of the ICC Statute as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”. However, article 7 (1) (h) criminalizes persecution only if it is committed in connection with any inhumane act enumerated in article 7 (1) or any crime within the jurisdiction of the Court. This

23 Charter for the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of Major War Criminals, London, 8 Aug. 1945, 82 UNTS 280, art. 6 (c) ; ICTY Statute, supra note 5, art. 5 (h) ; ICTR Statute, supra note 5, art. 3 (h).

24 *Tadic* Judgment, supra note 14, para 703. See also K. D. Askin, “Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status”, 93 *AJIL* (1999) 97-123, at 105.

25 *Prosecutor v Dragan Gagonic and others* (“Foca”), Case No. IT-96-23-1, Indictment, 26 June 1996, Count 29.

prerequisite is the result of the compromise that ensued in Rome between, on the one hand, those delegations wishing to exclude a broad criminalization of all discriminatory practices by including a ‘connection’ requirement as adopted in the Nuremberg and Tokyo Charters and, on the other hand, those delegations favouring the model of the Statutes of the Tribunals where there is no such restriction. The limiting provision on ‘connection’ indicates that persecution can be established when the act itself does not constitute a crime against humanity. Persecution is legally recognised pursuant to the Statute as long as it is proved that any of the inhumane acts specified in article 7 (1) were committed as persecutory acts, even if they do not meet the threshold of the chapeau. However, this ‘connection’ requirement means the Statute does not capture all discriminatory practices against women that could be defined as persecution and characterized as a widespread or systematic attacks directed against a civilian population. For instance, totally depriving women of the right to education or the right to work would not seem to qualify as a crime against humanity under the Statute.

Enslavement

Enslavement is a well-established crime against humanity recognised in the Nuremberg and Tokyo Charters,²⁶ Control Council Law No.10,²⁷ and the Statutes of the ad hoc Tribunals.²⁸ The drafters of the ICC Statute infused the traditional concept of slavery with new legal boundaries to define enslavement in article 7 (2) (c) as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, *in particular women and children*” (emphasis

26 Supra note 23, art. 6 (c) and article 5 (c) respectively.

27 Supra note 5, art. II (1) (c).

28 ICTY Statute, supra note 5, art. 5 (c) ; ICTR Statute, supra note 5, art. 3 (c).

added). The special emphasis on trafficking in women and children is a novel addition and a positive development in light of the escalating occurrence of this crime in recent years. As the EoC do not illuminate this aspect of enslavement²⁹, the Court's development of the definition may be assisted by the recent adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children that supplements the United Nations Convention against Transnational Organized Crime.³⁰

The ICTY in the *Kunarac, Kovac and Vukovic* case enumerated the factors to consider for determining whether enslavement was committed and these encompass the "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour".³¹

To conclude, it is submitted that the ICC is equipped with adequate and modern tools for the prosecution of gender-related crimes against humanity. It is hoped that the Court, with the support of the international community, will live up to the expectations of the victims of such crimes.

29 Supra note 9, art. 7 (1) (c) : Crime against humanity of enslavement.

30 UN Doc. A/55/383/2000.

31 *Kunarac, Kovac and Vukovic* Judgment, supra note 9, para 543.