

A Critical Appraisal of the Criminalisation and Prosecution of Sexual Violence under
International Criminal Law

Research Paper submitted in partial fulfilment of the degree of Masters of Laws: Transnational
Criminal Justice and Crime Prevention

By

Brenda Akia

Student Number: 3101487

Prepared Under the Supervision of

Prof Dr Gerhard Werle

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UNIVERSITY *of the*
WESTERN CAPE

Faculty of Law

University of the Western Cape

Declaration

I declare that 'A Critical Appraisal of the Criminalisation and Prosecution of Sexual Violence under International Criminal Law' is my own work, that it has not been submitted before any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Brenda Akia

Signature:

Date:



Dedication

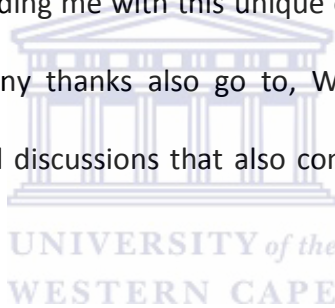
This thesis is dedicated to my late parents who have always believed in me and continue to silently inspire me. This thesis is also dedicated to women who are victims of sexual violence.



Acknowledgment

My sincere appreciation goes to the Almighty God for having given me the strength and grace to undertake and successfully complete this research work. Special thanks go to my supervisor, Prof Dr Gerhard Werle for all his immense contribution and support that guided me through this research. Thank you Prof Dr Werle.

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List of Abbreviations

AIDS	Acquired Immuno Deficiency Syndrome
CAR	Central African Republic
CCL No. 10	Control Council Law Number 10
DRC	Democratic Republic of Congo
EoC	Elements of Crime of the ICC
HIV	Human Immuno-deficiency Virus
ICC	International Criminal Court
ICTY	United Nations International Criminal Tribunal for the Former Yugoslavia
ICTR	United Nations International Criminal Tribunal for Rwanda
RPE	Rules of Procedure and Evidence
MLC	Mouvement de Liberation du Congo

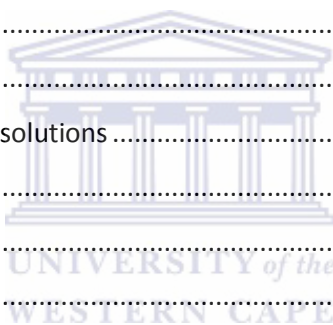


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Chapter One

1.1 Abstract

Sexual violence leaves the victims psychologically traumatised and stigmatised in the eyes of its community. Used on a large scale, sexual violence can destabilise a society as a whole and when used during armed conflicts, it serves as a powerful weapon against members of a community. During armed conflicts, sexual violence is widespread and systematically used as a tool of war and this makes sexual violence amount to crimes against humanity, genocide and war crimes. This research paper critically analyses and evaluates sexual violence as an international crime, as well as its prosecution under international criminal law mainly by the International Criminal Court (hereafter ICC), International Criminal Tribunal for the Former Yugoslavia (hereafter ICTY) and International Criminal Tribunal for Rwanda (hereafter ICTR). It discusses the problem of selectivity that can be observed in prosecuting sexual violence that has in fact, left many victims of sexual violence dissatisfied. By doing so, it analyses the law as it is to determine whether the law applied during sexual violence prosecutions is sufficient. The paper also states recommendations that can contribute to the effective prosecution of sexual crimes under international criminal law.

1.2 Key Words

Critical Appraisal

Sexual Violence

Sex Crimes

Prosecution

Selectivity

Armed Conflict

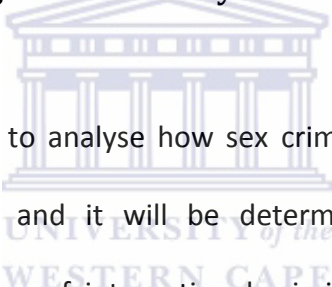
Victims

International Criminal Law

International Criminal Court

International Criminal Tribunals

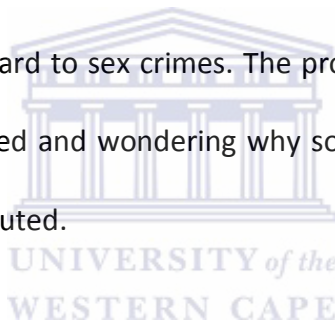
1.3 Research Questions and Objectives of Study



The aim of this research paper is to analyse how sex crimes are dealt with and prosecuted under international criminal law and it will be determined whether sexual violence is sufficiently covered under the rules of international criminal law and the ICC Statute. This research paper also aims at investigating the problem of selectivity in the practise of prosecuting sex crimes under international criminal law, as it is not clear, at least at a glance why certain sex crimes are prosecuted and others are not and why some accused are indicted for sex crimes and why others are not. The research questions are therefore: How are sex crimes dealt with under international criminal law? How does selectivity affect the prosecution of sex crimes by the ICC and how best can sex crimes be dealt with by the ICC and international criminal law?

1.4 Significance of the Study

This research paper first and foremost, adds to current legal literature written on sex crimes committed against women owing to the fact that sex crimes are now explicitly mentioned under Article 7 (Crimes against Humanity) and Article 8 (War Crimes) of the ICC Statute. It also adds on to the legal debate and critic of the international criminal courts and tribunals, how they deal with sexual violence prosecutions and their contributions to current jurisprudence of sexual violence. This research paper contributes to developing an understanding of the selective prosecution by the ICC and the international criminal tribunals of the ICTY and ICTR (hereafter ad hoc tribunals) in regard to sex crimes. The problem of selectivity is controversial and leaves many victims dissatisfied and wondering why some individuals are not prosecuted for sex crimes as others are prosecuted.



1.5 Research Methodology

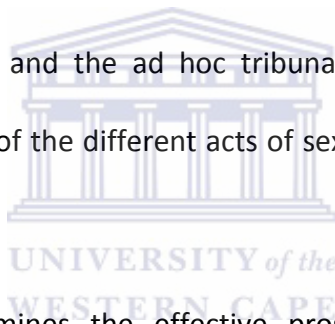
The research paper study will be library based. The study will be based on scholarly literature written on sexual violence, relevant international statutory documents, such as the Rome Statute, Elements of Crime of the ICC, the Rules and Procedure of the ICC, ICTY, and ICTR Statutes. Case law, legal articles and journals will also be used.

1.6 Scope of Study

This research limits itself to prosecution of sex crimes committed against women under international criminal law.

1.7 Preliminary Structure

This study is stratified in five chapters. The first chapter provides the context in which the study is carried out, the focus, objectives, significance of the study as well as the research methodology. Chapter two will deal with the phenomenon of the use of sexual violence in armed conflicts looking at the background to the use of sexual violence as a tool of war. It will discuss the development, criminalisation and prosecution from the Second World War until today and states the definition of sexual violence as defined in the Elements of Crime of the ICC. Chapter three focuses on the substantive law of sexual violence as an international crime, discussing how different the ICC and the ad hoc tribunals prosecute sexual violence. This chapter will discuss the elements of the different acts of sexual violence as provided for in the Elements of Crime of the ICC.



Chapter four analyses and examines the effective prosecution of sexual crimes under international criminal law examining both the achievements, challenges or shortcomings that hinder the effective facing prosecution of sex crimes before the ICC and ad hoc tribunals. Chapter five acknowledges the efforts of the ICC and ad hoc tribunals in prosecuting sexual violence but goes ahead to give recommendations that can facilitate effective prosecution of sexual violence under international criminal law. This chapter ends with concluding remarks.

Chapter Two

Historical Background to the Prosecution of Sexual Violence as an International Crime

2.1. Historical Background

During the Second World War, sexual violence was used on a large scale by German soldiers against women in the occupied territories and in retaliation, the Russian soldiers raped German women for the acts of rape committed by German soldiers against the Russian women.¹ During this period, rape was seen as a natural result of conflict used to humiliate the enemy, terrorise the population and as a symbolic act to demonstrate victory over the enemy. Sexual violence was also used as part of the military machinery to fuel the fighting soldiers and as a useful tool for destroying lives.² During World War II, Japanese troops sexually enslaved and abducted women as 'comfort women' to boost morale and for entertainment.³ Rape was believed by military commanders to be a well-deserved award after battle and a chance to relax and ease tensions.⁴

¹ De Brouwer, L. M. Anne Marie *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practise of the ICTY and the ICTR* (2005) 7.

² Askin, D. Kelly 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *BERKELEY J. INTN'L Law* 298 available at http://heinonline.org/HOL/Page?handle=hein.journals/berkjintlw21&div=20&g_sent=1&collection=journals (Accessed 18 August 2011).

³ United Nations Secretary General Hearing (25 February 1992), (Testimony of Hyo-Chai Lee, MA, Soon-Kim Park and Chung- Ok Yun, MFA, Korean Council for Women Drafted for Military Sexual Service by Japan), cited in Meier, Eileen 'Prosecuting Sexual Violence During War and Conflict: New Possibilities for Progress' (2004) 10 *International Legal Theory* 85 available at http://heinonline.org/HOL/Page?handle=hein.journals/intlt10&div=7&g_sent=1&collection=journals (Accessed 10 July 2011).

⁴ Meir (2004) 85.

However the use of rape as a weapon of war was already prohibited under customary international law under Article 46 of the Hague Convention of 1907 which criminalised and prohibited rape, enforced prostitution and any other form of indecent attack against women.⁵ Sexual violence was regarded a crime against family rights and honour and this aimed at protecting women against indecent attack and promoting respect of women's lives.⁶

2.2 International Military Tribunal at Nuremberg

To prosecute major war criminals of the European Axis countries for crimes against peace, war crimes and crimes against humanity, the International Military Tribunal at Nuremberg was established.⁷ However, despite numerous reports and transcripts containing evidence of torturous rape, forced prostitution, forced sterilisation, forced abortion and sexual mutilation, sexual violence was never prosecuted at the Nuremberg trials.⁸ The Nuremberg tribunal had power to prosecute sex crimes but failed to do so by not adding rape as a crime against humanity thereby allowing rape and other sexual crimes to remain unpunished.⁹ The failure to prosecute perpetrators was a form of injustice to women who had been raped as they did not

⁵ Article 46 Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land (and Annex Regulations Concerning the Laws and Customs of War on Land 18 October 1907, 36 Stat.2277, TS No. 539 reprinted in Roberts and Guelff (2000) 67.

⁶ The 1907 Hague Convention.

⁷ London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, The IMT Charter, reprinted in 39 American Journal of International Law (1945), Suppl.257.

⁸ Sellers, V. Patricia 'Rape under International Law, in War Crimes: The LEGACY OF NUREMBERG' 159, 160-61 (Belinda Cooper ed 1999) cited in Campanaro Jocelyn 'Women, war and International Law: The Historical Treatment of Gender- Based War Crimes' (2001) 89 *The George Town Law Journal* 2561, available at http://heinonline.org/HOL/Page?handle=hein.journals/glj89&div=69&g_sent=1&collection=journals (Accessed 17 July 2011).

⁹ Campanaro (2001) 2562.

have the chance to see their perpetrators held responsible and this resulted in the notion that rape and other sexual assaults are lesser crimes and inevitably accompany war.¹⁰

2.3 International Military Tribunal for the Far East (Tokyo Tribunal)

At Nuremberg, the International Military Tribunal for the Far East (hereafter Tokyo Tribunal) was established to prosecute Japanese officials who had committed atrocities during the Second World War.¹¹ During the Second World War, the Japanese soldiers raped in excess 20,000 women and girls in the Chinese city of Nanking.¹² Despite not being included in the Tokyo Charter, rape was prosecuted at the Tokyo tribunal alongside other crimes under prohibition against inhuman treatment, ill treatment and failure to respect family honour and rights.¹³ The foreign minister Hirota, General Toyoda and Matsui were prosecuted for command responsibility for violations of the laws of customs of war committed by their soldiers in Nanking which included widespread rape and sexual assault.¹⁴ General Matsui was found criminally liable for failing to control his troops and to protect the civilians of Nanking despite knowing that thousands of rapes were taking place.¹⁵ The Japanese officials were also found

¹⁰ Campanaro (2001) 2561.

¹¹ Werle Gerhard *Principles of International Criminal Law* 2 ed (2009) para 30.

¹² Askin Dawn Kelly, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (1997) 180.

¹³ Askin (1997) 180.

¹⁴ *Prosecutor v Anton Furundzija* Case No. IT-95-17/1-T (10 December 1998) para 168.

¹⁵ Luping Dianne 'Investigation and Prosecution of Sexual and Gender-Based Crimes before the ICC' (2009) 17 *Journal of Gender, Social Policy and The Law* 8, available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1030&context=jgspl&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Fsearch%3Fsourceid%3Dchrome%26ie%3DUTF-8%26q%3Dinvestigation%2Band%2Bprosecution%2Bof%2Bsexual%2Band%2Bgender%2Bbased%2Bcrimes%2Bbefore%2Bthe%2Bicc%252C%2Bdianne#search=%22investigation%20prosecution%20sexual%20gender%20based%20crimes%20before%20icc%2C%20dianne%22> (Accessed 10 October 2011).

guilty for rape for failing to carry out their duty to ensure that their subordinates complied with international law.¹⁶

Prosecuting commanders for acts of their subordinates set jurisprudence for holding superiors accountable for atrocities committed by their subordinates and were held individually responsible for failing to prevent the atrocities from happening or for failing to punish subordinates for committing atrocities. However, prosecution of sex crimes together with other crimes, such as crimes against peace failed to give sex crimes independent recognition as explicit crimes to be prosecuted as such.

2.4 Control Council Law No. 10



National Military Courts were later established in the post-war period that applied Council Law No. 10 (hereafter CCL No. 10). CCL No. 10 was the first international criminal law instrument to expressly criminalise rape as a crime against humanity under Article II (1) (c).¹⁷ CCL No. 10 provided a legal basis for the Allied powers to prosecute German nationals in their respective zones of occupation.¹⁸ Despite CCL No. 10 including rape as a crime of humanity, no

¹⁶ Campanaro (2001) 2564.

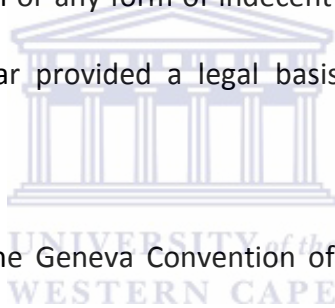
¹⁷ Control Council Law No. 10 was issued by the Allied Control Council and it improved on the model of the Nuremberg war crimes trial and was intended to ensure that the subsequent trials in the four occupied zones would rest on a uniform basis cited in Werle (2009) para 35.

¹⁸ Bassouni, M Cherif 'International Criminal Investigations and Prosecutions: From Versailles to Rwanda in International Criminal Law,' cited in Luping (2009) 12.

prosecutions were explicitly brought on the basis of rape.¹⁹ CCL No. 10 was also significant because it removed the war connection from crimes against humanity.²⁰

2.5 The Geneva Convention of 12 August 1949

To further prohibit the use of sexual violence during armed conflict, the Geneva Convention to the Protection of Civilians in Times of war (IV) of 12 August 1949 was passed that expressly prohibited the use of rape and enforced prostitution or any form of indecent assault during time of war.²¹ Article 27 protected women against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault. The express prohibition of use of sexual violence during war provided a legal basis and enforcement mechanism to prosecute sexual violence.



Additional Protocols I and II to the Geneva Convention of 1949 were further established to prohibit forms of sexual violence such as rape and enforced prostitution against women. The Additional Protocols provided a legal basis on which sex crimes could be prosecuted under international criminal law but no prosecutions were carried out. Additional Protocol I, under Article 75 (2) (b), expressly prohibited outrages upon personal dignity in particular humiliating and degrading treatment, enforced prostitution and any other form of indecent assault.²²

¹⁹ Boot Machteld 'Crimes against Humanity, Article 7(1) (g) Rape or Any Other Form of Sexual Violence of Comparable Gravity in Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article 159, 207 cited in Luping (2009) 12.

²⁰ Askin (1997) 125.

²¹ The Geneva Convention to the Protection of Civilian Persons during Times of War (IV) of 12 August 1949, 75 UNTS 287 (1949 Geneva Convention).

²² Additional Protocol I to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict of 8 June 1977.

Additional Protocol II stated that:

Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.²³

Despite sexual violence against women being prohibited, customary international law therefore historically ignored and failed to punish gender based crimes.²⁴

2.6 United Nations International Criminal Tribunal for the Former Yugoslavia

The early 1990s saw the use of sexual violence as a weapon of war in the Former Yugoslavia. Rape and sexual slavery were used by members of the Bosnian Serb armed forces as an instrument of terror 'applied whenever and against whomsoever' Bosnian Serbs wished against Muslim civilians.²⁵ During the war, 60,000 women were victims of sexual violence,²⁶ and Muslim women were locked up and raped until it was too late for them to carry out abortions with the aim of 'cleansing the population' through forcing women to bear Serbs children.²⁷ The war was aimed at cleansing former Yugoslavia of Muslim population and Muslim girls and women were targeted during the war.²⁸

²³ Article 76(1) Additional Protocol II to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflict of 8 June 1977.

²⁴ Campanaro (2001) 2558.

²⁵ *Prosecutor v Dragoljub Kunarac, Radomir Kovak, Zoran Vukovic*, ICTY Case No. IT-96-23/1-T (22 February 2001) paragraph 570.

²⁶ United Nations Development Fund for Women (UNIFEM) 'Violence against Women-Facts and Figures' (November 2007) cited in Leatherman, L. Janie *Sexual Violence and Armed Conflict* (2011) 2.

²⁷ Campanaro (2001) 2571.

²⁸ *Prosecutor v Kunarac et al* (22 February 2007) para 570.

The United Nations International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by UN Security Council to prosecute perpetrators most responsible for atrocities, such as sexual violence as an instrument of terror in the former Yugoslavia.²⁹ The ICTY statute criminalises and gives the court mandate to prosecute crimes of sexual violence as crimes against humanity and imposes individual criminal responsibility for perpetrators who commit sex crimes.³⁰ Rape is expressly mentioned under Article 5 as a crime against humanity and the different forms of sexual violence can also be prosecuted as genocide under Article 4, grave breaches of the Geneva Convention of 12 August 1949 under Article 2 and as violations of the laws and customs of war under Article 3 of the ICTY statute.

The ICTY despite not explicitly listing different forms of sexual violence, has moved away from the notion that sex crimes are only crimes against dignity and honour and is prosecuting sexual violence also as crimes of genocide and war crimes. Basing on the criminalisation of crimes of sexual violence in the ICTY statute, the ICTY has successfully prosecuted perpetrators of sex crimes. The ICTY in its judgements has made findings of sexual violence in 24 cases out of 75 completed cases before the tribunal.³¹

²⁹ UN Resolution 827, UN Dos. S/ Res/ 827 (25 May 1993).

³⁰ Article 5 and Article 7 Statute of the International Criminal Tribunal for the Former Yugoslavia.

³¹ Department of Peace Keeping Operations 'Review of the Sexual Violence Elements of the Judgements of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820' (2010) para 73 available at http://www.unrol.org/files/32914_Review%20of%20the%20Sexual%20Violence%20Elements%20in%20the%20Light%20of%20the%20Security-Council%20resolution%201820.pdf (Accessed 2 October 2011).

2.7 United Nations International Criminal Tribunal for Rwanda

With the outbreak of genocide in 1994 against the Tutsi and moderate Hutus in Rwanda, rape and other forms of sexual violence were used as a form to commit genocide with the intention to destroy the Tutsi ethnic population.³² 500,000 women were raped during the genocide in Rwanda,³³ and some were tortured and murdered after being raped which left many of the victims stigmatised, humiliated or traumatised both physically and emotionally. The use of sexual violence during the Rwanda genocide would lead to a mixed race of children belonging to Hutu ethnic group and eventually lead to the extinction of the Tutsi group, since Rwanda is a patrilineal society, where children take after the father's tribe.

The United Nations International Criminal Tribunal for Rwanda (ICTR) was created by United Nations Resolution to prosecute perpetrators responsible for genocide in Rwanda.³⁴ The ICTR has successfully convicted and prosecuted some perpetrators responsible for rape and other forms of sexual violence as a form of genocide. The ICTR in prosecuting sex crimes has charged 34 accused for having personally committed, encouraged or allowed the commission of acts of sexual violence.³⁵ Among the 34 cases, 13 of them include convictions of sexual violence constituting genocide, crimes against humanity and war crimes.³⁶

³² De Brouwer (2005) 11.

³³ Leatherman (2011) 2.

³⁴ UN Resolution 955, UN Dos.S/Res/955 (8 November 1994).

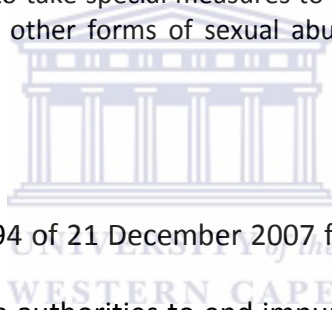
³⁵ Breton Le-Goff, Gaelle 'Analysis of Trends in Sexual Violence Prosecutions in Indictments by the International Criminal Tribunal for Rwanda (ICTR) from November 1995 to November 2002' (2002) available at http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/analysisoftrends_en.php (Accessed 29 September 2011).

³⁶ United Nations Department of Peace Keeping Operations 'Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for

2.8 United Nations Resolutions on Sexual Violence

To further prohibit the use of sexual violence during war, the United Nations Security Council passed several resolutions prohibiting the use of sexual violence against civilians in conflict areas and during war. The UN Security Council Resolution 1820 of 19 June 2008 expressly prohibits sexual violence as a tool of war and acknowledges the systematic and widespread use of rape as a war tactic that has an impact on the health and safety of civilians as well as the economic and social stability of nations.³⁷ The Security Council in resolution 1325:

Calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence particularly rape and other forms of sexual abuse and all other forms of violence in situations of armed conflict.³⁸



The United Nations Resolution 1794 of 21 December 2007 focuses on the Democratic Republic of Congo and calls upon Congolese authorities to end impunity and bring justice without delay to victims of grave human rights and international humanitarian law violations with special attention to acts of sexual violence against women and children.³⁹ There are three UN resolutions on sexual violence because its use as a war tactic and weapon of war continues in conflict areas especially in the Democratic Republic of Congo.

Rwanda and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820' (2010), available at http://www.unrol.org/files/32914_Review%20of%20the%20Sexual%20Violence%20Elements%20in%20the%20Light%20of%20the%20Security-Council%20resolution%201820.pdf (Accessed 3 September 2011).

³⁷ UN Resolution 1820, S/Res/1820 (19 June 2008).

³⁸ UN Resolution 1325, S/Res/1325 (31 October 2000).

³⁹ UN Resolution 1794, S/Res/1794 (21 December 2007).

2.9 International Criminal Court

A major step in international criminal law was achieved with the express recognition of different acts of sexual violence as explicit independent sex crimes under the Rome Statute of the International Criminal Court (hereafter ICC Statute).⁴⁰ The ICC was established in 1998 as a permanent court with complementary jurisdiction to national jurisdictions over persons for the most serious crimes of international concern.⁴¹ The ICC has jurisdiction only as far as member states to the ICC statute are concerned and by special agreement, on the territory of another state.⁴² The ICC Statute allows for the prosecution of different independent acts of sexual violence that take the form of genocide, crimes against humanity and war crimes and are prosecuted as such. As opposed to the ad hoc tribunals, the ICC Statute expressly lists sex crimes to include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any form of sexual violence of comparable gravity.⁴³

The ICC in the Elements of Crimes of the ICC (hereafter EoC) defines sexual violence to mean:

The perpetrator committed an act of sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force, or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.⁴⁴

⁴⁰ The Rome Statute of the ICC, UN Doc A/ Conf.183/9, July 17 1998, 37 I.L.M 1002, 1030.

⁴¹ Article 1 ICC Statute.

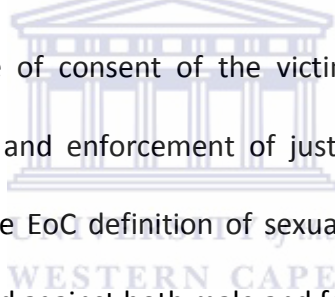
⁴² Article 4(2) ICC Statute.

⁴³ Article 7(1) (g), Article 8(2) (b) (xxii), Article 8(2) (c) (vi) ICC Statute.

⁴⁴ Elements of Crimes of the ICC, ICC-ASP/1/3.

The definition of sexual violence in the EoC has expanded sex crimes to include different forms and this is a big step in international criminal law that has led to the recognition of different forms of sexual violence as explicit sex crimes. Recognition of different forms of sex crimes has changed the notion stated in the Hague Convention of 1907 and Geneva Convention of 1949 that sexual violence is a crime against dignity and honour.

Expanding sexual violence to include different forms provides a wider basis on which charges against perpetrators can be drafted and prosecuted. The definition in the EoC does not focus on whether or not the victim consented to the sex act, but focuses instead on whether circumstances, such as force, duress and coercion existed that prevented the victim from giving genuine consent. The irrelevance of consent of the victim to the perpetrator's sexual act guarantees effective prosecution and enforcement of justice for sex crimes that affect the international community. Also, the EoC definition of sexual violence is gender sensitive as it encompasses sex crimes committed against both male and female victims.



Chapter Three

Sexual Violence under International Criminal Law

3.1 Introduction

International criminal law statutes and courts provide a legal mechanism for the criminalisation and prosecution of sexual violence committed in the context of armed conflicts as well as during peace time. From the failure to prosecute sexual violence at the Nuremberg trial, the establishment of the ad hoc tribunals and the ICC has played a significant role in developing jurisprudence and the recognition of sex crimes as independent crimes. The ICC established as a permanent international court allows for the prosecution of different acts as sex crimes. The ICC has also indicted perpetrators most responsible for serious crimes, such as, sexual violence that affect the international community. This chapter discusses the substantive law of sexual violence as an international crime, that is, as crimes against humanity (see part 3.2), as genocide (see part 3.3) and as war crimes (see part 3.4). This chapter uses the Eoc to discuss the elements of the different sex crimes. This chapter also highlights differences before the ICC and ad hoc tribunals in prosecuting crimes of sex crimes.

3.2 Sexual Violence as a Crime against Humanity

In the post-World War II era, the Nuremberg Charter did not mention any act of sexual violence to constitute crimes against humanity and that is one of the reasons sexual violence was not prosecuted at the Nuremberg tribunal. The Nuremberg Charter under Article 6(a) defined crimes against humanity to include:

Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.⁴⁵

The CCL No. 10 under Article II (1) (c) included rape as a crime against humanity and this was the first time rape was included in an international criminal law instrument as a crime against humanity. This provided a basis for the inclusion of rape in the ICC, ICTY and ICTR statutes as a crime against humanity.⁴⁶ The CCL No.10 defined crimes against humanity as:

Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.⁴⁷

The ICC expressly lists different acts of sexual violence such as, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of

⁴⁵ Article 6 (a) Charter of the International Military Tribunal, Nuremberg, in 39 American Journal of International Law (1945), Suppl.

⁴⁶ Werle (2009) para 875.

⁴⁷ Article II (1) (c) CCL No 10.

comparable gravity as crimes against humanity.⁴⁸ The different sex crimes in the ICC statute are important for the effective prosecution of sexual violence because they provide a wider basis on which indictments can be drafted and prosecuted as crimes against humanity. However, unlike the ICC, the ad hoc tribunals only expressly mention rape and other inhumane acts committed against civilians as part of a widespread or systematic attack in an armed conflict to constitute crimes against humanity.⁴⁹

The ICC prosecutes individual sexual acts committed as part of a widespread or systematic attack against a civilian population as constituting crimes against humanity. In prosecuting sex crimes, the ICC is guided by the EoC that lists their material elements, that is, the mental element (*mens rea*) and *actus reus* constituting crimes against humanity. Despite being in existence for twelve years, the ICC has not convicted an accused person for sex crimes as crimes against humanity. Individual sexual acts through which sexual violence is prosecuted as a crime against humanity are discussed in below.

3.2.1 Rape as a crime against humanity

Rape was never defined in any international instruments but was expressly included in Control Council Law No. 10 as such, and also in the ICC, ICTY and ICTR Statutes as a separate crime. This led to the creation of different legal definitions through case law of the ICTY and ICTR tribunals.⁵⁰

⁴⁸ Article 7(1) (g) ICC Statute.

⁴⁹ Article 5 ICTY Statute, Article 3 ICTR Statute.

⁵⁰ De Brouwer (2005) 104.

The ICTR was the first international criminal court to prosecute rape as crimes against humanity and it recognised that rape can be committed either during armed conflict or peace times. The ICTR also recognised that rape is a crime against humanity if committed against any civilian population on national, political, ethnic, racial or religious grounds.⁵¹ In the *Prosecutor v Jean Paul Akayesu*, the Trial Chamber convicted Akayesu, the mayor of Taba Commune for rape as crimes against humanity forming part of a widespread and systematic attack on ethnic and political grounds.⁵² Rape in the case of Akayesu was defined as:

A physical invasion of a sexual nature, committed on a person under circumstances which are coercive. That sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or physical conduct.⁵³



Rape under the ICTY statute constitutes a crime against humanity when committed in an international or internal armed conflict directed against any civilian population.⁵⁴ In the *Prosecutor v Kunarac, Kovac and Vukovic*, rape aimed at driving Muslim civilians out of the region, formed part of a systematic attack against Muslim civilians in the former Yugoslavia conflict. The accused having knowledge that rapes were being committed against the Muslim population, were convicted for rape as a crime against humanity.⁵⁵ The ICTY defined rape as:

The sexual penetration, however slight of a vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.⁵⁶

⁵¹ Article 3(g) ICTR Statute.

⁵² *Prosecutor v Jean Paul Akayesu* Case No ICTR 96-4-T (2 September 1998) para 595.

⁵³ *Prosecutor v Akayesu* (2 September 1998) para 598.

⁵⁴ Article 5(g) ICTY Statute.

⁵⁵ *Prosecutor v Kunarac et al* (22 February 2001) para 581.

⁵⁶ *Prosecutor v Kunarac et al* (22 February 2001) para 460.

Before the ad hoc tribunals, the central elements of rape include, lack of genuine consent by the victim to rape, and the perpetrator's knowledge of non-consent must be proved beyond reasonable doubt.⁵⁷ Also, surrounding circumstance must be looked at to ascertain whether or not circumstances existed that forced the victim to consent to the sexual act.⁵⁸

The ICC in defining and prosecuting rape as a crime against humanity is guided by the elements of rape expressly listed in the EoC. The *actus reus* elements of rape require that:

(i) The perpetrator invaded the body of a person resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. (ii) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁵⁹

The mental element for rape requires that the perpetrator committed the act of rape with intent and knowledge within the meaning of Article 30 of the ICC Statute.⁶⁰ The nexus requirement is that the act of rape forms part of a widespread or systematic attack directed against the civilian population.⁶¹

The elements of rape laid out with regard to the EoC provide a more specific definition of the criminal conduct of rape which requires a physical assault on the victim's body by the perpetrator which must result in penetration (also oral or anal) by the perpetrator's body or

⁵⁷ *Prosecutor v Gacumbitsi*, Case No. ICTR-2001-64-A (7 July 2006) para 153, *Prosecutor v Kunarac et al* (22 February 2001) para 460.

⁵⁸ *Prosecutor v Kunarac et al* (22 February 2001) para 460.

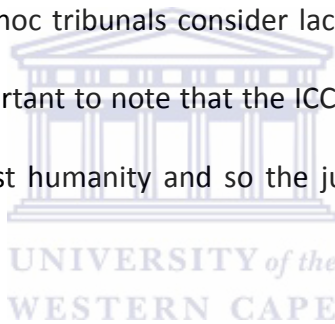
⁵⁹ Article 7(1) (g) EoC.

⁶⁰ *Prosecutor v Jean Pierre Bemba* Case No. ICC-01/05-01/08, 'Pre Trial Decision on Confirmation of Charges against Jean Pierre Bemba (15 June 2009) para 163.

⁶¹ Article 7 (1) (g)-1 EoC.

objects into the vagina or other parts of the victim's body.⁶² The ICC considers force or coercion on the victim resulting in intentional penetration of the victim by the perpetrator to be the fundamental element for rape as a crime against humanity. Coercion in this regard, is not limited to physical force but includes threats, intimidation and other forms of duress which prey on fear or desperation that may constitute coercion and coercion may be inherent in certain circumstances such as armed conflict or military presence.⁶³

It is important to note that the ICC unlike the ad hoc tribunals considers force or coercion as an element of rape and not consent because genuine consent cannot be given in the presence of coercive circumstances.⁶⁴ The ad hoc tribunals consider lack of genuine consent to constitute an element of rape. It is also important to note that the ICC has not yet convicted any accused person for rape as a crime against humanity and so the judges have not had the chance to interpret the elements of rape.



From the above, rape is not limited to penetration of a victim's vagina by the perpetrator's penis but includes penetration of any part of the victim's body with any object. The prosecution also has to prove beyond reasonable doubt that rape was committed as part of a widespread or systematic attack against civilian female population.

⁶² Werle (2009) para 876.

⁶³ *Prosecutor v Bemba*, (15 June 2009) para 162.

⁶⁴ Article 7(1) (g)-1 EoC.

3.2.2 Sexual Slavery as a crime against humanity

Sexual slavery is a common practise during armed conflict and during the World War II, more than 200,000 women and girls were sexually enslaved in so called 'comfort states' of the Japanese Imperial Army in Asia.⁶⁵ Sexual slavery as a crime against humanity was for the first time expressly included in the ICC statute and its elements also included for the first time in the EoC under Article 7 (1) (g).

The ICTY was the first international criminal court to state that sexual slavery is a crime against humanity and that under the conditions of sexual slavery, there could be no voluntary consent by the victim to the sexual acts.⁶⁶ During the armed conflict in the former Yugoslavia, sexual slavery was used strategically and systematically against non-Serbs. In the *Prosecutor v Kunarac et al*, it was stated that Kovac detained and sexually abused two non- Serb civilians and that he later sold them to two unidentified Montenegrin soldiers for 500 Deutschmarks.⁶⁷

Sexual slavery was also used during the insurgency in Uganda by rebels of the Lord's Resistance Army (hereafter LRA), headed by Joseph Kony.⁶⁸ It is estimated that 10,000-14,000 children including girls were abducted, raped and sexually enslaved as 'wives' to the LRA commanders.⁶⁹

⁶⁵ Ooesterveld, Valerie 'Sexual Slavery and the International Criminal Court: Advancing International Law' (2004) 25 *Michigan Journal of International Law* 606 available at http://heinonline.org/HOL/Page?handle=hein.journals/mjil25&div=21&g_sent=1&collection=journals (Accessed 28 September 2011).

⁶⁶ Leatherman (2011) 27.

⁶⁷ *The Prosecutor v Kunarac et al* (22 February 2001) para 775.

⁶⁸ *The Prosecutor v Joseph Kony*, Case No. ICC-02/04-01/05, 'Warrant of Arrest against Joseph Kony' (27 September 2005).

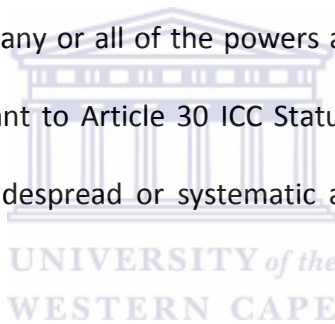
⁶⁹ Leatherman (2011) 126.

Also in the Democratic Republic of Congo, thousands of women have been abducted from their homes and forced to remain with armed groups as sex slaves.⁷⁰

The *actus reus* element of sexual slavery requires that:

(i) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. (ii) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature. Footnote 17 states: 'Given the complex nature of this crime, it is recognised that its commission could involve more than one perpetrator as a part of a common criminal purpose.'⁷¹

The mental element requires that the perpetrator committed the act of sexual slavery with intent and knowledge to exercise any or all of the powers attaching to the right of ownership over one or more persons pursuant to Article 30 ICC Statute. The nexus requirement is that sexual slavery forms part of a widespread or systematic attack directed against the civilian population.⁷²



The inclusion of sexual slavery in the ICC Statute has led to the explicit recognition of sexual slavery as an independent crime constituting a crime against humanity. This plays a big role in ending impunity and holding perpetrators accountable as sexual slavery can now be prosecuted as a crime against humanity before international courts hence bringing justice to victims.

⁷⁰ Oosterveld (2004) 609.

⁷¹ Article 7 (1) (g)-2 EoC.

⁷² Article 7 (1) (g)-2 EoC.

3.2.3 Enforced Prostitution as crime against humanity

During World War II, women were taken into Nazi concentration camps and encouraged to opt for forced sex with the false promise of being released after six months.⁷³ Enforced prostitution was then prohibited by the Geneva Convention and its Additional Protocols because of the need to recognise events of World War II where women and girls were forced to enter brothels.⁷⁴ The drafters of the Geneva Convention defined enforced prostitution as, 'the forcing of women into immorality by violence or threats.'⁷⁵

The ICC Statute recognises enforced prostitution for the first time as a crime against humanity,⁷⁶ having been expressly forbidden by the Geneva Convention of 12 August 1949 and the Additional Protocols as a crime against dignity and honour.⁷⁷ The *actus reus* elements of enforced prostitution require that:

(i) The perpetrator caused one or more persons to engage in one or more acts of sexual nature by force or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person or persons' incapacity to give genuine consent. (ii) The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.⁷⁸

The mental element requires that the perpetrator intended to cause one or more persons to engage in one or more acts of a sexual nature by force or by threat of force or coercion that

⁷³ Leatherman (2011) 52.

⁷⁴ Oosterveld (2004) 617.

⁷⁵ Oosterveld (2004) 617.

⁷⁶ Article 7(1) (g) ICC Statute.

⁷⁷ Article 27(2) Geneva Convention of 12 August 1949, Article 75 (2) (b) and Article 76 (1) of Additional Protocol I and Article 4(2) of Additional Protocol II of 1977.

⁷⁸ Article 7(1) (g)-3 EoC.

caused fear of violence or psychological oppression.⁷⁹ And also, that the perpetrator committed the act of enforced prostitution with intent and knowledge pursuant to Article 30 ICC statute. The nexus requirement is that enforced prostitution forms part of a widespread or systematic attack directed against any civilian population.⁸⁰

Today, the ICC expressly prohibits enforced prostitution in order to protect civilians from any form of sexual assault and to end impunity for sex crimes amounting to enforced prostitution.

3.2.4 Forced Pregnancy as a crime against humanity

Forced pregnancy is a consequence of rape and can be used as a weapon of war as it forces the victim to bear children of the perpetrator, which leaves the victim physically and emotionally, traumatised the rest of her life. The ICC Statute defines forced pregnancy to mean:

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.⁸¹

During the armed conflict in the former Yugoslavia, forced pregnancy was used as a form of 'ethnic cleansing' where Muslim and Croat women were systematically raped by Bosnian Serbs with the intent that the victims become pregnant and detained past the point of abortion in order to destroy the Muslim population.⁸²

⁷⁹ Article 7 (1) (g)-3 EoC.

⁸⁰ Article 7 (1) (g)-3 EoC.

⁸¹ Article 7(2) (f) ICC Statute.

⁸² Askin D Kelly 'The Jurisprudence of International War Crimes Tribunals' in Durham Helen and Gurd Tracey *Listening to the Silences: Women and War* (2005) 144.

Cryer states that the crime of forced pregnancy is not a new crime against humanity and that the forcible making of a person pregnant would be rape, which is a long standing crime against humanity and is included in Article 7 (1) (e) of the ICC Statute.⁸³ Schabas also states that forced pregnancy was problematic to define because it might be construed by some as creating an obligation upon states to provide women who had been forcibly impregnated with access to abortion.⁸⁴

The *actus reus* element of forced pregnancy requires that:

(i) The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition or carrying out other grave violations of international law.⁸⁵

The mental element is included in the *actus reus* and requires that the perpetrator intended to affect the ethnic composition of any population or carry out other grave violations of international law.⁸⁶ As a nexus requirement, forced pregnancy must form part of a widespread or systematic attack against a civilian population.⁸⁷

Forced pregnancy is therefore a new crime under international criminal law, in so far as it being expressly listed as an independent crime for the first time under an international criminal law instrument. Since pregnancy is a foreseeable consequence of sex, the prosecution must prove beyond reasonable doubt that the perpetrator intended to engage in the sexual act. The ICC has also not prosecuted any accused for forced pregnancy as a crime against humanity.

⁸³ Cryer, Robert *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) 258.

⁸⁴ Schabas, A. William *An Introduction to the International Criminal Court* 3 ed (2007) 106.

⁸⁵ Article 7(1) (g)-4 EoC.

⁸⁶ Article 7 (1) (g)-4 EoC.

⁸⁷ Article 7 (1) (g)-4 EoC.

3.2.5 Enforced Sterilisation as a crime against humanity

The ICC Statute is the first international criminal law instrument to explicitly list enforced sterilisation committed systematically against women as a crime against humanity.⁸⁸ During World War II, majority of the former 'comfort women' lost their reproductive ability as a result of the sexual violence committed against them by the Japanese military.⁸⁹ Enforced sterilisation includes both temporary and permanent sterilisation and encompasses any means or measures which have the effect of depriving a person of his or her biological reproductive capacity.⁹⁰

The *actus reus* elements of enforced sterilisation require that:

(i) The perpetrator deprived one or more persons of biological reproductive capacity. (ii) The conduct was neither justified by medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.⁹¹

The mental element requires that the perpetrator committed the crime of enforced sterilisation with intent and knowledge pursuant to Article 30 ICC Statute. The nexus requirement is that enforced sterilisation forms part of a widespread or systematic attack against a civilian population.⁹²

⁸⁸ Article 7 (1) (g) ICC Statute.

⁸⁹ Askin in Durham *et al* (2005) 145.

⁹⁰ La Haye (2001) cited in De Brouwer (2005) 146.

⁹¹ Article 7(1) (g)-5 EoC.

⁹² Article 7 (1) (g)-5 EoC.

Footnotes 19 and 20 do not include birth control measures with a non-permanent effect in practise neither does genuine consent include consent obtained through deception respectively.⁹³

From the above, the prosecution must prove beyond reasonable doubt that the perpetrator with intent and knowledge and as part of a widespread or systematic attack, deprived one or more persons of his or her biological reproductive capacity. It is important to note that the ICC and the ad hoc tribunals have not prosecuted enforced sterilisation as an independent crime constituting a crime against humanity.

3.2.6 Any other form of sexual violence of comparable gravity

The judges in the case of *Prosecutor v Akayesu* defined sexual violence as any acts of a sexual nature that are committed on persons under circumstances which are coercive and it involves other 'inhumane acts', such as, forced nudity and forced abortion.⁹⁴ For example, during the Rwandan genocide, the interahamwe undressed a student and forced her to perform gymnastics in the public courtyard of bureau communal.⁹⁵ The ICTY also went ahead to state that:

International criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. The prohibition 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.⁹⁶

⁹³ Footnote 19 and 20 Article 7(1) (g) EoC.

⁹⁴ *Prosecutor v Akayesu* (2 September 1998) para 688.

⁹⁵ *Prosecutor v Akayesu* (2 September 1998) para 688.

⁹⁶ *Prosecutor v Furundzija* (10 December 1998) para 186.

The ICC under Article 7 (1) (g) provides for all other forms of sexual violence that have not been expressly mentioned under Article 7 (1) (g) but are of comparable gravity to the other sex crimes. The *actus reus* elements of any other forms of sexual violence require that:

(i) The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent. (ii) Such conduct was of gravity comparable to the other offences in Article 7, paragraph 1 (g) of the Statute. (iii) The perpetrator was aware of the factual circumstances that established the gravity of the conduct.⁹⁷

The mental element requires that the perpetrator was both aware of the factual circumstances that established the gravity of conduct,⁹⁸ and with intent and knowledge pursuant to Article 30 ICC Statute, committed the act of sexual violence. The nexus requirement is that sexual violence forms part of a widespread or systematic attack directed against a civilian population.⁹⁹

It is therefore right to say that sexual violence is broader than acts of rape and sexual slavery and includes all physical and psychological acts aimed at one's sexuality that do not involve penetration. The inclusion of other forms of sexual violence of comparable gravity under Article 7 (1) (g) gives the prosecution a wider range on which to base indictments for sex crimes. The ICC has not convicted any accused for any other form of sexual violence of comparable gravity. There is need therefore, for the ICC to complete a trial involving sex crimes in order to provide clarity on what constitutes other forms of sexual violence of comparable gravity. This will also

⁹⁷ Article 7 (1) (g)-6 EoC.

⁹⁸ Article 7 (1) (g)-6 EoC.

⁹⁹ Article 7(1) (g)-6 EoC.

prevent a possible defence from the accused that the sex crime being charged is not expressly listed in the Statute.



3.3 Sexual Violence as Genocide

The definition of genocide in the Genocide Convention of 1948, does not expressly state that sexual violence constitutes genocide.¹⁰⁰ The ad hoc tribunals have however interpreted the definition of genocide to include rape, and other crimes of sexual violence as a way through which genocide can be committed.¹⁰¹ The ad hoc tribunals have successfully convicted accused persons for sex crimes as acts of genocide. Under international criminal law, Jean Paul Akayesu, was in fact the first perpetrator to be prosecuted and held individually criminally responsible for rape and sexual violence as an element of genocide.¹⁰²

In the former Yugoslavia, sexual violence, during the conflict, was used as a tool of war in the form of 'ethnic cleansing' with the intention of destroying Bosnian Muslim population.¹⁰³ 20,000-50,000 rapes that would result in forced impregnation were a means used by Serb armed forces to exterminate the Muslim community.¹⁰⁴ Also, in Rwanda, during the genocide, sexual violence was intentionally used against Tutsi women with the aim of destroying the Tutsi ethnicity.¹⁰⁵

The ICC has not prosecuted any accused for sexual violence as genocide but it acknowledges, in its EoC the fact that rape and sexual violence are ways through which genocide can be committed.¹⁰⁶ Sex crimes as genocide can fall under the following elements where any of the

¹⁰⁰ Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, 78 U.N.T.S.277.

¹⁰¹ De Brouwer (2009) 44.

¹⁰² *Prosecutor v Akayesu* (2 September 1998) para 734.

¹⁰³ Mackinnon A, Catherine 'Rape, Genocide, and Women's Human Rights' in French G Stanley, Teays Wanda and Purdy M, Laura (ed) *Violence against Women: Philosophical Perspectives* (1998) 47.

¹⁰⁴ Leatherman (2011) 112.

¹⁰⁵ *Prosecutor v Akayesu* (2 September 1998) para 732.

¹⁰⁶ Footnote 3; Article 6(b) EoC.

following acts are committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (i) Killing members of the group
- (ii) Causing serious bodily or mental harm to members of the group;
- (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (iv) Imposing measures intended to prevent births within the group.¹⁰⁷

If sexual violence is used as an important aspect of a conflict, with the aim of intentionally destroying a protected group, in whole or in part, the specific sex crimes committed constitute genocide and can be prosecuted as such under international criminal law. Even if different forms of sexual violence are intentionally committed against a single member of a protected group, with the aim of destroying the protected group in whole or in part, the different forms of sexual acts committed may meet the elements of genocide.¹⁰⁸ Sex crimes that constitute elements of genocide are therefore prosecuted in the following ways:

3.3.1 Killing members of the group

The ICC and the ad hoc tribunals require that the perpetrator caused the death of members of the group belonging to a protected group with intention to destroy in whole or in part.¹⁰⁹ In Akayesu, the Trial Chamber of the ICTR found that rape was committed against Tutsi women in

¹⁰⁷ Article II Genocide Convention of 1948, Article 4 ICTY Statute, Article 2 ICTR Statute, Article 6 ICC Statute.

¹⁰⁸ Askin (2003) 316.

¹⁰⁹ Article 4(a) ICTY Statute, Article 2(a) ICTR Statute and Article 6(a) ICC Statute.

Taba commune with the intention to kill them and that many rapes were perpetrated near mass graves where Tutsi women were taken to be killed.¹¹⁰ That the acts of rape and sexual violence reflected the determination to make the Tutsi women suffer and mutilated them even before killing them, the intention being to destroy the Tutsi group while inflicting acute suffering on its members in the process.¹¹¹

The *actus reus* elements of killing members of the group require that:

(i) The perpetrator killed one or more persons.¹¹²

The mental element requires that the perpetrator acted with specific intention to destroy a protected group in whole or in part, and the nexus requirement is that the conduct took place in the context of a manifest pattern of similar conduct directed against a protected group or was conduct that could itself effect such destruction.¹¹³

Sexual violence can also lead to death of members of a protected group if some victims are infected with sexually transmitted diseases such as, HIV/AIDS. For example, in Rwanda, as a consequence of widespread and systematic rapes that occurred during the genocide, 70 per cent of Tutsi female survivors were deliberately infected with HIV/AIDS.¹¹⁴ Some survivors of a protected group infected with HIV/AIDS, may not be able to afford treatment or access medical care, and as a result, they die, hence leading to the eventual destruction of a protected group.

¹¹⁰ *Prosecutor v Akayesu* (2 September 1998) para 733.

¹¹¹ *Prosecutor v Akayesu* (2 September 1998) para 733.

¹¹² Article 6 (a) EoC.

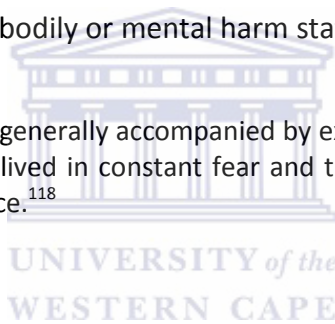
¹¹³ Article 6 (a) EoC.

¹¹⁴ USAID Health Profile Rwanda (November 2010) 1, available at http://www.usaid.gov/our_work/global_health/aids/Countries/africa/rwanda.pdf (Accessed 7 October 2011).

3.3.2 Causing serious bodily or mental harm to members of the group

Sexual violence can constitute an element of genocide if it causes serious bodily or mental harm to members of the group with the intent to destroy the group in whole or in part. The rapes committed in the former Yugoslavia as a form of 'ethnic cleansing' resulted in severe mental and physical pain and suffering of the victims.¹¹⁵ Also, after the genocide in Rwanda, psychologists estimated that 80 per cent of women who survived the war were suffering from major psychological problems and needed treatment.¹¹⁶ The ICTR therefore does not limit itself to harm that is permanent and irremediable.¹¹⁷ The ICTR while considering sexual violence as an act of genocide causing serious bodily or mental harm stated that:

Multiple acts of sexual violence were generally accompanied by explicit threats of death or bodily harm, where the female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of sexual violence.¹¹⁸



The ICC also prosecutes sexual acts that cause mental or physical harm to a protected group and does not restrict the conduct of causing serious bodily or mental harm to acts of torture, rape, sexual violence or inhumane degrading punishment only.¹¹⁹ Acts such as mutilation, use of force and castration may also be considered by the ICC as conduct that causes serious bodily

¹¹⁵ *Prosecutor v Kunarac et al* (22 February 2001) para 669.

¹¹⁶ Report of the Special Rapporteur on Violence Against Women: Report of the Mission to Rwanda on the Issue of Violence Against Women in Situations of Armed Conflict, 54 UNESCOR, UN Doc E/CN.4/1998/54/Add.1 (1998) cited in Askin in Durham *et al* (2005) 62.

¹¹⁷ *Prosecutor v Akayesu* (2 September 1998) para 502.

¹¹⁸ *Prosecutor v Akayesu* (2 September 1998) para 5.5.

¹¹⁹ Footnote 3; Article 6(b) EoC.

or mental harm.¹²⁰ The *actus reus* elements of causing serious bodily or mental harm require that:

(i) The perpetrator caused serious or bodily mental harm to one or more persons.¹²¹

The mental element requires that the perpetrator acted with specific intention to destroy a protected group in whole or in part, and the nexus requirement is that the conduct took place in the context of a manifest pattern of similar conduct directed against a protected group or was conduct that could itself effect such destruction.¹²²

The inclusion of sexual violence as an act of genocide causing bodily or mental harm acknowledges the fact that sexual violence is grave in its consequences. This is because sexual violence has long term traumatic effects on victims and the community which cannot be easily erased. Traumatic effects include, unwanted pregnancies, physical and psychological pain and suffering and infection with sexually transmitted diseases.¹²³

3.3.3 Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

The ICTR in interpreting the act of deliberately inflicting conditions of life stated that it:

Should be construed as the method of destruction by which the perpetrator does not immediately kill the members of the group but which ultimately seek their physical destruction.¹²³

¹²⁰ Sellers (2007) 13.

¹²¹ Article 6(b) EoC.

¹²² Article 6(b) EoC.

¹²³ *Prosecutor v Akayesu* (2 September 1998) para 505.

Withholding necessities of life, such as, medicine and shelter may constitute possible conduct that can bring about physical destruction of a protected group.¹²⁴

De Brouwer discusses that rape, sexual mutilation, forcible sterilisation, forcible abortion and sexual slavery are also conditions of life that may lead to physical destruction.¹²⁵ Werle points out that mass rapes are not conditions of life but if inflicted systematically and repeatedly, perhaps in connection with other measures as a means to physically exterminate the group, they become considered as conditions of life.¹²⁶ The *actus reus* elements of inflicting conditions of life require that:

(i) The perpetrator inflicted certain conditions of life on one or more persons.¹²⁷

The mental element requires that the perpetrator acted with specific intention to destroy a protected group in whole or in part, and the nexus requirement is that the conduct took place in the context of a manifest pattern of similar conduct directed against a protected group or was conduct that could itself effect such destruction.¹²⁸

De Brouwer suggests that intentional infection of HIV/AIDS should also be prosecuted as a condition of life calculated to bring about destruction.¹²⁹ I agree with De Brouwer because deliberately infecting members of a protected group with HIV/AIDS eventually leads to death of its members which results in the extinction and destruction in the composition of a protected group.

¹²⁴ *Prosecutor v Clement Kayishema and Obed Ruzindana*, Case No ICTR -95-1-T (21 May 1999) para 115.

¹²⁵ De Brouwer (2005) 57.

¹²⁶ Werle (2009) 268.

¹²⁷ Article 6(c) EoC.

¹²⁸ Article 6(c) EoC.

¹²⁹ De Brouwer (2005) 81.

Therefore, to prosecute sex crimes as conditions of life calculated to bring about physical destruction of a protected group, the prosecution must prove beyond reasonable doubt that the perpetrator had specific intention to destroy a protected group in whole or in part.

3.3.4 Imposing measures intended to prevent births within the group

Imposing measures intended to prevent births within the group occurs when the perpetrator, with the intention to destroy a protected group, and in a manifest pattern, imposes certain measures intended to prevent births within the group, on one or more persons, belonging to a protected group.¹³⁰ Measures to prevent births include sexual mutilation, the practise of sterilisation, forced birth control and prohibition of marriages.¹³¹ During the armed conflict in the former Yugoslavia, some camps were used specifically to detain women and rape them with the intention of impregnating them and forcing them to give birth to Serbian children.¹³²

Measures imposed to prevent births, such as rape, result in giving birth of children who take up the lineage of the father and not the mothers. This results in the change of composition of a protected group hence leading to its destruction. Also, members of a protected group subjected to sexual violence may be psychologically and physically traumatised as a result of conditions of life inflicted on them. This may discourage them from reproducing, which will lead to eventual extinction of the protected group hence leading to its destruction.

¹³⁰ Article 6(d) EoC.

¹³¹ *Prosecutor v Akayesu* (2 September 1998) para 507.

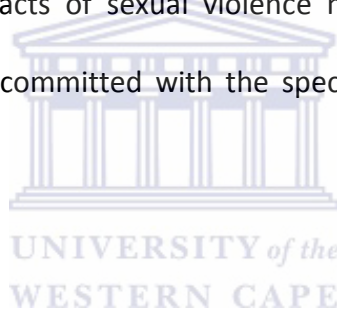
¹³² *Karadzic and Mladic* Rule 61 Decision para 64 cited in De Brouwer (2005) 58.

The *actus reus* elements for imposing measures to prevent births require that:

- (i) The perpetrator imposed certain measures on one or more persons.¹³³

The mental element requires that the perpetrator acted with specific intention to destroy a protected group in whole or in part and the nexus requirement is that the conduct took place in the context of a manifest pattern of similar conduct directed against a protected group or was conduct that could itself effect such destruction.¹³⁴

From the above discussion, it is shown how sexual violence is a form through which genocide can be committed. The specific acts of sexual violence must therefore be proved beyond reasonable doubt, to have been committed with the specific intent, to destroy a protected group, in whole or in part.



¹³³ Article 6(d) EoC.

¹³⁴ Article 6(d) EoC.

3.4 Sexual Violence as a War Crime

Sexual violence has always been prohibited under international customary law as one that gives rise to individual criminal responsibility.¹³⁵ Sexual violence during armed conflict is a serious violation of international humanitarian law and is prosecuted as a war crime under international criminal law. Armed conflict suggests the existence of hostilities between armed forces organised to a greater or lesser extent and does not include situations of internal disturbances and tension.¹³⁶

If committed during international armed conflicts, sex crimes are prosecuted as grave breaches of the Geneva Convention of 12 August 1949 or other serious violations of laws and customs applicable in international armed conflicts.¹³⁷ When sex crimes occur in conflicts not of an international armed conflict, they are prosecuted as serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 and other serious violations of the laws and customs applicable in armed conflicts not of an international character.¹³⁸

The ad hoc tribunals have successfully prosecuted and convicted perpetrators of sex crimes against women during the armed conflicts that took place in the former Yugoslavia and Rwanda. The ICTY Statute despite expressly listing rape only in its Statute, also prosecutes rape and other forms of sex crimes as war crimes constituting grave breaches of the Geneva Convention of 12 August 1949 and as violations of the laws or customs of war.¹³⁹ The ICTY relies

¹³⁵ *Prosecutor v Furundzija* (10 December 1998) para 165.

¹³⁶ *Prosecutor v Akayesu* (2 September 2008) para 620.

¹³⁷ Article 8 (2) (b) (xxi), Article 8 (2) (b) (xxii) ICC Statute, Article 2 and Article 3 ICTY Statute.

¹³⁸ Article 8(2) (c) (vi) ICC Statute and Article 4 ICTR Statute.

¹³⁹ Article 2 and Article 3 ICTY Statute, *Prosecutor v Furundzija* (10 December 1998) para 172.

on Article 5 (i) of the Statute to prosecute other acts of sexual crimes not expressly mentioned as 'other inhumane acts'.¹⁴⁰

The ICTR prosecutes sex crimes as serious violations of Article 3 Common to the Geneva Convention of 1949 and the 1977 Additional Protocol II specifically under Article 4 (e). The ICTR also prosecutes sex crimes as outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.¹⁴¹ The reason for this is because the armed conflict that took place in Rwanda is considered one not of an international character.

The ICC is the first international criminal law instrument to explicitly criminalise sexual violence committed either in international armed conflicts or in conflicts not of an international character, as war crimes.¹⁴² Sex crimes expressly listed as war crimes under the ICC Statute include, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity.¹⁴³ Sex crimes as war crimes differ from crimes against humanity in regard to the context in which they are committed. When committed as part of a plan or policy or as part of a large scale commission during armed conflict, sex crimes are prosecuted as war crimes.¹⁴⁴ The individual crimes listed as war crimes in the ICC Statute are the same as the sexual acts listed as crimes against humanity which have been discussed under section 3.3.

¹⁴⁰ *Prosecutor v Furundzija* (10 December 1998) para 175.

¹⁴¹ Article 4 (e) ICTR Statute.

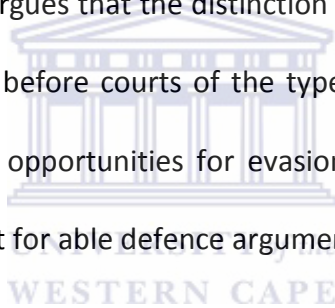
¹⁴² Article 8(2) (b), Article 8(2) (c) ICC Statute.

¹⁴³ Article 8(2) (b) (xxii), Article 8(2) (c) (vi) ICC Statute.

¹⁴⁴ Article 8(2) (a), Article 8(2) (b) (xxi) and Article 8(2) (b) (xxii) ICC Statute.

The ICC unlike the ad hoc tribunals creates a distinction between international armed conflicts and conflicts not of an international character. Also, the ICC unlike the ICTY combines the grave breaches of the Geneva Convention and the violations of war or customs of war.¹⁴⁵ The ICC under grave breaches of the Geneva Conventions creates a provision for sex crimes to be prosecuted as torture, or inhumane treatment and wilfully causing great suffering or serious injury to body or health.¹⁴⁶

Despite the distinction, the consequence for committing sexual violence as a war crime remains the same and the perpetrator is held individually criminally responsible hence ending impunity for sex crimes. Schabas however argues that the distinction created by the ICC Statute imposes a difficult exercise of assessment before courts of the type of conflict involved.¹⁴⁷ Having an exhaustive categorisation creates opportunities for evasion, as the greater the detail in the provision, the more loopholes exist for able defence arguments.¹⁴⁸



¹⁴⁵ Campanaro (2001) 2588.

¹⁴⁶ Article 8 (2) (a) (ii) (iii) ICC Statute.

¹⁴⁷ Schabas(2007) 116.

¹⁴⁸ Schabas(2007) 117.

3.4.1 Sexual Violence in International Armed Conflict

Sex crimes committed in international conflicts are prosecuted as grave breaches of the Geneva Convention of 1949 under torture or inhumane treatment, including biological experiments,¹⁴⁹ or wilfully causing great suffering, or serious injury to body or health.¹⁵⁰

3.4.1.1 Sexual Violence as torture and inhumane treatment

Sexual violence is an act of torture because it causes severe physical and mental suffering which is usually committed for the purpose of humiliating, intimidating, degrading or obtaining information.¹⁵¹ Torture is prohibited under customary international law and is regarded a *jus cogens* from which no derogation is allowed. Torture is defined by the ICC to mean:

The intentional infliction of severe pain or suffering whether physical or mental, upon a person in custody or under the control of the accused except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.¹⁵²

The ICTY prosecutes sexual violence as torture prohibited on the basis of the 1949 Geneva Conventions, Common Article 3 and Article 3 of the ICTY Statute. During the conflict in the former Yugoslavia, rape and other forms of sexual violence were used as a form of torture to intimidate and humiliate Muslim women. Delic was found guilty by the ICTY for using forcible

¹⁴⁹ Article 8(2) (a) (ii) ICC Statute, Article 2 (b) ICTY Statute.

¹⁵⁰ Article 8(2) (a) (iii) ICC Statute, Article 2(c) ICTY Statute.

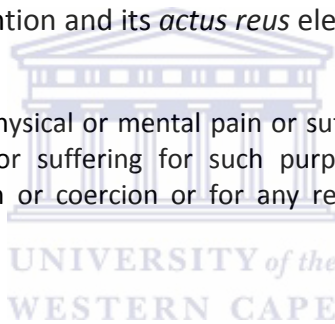
¹⁵¹ Amnesty International and CODESRIA *Monitoring and Investigating Sexual Violence, A Companion to UKWELL: Monitoring and Documenting Human Rights Violations in Africa* (2000) 9.

¹⁵² Article 7(2) (e) ICC Statute.

vaginal and anal sexual intercourse to torture witness A and other Muslim women.¹⁵³ Also, as a way of asserting Serb superiority and victory, Muslim women were detained in unhygienic conditions, mistreated and raped repeatedly by Serb soldiers.¹⁵⁴ 50 women and girls detained in Foca High School were repeatedly raped by Serb soldiers, while other women were detained in different places as sex slaves.¹⁵⁵ The repeated rapes in places of detention of Muslim women led the Appeals Chamber in *Kunarac* to hold that, sexual violence is an act of torture because it gives rise to severe mental or physical pain or suffering.¹⁵⁶

Under the ICC Statute, torture constitutes a war crime under Article 8(2) (a) (ii) as a grave breach of the 1949 Geneva Convention and its *actus reus* elements require that:

(i) The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons, (ii) the perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.¹⁵⁷



The mental element requires that the perpetrator was aware of the factual circumstances that established the protected status and committed the act of torture intentionally, and the nexus requirement is that the acts of torture took place in the context of and associated with an international armed conflict.¹⁵⁸

¹⁵³ *Prosecutor v Zejnil Delalic, Zdravko Mucic and Esad Landzo* Case No. IT-96-21-T (16 November 1998) para 944.

¹⁵⁴ *Prosecutor v Kunarac et al* (22 February 2001) para 574, para 583.

¹⁵⁵ Leatherman (2011) 112.

¹⁵⁶ Commission on Human Rights, Forty-eight session, Summary Record of the 21st Meeting, 11 February 1992, Doc E/CN-4/1992/SR. 21, 21 February 1992, para 35 cited in *Prosecutor v Kunarac, Kovic and Vokovic*, Case No.IT-96-23 and IT-96-23/1-A (12 June 2002) para 205.

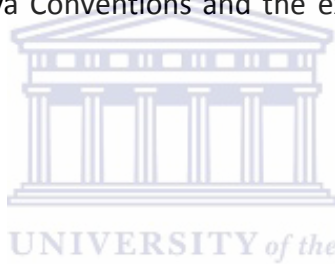
¹⁵⁷ Article 8 (2) (a) (ii)-1 EoC.

¹⁵⁸ Article 8 (2) (a) (ii)-1 EoC, *Prosecutor v Kunarac et al* (22 February 2001) para 557.

Torture under international criminal law does not require that the perpetrator acted in an official or authoritative capacity for an act of torture to qualify as a war crime.¹⁵⁹ Also, torture as a war crime does not also require that the persons were in custody or under the control of the perpetrator but only requires that victims are protected persons under one or more of the Geneva Conventions.¹⁶⁰

From the above, the physical or mental suffering inflicted on women as a result of sexual violence, when used in international conflicts, justifies its characterisation as an act of torture. It must be proved beyond reasonable doubt that the perpetrator was aware of the protected status of victims under the Geneva Conventions and the existence of an international armed conflict.

Inhumane Treatment



Inhumane treatment is a grave breach of the 1949 Geneva Convention and is prohibited under Article 8(2) (a) (ii) of the ICC Statute and Article 2(b) of the ICTY Statute. Examples of inhumane treatment include forcing related persons to commit incest and forcing ladies to dance naked.¹⁶¹ Sexual violence constituting inhumane treatment therefore includes sexual acts that cause humiliation and attack the fundamental norms of respect for human dignity and humane treatment.

¹⁵⁹ Boot, Machteld *Genocide, Crimes against Humanity, War Crimes: Nullem Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (2002) para 566.

¹⁶⁰ Boot (2002) para 567.

¹⁶¹ Askin 'The Jurisprudence of International War Crimes Tribunals' in Durham *et al* (2005) 147.

The ICTY defined inhumane treatment to mean:

An intentional act or omission that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.¹⁶²

The *actus reus* element of inhumane treatment requires that:

(i) The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.¹⁶³

The mental element of inhumane treatment as a war crime requires that the perpetrator caused inhumane treatment with intent and knowledge pursuant to Article 30 ICC statute. Also, the perpetrator must have been aware of the factual circumstances establishing the protected status of persons, under the Geneva Convention, and the nexus requirement is that the act of causing inhumane treatment must occur in the context of and associated with an international armed conflict.¹⁶⁴

3.4.1.2 Wilfully causing great suffering or serious injury to body or health

The offence of wilfully causing great suffering or serious injury to body or health constitutes a war crime that violates grave breaches of the Geneva Convention of 1949.¹⁶⁵ The offence covers acts or omissions that are intentional or deliberate, that cause mental harm or physical

¹⁶² *Prosecutor v Delalic et al* (16 November 1998) para 543.

¹⁶³ Article 8 (2) (a) (ii)-2 EoC.

¹⁶⁴ Article 8 (2) (a) (ii)-2 EoC.

¹⁶⁵ Article 8(2) (a) (iii) ICC Statute.

injury and does not meet the purposive requirements of torture.¹⁶⁶ Wilfully causing great suffering or serious injury to body or health differs from torture on the basis that the acts or omissions need not be committed for a prohibited purpose as is required of torture.¹⁶⁷ Sexual acts, such as, sexual mutilation and forced oral sex may cause great suffering or serious injury to body or health.

The *actus reus* element of wilfully causing great suffering or serious injury requires that:

(i) The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.¹⁶⁸

The mental element requires that the perpetrator committed the act with intent and knowledge according to Article 30 ICC Statute. The perpetrator must have been aware of the factual circumstances establishing the protected status of persons, under the Geneva Convention, and the nexus requirement is that the act causing serious great suffering or serious injury to body and health took place in the context of or was associated with an international armed conflict.¹⁶⁹

3.4.1.3 Outrage upon Personal Dignity

Sexual violence can be prosecuted by the ICC as an outrage upon personal dignity, in particular humiliating and degrading treatment provided for under Article 8 (2) (b) (xxi) of the ICC Statute.

¹⁶⁶ *Prosecutor v Delalic et al* (16 November 1998) para 511.

¹⁶⁷ *Prosecutor v Delalic et al* (16 November 1998) para 442.

¹⁶⁸ Article 8 (2) (a) (iii) EoC.

¹⁶⁹ Article 8 (2) (a) (iii) EoC.

However, De Brouwer states that this provision of committing outrage upon personal dignity is not usually used in prosecutions.¹⁷⁰ However, examples include sexual mutilation, forced abortion and forced nudity.¹⁷¹

Therefore, sexual violence as a war crime committed in international armed conflicts is prosecuted as grave breaches of the Geneva Convention and as serious violations of the laws and customs of international armed conflict. Prosecuting sexual violence as such provides a wider basis to the prosecution on which to frame charges and hold perpetrators accountable so as to end impunity for sex crimes.

3.4.2 Sexual Violence in Non- International Armed Conflict

The ICTR prosecutes sexual violence not only as a serious violation of Article 3 common to the four Geneva Convention but also as a violation of Additional Protocol II.¹⁷² The ICC also prosecutes sex crimes committed in the context of conflicts not of an international character as serious violations of Article 3 Common to the four Geneva Conventions of 1949.¹⁷³ Also sex crimes are prosecuted on the basis of torture, acts of outrage upon personal dignity and inhumane and degrading treatment.¹⁷⁴

The ICC prosecutes sex crimes as serious violations of law and customs and goes ahead to expressly list the crimes. Rape, sexual slavery, enforced prostitution, forced pregnancy,

¹⁷⁰ De Brouwer (2005) 197.

¹⁷¹ Askin in Durham *et al* (2005) 148.

¹⁷² Article 4 (e) ICTR Statute.

¹⁷³ Article 8 (2) (e) (vi) ICC Statute.

¹⁷⁴ Article 8 (2) (c) (i), Article 8 (2) (c) (ii).

enforced sterilisation and any other form of sexual violence are expressly listed under the ICC Statute as sex crimes committed in non-international armed conflict.¹⁷⁵ Bemba in *Prosecutor v Jean Pierre Bemba*, is currently being charged and prosecuted by the ICC for acts of rape and other forms of sexual violence constituting war crimes committed against civilians in the context of and in association with an armed conflict not of an international character.¹⁷⁶

3.4.2.1 Torture through acts of sexual violence as a war crime

Torture is prohibited as a serious violation of Article 3 Common to the four Geneva Conventions of 1949 in the ICTR Statutes and is prosecuted as such.¹⁷⁷ Judges in the *Prosecutor v Jean Paul Akayesu*, stated that rape is a violation of personal dignity and in fact constitutes torture.¹⁷⁸ Sexual violence as an act of torture has been discussed in 3.4.1.1 above, and reference may be made, as the elements of sexual violence constituting torture in an international armed conflict are similar to the ones in a conflict not of an international character.

During the armed conflict in the Central African Republic, Mouvement de Liberation du Congo (hereafter MLC), used torture through acts of rape for the purpose of punishing, discriminating and intimidating the civilian population as for supporting Bozize's rebels.¹⁷⁹ Through rape and

¹⁷⁵ Article 8(2) (e) (vi) ICC Statute.

¹⁷⁶ *Prosecutor v Bemba* (15 June 2009) para 282.

¹⁷⁷ Article 4 ICTR Statute.

¹⁷⁸ *Prosecutor v Akayesu* (2 September 1998) para 597.

¹⁷⁹ *Prosecutor v Bemba* (15 June 2009) para 297.

other forms of sexual violence, the MLC soldiers inflicted severe physical or mental pain or suffering in violation of Article 8(2) (c) (i) ICC Statute.¹⁸⁰

The *actus reus* elements of torture require that:

(i) The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons. (ii) The perpetrator inflicted pain or suffering for such purpose as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.¹⁸¹

The mental element requires that the perpetrator committed the act of torture with intent and knowledge pursuant to Article 30 ICC Statute. The perpetrator must have been aware of the factual circumstances establishing the status of the persons concerned, and the nexus requirement is that the acts of sexual violence amounting to torture took place in the context of and associated with an armed conflict not of an international nature.¹⁸²

Prosecuting sexual violence that occurs in non-international armed conflicts recognises that sex crimes amount to torture and inflict severe physical or mental pain or suffering on women. The prosecution therefore has to successfully prove beyond reasonable doubt that the perpetrator intentionally committed sexual acts that amounted to torture.

¹⁸⁰ *Prosecutor v Bemba* (15 June 2009) para 289.

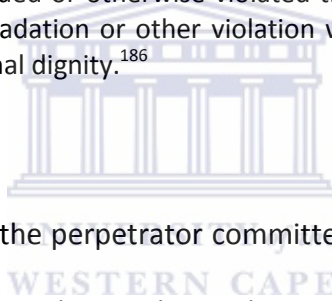
¹⁸¹ Article 8 (2) (c) (i)-4 EoC.

¹⁸² Article 8(2) (c) (i)-4 EoC.

3.4.2.2 Sexual violence as acts of outrages upon personal dignity, inhumane and degrading treatment as war crimes.

Sexual violence in international criminal law can be prosecuted as an outrage upon personal dignity, inhumane and degrading treatment.¹⁸³ Rape is used for such purposes as intimidation, humiliation, discrimination, punishment, control or destruction of a person and is a violation of personal dignity.¹⁸⁴ Schabas also states that other acts beyond rape, for example, forced nakedness can also amount to inhumane acts.¹⁸⁵ The *actus reus* elements of outrage upon personal dignity require that:

(i) The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons. (ii) The severity of the humiliation, degradation or other violation was of such degree as to be generally recognised as an outrage upon personal dignity.¹⁸⁶



The mental element requires that the perpetrator committed the act of outrage upon personal dignity with intent and knowledge in line with Article 30 ICC Statute. The perpetrator must have been aware of the factual circumstances establishing the status of the persons concerned and the nexus requirement is that the sex acts amounting to outrage upon personal dignity took place in the context and were associated with a conflict not of an international character.¹⁸⁷

Therefore, elements of specific sex crimes must be proved to have been committed in violation of Common Article 3 and the laws and customs applicable to a conflict not of an -international

¹⁸³ Article 8 (2) (c) (ii) ICC Statute, Article 4 (e) ICTR Statute.

¹⁸⁴ *Prosecutor v Akayesu* (2 September 1998) para 597.

¹⁸⁵ Schabas (2007) 110.

¹⁸⁶ Article 8 (2) (c) (ii) EoC.

¹⁸⁷ Article 8 (2) (c) (ii) EoC.

character. The sex crimes should also be committed against protected persons, such as, those taking no active part in hostilities, including members of armed forces who have laid down their tools, and those in hors de combat.

3.5 Individual Criminal Responsibility for Sexual Violence

Individual criminal responsibility is a substantive principle of international criminal law that has been recognised as customary international law.¹⁸⁸ Individuals were for the first time, before the Nuremberg tribunal, held criminally liable for crimes committed under international law.¹⁸⁹

In efforts to end impunity for sex crimes, the ad hoc tribunals have prosecuted and held perpetrators most responsible for sex crimes individually criminally liable. The ICC has also played an important role in explicitly stating the principle of individual criminal responsibility in its Statute despite not having held any accused person as yet individually criminally responsible for sexual violence.

The ad hoc tribunals also provide for individual criminal responsibility for a person who planned, instigated, ordered or committed or otherwise aided and abetted in planning, preparation or execution of an international crime.¹⁹⁰ The ad hoc tribunals follow the notion of joint criminal enterprise (hereafter JCE) to hold an accused person criminally liable for criminal conduct involving a joint plan or purpose. Under JCE, each participant may be held accountable for consequences not included in the common plan if they are a natural or foreseeable

¹⁸⁸ Werle (2009) para 16.

¹⁸⁹ Werle (2009) para 15.

¹⁹⁰ Article 7 ICTY Statute and Article 6 ICTR Statute.

consequence of effecting the common purpose.¹⁹¹ Whether or not the crime agreed upon was committed, the guilt and *mens rea* is imputed on all the parties by association.¹⁹² Under JCE, the ICTY in *Prosecutor v Krsitic* convicted the accused and found him criminally liable for rapes committed against Bosnian Muslim women, in execution of his criminal enterprise because the sexual violence that took place was a natural and foreseeable result of wartime violations.¹⁹³ Also the ICTY stated that the detention of women guarded by physically and mentally abusive drunk, violent men with weapons was a natural and foreseeable result of rape for which the accused was to be held criminally liable under JCE.¹⁹⁴

The ICC however does not follow the principle of joint criminal enterprise.¹⁹⁵ For one to be held criminally liable for commission of a crime committed jointly, a common plan for execution of a crime against international law must exist, there must be multiple participants, each participant must essentially contribute to the plan and the mental element or *mens rea* must personally be fulfilled by each individual.¹⁹⁶ To be held individually responsible for a crime committed through another, the perpetrator must control the will of those who physically carry out the material elements of the crime.¹⁹⁷ The ICC provides that a person who commits a crime whether as an individual, jointly with another or through another person, regardless of whether the other person is criminally responsible, shall be individually responsible and liable for punishment.¹⁹⁸

¹⁹¹ *Prosecutor v Duko Tadic* Case No. IT-94-1-A (Judgment of 15 July 1999) para 204 cited in Werle (2009) para 462.

¹⁹² Werle (2009) para 462.

¹⁹³ *Prosecutor v Radislav Krstic*, Case No. IT-98-33-T (2 August 2001) para 617.

¹⁹⁴ *Prosecutor v Miroslav Kvočka, Milojica, Mlao, Zorani, Dragoljub*, Case No. IT-98-30/1-T (2 November 2001) para 327.

¹⁹⁵ Werle (2009) para 468.

¹⁹⁶ Werle (2009) para 472.

¹⁹⁷ *Prosecutor v Thomas Lubanga Dyilo* Case No ICC-01/04-01/06 'Pre Trial Chamber Decision on the Confirmation of Charges' (29 January 2007) para 332.

¹⁹⁸ Article 25 ICC Statute.

For example, the ICC indicted Jean Pierre Bemba for sex crimes committed through others, who were his soldiers.

Therefore, in prosecuting sex crimes before international criminal courts, perpetrators are held individually criminally responsible for sex crimes committed either individually, jointly with another or through another person. Before the ICC, for one to be criminally responsible for sex crimes, the sex crime committed must be done either individually, jointly with another or through another person. And before the ad hoc tribunals, for one to be held individually criminally responsible, a perpetrator must either commit sex crimes individually or aid and abet in the commission of sex crimes forming part of a joint criminal enterprise.



Chapter Four

Critical Appraisal of the Prosecution of Sexual Violence under International

4.1 Introduction

The effectiveness of prosecuting sexual violence can be measured by the number of convictions and cases that have been prosecuted before international criminal courts. The ad hoc tribunals have prosecuted and convicted a number of accused for sex crimes as crimes against humanity, genocide and war crimes. Also, the ICC may not have convicted any accused for sexual violence, but some persons have been charged with sexual violence related offences. The ICC Statute has also played a significant role by explicitly listing different acts of sexual violence as crimes against humanity and war crimes. Despite the achievements, there is need for improvements by international criminal courts in prosecuting sex crimes so as to end impunity and hold those responsible accountable. This chapter is a critical appraisal of the prosecution of sexual violence on the international level and points out areas that have facilitated effective prosecution of sex crimes. This chapter also discusses areas of concern that is, challenges and shortcomings that affect and hinder the effective prosecution of sexual violence under international criminal law.

4.2 Achievements in Prosecution of Sex Crimes under International Criminal Law

4.2.1 Recognition of Sexual Violence as explicit crimes

The ad hoc tribunals pioneered prosecution of sex crimes and have established jurisprudence and defined elements of sex crimes to be forms in which crimes against humanity, genocide and war crimes can be committed. The ad hoc tribunals in their statutes, despite expressly listing rape as a crime against humanity and not any other forms of sexual violence, have also prosecuted other forms of sex crimes.¹⁹⁹ As war crimes, the ICTR expressly mentions rape, enforced prostitution and any other form of indecent assault but has gone ahead to prosecute other forms of sex crimes as war crimes.²⁰⁰ The ad hoc tribunals have also prosecuted and convicted perpetrators for sex crimes as war crimes constituting torture, inhumane treatment, wilfully causing great suffering and injury and as crimes against humanity.

Also, despite sex crimes not being stated in the definition of genocide, the ad hoc tribunals have gone ahead to interpret sexual violence as a way through which genocide may be committed. Therefore, through their indictments and convictions for sex crimes, the ad hoc tribunals have led to sex crimes being taken seriously by the international community as it shows that they are committed to ending impunity of sex crimes and holding perpetrators accountable. The jurisprudence established by the ad hoc tribunals for sex crimes also provided a background for the inclusion of sex crimes in the ICC statute.

¹⁹⁹ Article 5(g) ICTY Statute; Article 3(g) ICTR Statute.

²⁰⁰ Article 4(e) ICTR Statute.

The ICC Statute is the first international criminal instrument to list different acts through which sexual violence can be committed as crimes of genocide, crimes against humanity and war crimes. Unlike before, sexual violence was regarded only as a crime against honour and dignity. The ICC explicitly mentions, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity. The different acts of sexual violence recognised in the ICC Statute provide a wider basis on which to draft and prosecute indictment charges. Having a wider basis on which to draft indictments plays a significant role in ending impunity and bringing justice to victims of sex crimes because all crimes of a sexual nature are included.

4.2.2 Responsibility of Commanders and Other Superiors

The ICC Statute provides for the principle of command responsibility that plays a significant role in the effective prosecution of sex crimes. Military commanders or other superiors are held criminally responsible for crimes committed by their subordinates under their effective control if they fail to take reasonable steps or measures to punish or prevent commission of the crime.²⁰¹ Command responsibility is important to the effective prosecution of sex crimes because commanders are in the best position to stop their subordinates from committing sexual crimes against women.²⁰² This is because if commanders properly supervise the activities of their subordinates, and take action against them for their actions, they would prevent sex crimes from taking place. The ICC in the case of *Prosecutor v Bemba* is prosecuting Bemba

²⁰¹ Article 28 ICC Statute.

²⁰² Pritchett, M. Susan 'Entrenched Hegemony, Efficient Procedure or Selective Justice? An Enquiry into Gender Based Violence at the International Criminal Court' (2008) 17 *Transnational Law and Contemporary Problems* 293 available at <http://www.uiowa.edu/~interls/PDFs/Pritchett.finalfinal.dse.031108.pdf> (Accessed 1 June 2011).

under the principle of command responsibility, as the former commander of the MLC, for acts of rape committed by his soldiers against civilians in CAR during the armed conflict.²⁰³

Before the ad hoc tribunals, the principle of holding commanders responsible for the acts of their subordinates has led to the conviction of superiors for sex crimes.²⁰⁴ For example, the ICTR in *Prosecutor v Jean Paul Akayesu* convicted Akayesu, who held an executive civilian position in Taba Commune, in Rwanda, for sex crimes committed by his subordinates because he knew that acts of sexual violence were being committed against women but he failed to prevent sexual violence and instead encouraged it.²⁰⁵

The principle of command responsibility is an effective mechanism when dealing with sex crimes because it manifests zero tolerance for sex crimes committed against civilians. Also, holding superiors responsible for acts they have not physically committed puts a strict obligation on superiors to exercise their supervisory powers over subordinates and this, acts as a deterrence mechanism against future commission of sex crimes.

4.2.3 Participation of Victims of Sex Crimes

The ICC has been the first international criminal court to allow victims whose personal interests are affected to present their views and concerns in proceedings. The Registrar of the ICC is required to take gender sensitive measures to facilitate participation of victims of sexual violence in all stages of proceedings.²⁰⁶ Victims may participate in proceedings either personally

²⁰³ *Prosecutor v Jean Pierre Bemba*, Case No. ICC-01/05-01/08, Case Information Sheet.

²⁰⁴ Article 7(3) ICTY Statute, Article 6(3) ICTR Statute.

²⁰⁵ *Prosecutor v Akayesu* (2 September 1998) para 107.

²⁰⁶ Rule 16 ICC RPE.

or through their legal representatives and may make representations to the Pre-Trial Chamber in accordance with the Rules of Procedure and Evidence.²⁰⁷ In this case, a victim is defined as a natural person who has physically, mentally or emotionally suffered damage or harm as a result of the accused person's acts.²⁰⁸ However, in allowing victims of sex crimes to participate in proceedings, the rights of the accused and the accused's right to a fair trial should not be infringed upon.²⁰⁹ The ad hoc tribunals are however silent in regard to giving victims of sex crimes an opportunity to participate at any stage of court proceedings and limit the proceedings and court process to only the accused, his defence counsel, prosecution counsel and the judges only.

Participation of victims in proceedings is an effective mechanism for prosecuting sex crimes because victims have the opportunity to present relevant information of facts and evidence before international courts. Through participation in proceedings, victims also have the opportunity to present their views and concerns before the ICC, know the truth pertaining to their violations and if any, show the physical scars caused as a result of sexual violence as evidence. Allowing victims of sex crimes to participate in court proceeding before the ICC gives them the chance to talk about their pain and experiences which in a way fastens their healing. Victims are also encouraged to testify because they get more involved in court proceedings and they get to experience the work of the ICC in its efforts to end impunity for sex crimes.

²⁰⁷ Article 68(3) ICC Statute.

²⁰⁸ Rule 2 RPE of the Special Tribunal for Lebanon, STL/BD/2009/01/Rev 3.

Participation of victims of sex crimes in ICC proceedings is also an effective mechanism as it manifests that the ICC, in its efforts to end impunity and hold perpetrators for sex crimes accountable, takes the interests of victims into consideration.

4.2.4 Protection of Victims and Witnesses and Reparations

Prosecuting sex crimes requires that victims and witnesses are offered protection and appropriate assistance when they decide to testify. In this regard, the ICC and the ad hoc tribunals have victim and witness protection units that consist of qualified staff to provide protection, confidentiality, physical and psychological rehabilitation and counselling in issues of sexual violence.²¹⁰ Protective and confidentiality measures may include, holding closed court sessions, redacting witness statements and use of pseudonyms all aimed at hiding the identity of victims or witnesses. Protective mechanisms are important when prosecuting sex crimes before international criminal courts because they provide confidentiality to witnesses and hide the identity of victims who fear for their lives. Protective mechanisms therefore encourage victims and witnesses to report, testify and present relevant facts and evidence without fear of being identified or being confronted by accused persons.

In addition to protective measures, the ICC and the ad hoc tribunals provide reparations to victims of sex crimes, such as, physical and psychological rehabilitation, restitution and compensation.²¹¹ Reparation offered to victims may include, among others, counselling, medical health care facilities, short or long term protection facilities and compensation. The ICC unlike the ad hoc tribunals offers victims appearing before the court compensation as part of

²¹⁰ Rule 17 ICC RPE, Rule 34 (A) (i) ICTY RPE, Rules 34(A) (i) ICTR RPE.

²¹¹ Article 75 ICC Statute, Rule 34 (A) (ii) ICTY RPE, Rules 34 (A) (ii) ICTR RPE.

reparations.²¹² Reparations are important to the prosecution of sex crimes because they are symbolic of restorative justice to victims for the suffering and pain caused as a result of sex crimes.

4.2.5 Irrelevance of Consent

The RPE of the ICC and ad hoc tribunals provide for principles governing evidence in cases of sexual violence. In evidence regarding sex crimes, the ICC and the ad hoc tribunals clearly state that consent of the victim subjected to threat, violence, duress, detention or psychological oppression cannot be relied on by the defence as evidence.²¹³ In the Central African Republic (hereafter CAR), women were beaten up and forced to undress in order to be raped by the MLC soldiers and this undermined women's ability to give genuine consent to the sexual acts.²¹⁴ Also in Rwanda, women who tried to resist being raped by the interahamwe during the genocide were threatened by death and this established circumstances that prevented victims from giving genuine consent.²¹⁵ Irrelevance of consent in international criminal law is important, as any circumstances that undermine a woman's ability to consent to a sexual act cannot be relied on and inferred by the perpetrators to constitute genuine consent.

Also, consent cannot be inferred by reason of any words, conduct, silence or lack of resistance of the victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent.²¹⁶ In

²¹² Article 68 ICC Statute.

²¹³ Rule 70 ICC RPE, Rule 96 ICTY RPE, and Rule 96 ICTR RPE.

²¹⁴ *Prosecutor v Bemba* (15 June 2009) para 179.

²¹⁵ *Prosecutor v Gacumbitsi*, Case No. ICTR-2001-64-T (17 June 2004) para 325.

²¹⁶ Rule 70 ICC RPE.

addition, prior sexual conduct of the victim shall not also be submitted in defence by the accused and corroboration of the victim's testimony is also considered irrelevant and cannot be relied upon by the defence.²¹⁷

Irrelevance of consent and prior conduct of the victim contributes to effective prosecution of sex crimes because it prevents victims from answering humiliating and demoralising questions put forward in court in order to enquire into the victim's state of mind. It also removes the burden of proof from victims and the prosecution to prove that they did not consent to the sex act committed by the perpetrator. Unlike, domestic laws that require lack of consent to sexual acts to be proved, under international criminal law, irrelevance of consent and prior conduct of the victim stresses the fact that coercive circumstances render sexual acts non-consensual. This therefore encourages victims to come forward and testify hence promoting access to justice of victims and leading to the effective prosecution of sex crimes before international criminal courts.

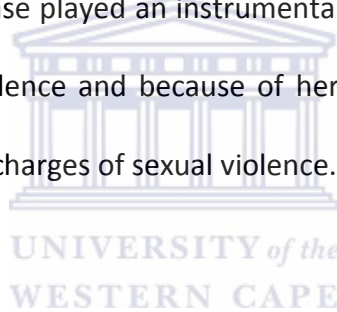
4.2.6 Presence of Female Judges

During armed conflicts, sexual violence is mostly committed against women as crimes against humanity, war crimes and acts of genocide. It is therefore very important to include female judges in their prosecutions in order to encourage female victims testify openly and confidently. The ICC Statute under Article 36 (8) (a) (iii) states that the court must have a fair representation of both male and female judges and judges with expertise on violence against women or children. Also, because of the widespread use of sexual violence during armed

²¹⁷ Rule 96 (iv) ICTR RPE, Rule 70(d) RPE of the ICC.

conflict, it is imperative to include judges with legal expertise on sex crimes on the bench before international criminal courts. Having both female judges and judges with legal expertise on sexual violence promotes effective prosecution of sex crimes as the judges understand the nature and consequences of sex crimes. Also, female and expert judges will know how to handle victims and the right questions to ask victims that will disclose relevant facts and evidence necessary to hold perpetrators accountable.

The importance of having female judges to promote effective prosecution of sex crimes was manifested at the ICTR during the trial of the *Prosecutor v Jean Paul Akayesu*. Judge Navanethem Pillay in Akayesu's case played an instrumental role by questioning witnesses and eliciting testimonies of sexual violence and because of her questions, the indictment against Akayesu was amended to include charges of sexual violence.²¹⁸



²¹⁸ Copelon, Rhonda 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill Law Journal* 217 at 220-8 available at http://www.iccwomen.org/publications/articles/docs/Gender_Crimes_as_War_Crimes.doc (Accessed 14 October 2011).

4.3 Challenges Facing Prosecution of Sexual Violence under International Criminal Law

4.3.1 Selective Prosecution of Sex Crimes

Selective prosecution is one of the major factors that affect prosecution of sex crimes effectively. Selective prosecution means when an enforcement agency or officer has discretionary power to do nothing about a case in which enforcement would be justified.²¹⁹

Selective prosecution leads to selective enforcement yet the law should be applied equally to all.²²⁰ It is understandable that international criminal courts do not have the capacity to prosecute all offences and perpetrators, and so prosecutors select a limited number of cases and charges to bring before international courts. However, the use of sexual violence is so widespread that failing to prosecute sex crimes mainly due to selectivity leaves an impression that sexual violence is condoned by the international community. Sex crimes should be given priority in prosecution as their consequences are too grave and may result in elimination of an entire population, through changing its ethnicity. Also, effects of sexual violence go beyond individual suffering to affect the entire community. Selectivity in prosecution of sex crimes is manifested in different ways which are discussed below.

4.3.1.1 Focus on Commanders and Top Officials

Obligation to prosecute subordinates who physically commit sex crimes is left to domestic courts that may be functionally unable to issue jurisdictional response due to hardship and

²¹⁹ Cryer (2005) 192.

²²⁰ Cryer (2005) 192.

devastation of war.²²¹ Such hardships among others, may include, lack of protection measures and reparation services for victims and witnesses willing to testify before domestic courts.²²² Focus on top officials arises due to the principle of complementarity and because international criminal courts exclusively prosecute commanders and other superiors and not subordinate, who physically commit sex crimes. Haskell argues that domestic courts are ineffective in prosecuting sexual crimes and women in the DRC live in a state without effective rule of law mechanisms and gender bias in the judicial process is prevalent.²²³ In the Democratic Republic of Congo, magistrates are poorly trained to handle sex crimes and are not inclined to helping sex victims which results in the lack of confidence in the domestic justice system.²²⁴

Mackinnon rightfully argues that international justice confirms for the subordinate men who commit most rapes that there is no chance they will be held responsible for each rape they commit.²²⁵ Therefore, prosecutorial discretion to exclusively prosecute superiors instead of actual physical perpetrators hinders effective prosecution of sex crimes under international law. This is because there is no guarantee that subordinates are held accountable under domestic courts for sex crimes under international criminal law. Focusing on superiors also

²²¹ Lawson, F. Tamara 'A Shift towards Gender Equality in Prosecutions: Realising Legitimate Enforcement of Crimes Committed against Women in Municipal and International Criminal Law' 2009) 33 *ULJ* 215 available at http://heinonline.org/HOL/Page?handle=hein.journals/siulj33&div=12&g_sent=1&collection=journals (Accessed 1 June 2011).

²²² Glifford, Lisa and Ntirica, Charles 'Hague Court Considers Bolstering Local Judiciary' in Tosh Caroline and Chazan Yigal (eds) Special Report: Sexual Violence in the Democratic Republic of Congo (2008) 15 available at <http://www.ceipaz.org/images/contenido/Sexual%20violence%20in%20the%20Democratic%20Republic%20of%20Congo.pdf> (Accessed 10 October 2011).

²²³ Haskell, D. John 'The Complicity: Limits of International Law in Armed Conflict Rape' cited by Owen, Meredith 'Fight Fire with Fire: The ICC Should Be More Aggressive in Pursuing Crimes of Sexual Violence' (2009) 5 *Criminal Law Brief* 107 available at <http://www.wcl.american.edu/journal/clb/documents/Vol5Issue1.pdf?rd=1> (Accessed 30 March 2011).

²²⁴ Goetze, Katharina 'No Sign of End to Epidemic' in Tosh *et al* (2008) 5.

²²⁵ Mackinnon, Catherine 'The Recognition of Rape as an Act of Genocide- *Prosecutor v Akayesu*' (27 October 2008) 106 available at <http://www.icc-cpi.int/library/organs/otp/ICC-OTP-20081027-MacKinnon.pdf> (Accessed 22 July 2011).

increases participation of lower soldiers in sex crimes and promotes impunity among them since their commanders are held accountable on their behalf.

4.3.1.2 Selectivity in Issuing Charges for Sex Crimes

The prosecutor in International criminal courts is required to take appropriate measures to ensure prosecution of crimes involving sexual violence so as to promote justice and end impunity. However, there is absence of charges and arrest warrants, mainly by the ICC issued against those associated with the military that committed sex crimes. For example, in the DRC, many girl children conscripted as child soldiers by Lubanga were subjected to severe amounts of sexual violence, but only charges of conscripting and enlisting child soldiers into the army were issued against Lubanga, despite the overwhelming evidence of sexual violence.²²⁶ The ICC prosecutor failed to issue charges against Lubanga for sexual violence because of failure to provide sufficient evidence to prove a link between Lubanga and individual rapists.²²⁷ The absence of arrest warrants against the Lubanga has led to a strong perception among the people of DRC that the ICC is carrying out selective justice.²²⁸

Selectivity in issuing sexual violence charges against perpetrators, despite overwhelming evidence, leads to failure in bringing charges of sex crimes for prosecution before international criminal courts. Selectivity therefore hinders effective prosecution of sex crimes and this is currently evidenced by the lack of convictions and few prosecutions before the ICC so far. Also,

²²⁶ *Prosecutor v Thomas Lubanga Dyilo* Case No. ICC-01/04/01-06 (10 February 2006).

²²⁷ Pritchett (2008) 295.

²²⁸ Human Rights Watch, *The Selection of Situations and Cases for Trial before the International Criminal Court 3* (2006) available at <http://www.hrw.org/backgrounder/ij/ij1006/ij1006web.pdf> cited in Pritchett (2008) 300.

issuing charges selectively against perpetrators creates lack of confidence among victims of the ability of international criminal courts in promoting justice.

4.3.1.3 Selectivity through Temporal Jurisdiction

The ICC and the ad hoc tribunals have temporal jurisdiction which is limited to the mandate for which they were established. The ad hoc tribunals have jurisdiction to prosecute international crimes committed in the former Yugoslavia and Rwanda since 1991 and in 1994 respectively.²²⁹

The ICC has jurisdiction to prosecute crimes committed after 1 July 2001.²³⁰ Selectivity in prosecution through *ratione temporis* was created because of the need to reduce the backlog of cases brought before international courts so as to ensure effective prosecution of international crimes.

However, sex crimes are too grave in their consequences on victims and the community to be limited to the time frame mandated to international courts. Right from the Second World War, consequences of sex crimes have been grave and it is estimated that only 25 per cent of the 'comfort women' survived and most of them were unable to have children as a consequence of the multiple rapes or diseases contracted as a result of the rapes.²³¹ It is for this reason that 'comfort women' are still fighting after 60 years for the government of Japan to acknowledge the crimes of sexual violence committed against them and for them to be recognised as victims.

Prosecution of sex crimes should therefore not be limited to time frame as they violate peace and security, and often result in unwanted pregnancies which may change the ethnicity of the

²²⁹ Article 1 ICTY Statute, Article 1 ICTR Statute.

²³⁰ Article 11(1) ICC Statute.

²³¹ Askin (1997) 92.

population, hence going beyond individual suffering to destabilise the entire community. Sex crimes often leave victims and the entire community physically and psychologically injured, may cause women to be discriminated upon, stigmatised by the society and results in destruction of families as women may be shunned or divorced by their husbands. Sex crimes may lead to transmission of sexually transmitted diseases, such as HIV/AIDS and may result in rupture of women's bladders or fistula which results in failure to control bowels or urine, hence causing death and this destabilises the community.

Limiting sex crimes to a time frame for which they are to be prosecuted, yet they result in grave consequences listed above, hinders effective prosecution of sex crimes. It results in past perpetrators not being held accountable, and this leaves victims aggrieved and desiring justice for the pain and suffering caused to them by past sex crimes. An exception for sex crimes should therefore be made to include and prosecute sex crimes committed beyond the time frame. This will prove that sexual violence is a serious crime for which impunity cannot be tolerated.

4.3.2 Investigation Criteria used by the Prosecution in Investigating Sexual Violence

Investigation criteria and process is vital when dealing in sex crimes as they lead to discovery of relevant facts and evidence. The ICC and ad hoc tribunals as an investigative strategy usually limit their focus on certain crimes. However, limiting the investigative focus to a certain scope results in failure to fully investigate, disclose and prosecute sex crimes. For example, while investigating international crimes in the DRC for the issuance of charges against Lubanga, the ICC investigation team used a pre-determined investigation strategy. The ICC team was told to

only focus on the crime of conscripting child soldiers into the armed forces.²³² This investigation criteria used in Lubanga was not useful in disclosing sex crimes yet witnesses were disclosing sex crimes committed against them. Also in Rwanda, the Prosecutor of the ICTR failed to adequately investigate rape and other sexual violence despite evidence that thousands of Rwandan women faced gender based violence.²³³

Also during investigations, the investigation team may lack experts who understand sexual violence and know how to handle victims and ask questions relating to sex crimes. The investigation team may not also be gender sensitive and may have mostly male investigators which could discourage female victims from disclosing the truth about sex violations. Questions asked during investigation may also not be straight forward to indicate, necessitate and disclose answers relating to sexual violence. This discourages victims from opening up and having confidence in providing information concerning sex crimes committed against them and this will result in insufficient evidence being gathered.

The principle of complementarity sometimes tampers with investigation of serious crimes such as sexual violence. The principle of complementarity creates a problem for the ICC in effectively investigating and prosecuting sex crimes as it does not have monopoly to investigate states where sexual crimes have occurred.²³⁴ This is because the ICC only operates where national courts are unwilling or unable to carry out genuine investigations or prosecutions.²³⁵

²³² Glassborow, Katy 'ICC Investigative Strategy under Fire' in Tosh *et al* (2008) 9.

²³³ Campanero (2001) 2585.

²³⁴ Webb (2005) 316.

²³⁵ Article 17 ICC Statute.

A weak investigation criterion therefore hinders effective prosecution of sex crimes as it results in the gathering of limited facts and evidence relevant to the prosecution of sex crimes. Also, direct evidence that is important to the prosecution of sex crimes is not collected which results in sex crimes being overlooked during prosecution before international courts. Failure to gather sufficient evidence in relation to sex crimes creates missed opportunities for prosecuting sex crimes hence leading to drafting of limited charges in indictments that exclude sex crimes.

4.3.3 Limited Acceptance of Amendment of Charges

The ICC and the ad hoc tribunals are reluctant to accept amendment of charges against accused persons to include sex crimes and this usually interferes with effective prosecution of sexual violence. Article 61 (9) ICC Statute allows the prosecutor to amend charges with the permission of the Pre-Trial Chamber and after notice has been given to the accused. However, despite allowing amendment of charges, international criminal courts are reluctant to accept amendment of charges. The ICTR has been criticised for failing to amend charges in indictments to include rape and sexual violence within the framework of genocide, war crimes and crimes against humanity.²³⁶

Reluctance to amend charges was manifested when the Pre-Trial Chamber in the *Prosecutor v Thomas Lubanga* declined to amend charges to include sex crimes.²³⁷ In a legal re-characterisation request before the ICC, victims of sex crimes in the DRC applied to the court to

²³⁶ Campanaro (2001) 2585.

²³⁷ *Prosecutor v Thomas Lubanga Dyilo*, Case No ICC-01/04/01-06/2049, 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject change in accordance with the Regulations 55 (2) Regulations of the Court (14 July 2009).

have charges against Lubanga amended to include sexual violence committed under Lubanga's command against civilians as crimes against humanity and war crimes.²³⁸

A re-characterisation request is a reflection that victims are dissatisfied with the charges brought against the accused.²³⁹ Declining to accept amendment of charges to include sex crimes promotes impunity as sex crimes are not included in the indictments and accused persons are not prosecuted and held accountable. Victims of sex crimes are also left aggrieved because in their view, justice has not been served and this makes them lose confidence in the justice system of international criminal courts. Failure to prosecute sex crimes as a result of not being included in charges leaves an impression that sex crimes are not as important as the crimes already included in the indictment.

4.3.4 Standard of Proof for Sex Crimes

It is an acceptable principle of law that an accused is presumed innocent so that the prosecution bears the onus of establishing the guilt of the accused beyond reasonable doubt.²⁴⁰

International criminal law requires sex crimes to be proved beyond reasonable doubt by the prosecution before an international criminal court can hold a perpetrator liable for sex crimes.

The standard of proof required to be met puts a difficult task on the prosecution to meet especially due to the fact that sex crimes are difficult to prove.

Most victims of sex crimes are afraid to come forward and testify about what exactly happened to them and since sex crimes sometimes do not leave visible marks, it results in difficulty in

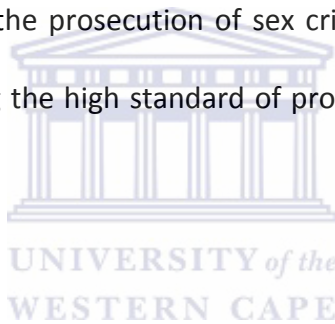
²³⁸ *Prosecutor v Lubanga* (Decision of 14 July 2009).

²³⁹ Diala, A. Chima 'Victims' Justice and Re- Characterising the facts in the Lubanga Trial at the ICC' (2010-2012) 7 Number 1 *Eyes on the ICC* 53.

²⁴⁰ *Prosecutor v Kunarac et al* (22 February 2001) para 559.

presenting evidence before international courts. Prosecution of sex crimes sometimes depends on hearsay and circumstantial evidence because some victims are killed immediately after the sexual act has been committed against them. Also, some witnesses may fear to testify before international criminal courts for fear of being attacked by the accused's supporters. Sometimes, victims have difficulties in presenting evidence and identifying the accused because of the traumatic experience they have been through and human occurrence to forget. Victims may have also been very young when the sex acts were committed and may fail to recall what happened to them or fail to identify the accused.

All these factors discussed make the prosecution of sex crimes difficult and may weaken the prosecution's evidence in meeting the high standard of proof threshold and this may result in few convictions and prosecutions.



4.4.5 Limited Resources

International criminal courts face financial constraints to facilitate prosecution of sex crimes effectively. Prosecuting sex crimes is costly as there is need to provide protection measures and rehabilitation services to witnesses and victims of sex crimes. Such services include, compensation to victims for the harm suffered as a result of sex crimes, hiring counsellors to help victims cope with the pain and suffering caused by sexual violence. There is also need to train personnel in issues regarding sexual violence so as to effectively investigate and prosecute sex crimes. Limited resources therefore create a challenge in facilitating effective prosecution of sex crimes before the ICC and ad hoc tribunals.

Chapter Five

Recommendations and Concluding Remarks

5.1 Introduction

This chapter discusses possible recommendations on how dealing with sexual violence can be further improved despite numerous achievements by the ICC and ad hoc tribunals. The chapter goes on to give concluding remarks.

5.2 Recommendations

The ICC and the ad hoc tribunals should encourage states to cooperate with the courts in carrying out investigations for sex crimes in order to promote effective prosecution of sex crimes. Countries should also be encouraged to domesticate the ICC Statute and include sex crimes as genocide, crimes against humanity and war crimes.²⁴¹ States should also put in place legislation to facilitate prosecution of sex crimes and to protect women from sexual violence. Domestic courts should establish witness protection mechanisms so as to promote domestic prosecution of sex crimes under international criminal law. Presence of protective mechanisms will encourage witness to testify before domestic courts without fear of being identified and confronted. Co-operation between states and the international criminal courts will therefore strengthen accountability, end impunity for sex crimes and send a clear message to perpetrators that sexual violence is a serious crime committed against the international community.

²⁴¹ Coomaraswamy, Radhika 'Sexual Violence during Wartime' in Durham et al (2005) 64.

Enforcement mechanisms such as sanctions and mutual evaluation with respect to the ICC Statute and the Statutes of the ad hoc tribunals should be put in place. Enforcement mechanisms will facilitate state cooperation with requests of the ICC and the ad hoc tribunals as each state will not want to be sanctioned for refusing to cooperate. Requests may include, arresting accused persons found within a state, assisting in investigations and providing evidence needed in the prosecution of sex crimes. Enforcement mechanisms will also emphasise the fact that sex crimes are serious crimes for states must play a big role in holding perpetrators accountable.

There is need to increase awareness and educate the community about sexual violence, the role of international criminal courts and the importance of prosecuting sex crimes. Education to create awareness can be done through increasing outreach programs to communities as well as grass root areas. The community should be educated on the need to report perpetrators of sex crimes to authorities so that they are held accountable and to end impunity and deter sex crimes. The community should also be educated about their role in promoting effective prosecution of sex crimes, including testifying before international courts. The community should be educated about the protective mechanisms offered by international criminal courts, such as, testifying in camera, use of pseudonyms and redacted statements that will guarantee their safety when they testify. This will promote effective prosecution of sex crimes because victims and witnesses are encouraged to testify and provide relevant facts and evidence.

The trust fund of international courts and tribunals should also be made imperative for victims of sexual violence who appear before the court.²⁴² The ad hoc tribunals should also, like the ICC, consider including compensation in monetary terms as part of reparation services as opposed to only physical and psychological rehabilitation to victims. Compensation is an acknowledgment by international courts of victims suffering caused as a consequence of sex crimes. Compensation will also help victims economically to meet the daily needs of their day to day life. As part of reparation programs, international courts should strive at providing antiretroviral drugs to survivors of sexual violence infected with HIV/ AIDS.

International criminal courts should increase and prioritise resource allocation to the investigation and prosecution of sex crimes as victims want justice and to see their perpetrators held accountable. For investigations, increased funding will facilitate the training of personnel who are skilled in handling sexual violence investigations which will promote discovery of relevant facts and evidence. Witness protection is a necessary component of effective prosecution,²⁴³ and funding should therefore be increased and allocated to victim and witness support units of international criminal courts to facilitate their activities.

International criminal courts in interpreting their statutes should be liberal in allowing amendment of charges for sex crimes especially when victims file legal re-characterisation requests. This is because, when legal re-characterisation requests are filed, it shows that victims are not satisfied with the charges before the court. Allowing amendment of charges when

²⁴² Booth, Cherie and Max Du Plessis 'The International Criminal Court and Victims of Sexual Violence' (2005)3 SACJ 255 available at http://search.sabinet.co.za/WebZ/Authorize?sessionid=0&bad=ejour/ejour_badsearch.html&portal=ejournal&next=images/ejour/ju_sajci/ju_sajci_v18_n3_a1.pdf (Accessed 14 October 2011).

²⁴³ Lawson (2009) 212.

sufficient evidence is provided will mean that sex crimes can be added to the original charges and be prosecuted before international criminal courts. For the need to provide justice to victims therefore, international criminal courts should consider being liberal in accepting amendment of charges. Also, when faced with legal re-characterisation requests, the Pre-Trial Chamber of the ICC should consider exercising its powers to request the prosecutor to conduct further investigations.²⁴⁴ Conducting further investigations may lead to discovery of relevant facts and evidence that may lead to successful prosecution of sex crimes.


International criminal courts should make improvements to guarantee speedy and effective prosecution of sex crimes. Efficient speedy trials are particularly important for sex crimes because of their severity and also for the need to deter further commission in the continuing existence of armed conflicts today. Today, sexual violence continues to be committed in the eastern DRC, mainly against women as a crime against humanity and a war crime with 7,500 cases reported in the first nine months of 2009.²⁴⁵ The ICC is regarded by victims as the temple of justice that holds perpetrators who commit international crimes accountable, where domestic courts fail. However, the absence of convictions since the establishment of the ICC has been regarded by some victims as delayed justice and has caused some of them to lose confidence in the work of the ICC. There is need therefore for speedy and effective trials for sex crimes to be done so as to deter continued use of sexual violence as a tool of war, mainly in the DRC.

²⁴⁴ Article 61 (7) (c) ICC Statute.

²⁴⁵ United Nations Human Rights Council, Technical Assistance and Capacity Building, Second Joint Report of Seven United Nations Experts on the Situation in the DRC, A/HRC/13/63 (March 8 2010) 10 cited in Leatherman (2011) 120.

In order to end impunity for sexual violence against women, prosecutors of international criminal courts should consider moving down the chain of command specifically for sex crimes. This is because victims of sex crimes remain alive and if physical perpetrators are not accountable, they are left aggrieved and they eventually undermine the legitimacy of courts in bringing about justice. Moving down the chain of command to hold subordinates accountable for sex crimes will ensure that subordinates who are not prosecuted by domestic courts, due to lack of resources or political instability are held accountable. Moving down the chain will promote justice for victims of sexual violence and send a clear message that sex crimes cannot be tolerated and are of serious concern to the international community.

5.3 Conclusion



In conclusion, International criminal law, the ICC and the ad hoc tribunals provide primary mechanisms through which sexual violence is criminalised and prosecuted as crimes against humanity, war crimes and genocide. As an achievement, the ICC and the ad hoc tribunals have recognised sex crimes as serious explicit crimes of crimes against humanity, genocide and war crimes instead of as crimes against dignity and honour. The ad hoc tribunals have to a great extent successfully prosecuted different forms of sexual violence as crimes against humanity, genocide and war crimes. The ICC has also charged some persons for sexual violence as crimes against humanity and war crimes with the aim of ending impunity and holding perpetrators accountable.

However, challenges are still faced by the ICC and the ad hoc tribunals that hinder the effective prosecution of sexual violence. The few prosecutions and lack of convictions before the ICC for

sex crimes, leaves a lot to be desired and may be interpreted by victims and others as a manifestation of the ineffectiveness of the ICC in prosecuting sex crimes. Despite being the first international criminal court to list different acts of sexual violence under its Statute, the ICC has neither completed any case involving sexual violence nor convicted an accused for sex crimes.

I hope the discussion in this thesis contributes to developing a critical understanding about the prosecution of sex crimes before the ICC, ad hoc tribunals and international criminal law.

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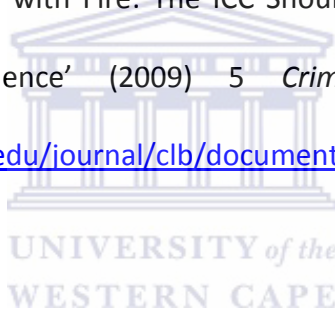
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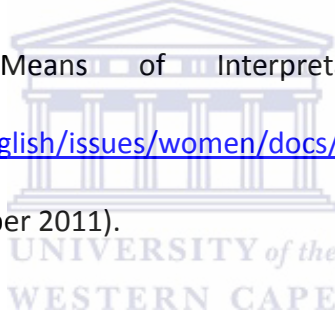
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