Gender-Related Violence and International Criminal Law and Justice

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Gender-related Violence and International Criminal Law and Justice

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1. Introduction

The treatment of gender-related violence within ICL is inextricably tied up with the recognition of women’s rights as human rights, and the growing jurisprudence recognizing violence against women in non-armed conflict situations as human rights violations. Following from the Third World Conference on Women in Nairobi in 1985 women’s NGOs campaigned to have gender-based acts of violence against women recognized as abuses of human rights, a goal that was achieved at the Vienna World Conference on Human Rights in 1993. That Conference was held against the backdrop of the ‘massive, organized and systematic detention and rape of women’ that were being committed only a few miles away in Bosnia-Herzegovina. Just weeks before the Vienna Conference the SC, acting under Chapter VII of the UN Charter, had agreed to establish the ICTY with jurisdiction over war crimes, crimes against humanity and genocide in the Former Yugoslavia. In turn the Vienna Conference affirmed that:

Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.

One such effective response is accountability through the prosecution of such crimes by international criminal tribunals, the ICTY, ICTR, ICC and SCSL. If such crimes were not included in the jurisdiction of the international criminal tribunals there would be a promise of impunity at the international level and an implication of their triviality compared with ‘real’ war crimes and crimes against humanity.

This essay discusses the development of a jurisprudence and practice around gender-related crimes of violence since the establishment of the ad hoc tribunals and the extent to which ICL can deliver justice for women.

2. The Meaning of ‘Gender-related’ Violence

A preliminary question is the meaning of this expression. The UN Committee on the Elimination of Discrimination against Women (CEDAW) defined gender-based violence against women as ‘violence that is directed against a woman because she

is a woman or that affects women disproportionately. 'Disproportionately' means that such forms of violence are committed most frequently, although not exclusively, against members of one sex, or have different consequences for women and men. CEDAW was explicitly referring to violence against women, but gender-based crimes can also be committed disproportionately against men, as in the massacre of Muslim boys and men by Bosnian Serbs at Srebrenica in 1995. Although offences such as rape, sexual slavery, sexual violence, forcible sterilization and trafficking can be, and are, perpetrated against men as well as women, they remain primarily directed at women because they are women and may have gender-specific consequences such as pregnancy, HIV/AIDS that may be transmitted to children, and specific bodily harms. Many gendered crimes are also sexualized and stigma and shame are particularly gendered consequences of sexual violence: women survivors may face social rejection or be regarded as unmarriageable within their own society while men may endure different forms of humiliation, isolation and rejection. It is not a question of asserting that either women or men suffer greater or lesser harm but of identifying gender-specific harms (through their level of incidence or forms of injury) and ensuring that the law is responsive to them.

Nevertheless it is gender-related crimes against women that have become the major focus of discussion and analysis in the jurisprudence of the ICTY and ICTR, perhaps because earlier jurisprudence was largely lacking. Historically, while it has long been accepted that crimes of sexual violence are contrary to the laws of war and customary international law, the applicable treaty provisions were limited and, until the advent of the ad hoc criminal tribunals, jurisprudence explicitly directed at sexual assaults was underdeveloped and under-theorized at the international level. Indeed the prevailing silence about such crimes made them the 'forgotten' crimes of international law.

3. The Statutes of the ICTY and the ICTR

An important step in enhancing the visibility of gender-related crimes of violence was their inclusion within the jurisdiction of the international criminal tribunals. Unlike the IMT Charter, the ICTYSt. and ICTRSt. specified rape as a crime against humanity. The GCs had articulated the need for the protection of women against attacks on their honour, but did not identify sexual abuse as gendered violence that must be prohibited, or as a grave breach. The ICTYSt., following Geneva, also did not explicitly include rape or other forms of sexual violence as a grave breach in Art. 2, nor as a violation of the laws and customs of war in Art. 3. However, Art. 4 ICTRSt.

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4 Although evidence was given of rape of women in Tadić (IT-94-1) it was sexual violence and mutilation of men that was the subject of indictment and conviction.
6 Furundžija (IT-95-17), TJ, 10 December 1998, § 168.
8 Art. 5(g) ICTYSt.; Art. 3(g) ICTRSt.
9 Art. 27 GCIV; Art. 76(1) API (omits 'honour' but requires that women are the object of 'special respect'); Art. 4(2)(c) AP II.
included ‘[o]utrages upon personal dignity, in particular humiliating and degrading
treatment, rape, enforced prostitution and any form of indecent assault’ as violations
of the GCs, Common Article 3.

4. The Statute of the ICC

Women’s NGOs (notably the Women’s Caucus for Gender Justice in the ICC) cam­
paigned for even wider inclusion of gender-related crimes of violence in the Rome
Statute. Their success is shown by the listing of ‘Rape, sexual slavery, enforced prosti-
tution, forced pregnancy, enforced sterilization, or any other form of sexual violence of
comparable gravity’ as crimes against humanity (Art. 7(1)(g)); as serious violations of
the laws and customs applicable in international armed conflict (Art. 8(b)(xxii)); and
in non-international armed conflict (Art. 8(e)(vi)). In addition, unlike the IMT Charter
and the ICTY St. and ICTR St., which limited persecution as a crime against humanity
to political, racial and religious grounds, Art. 7(1)(h) includes persecution on gender
grounds within this rubric. However other gender-based violent crimes are not within
the jurisdiction of the ICC St., for example trafficking in women and girls, unless it is
brought within the rubric of enslavement or sexual slavery (Art. 7(2)(c) ICC St.). The
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women
and Children Supplementing the United Nations Convention against Transnational
Organized Crime, 2000 defines trafficking (Art. 3) and requires states to criminalize it
(Art. 5), but does not determine it as an international crime.

The ICC St. made major advances in the legal recognition of gender-related violent
crimes. It also recognized the importance of gender-balance in the Court’s personnel,
in particular requiring states to take into account the need for ‘a fair representation of
female and male judges’.10

Nevertheless two issues remain problematic. First, the definition of gender was
highly controversial at Rome. Art. 7(3) defines ‘gender’ to be understood as ‘the two
sexes, male and female, within the context of society’. It clarifies that it ‘does not indi-
cate any meaning different from the above’. This definition refers primarily to the bio-
logical differences between women and men rather than an understanding of ‘gender’
as the ascribed, social and cultural nature of distinctions between women and men,
although the final clause allows some reference to social context. This has the effect of
excluding issues of sexuality from the definition.

The second definitional concern relates to forced pregnancy. Forced pregnancy
is the only offence that is committed exclusively against women. It comprises two
separate violent acts, forcible impregnation, that is rape, and the forced carrying
of the foetus through to birth, through detention and denial of access to abortion.
Art. 7(2)(f) ICC St. denotes forced pregnancy as a crime against humanity only where
there is the ‘intent of affecting the ethnic composition of any population or carrying
out other grave violations of international law’. The reasons restricting the crime in
this way relate to religious objections to abortion, as is made clear by the rider that
the definition ‘shall not in any way be interpreted as affecting national laws relating to
pregnancy’. Nowhere else is an additional intent or motive required for an offence to
constitute a crime against humanity. Forcing a woman to bear a child constitutes a
very particular denial of a woman’s autonomy and bodily integrity, with lifelong impli-
cations. Yet the continuing insistence, in particular by religious leaders, that control

10 Art. 36(8)(a)(iii).
is maintained over women's reproductive capacity has subjugated gender identity to
ethnic identity or other international law imperatives.

5. ICTY and ICTR Jurisprudence

Inclusion of gender-related violent crimes within the jurisdiction of international tri-
bunals is a significant way of breaking the traditional silence around them. However,
there must also be effective prosecution of accused persons, requiring both appropriate
procedures and legal interpretations that take account of women's lived experiences
of the crimes committed against them. The appointment by the first ICTY prosecutor,
Richard Goldstone of a specialist in gender ensured indictments of sexual abuse, both
as the central focus of the trial (Furundžija11 and Kunarac12) and in conjunction with
other crimes. In the ICTR the indictment was amended in the first case, Akayesu,13
some months into the trial and on the insistence of a woman judge to include sexual
violence as a crime against humanity and as an instrument of genocide. Women's
experiences in the conflict in Sierra Leone exposed yet another form of gender-related
violence, forced marriage. The Prosecutor unsuccessfully sought to have forced mar-
riage included in the Civil Defence Case but succeeded in the consolidated indictments
against the Armed Forces Revolutionary Council (AFRC) and Revolutionary United
Front (RUF). The Prosecutor argued that the 'bush wife' phenomenon—the capture of
women who were then 'married', forced to have sex with their abductors and to bear
children—was not adequately captured by offences such as rape or enslavement. The
late indictment of forced marriage as a crime against humanity (under the rubric of
'other inhumane acts', Art. 2(i) SCSLSt.) shows that there can be no complacency that
the totality of women's experiences in armed conflict and genocide is captured by exist-
ning offences; rather there must be ongoing vigilance to ensure that women are able to
speak of what has happened to them and a readiness to adapt indictments accordingly.

A sizeable body of jurisprudence has now developed whereby rape and other forms
of sexual violence have been recognized as constituting torture14 and enslavement15 as
crimes against humanity; as a self-standing crime against humanity; as a war crime;16
and as constituting genocide.17 There is perhaps an inevitable tendency to focus on rape
but sexual violence has many manifestations, including 'forced nudity, forced steril-
ization or experimentation, sexual mutilation, sexual threats'.18 The ICTY has asserted
that ICL 'embraces all serious abuses of a sexual nature inflicted upon the physical and
moral integrity of a person by means of coercion, threat of force or intimidation in a
way that is degrading and humiliating for the victim's dignity'.19 Further, the bases
of liability for crimes of sexual violence have been extended to include commanders,
those instigating or encouraging acts of sexual violence and perpetrators acting in a

11 Furundžija (IT-95-17), TJ, 10 December 1998.
14 'Violence suffered by Cecez in the form of rape was inflicted upon her by Delić because she is a
woman...this represents a form of discrimination which constitutes a prohibited purpose for the offence of
torture.' Delalić and others (IT-96-21), TJ, 16 November 1998, § 495–496.
16 Furundžija (IT-95-17), TJ, 10 December 1998, § 172.
17 Sexual violence and mutilation were recognized as an 'integral part of the process of destruction specif-
ically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the
Tutsi group as a whole.' Akayesu (ICTR-96-4), TJ, 2 September 1998, § 731.
19 Furundžija (IT-95-17), TJ, 10 December 1998, § 186.
common or joint purpose or enterprise. The legal trajectory of these developments cannot be explored here but some of the concerns that underlie thinking about the definition of the core crime of rape illustrate the continuing conceptual obstacles to ensuring the full inclusion of gender-related violence into ICL.

6. The Problem of Definition

When the ad hoc tribunals commenced their work there was no definition of rape or other sexual offences under international law and no accepted applicable general principles. Accordingly the tribunals have had to articulate the relevant principles while taking care to balance the rights of the accused and the need to ensure the delivery of justice to women survivors. Where there is dissonance between survivors’ perceptions of the offence that has been committed against them and the law’s verdict on this point, the impunity granted means that justice is not delivered and the law ceases to have relevance as an instrument of protection or of punishment. It must be remembered that this is precisely what happens in rape trials in many national jurisdictions where there are higher rates of acquittal than for other offences. Such impunity is often based upon myths about male and female sexuality that inform decisions about rape. Consent is an especially controversial issue as it confronts many prejudices about women’s behaviour and, of course, offers a complete defence.

7. The Question of Coercion and Consent

The differing definitions of rape within the ad hoc tribunals fluctuate between concern about whether the victim has given consent and recognition of the desperate circumstances women find themselves in during armed conflict. In Akayesu the ICTR TC captured the essence of rape as a crime against humanity as a physical, bodily invasion committed in coercive circumstances.\(^\text{20}\) The TC pointed out that ‘[l]ike torture, rape is used for … intimidation, degradation, humiliation, discrimination, punishment’.\(^\text{21}\) This understanding goes to the heart of the sexual violence experienced by women in armed conflict or genocide by clarifying that any concept of implied consent is inapplicable in such a coercive environment. A woman may not protest or fight against sexual violence because of fear for herself or another person. Coercion is inherent in the presence of armed militia and those committing genocide, mass killings and rapes. Since this is a quite different context from that of most rape trials in domestic law, the international law definition might be expected to be less restrictive than that within national jurisdictions. The Akayesu definition was accepted by the ICTY in Delalić,\(^\text{22}\) and ICTR in Musema.\(^\text{23}\) However in Kunarac the ICTY emphasized the victim’s sexual autonomy and personal integrity rather than the inherent horror of the surrounding circumstances. It adopted the Furundžija so-called ‘body part’ approach (vaginal or anus penetration by the penis or other object, or oral penetration by the penis) but added that:

Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The mens rea is the intention.

\(^{20}\) Akayesu (ICTR-96-4), TJ, 2 September 1998, § 598.
\(^{21}\) Akayesu (ICTR-96-4), TJ, 2 September 1998, § 597, 598.
\(^{22}\) Delalić and others (IT-96-21), TJ, 16 November 1998, § 479.
\(^{23}\) Musema (ICTR-96-33), TJ, 27 January 2000, § 965.
to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.24

The TC thus brought into the definition the victim’s consent and the perpetrator’s knowledge of it, matters that were not raised in the Akayesu approach. The AC approved this definition, but added that customary international law does not require the victim to resist for this would be ‘absurd on the facts’.25 Reference to ‘surrounding circumstances’ contextualizes sexual violence, as in Kunarac itself where Muslim women were detained in de facto military headquarters and were regarded as the sexual prey of their captors. The TC found it not credible that Kunarac was ‘confused’ by the motives of witness DB who had taken an active part in sexual intercourse with him because, she testified, she had been threatened by a subordinate that she would be killed if she did not do so.26 Despite the willingness of the TC to view the facts realistically from the victims’ perspective, the issue of consent had been introduced.

In Gacumbitsi the Prosecutor asked the ICTR appellate chamber to clarify the elements of rape as a crime against humanity.27 The AC affirmed the Kunarac requirement of non-consent as part of the mens rea of rape but specified that the prosecution can prove non-consent ‘beyond a reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible’. This means the prosecutor need not bring in evidence of the victim’s behaviour nor her relationship to the accused as the Tribunal may infer non-consent from circumstances such as genocide or detention. Rule 96 RPE of the ad hoc tribunals determines when evidence of consent is admissible. The AC also clarified that although one witness had known her perpetrator previously this did not prevent her rape being part of a widespread or systematic attack, for the genocide in Rwanda was characterized ‘in significant part by neighbours killing and raping neighbours’.28 The ICC Elements of Crimes, Art. 7(i)(g) also combines an itemization of bodily parts with recognition of coercive circumstances or environment but places greater emphasis on coercion and force than on the victim’s autonomy, sexual integrity and lack of consent.

8. Conclusions

Gender-related crimes of violence have become more visible since the Nuremberg and Tokyo trials and the ad hoc criminal tribunals have struggled with difficult definitional questions. They have also shown that gender-related violence is public, structural, and inherent to the aims of conflicting parties, including to terrorize the population. It is not the random or the personal acts of individuals that can be distanced from the broader picture of conflict or genocide. In 2008, the Security Council in effect endorsed the legal developments of the international criminal courts by noting in its Resolution 1820 on women, peace and security that rape and other forms of sexual violence can constitute a war crime, a crime against humanity or be a constitutive act of genocide. The council also recognised the nature of sexual violence in armed conflict and its propensity to exacerbate conflict and impede efforts at peace.

Nevertheless a number of practical, logistic and social concerns remain. First, it remains the case that indictments may omit gender-related crimes and subsequent

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24 Kunarac (IT-96-23 and IT-96-23/1), TJ, 22 February 2001, § 460.
25 Kunarac (IT-96-23 and IT-96-23/1), AI, 12 June 2001, § 128.
26 Kunarac (IT-96-23 and IT-96-23/1), TJ, 22 February 2001, § 645.
27 Gacumbitsi (ICTR-2001-64), AI, 7 July 2006, § 147–60.
28 Gacumbitsi (ICTR-2001-64), AI, 7 July 2006, § 103.
amendments may not be agreed. It is important that prosecutions before the ICC include such crimes from the outset lest they become invisible in that Court.

Second, testifying about painful and traumatic events is not easy for many witnesses, women or men. It may be especially difficult to speak of sexual offences because of fear of stigma and social ostracism, although some survivors wish to tell of the atrocities. Court proceedings inhibit witnesses from telling their stories in their own words and impose their own realities. There is also the fear of violent reprisal, heightened where perpetrators and survivors come from the same locale. Gender sensitive investigation, interviewing, and preparing those who are prepared to testify to do so are all essential, as are real and effective measures to ensure their physical safety before, during and after any court proceedings. This obligation must fall primarily on the state but international tribunals share some of the responsibility. Judges must ensure that defence lawyers are not allowed to resurrect gendered stereotypes to impugn the reliability or integrity of women judges, prosecutors and witnesses in repetition of the myths and prejudices about women's sexuality that have haunted domestic legal systems.

Third, emphasis upon women as victims of sexual violence defines women through their sexuality and depicts them primarily as victims of international crimes rather than as autonomous actors for change. It may also obscure the many other gender-specific ways in which women experience international crimes, for example disappearances of male family members and the destruction of property and food sources creating physical dangers for women, the primary care-givers who must seek shelter and supplies for family members. It fails to address why other gender-related crimes, such as honour killings and female infanticide are not elevated to the status of international crimes and why other crimes flourish post-conflict, for example the enormous increase of trafficking in women and children.

Finally, focus upon specific crimes excludes broader enquiry into the motives for such crimes and fails to ask important questions: why is it that crimes of sexual violence against women are consistently committed in armed conflict and non-conflict situations? What is the proper response of ICL to the gross inequalities of power that makes their commission so regular? Why does violence against women not stop when a cease-fire or negotiated settlement is achieved but continues in ways directly connected with conflict? Further progress in delivery of justice to women requires such questions to be asked and seriously examined.


C. Chinkin, 'Rape and Sexual Abuse of Women in International Law', 5 EJIL (1994) 326.


