

The status of acts of sexual violence in international criminal law

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'The past ten years have witnessed explosive developments in recognizing and prosecuting gender crimes in international law. Long ignored, trivialized, and misunderstood, rape and other forms of sexual offences committed in the context of war or mass atrocity have received unprecedented attention in recent years.'

KD Askin 'A decade in the development of gender crimes in international courts and tribunals: 1993 and 2003' (2004) *Human Rights Brief* 16

1. Introduction

Crime has been with humanity since time immemorial. Acts of sexual violence are criminalized and punished in national legal systems as they constitute direct attacks on the most basic of human rights.¹ Historically, acts of sexual violence have been left to the jurisdiction of national or military courts within individual states and the international criminal law demonstrates an historical silence on recognizing sexual violence as international crimes. De Than and Shorts² expose the fact that neither the Nuremberg nor Tokyo tribunals mentioned sexual violence in their Charters whatsoever, even though rape had undeniably been a crime during warfare for centuries.³ Chinkin⁴ refers to the worldwide rape of women by so-called enemy and 'friendly' forces as well as members of

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¹ 'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.' Mahomed CJ in *S v Chapman* 1997 (2) SACR 3 at 5. See also Nkabinde J in *Masiya v Director of Public Prosecutions, Pretoria (Centre for Applied Legal Studies, Amici Curiae)* 2007 (5) SA 30 (CC) at para 27. See also J Burchell *Cases and Materials on Criminal Law* 3ed (2007) 707 as well as R Cryer, H Friman, D Robinson and E Wilmschurst *An Introduction to International Criminal Law and Procedure* 1ed (2007) 208.

² C de Than and E Shorts *International Criminal Law and Human Rights* 1ed (2003) 348. See also I Bantekas and S Nash *International Criminal Law* 2ed (2003) 365 and IJ van den Herik *The Contribution of the Rwanda Tribunal to the Development of International Law* 1ed (2005) 192.

³ The historical indolence of the recognition of sexual violence as international crimes may be due to a lack of understanding of the physical and psychological impact of such violence on the victims; prejudice and the absence of effective women's rights lobby for such recognition. De Than and Shorts op cit (n2) 348 further identify the absence of

United Nations peacekeeping forces and concludes that sexual violence towards women⁵ in armed conflict has a long history.

Perpetrators of international crimes often resort to acts of sexual violence as wartime tactics. Nowrojee⁶ explains that rape in wartime is employed as a weapon to terrorise and degrade a particular community. The sexual violence is meant to degrade not only the individual woman, but also to dehumanise the larger group of which the victim is a part. Sexual violence thus becomes the means to achieve social degradation. The special rapporteur appointed by the United Nations Commission on Human Rights, Tadeusz Mazowiecki, explained the purpose of rape during the Bosnia-Herzegovina conflict as an attack on the individual victim as well as a method of ethnic cleansing, intended to humiliate, shame, degrade and terrify the entire ethnic group.⁷ Historically the victor's 'right to rape' was also seen as part of the spoils of war and a bonus for the victor. So-called 'rape camps' were established during World War II

women from the drafting of United Nations instruments and the downplay of wartime acts of sexual violence to generic charges of violence as causal factors. See also MC Bassiouni *Crimes against Humanity in International Criminal Law* 2ed (1999) 345.

⁴ See C Chinkin 'Rape and sexual abuse of women in international law' (1994) *European Journal of International Law* 326. See also TLH McCormack and GJ Simpson *The Law of War Crimes: National and International Approaches* 1ed (1997) 210 and R Coomaraswamy 'Sexual violence during wartime' in *Listening to the Silences: Women and War* (2005) H Durham and T Gurd (eds) 7.

⁵ Although men can be equally affected by wartime sexual violence, De Than and Shorts op cit (n2) 347 convincingly argue that women fall victim in the majority of cases. Being raped arguably impacts far more negatively on women than on men, in that, apart from being scarred physically and psychologically, they may become ostracized and lose their 'marriageable' status. Compare JMT Labuschagne 'Die penetrasieverste by verkragting' (1991) *South African Law Journal* 156; GA Walker *Family Violence and the Women's Movement* (1990) 103; Satchwell J in *S v Engelbrecht* 2005 (2) SACR 41 (W) at para 53; Howie J in *S v Ferreira* 2004 (2) SACR 454 (SCA) at para 40 and Ackermann and Goldstone JJ in *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at para 62. See also E ●dio-Benito 'Sexual violence as a war crime' in *The New Challenges of Humanitarian Law in Armed Conflicts* (2005) PA Fernandez-Sanchez (ed) 164. (Elizabeth ●dio-Benito was the vice-president of the International Criminal Court at the time.) WA Shabas *Genocide in International Law: The Crimes of Crimes* 1ed (2000) 170 notes that Islamic law provides that women who have sexual relations outside of marriage are not marriageable and refers to Bassiouni who concluded that targeting Muslim women for rape and sexual assault in order to effectively separate Bosnian Muslim women from Bosnian Muslim men may create a condition of life calculated to bring about the group's destruction.

⁶ B Nowrojee 'Shattered lives: Sexual violence during the Rwandan genocide and its aftermath' (1996) *New York Human Rights Watch* 1. See also MN Vinar 'Civilization and torture: Beyond the medical and Ppsychiatric approach' (2007) *International Review of the Red Cross* 620.

⁷ See T Meron *War Crimes Law Comes of Age* 1ed (1998) 205. See also K Kittichaisaree *International Criminal Law* 1ed (2001) 112 and Bantekas and Nash op cit (n2) 365.

to encourage Japanese troops and to improve their morale — a fact only recently acknowledged by the international community.⁸

It takes atrocities like these to shock the public conscience into focusing on historically neglected areas of the law, such as the status of sexual violence as international crimes. Research and activism of women's groups at the international level recently saw sexual violence on women during wartime transformed from an 'invisible issue'⁹ to wide scale prosecutions and explicit criminalization by international conventions and institutions.

The purpose of this contribution is to provide a brief analysis of the current status of sexual violence in international law. The forms and definitions of sexual violence will firstly be discussed. The second part will examine selected international instruments containing provisions governing acts of sexual violence. Finally the focus will be on some of the most important judgments of international criminal tribunals which illustrate the circumstances in which acts of sexual violence may constitute either the crime of genocide, crimes against humanity or war crimes.

2. Forms and definitions of acts of sexual violence

Acts of sexual violence range from rape to sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence. Each of these acts will be briefly discussed.

2.1 Rape

Rape is the oldest known form of sexual violence.¹⁰ Despite this fact, rape was historically seen as an unfortunate by-product of war and was generally not prosecuted as a crime. Meron¹¹ opines that it was the indescribable abuse of thousands of women in the former Yugoslavia that shocked the international community into rethinking the prohibition of rape as a crime under the laws of war.

Although rape had been implicitly¹² and explicitly¹³ prohibited under international humanitarian law, it was really under the auspices of the

⁸ De Than and Shorts op cit (n2) 347.

⁹ Coomaraswamy op cit (n4) 7.

¹⁰ Chinkin op cit (n4) 7. See also Blakesley in McCormack and Simpson (eds) op cit (n4) 210; Cryer, Friman, Robinson and Wilmschurt op cit (n1) 208; De Than and Shorts op cit (n2) 347; Chinkin op cit (n4) 326 and Meron op cit (n7) 204.

¹¹ Meron op cit (n7) 207. See also NNR Quéniévet *Sexual Offences in Armed Conflict and International Law* 1ed (2005) 152.

¹² See, for example, Geneva Conventions article 3; Geneva IV article 147; Protocol I article 85(4)(c); Protocol II article 4(1) and (2)(a). See also Bassiouni op cit (n3) 355.

¹³ See, for example, Geneva IV article 27; Protocol I article 76(1) and Protocol II article 4(2)(c). See also Bantekas and Nash op cit (n2) 364.

International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY) and the International Criminal Tribunal for Rwanda (hereinafter ICTR) that the definition and recognition of rape as an international crime advanced. Before the establishment of these tribunals, rape had never been defined in any international instrument.¹⁴ Neither statute of these *ad hoc* tribunals, however, provided a coherent definition of rape and it thus became a task for the judges to develop definitions of crimes of sexual violence.

Through constructive interaction¹⁵ the ICTY and ICTR have sought to develop an internationally accepted definition of rape. In addressing the matter for the first time, an ICTR Trial Chamber in the *Akayesu* judgment opted for a conceptual rather than a technical definition. Holding that rape is a form of aggression whose central elements cannot be captured in a mechanical description of body parts¹⁶, the Trial Chamber defined rape as:

'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive . . . [S]exual violence, which includes rape, [is] any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.'¹⁷

Kittichaisaree¹⁸ supports the conceptual definition of rape by arguing that the essential elements of rape are not the particular details of the body parts and the objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion. Although the conceptual definition of rape as exposed in *Akayesu* was initially

¹⁴ C McDougall in *The Challenge of Conflict: International Law Responds* (2006) U Dolgop and J Gardam (eds) 335. See also Bantekas and Nash op cit (n2) 364.

¹⁵ Van den Herik op cit (n2) 192.

¹⁶ *The Prosecutor v Jean Paul Akayesu*, Chamber I, Case No ICTR-96-4-T, Decision of 2 September 1998 at 597, 687. See also Kittichaisaree op cit (n7) 112; D Shelton *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (2000) 53 and McDougall in Dolgop and Gardam (eds) op cit (n14) 335.

¹⁷ *The Prosecutor v Jean Paul Akayesu supra* (n16) 688. See also *The Prosecutor v Alfred Musema*, Chamber I, Case No ICTR-96-13-A, Decision of 27 January 2000 at 226; C Ap-tel and JA Williamson 'Prosecutor v Musema: A commentary on the Musema judgment rendered by the United Nations International Criminal Tribunal for Rwanda' (2000) *Melbourne Journal of International Law* 131; Van den Herik op cit (n2) 192; McDougall op cit (n14) 335 and KD Askins 'The International Criminal Tribunal for Rwanda and its treatment of crimes against women' in *International Humanitarian Law: Origins, Challenges and Prospects* (2000) 117.

¹⁸ Kittichaisaree op cit (n7) 112.

affirmed by the ICTY in *Delalic*¹⁹, a more technical definition was adopted by the ICTY in the *Furundzija*²⁰ judgment:

- i. the sexual penetration, however slight:
 - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - (b) of the mouth of the victim by the penis of the perpetrator;
- ii. by coercion or force or threat of force against the victim or a third person.'

This definition of rape was subsequently endorsed by the Appeals Chamber in the *Kunarac*²¹ judgment. The drafters of the International Criminal Court (hereinafter ICC) Elements of Crimes largely exposed the approach of the ICTY by defining rape as follows:

'The perpetrator invaded the body of a person by conduct 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.'²²

The physical invasion of a sexual nature must not be consented to by the victim; there must have been duress or coercion. Nevertheless, the Trial Chamber in the *Akayesu* judgment opined that coercion need not be evidenced by a demonstration of physical force.²³ Threats, intimidation, psychological oppression, extortion and other forms of duress which invoke fear or desperation on the part of the victim or a third person may constitute coercion.²⁴ Furthermore, coercion may be inherent to certain situations, such as armed conflict. Any physical invasion of a sexual nature of persons incapable of giving valid consent, such as children or the mentally ill, will constitute coercion and thus rape. Since rape does not necessarily involve sexual intercourse in the conventional manner, men may also be victims of rape. The ICTY has held that

¹⁹ *The Prosecutor v Zejnir Delalic*, Chamber II, Case No ICTY-96-21, Decision of 16 November 1998 at 478.

²⁰ *The Prosecutor v Anto Furundzija*, Chamber II, Case No ICTY-95-17/1, Decision of 10 December 1998 at 185. See also *The Prosecutor v Laurent Semanza*, Trial Chamber, Case No ICTR-97-20-T, Decision of 15 May 2003 at 344.

²¹ *The Prosecutor v Dragoljub Kunarac*, Chamber II, Case No ICTY-96-23-T, Decision of 22 February 2001 at 460. See also Cryer, Friman, Robinson and Wilmshurst op cit (n1) 209 and McDougall op cit (n14) 335.

²² ICC Elements of Crimes, article 7(1)(g)-1, element 1 and article 7(1)(g) of the Rome Statute. See also De Than and Shorts op cit (n2) 491 and Cryer, Friman, Robinson and Wilmshurst op cit (n1) 209 where it is explained that the crime of rape has two elements: a physical invasion of a sexual nature and, secondly, the presence of coercive circumstances.

²³ *The Prosecutor v Jean Paul Akayesu* supra (n16) at 688.

²⁴ Ibid.

forcing two men to perform fellatio on one another could constitute rape 'if pleaded in the appropriate manner'.²⁵ By the same token, forced penetration of the mouth of a male victim by the genital organ of the perpetrator which humiliates and degrades the victim could also constitute rape.²⁶

2.2 Sexual slavery

The ICC Elements of Crimes²⁷ defines sexual slavery as a phenomenon where the perpetrator exercises any or all of the powers attaching to the right of ownership over one or more persons, such as purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.²⁸ The commission of sexual slavery could involve more than one perpetrator as part of a common criminal design and the *actus reus* includes human trafficking.²⁹ Victims are thus treated as the personal property of the perpetrator who submits them to activities of a sexual nature. Kittichaisaree³⁰ illustrates the commission of sexual slavery during the 1994 Rwandan genocide when Tutsi women acquiesced to forced temporary marriages and sexual services to their so-called 'husbands' in order to save themselves or their relatives from the continuous genocide.

Since sexual services are offered forcefully³¹, sexual slavery also qualifies as forced labour as defined by the 1930 Forced Labour Convention

²⁵ *The Prosecutor v Zdravko Mucic et al*, Trial Chamber, Case No ICTY-96-21 ('Celebici Case'), Decision of 20 February 2001 at 1066.

²⁶ *Ibid.* See also ●dio-Benito op cit (n5) 168 who describes oral rape as 'the worst humiliation and the most disgraceful assault against human dignity', quoting the Trial Room in the *The Prosecutor v Furundzija* judgment with approval.

²⁷ ICC Elements of Crimes, article 7(1)(g)-2, element 2 and article 7(1)(g) of the Rome Statute.

²⁸ See D Weissbrodt, J Fitzpatrick and F Newman *International Human Rights: Law, Policy and Process* 3ed (2001) 789 and De Than and Shorts op cit (n2) 491.

²⁹ De Than and Shorts op cit (n2) 516. See also J Chill and S Kilbourne 'The rights of the girl child' *Women, Gender and Human Rights* (2001) M Agosin (ed) 165 and Bantekas and Nash op cit (n2) 114.

³⁰ Kittichaisaree op cit (n7) 113.

³¹ ●dio-Benito op cit (n5) 169 highlights the victims' rights to protect their sexual autonomy and personal integrity. The author underlines the issue of consent and explains that consent 'should be given voluntarily by the victim, resulting from the free will of the victim, valued in context by the surrounding circumstances'. The ICTY in *The Prosecutor v Dragolub Kunarac, Radomir Kovac and Zoran Vukovic*, Chamber II, Case No ICTY-96-23-T, Decision of 22 February 2001 at 460 held that the unconditional sexual access that the accused had of their victims was proof of possession and slavery because they (the accused) controlled the sexual, psychological and physical movements of their victims.

of the International Labour Organization, which includes all work or services which are extracted from any person under the menace of any penalty and for which the person has not offered himself or herself voluntarily.³²

2.3 Enforced prostitution

Enforced prostitution is distinguished from sexual slavery by the pecuniary or other advantage the perpetrator or another person obtains, or expects to obtain, in exchange or in connection with the victim's sexual acts. The ICC Elements of Crimes³³ stipulates that enforced prostitution occurs where the perpetrator causes the victim(s) to engage in one or more acts of a sexual nature by force. The perpetrator may also resort to a threat of force or coercion, such as that caused by fear of violence, psychological oppression or abuse of power against the victim or another person. The perpetrator may also take advantage of a coercive environment, leaving the victim(s) incapable of giving genuine consent.³⁴

Coomaraswamy³⁵ opines that, during wartime, the demand for prostitution increases due to the presence of large armies and unattached males. This increased demand is then met by trafficking women and forcing them into sexual slavery and prostitution. The author refers to the Japanese army's 'comfort women' of World War II who became victims of these practices and who were raped in excess of 40 times per day and subjected to sexual violence and humiliation.³⁶

2.4 Forced pregnancy

The ICC Elements of Crimes³⁷ stipulates that forced pregnancy occurs where the perpetrator confines a woman or women forcibly made

³² Article 2(1) of the 1930 Forced Labour Convention (No 29); compare De Than and Shorts op cit (n2) 264; Kittichaisaree op cit (n7) 114 and Bantekas and Nash op cit (n2) 115.

³³ ICC Elements of Crimes, article 7(1)(g)-3, element 1 and article 7(1)(g) of the Rome Statute. Efforts to include enforced prostitution in the list of enumerated crimes against humanity in the Statute of the ICTY were unsuccessful. See McDougall op cit (n14) 337.

³⁴ Kittichaisaree op cit (n7) 114; Bantekas and Nash op cit (n2) 113.

³⁵ Coomaraswamy op cit (n4) 56.

³⁶ Ibid. It is further explained that victims of the sexual slavery and enforced prostitution during the Bosnian war also fell victim to sexual exploitation in the form of pornography in that rapes were videotaped and sold as pornographic material.

³⁷ ICC Elements of Crimes, article 7(1)(g)-4, element 1 and article 7(1)(g) of the Rome Statute. Efforts to include forced pregnancy in the list of enumerated crimes against humanity in the Statute of the ICTY were unsuccessful. See McDougall op cit (n14) 337.

pregnant, with the intent of affecting the ethnic composition of a population or carrying out other grave violations of international law.³⁸ Shabas³⁹ highlights the heated debate at the Rome conference surrounding this concept. The fear existed that the inclusion of this term might be interpreted as obliging states to provide women who had been forcibly impregnated with access to abortion.⁴⁰ However, the definition of forced pregnancy should not be interpreted as affecting national laws relating to pregnancy.⁴¹ The proscription of forced pregnancy as a crime against humanity does not give rise to a universal right to abortion and does not in any way restrict the autonomy of states to regulate birth control and abortion pursuant to their own constitutional, philosophical or religious principles.⁴²

Carpenter,⁴³ as well as Bielefeldt,⁴⁴ explains that unwanted children produced by forced impregnation⁴⁵ and the mothers who bore such children are seen by the group as alien to the group and that the identity of the child is associated with the father. Muslim women forcibly impregnated by Serbs during the war in Bosnia-Herzegovina were thus considered to bear Serbian children.⁴⁶ Forced pregnancy thus covers situations where women are forcibly impregnated and confined so as to force them to bear children of a conquering ethnic group with a view of affecting the ethnic composition of a population, or so as to serve as a medical experiment.⁴⁷

2.5 Enforced sterilization

The ICC Elements of Crimes⁴⁸ stipulates that enforced sterilization occurs where the perpetrator deprives the victim of her biological reproductive capacity in circumstances where this conduct was neither justified by the

³⁸ De Than and Shorts op cit (n2) 492.

³⁹ WA Schabas *An Introduction to the International Criminal Court* (2004) 47.

⁴⁰ Kittichasaree op cit (n7) 114 refers to the concerns of the Vatican and Arabic delegations at the Rome conference that the inclusion of forced pregnancy as a crime against humanity may cause the Rome Statute to be in conflict with their own anti-abortion laws.

⁴¹ Article 7(2)(f) ICC Statute.

⁴² Ibid.

⁴³ RC Carpenter 'Surfacing children: Limitations of genocidal rape discourse' (2000) *Human Rights Quarterly* 444.

⁴⁴ H Bielefeldt 'Muslim voices in the human rights debate' (1995) *Human Rights Quarterly* 598.

⁴⁵ See KC Moghalu *Rwanda's Genocide: The Politics of Global Justice* (2005) 61.

⁴⁶ Ibid. Moghalu describes the unwanted children from forced pregnancies as '*enfants non-désirés*' or 'children of hate'. Compare Quénivet op cit (n11) 164.

⁴⁷ Kittichasaree op cit (n7) 114.

⁴⁸ ICC Elements of Crimes, article 7(1)(g)-5. See also article 7(1)(g) of the Rome Statute.

medical or hospital treatment of the victim nor carried out with the victim's genuine consent.⁴⁹ 'Genuine consent' implies informed consent obtained without deception. The deprivation of biological reproductive capacity does not include birth-control measures which have a non-permanent effect in practice.⁵⁰ This proviso essentially embodies a compromise between two opposite views. During the Rome negotiations on the ICC Statute, the Chinese delegation expressed concern that their one-child policy to control their population growth would be in conflict with the Rome Statute. Birth-control measures having only a short-term effect thus had to be expressly excluded from the Statute. On the other hand, the delegations from Canada and Germany expressed the view that any reference to birth-control would nullify the entire crime of 'enforced sterilization', since all sterilization involves 'birth-control measures'. Consequently, the compromise of the term 'a non-permanent effect in practice' was intended to allow the ICC flexibility to determine whether the birth-control measures in question have a practical effect of depriving the victim of her biological reproductive capacity permanently.⁵¹

The ICTY in the *Akayesu*⁵² judgment held that enforced sterilization can also constitute 'measures intended to prevent births within the group, thus constituting the crime of genocide'.⁵³

2.6. Sexual violence

Sexual violence is a broad concept which includes any act of a sexual nature which is committed on a person in circumstances which are coercive.⁵⁴ The ICC Elements of Crimes⁵⁵ defines sexual violence as

'an act of a sexual nature committed by the perpetrator against the victim, but also conduct where the perpetrator causes the victim to engage in an act of a sexual nature by force or threat or coercion.'

Coercion could include fear of violence, duress, detention, psychological oppression or abuse of power, or taking advantage of a coercive

⁴⁹ De Than and Shorts op cit (n2) 492; Kittichaisaree op cit (n7) 115.

⁵⁰ Ibid.

⁵¹ Kittichaisaree op cit (n7) 115.

⁵² *The Prosecutor v Jean Paul Akayesu* supra (n16) at 507. See also McDougall op cit (n14) 338 and Quéniwet op cit (n11) 164.

⁵³ Article 6(d) ICC Statute.

⁵⁴ *The Prosecutor v Jean Paul Akayesu* supra (n16) at 688.

⁵⁵ ICC Elements of Crimes, article 7(1)(g)-6. See also article 7(1)(g) of the Rome Statute.

environment.⁵⁶ The Trial Chamber in the *Akayesu* judgment held that 'sexual violence' is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.⁵⁷ The conduct of undressing a female and forcing her to do gymnastics nakedly in a public courtyard in the presence of onlookers thus constituted sexual violence.⁵⁸ Academics⁵⁹ also view sexual violence among the most serious war crimes, constituting torture, inhuman treatment and wilfully causing great suffering or serious injury.

3. Acts of sexual violence within international instruments

Acts of sexual violence may at the same time constitute violations of international human rights, international criminal law and international humanitarian law. Provisions pertaining to acts of sexual violence in international humanitarian instruments and international criminal law instruments will consequently be examined.

3.1 Provisions pertaining to acts of sexual violence in international humanitarian instruments

The very first international humanitarian instrument to provide for the proscription of sexual crimes in the course of an armed conflict was the Lieber Code of 1863. This Code, which was intended to regulate the conduct of the Union army during the United States Civil War (1861-1865)⁶⁰, proscribed rape in article 44 and made it punishable by the death penalty. The Code was later internationalised at the 1907 International Peace Conference in Copenhagen and became the basis of The Hague IV Convention Relating to the Respect of Laws and Customs of War on Land. The rape provisions, however, underwent dramatic change in that no specific mention of rape was made either

⁵⁶ Compare De Than and Shorts op cit (n2) 492.

⁵⁷ *The Prosecutor v Jean Paul Akayesu* supra (n16) at 688. See also Schabas op cit (n5) 170 and M Boot *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* 1ed (2002) 444.

⁵⁸ *Ibid.* Compare Weissbrodt, Fitzpatrick and Newman op cit (n28) 789 and Coomaraswamy op cit (n4) 55.

⁵⁹ R Dixon 'Rape as a crime in International Humanitarian Law: Where to from here?' (2002) *European Journal of International Law* 701; JC ●Brien 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993) *American Journal of International Law* 645. See also *The Prosecutor v Zejnil Delalic* supra (n19) at 491.

⁶⁰ F Kalshoven and L Zegveld *Constraints on the waging of war: An introduction to International Humanitarian Law* 3ed (2001) 19.

in the Convention itself or in the Regulations attached to the Convention.⁶¹

The Geneva Conventions of 1949 (specifically article 147 of the fourth Geneva Convention) and their 1977 Additional Protocols dramatically improved the protection afforded to victims of sexual crimes during war-time. These instruments prohibit, in general terms, outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.⁶² Article 27 of the fourth Geneva Convention and article 76(1) of Additional Protocol II are more protective vis-à-vis female victims. They state that 'women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'. In its Commentary on the fourth Geneva Convention, the International Committee of the Red Cross stressed that

'rape, enforced prostitution i.e. the forcing of a woman into immorality by violence or threats, and any form of indecent assault . . . are and remain prohibited in all places and all circumstances . . .'.⁶³

Important to note is that although rape and other sexual assaults are not listed explicitly as 'grave breaches' of the Geneva Conventions,⁶⁴ they are nevertheless incorporated by reference under inhuman treatment and do therefore constitute 'grave breaches' of the Conventions.⁶⁵

3.2 Provisions pertaining to acts of sexual violence in international criminal instruments

The London Charter creating the International Military Tribunal of Nuremberg made no explicit reference to the crime of rape and thus no rape charges were brought at Nuremberg.⁶⁶ However, a seed for future development was sown⁶⁷ in Control Council Law No 10 which was

⁶¹ Meron op cit (n7) 206.

⁶² See common article 3 to the Geneva Conventions as well as articles 75(2)(b) and 34 of the Additional Protocols I and II respectively.

⁶³ Bassiouni op cit (n3) 353.

⁶⁴ Van den Herik op cit (n1) 191. The fact that neither the fourth Geneva Convention nor the Additional Protocols list rape among the grave breaches, means that rape was not brought under universal jurisdiction. See F Krill 'The protection of women in International Humanitarian Law' (1985) *International Review of the Red Cross* 337.

⁶⁵ In the same vein, in *Cypres v Turkey* the European Commission on Human Rights considered rape as inhuman treatment. See Bassiouni op cit (n3) 353.

⁶⁶ Blakesley op cit (n4) 210.

⁶⁷ Compare Meron op cit (n7) 206.

adopted by the four occupying powers in Germany and which constituted the basis for war crime trials in German courts. Control Council Law No 10 expressly listed rape as a crime against humanity.⁶⁸ The Tokyo War Crimes Tribunal also charged rape as an offence but, in doing so, relied on the provision of article 46 of the Hague Regulations relating to family honour.⁶⁹

Explicit provision for sexual crimes within international criminal instruments was made in both *ad hoc* Statutes of the ICTY and the ICTR, and more recently, the ICC. As far as the Statutes of the ICTY and the ICTR are concerned, only rape amongst sexual crimes is listed as acts constituting crimes against humanity.⁷⁰ The ICTR Statute expressly proscribes 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'.⁷¹

The Rome Statute of the ICC is more explicit and detailed in comparison to the Statutes of the *ad hoc* tribunals as far as sexual crimes are concerned. It specifically prohibits all forms of sexual violence, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity.⁷² Depending on the circumstances in which these acts are committed, they may constitute either the crime of genocide,⁷³ crimes against humanity,⁷⁴ war crimes in international armed conflicts⁷⁵ or war crimes in non-international armed conflicts.

4. Acts of sexual violence as international crimes

4.1 Acts of sexual violence as the crime of genocide

As defined in article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and as reproduced *verbatim* in

⁶⁸ Kittichaisaree op cit (n7) 112. Control Council Law No 10. article II (1)(c) included rape as a crime against humanity. See Batekas and Nash op cit (n2) 365. Also see Bassiouni op cit (n3) 35.

⁶⁹ Article 46 of the Hague Regulations states that 'family honour and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected'. See Meron op cit (n7) fn12.

⁷⁰ Article 5(g) of the ICTY Statute and article 3(g) of the ICTR Statute. Rape is also listed as a war crime of internal conflicts under article 4(e) of the ICTR Statute. See Bantekas and Nash op cit (n2) 365.

⁷¹ Article 4(e) of the ICTR Statute. See also De Than and Short op cit (n2) 422.

⁷² Article 7(g) of the Rome Statute.

⁷³ Article 6(b) of the Rome Statute.

⁷⁴ Article 7(1)(g) of the Rome Statute.

⁷⁵ Article 8(2)(b)(xxii) of the Rome Statute.

the Statutes of the ICTY, ICTR and the ICC,⁷⁶ genocide is constituted by certain 'acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such'.⁷⁷ The acts that constitute the crime of genocide include killing, causing serious bodily or mental harm to members of the group, deliberately inflicting conditions of life calculated to bring about physical destruction of the group in whole or in part, imposing measures intended to prevent births within the group, or forcibly transferring its children to another group.⁷⁸

It is worth noting that acts of sexual violence are not explicitly included in the definition of acts of genocide. However, it is submitted that these acts can cause serious bodily and mental harm on the victim.⁷⁹ In this sense, the Trial Chamber in the *Akayesu*⁸⁰ judgment considered rape and other sexual violence as acts of genocide in that they constitute serious bodily and mental harm within the meaning of the Genocide Convention.⁸¹ The Trial Chamber held that rape and other sexual violence:

'constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute

⁷⁶ The 1948 Genocide Convention was adopted and opened for signature, ratification and accession by the United Nations General Assembly on 9 December 1948. See G Boas and WA Schabas *International Criminal Law developments in the case law of the ICTY* (2003) 171. See also article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, article 4(2) of the ICTY Statute, article 2(2) of the ICTR Statute and article 6 of the ICC Statute.

⁷⁷ Compare De Than and Shorts op cit (n2) 426, Askin op cit (n17) 117, Boas and Schabas op cit (n76) 171, generally R Lemkin *Axis Rule in Occupied Europe* (1944), L Sunga *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (1997) 103 as well as Weissbrodt, Fitzpatrick and Newman op cit (n28) 788.

⁷⁸ Boot op cit (n57) 444 and D Aydelott 'Mass rape during war: Prosecuting Bosnian rapists under international law' (1993) *Emory International Law Review* 585. The Trial Chamber in *The Prosecutor v Kayishema*, Case No ICTR-96-10, Decision of 21 May 1999 at 116 recognised the use of rape as a process of 'slow death' as a means of deliberately inflicting on a group conditions of life calculated to bring about physical destruction, thus constituting genocide.

⁷⁹ Van den Herik op cit (n1) 140. See also SL Russel-Brown 'Rape as an act of genocide' (2003) *Berkeley Journal of International Law* 363 and Schabas op cit (n5) 170.

⁸⁰ *The Prosecutor v Jean Paul Akayesu* supra (n16) at 731-4. The Trial Chamber found that, in most cases, the rape of Tutsi women was accompanied by the intent to kill those women: 'Many rapes were perpetrated near mass graves where the women were taken to be killed' *The Prosecutor v Jean Paul Akayesu* supra (n16) at para 732. Compare Boot op cit (n7) 444.

⁸¹ The Trial Chamber in *The Prosecutor v Clément Kayishema and Obed Ruzindana*, Case No ICTR-95-1-T, Decision of 21 May 1999 at 108 held that it is of importance to assess what constitutes serious bodily or mental harm on a case-by-case basis.

infliction of serious bodily and mental harm on the victims and are even . . . one of the worst ways of *sic* inflict harm on the victim as he or she suffers both bodily and mental harm.⁸²

The harm resulting from rape and other forms of sexual violence does not have to be permanent or irremediable in order for such conduct to qualify as genocidal acts.⁸³ The sole *dolus specialis*, being the intention to destroy in whole or in part a particular group, suffices. In the context of the Rwandan genocide, rape and other forms of sexual violence constituted a part of a larger genocidal policy that was aimed at the destruction of the Tutsi, as these acts targeted the Tutsi women with the aim of destroying them physically and psychologically and thus destroying indirectly their families and their communities.⁸⁴ According to the Trial Chamber, rape and other acts of sexual violence were intended to destroy the spirit, will to live and thus the life itself.⁸⁵ The qualification of rape and other forms of sexual violence as genocidal acts, though unprecedented and poorly argued, is thus appropriate.⁸⁶

Acts of sexual violence can also be resorted to as instruments to impose conditions calculated to destroy the victim, to sunder their families or to destroy their group's capacity to reproduce. In this regard, during the 1994 Rwandan genocide, rape and other acts of sexual violence were employed to destroy the Tutsi ethnic group. These offences constitute, in the Trial Chamber's opinion, methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.⁸⁷ As such,

⁸² *The Prosecutor v Jean Paul Akayesu* supra (n16) at 731. See also ●dio-Benito op cit (n5) 167.

⁸³ *The Prosecutor v Jean Paul Akayesu* supra (n16) at 502.

⁸⁴ S Fisher '●ccupation of the womb: Forced impregnation as genocide' (1996) *Duke Law Journal* 120; ● Triffterer 'Genocide: Its particular intent to destroy in whole or in part the group as such' (2001) *Leiden Journal of International Law* 399. The Trial Chamber in *The Prosecutor v Jean Paul Akayesu* judgment supra (n16) at 521 emphasized that the victim of the crime of genocide is the group itself and not only the individual. Whereas it is the individuals who constitute the victims of genocide, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members.

⁸⁵ *The Prosecutor v Jean Paul Akayesu* supra (n16) at 732. In the judgment of *The Prosecutor v Krstic*, Trial Chamber, Case No ICTY-96-21, Decision of 2 November 2001 at 574 the Trial Chamber held that the throwing of the corpses of the Tutsis in the Nya-barongo river, which is an affluent of the Nile river, from which the Tutsis are perceived to originate, demonstrated an intention of the Hutus to destroy the spirit of the Tutsis.

⁸⁶ Van den Herik op cit (n2) 141.

⁸⁷ *The Prosecutor v Jean Paul Akayesu* supra (n16) at 505; *Kayishema and Ruzindana* supra (n81) at 116.

these acts fit the expression of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.⁸⁸

Finally, acts of sexual violence may constitute measures intended to prevent births within a targeted group. According to the Trial Chamber in *Akayesu* these measures 'should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages'.⁸⁹ A measure intended to prevent births within a group was illustrated by the Rwandan patriarchal society where membership of an ethnical group is determined by the identity of the father: if a woman of a given group is deliberately impregnated by a man of another group with the intent to have her give birth to a child who will consequently not belong to its mother's group.⁹⁰ Furthermore, rape can also be a measure intended to prevent births where the raped woman subsequently refuses to procreate in the same way that members of a group can be led through threats or trauma not to procreate.⁹¹

4.2 Acts of sexual violence as crimes against humanity

Crimes against humanity were already prosecuted in the Nuremberg and Tokyo tribunals. It were subsequently confirmed and afforded widespread application in the trials of the ICTY and ICTR.⁹² Crimes against humanity also fall under the ICC subject-matter jurisdiction.⁹³ The *actus reus* of these crimes comprises commission of an attack that is inhumane in nature and character, causing great suffering or serious injury to bodily, mental or physical health. Most importantly, the

⁸⁸ Compare *The Prosecutor v Semanza* supra (n20) at 313.

⁸⁹ *The Prosecutor v Jean Paul Akayesu* supra (n16) at 507. See also *The Prosecutor v Jelisić*, Trial Chamber, Case No ICTY-95-10, Decision of 5 July 2001 at 102 where the Trial Chamber stated that 'Goran Jelisić purportedly said that he hated Muslim women, that he found them highly dirty and that he wanted to sterilize them all in order to prevent an increase in the number of Muslims ...' and Quéñivet op cit (n11) 169.

⁹⁰ Carpenter op cit (n43) 444; Bielefeldt op cit (n44) 598.

⁹¹ Boot op cit (n57) 444; ●dio-Benito op cit (n5) 168.

⁹² See Kittichaisaree op cit (n7) 86; Bantekas and Nash op cit (n2) 365. The first time that an accused has been convicted of rape as a crime against humanity was in *The Prosecutor v Jean Paul Akayesu* supra (n16) at 294 ('Court 13: Guilty of Crime Against Humanity (Rape)'). See also Bassiouni op cit (n3) 344.

⁹³ Article 7 of the ICC Statute.

inhumane act must be committed as part of a widespread or systematic attack against any civilian population.⁹⁴

As contained in the Statutes of the *ad hoc* tribunals as well as the ICC, acts constituting crimes against humanity range from murder, enslavement, imprisonment, torture, the whole range of acts of sexual violence and other inhumane acts.⁹⁵ The widespread or systematic commission of acts of sexual violence against a civilian population thus constitutes a crime against humanity and may be prosecuted as such. The Trial Chamber in the *Akayesu* judgment convicted the accused of crimes against humanity based on evidence that he had witnessed and encouraged rapes of Tutsi women while he was a communal leader. The Chamber found that the rapes were systematic and executed on a massive scale.⁹⁶

It is worth noting that, while the ICC Statute outlines a range of acts of sexual violence as crimes against humanity, the ICTY and ICTR Statutes list only rape. However, other acts of sexual violence may qualify either as torture or other inhumane acts and as such constitute crimes against humanity. As was held by the Trial Chamber in *Akayesu*,⁹⁷ sexual violence may qualify as 'other inhumane acts' set forth in article 3(i) of the tribunal's Statute, 'outrages upon personal dignity' set forth in article 4(e) of the Statute and 'serious bodily or mental harm' set forth in article 2(2)(b) of the Statute.⁹⁸

Sexual violence may constitute torture which is itself an act constituting a crime against humanity.⁹⁹ In particular, sexual violence constitutes torture in the sense that it causes severe pain and suffering both

⁹⁴ Kittichaisaree op cit (n7) 90. The proviso of a widespread or systematic attack is contained in article 7(1) of the ICC Statute and in article 3 of the ICTR Statute. However, the latter adds that the act must be committed on one or more discriminatory grounds, namely national, political, ethnical, racial or religious grounds. The ICTY Statute, on the other hand, subordinates the ICTY jurisdiction over crimes against humanity to the event of an armed conflict, whether international or internal: see article 5 of the ICTY Statute.

⁹⁵ See article 7(1)(g) of the ICC Statute, article 5 of the ICTY Statute and article 3 of the ICTR Statute. In *The Prosecutor v Jean Paul Akayesu* supra (n16) at 692 forced public nudity was cited as constituting sexual violence and this was successfully prosecuted as an 'inhumane act'. Compare Shelton op cit (n16) 53 and Bassiouni *Crimes Against Humanity in International Criminal Law* (1992) 35.

⁹⁶ Compare Meron op cit (n7) 207.

⁹⁷ *The Prosecutor v Jean Paul Akayesu* supra (n16) at 688.

⁹⁸ See Bassiouni op cit (n3) 344.

⁹⁹ Article 3(f) ICTR Statute; article 5(f) ICTY Statute and article 7(f) ICC Statute. See also Bantekas and Nash op cit (n2) 117 and C Droegge 'The prohibition of torture and other forms of ill-treatment in International Humanitarian Law' (2007) *International Review of the Red Cross* 515.

physically and psychologically.¹⁰⁰ Both the ICTY¹⁰¹ and ICTR¹⁰² held that rape and other forms of sexual violence constitute torture when it is committed by, or at the instigation or with the consent or acquiescence of, a public official for purposes such as intimidation, coercion, punishment, degradation or eliciting information or confession.¹⁰³

4.3 Acts of sexual violence as war crimes

Although there is no single binding definition of war crimes¹⁰⁴, these are generally defined as crimes committed during armed conflicts, whether international or internal. Technically speaking, war crimes are all forms of violation of laws and customs of armed conflicts, *jus bello*, as regulated by The Hague and Geneva laws. While The Hague law concerns the methods and means of waging armed conflicts, the Geneva law deals mostly with the protection of persons who do not take part, or who no longer take part in armed conflicts, namely the sick, wounded, shipwrecked members, war prisoners and civilians. Therefore, the war crimes dealt with in this contribution deal with the Geneva law.¹⁰⁵

¹⁰⁰ Cryer, Friman, Robinson and Wilmshurst op cit (n1) 208; R Branch 'Torture of terrorists? Use of torture in a war against terrorism: Justifications, methods and effects. The case of France in Algeria, 1954-1962' (2007) *International Review of the Red Cross* 543.

¹⁰¹ The accused in *The Prosecutor v Furundzija* supra (n20) at 267 was convicted of torture (and thus a crime against humanity) for acts committed during an interrogation, including sexual threats and rapes. The Trial Chamber found that the accused, an officer of the special forces of the Bosnian Croat armed forces, was guilty of torturing a Muslim woman who had been detained by the Bosnian Croats. The accused was present in the room and interrogated her while she was in a state of nudity. See Cassese *International Criminal Law* (2003) 78.

¹⁰² *The Prosecutor v Kunarac and Others* supra (n21) at 438-460.

¹⁰³ The Trial Chamber in *The Prosecutor v Kunarac and Others* supra (n21) at 496 held that the presence of a State official or any other public official who is in a position of authority is not necessary for the offence to be regarded as torture under international humanitarian law. Compare Cassese op cit (n101) 78. In *The Prosecutor v Furundzija* supra (n20) at 267 an accused rubbed a knife on the naked inner thighs of a victim and threatened to cut out her private parts if she did not tell the truth in response to the interrogation by the accused.

¹⁰⁴ Y Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* (2005) 29. See also Y Dinstein 'The distinction between war crimes and crimes against peace' in *War Crimes in International Law* (1996) Y Dinstein and M Taborly (eds) 3.

¹⁰⁵ Bassiouni op cit (n3) 346 notes that one of the earliest documented rape prosecutions in connection with military activity occurred in 1474 and that the process of codifying customary laws of war, protecting the civilian population against rape and sexual violence began only in the late eighteenth century. See also Sunga op cit (n77) 163.

Acts of sexual violence constitute a fundamental infringement of the victim's human health, physical integrity and dignity and it therefore amount to breaches of the Geneva Conventions. Specifically, the fourth Geneva Convention and the second Additional Protocol require the protection of women against rape, enforced prostitution or any form of indecent assault.¹⁰⁶

Acts of sexual violence are also criminalized as war crimes under article 2(b) and (c) of the ICTY Statute and article 3(a) and (e) of the ICTR Statute.¹⁰⁷ The ICC Statute also recognizes sexual violence as a grave breach of the Geneva Conventions.¹⁰⁸

In the *Celibici* judgment¹⁰⁹ the Trial Chamber of the ICTY found Anto Furudzija, a local Bosnian Croat military commander, guilty of aiding and abetting a war crime, the rape of a Bosnian Muslim woman.¹¹⁰ The accused was convicted on the ground of command responsibility pursuant to article 7(3) of the ICTY Statute. In the *Mucic* judgment¹¹¹, where Zdravko Mucic was also convicted of war crimes on the basis of command responsibility where he was the *de facto* commander of the *Celibici* camp, the crimes constituting violations of international humanitarian law included rapes and sexual assaults which were orchestrated by Mucic's subordinates. In *Akayesu*, the latter was also charged with rape as a war crime but acquitted on the ground that the prosecution did not sufficiently prove that he was a member of the armed forces or charged with military duties.¹¹²

5. Conclusion

Acts of sexual violence are employed as a double-edged sword as they cause both physical and psychological suffering to the victim. Although

¹⁰⁶ Article 27 of the Geneva Convention IV and article 76(1) of the Additional Protocol II; Boas and Schabas op cit (n76) 169.

¹⁰⁷ De Than and Shorts op cit (n2) 415; 422; Bantekas and Nash op cit (n2) 117.

¹⁰⁸ Article 8(2)(a) of the ICC Statute stipulates that 'war crimes' means 'grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention ...' and then lists detailed acts which would constitute such breaches. See also International Review of the Red Cross 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2007) 719-758, a document prepared by the International Committee of the Red Cross, for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26-30 November 2007.

¹⁰⁹ *The Prosecutor v Delacic, Mucic, Delic and Land* ('the Celibici Case'), Case No IT-96-21-T; Decision of 16 November 1998 at 478.

¹¹⁰ Van den Herik op cit (n2) 192; Cassese op cit (n101) 78.

¹¹¹ *The Prosecutor v Delacic, Mucic, Delic and Land* ('the Celibici Case'), Case No IT-96-21-T; (Appeals Chamber), Decision of 20 February 2001 at 214.

¹¹² De Than and Shorts op cit (n2) 368.

acts of sexual violence had long been trivialized in international law, rape and other forms of sexual offences finally received unprecedented attention during the last decades. It took atrocities such as the 'rape camps' during World War II, the Bosnia-Herzegovina conflict and the Rwandan genocide to shock the international community into focusing on the status of sexual violence as international crimes. The *ad hoc* tribunals of the former Yugoslavia and Rwanda played a vital role in recognizing and prosecuting acts of sexual violence as international crimes and establishing presidential authority in this regard.