Penal mechanisms in international humanitarian law with specific reference to sexual violence committed against women during armed conflict

Laetetia van Der Poll

Penal mechanisms in international humanitarian law with specific reference to sexual violence committed against women during armed conflict

Letetia VAN DER POLL
Associate Professor, Faculty of Law, University of the Western Cape

"Women are raped in all forms of armed conflict, international and internal, whether the conflict is fought primarily on religious, ethnic, political or nationalist grounds, or a combination of all these… The reality is that rape and [the] violent sexual abuse of women in armed conflict has a long history… Rape in war is [thus] not merely a matter of chance, of women victims being in the wrong place at the wrong time."[1]

1. INTRODUCTION

A report by the United Nations Security Council confirms that from 1989 to 1997, an estimated 103 armed conflicts were waged in 69 localities, resulting in devastating civilian casualties.[2] And since women are thought to constitute the majority of a 'civilian population'[3] during an armed conflict, it stands to reason that literally millions of women have been directly and/or indirectly affected by these conflicts. During the 1990s in particular, the calculated targeting of women in the Balkan and Rwandan conflicts compelled the international community to confront the reality of women's experience of war. As a consequence of these two conflicts, the international community was compelled to reconsider its conception of, and legal response to, the sexually-based direct, systematic and widespread targeting of women.[4]

And yet, the intentional targeting of women as a practice of war dates back to ancient times.[5] The idea of women as property, and thus part of the 'spoils of war',[6] has existed for centuries, rendering the sexual abuse and exploitation of women an almost natural, and therefore

---

* Some of the themes addressed herein may correspond with a manuscript by the author published in (2007) *African Yearbook on International Humanitarian Law*.

[1] C Chinkin 'Rape and Sexual Abuse of Women in International Law' (1994) 5 *European Journal of International Law* 326.

[2] See UN Security Council UN Doc S/RES/1265 (17 September 1999).

[3] By analogy to Articles 4 and 5 of the Fourth Geneva Convention, a civilian is a protected person who is a national of a State and who is not engaged in active hostilities during an armed conflict.

[4] See para 2.1.1 *infra*.

[5] See, in general, C Moeller 'The Significance of the ad hoc Tribunals for the Establishment of a Permanent International Criminal Court: Prosecution of Sexual Violence in War and Armed Conflict'. Available at <http://www.ishr.org/activities/campaigns/icc/iccmoeller.htm> (accessed 6 May 2007).

[6] See, in particular, C de Than and E Shorts *International Criminal Law and Human Rights* (2003) marginal nos 11-001 – 11-002 pp 346 – 347. For a comprehensive and detailed historical account of rape and sexual violence during war, see S Brownmiller 'War' in *Against Our Will: Men, Women and Rape* (1975) (reprinted 1986) 31 – 113.

inevitable,[1] consequence of war. Even during the era of modern conflicts, numerous examples exist that confirm the extent to which sexual violence was considered to be a 'normal' and essential part of warfare.[2] This violence takes gender-specific forms, including sexual mutilation, forced pregnancy, rape and sexual slavery. Being female could thus indeed be seen as an increased risk factor[3] during armed conflict.

This article will explore the nature of the protection granted to women during armed conflict, coupled with an assessment of some of the penal mechanisms that exist under international law to combat sexual violence in wartime. To this end, the protective regime under the four Geneva Conventions and Additional Protocols will be considered first,[4] where after the manner in which the International Criminal Tribunal for the Former Yugoslavia (ICTY)[5] and the International Criminal Tribunal for Rwanda (ICTR)[6] have addressed acts of sexual violence perpetrated against women, will be examined. In particular, the ICTY and ICTR's treatment of sexual violence as torture[7] and genocide,[8] together with some relevant provisions of the Rome Statute,[9] will be discussed.

2. THE NATURE OF THE PROTECTION ACCORDED TO WOMEN UNDER INTERNATIONAL HUMANITARIAN LAW (IHL)

2.1. A brief overview of the 'traditional' protection granted to women

The so-called 'traditional' protection that women enjoy under IHL emanates from the four Geneva Conventions of 1949 and their two Additional Protocols of 1977. The protection that women enjoy under these significant instruments is both detailed and extensive, and finds

[1] S Brownmiller *ibid* 32 describes rape as an horrific, yet inevitable by-product of the accepted war game. Consequently, women are 'simply regrettable victims – incidental, unavoidable casualties – like civilians of bombing, lumped together with children, homes, personal belongings, a church, a dyke, a water buffalo or next year's crop'.

[2] According to C Moeller, *ibid,* the number of cases of rape in Berlin committed by Russian troops is cautiously estimated to be between 100 000 and 980 000. In the Chinese town of Nanking which was attacked by the Japanese army, 200 000 persons were alleged to have been raped or otherwise sexually violated. More than 200 000 women and children aged 12 years and older were forced into brothels or so-called 'comfort stations' (hence the term 'comfort women') to boost the moral of Japanese troops stationed in the Pacific. Of these, fewer than 30% survived World War II. See also para 3.4.1 *infra.*

[3] See B Nowrojee 'Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath' 1996 New York Human Rights Watch, cited in C de Than and E Shorts *International Criminal Law and Human Rights* (2003) 345.

[4] See para 2.1.1 *infra.*

[5] The Statute of the International Criminal Tribunal for the Former Yugoslavia was adopted on 25 May 1993 by virtue of two resolutions of the UN Security Council: see Annex to the *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808* (22 February 1993), UN Doc S/25704 (1993), approved by the UN Security Council Resolution 827 (25 May 1993).

[6] The Statute of the International Criminal Tribunal for Rwanda was adopted by virtue of UN Security Council Resolution 955 on 8 November 1994 to prosecute genocide and other serious violations of IHL committed in Rwanda and in the territory of neighbouring states between 1 January 1994 and 31 December 1994.

[7] See para 3.3.1 *infra.*

[8] See para 3.4.1 *infra.*

[9] The Statute of the International Criminal Court (hereinafter referred to as the Rome Statute) was adopted in plenary session with 120 votes on 17 July 1998. The 60 ratifications required under Article 126 were exceeded on 11 April 2002 and the Rome Statute thus went into effect on 1 July 2002. The International Criminal Court began operations in The Hague, Netherlands, on 11 March 2003.

expression in various rules that apply to both international[1] and non-international (or 'internal')[2] armed conflicts. Women accordingly enjoy a broad spectrum of protection based on their perceived needs and particular susceptibility during an armed conflict. Some of the key provisions that illustrate the nature of the protection thus accorded to women during armed conflict will be considered in the next paragraph.

2.1.1. The four Geneva Conventions and the Additional Protocols

The necessity to grant both general[3] and specific[4] protection to women during war is recognized in the four Geneva Conventions and the two Additional Protocols. To this end, women enjoy general protection as members of the civilian population as well as special protection directly related to their distinctive needs and vulnerability as women. As civilians, women are accordingly protected against indiscriminate[5] as well as direct[6] attacks. In recognition of their particular vulnerability, women who, for example, fall into the categories of maternity cases or mothers of infant and dependent children[7] enjoy both special and comprehensive protection.[8]

As members of the armed forces, women likewise enjoy extensive protection both of a general[9] and a special[1] nature. The need to grant special protection to women who directly

---

[1] Common Article 2 of the four Geneva Conventions defines an international armed conflict as 'all cases of declared war or . . . any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'. See also note 17 *infra*.

[2] Article 1(1) of Additional Protocol II defines a conflict not of an international character (hereinafter referred to as an internal armed conflict) as one which takes place 'in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed group . . . under responsible command'.

[3] General protection is expressed in the idea of equal treatment. The four Geneva Conventions and their Additional Protocols establish a system of equality in the sense that no adverse distinction can be drawn between individuals on the basis of, *inter alia*, sex. For a comprehensive discussion of how the idea of equal treatment finds application in the four Geneva Conventions and their Additional Protocols, see F Krill 'The Protection of Women in International Humanitarian Law' (1985) 249 *International Review of the Red Cross* 337 – 339. See also para 2.1.2 *infra*.

[4] Specific or special protection is based on the idea that women warrant different treatment 'on account of their sex'. See, for example, Article 38 and Article 50 of the Fourth Geneva Convention. Article 50 stipulates, for example, that the 'Occupying Power shall not hinder the application of any preferential measures . . . in favour of children under fifteen years, expectant mothers, and mothers of children under seven years'.

[5] The four Geneva Conventions and their Additional Protocols provide general protection of the civilian population against the effects of hostilities. In the case of international armed conflicts, IHL requires the parties to distinguish at all times between civilians and combatants as well as between civilian objects and military objectives. By contrast, the treaty rules restraining the means and methods of warfare in non-international armed conflicts in order to protect civilians are very limited. Even though Article 13 of Additional Protocol II confers general protection on the civilian population against the effects of military operation, unlike Additional Protocol I, it contains no specific limitations on the means and methods of warfare. See also, in general, JG Gardam and MJ Jarvis *Women, Armed Conflict and International Law* (2001) 68 – 71; and MN Schmitt 'Precision Attack and International Humanitarian Law' (2005) 859 *International Review of the Red Cross* 454 – 466.

[6] Article 48 of Additional Protocol I codifies the customary principle of distinction, and that military operations shall accordingly by directed only against military objectives. See also Article 13 of Additional Protocol II in respect of non-international armed conflicts.

[7] The term 'mothers having dependent infants' as used in Article 76 para 2 of Additional Protocol I has a wider meaning that 'nursing mothers', the wording which had been previously proposed: see F Krill 'The Protection of Women in International Humanitarian Law' (1985) 249 *International Review of the Red Cross* 346 note 20. The authors of the Additional Protocol were unable to agree on the age when children cease to be dependent on their mothers, but since various provisions in the Fourth Geneva Convention refer to mothers of children under the age of seven years, this age would appear to be the maximum age of 'dependent infants'. See, in particular, Article 50 (on preferential treatment) and Article 14 (on safety zones) of the Fourth Geneva Convention.

[8] Article 48 of Additional Protocol I codifies the customary principle of distinction, and that military operations shall accordingly by directed only against military objectives. See also Article 13 of Additional Protocol II in respect of internal armed conflicts.

[9] Article 14 of the Third Geneva Convention expressly stipulates that women 'shall in all cases benefit by treatment as favourable as that granted to men'. Women combatants and prisoners of war thus enjoy every protection accorded to these categories of persons under IHL.

participate in hostilities was first recognized by the Geneva Convention of 1929 and Article 3 accordingly gave express recognition to the notion that 'women shall be treated with all consideration due to their sex'.[2]

The specific questions of rape and other forms of sexual violence committed during an international armed conflict[3] are addressed in Article 27 of the Fourth Geneva Convention and Articles 75 and 76 of Additional Protocol I.

Article 27 (which applies to the territories of the parties to the conflict and to occupied territories) expressly stipulates that:

'[w]omen shall be especially protected against any attack on their honour, in particular rape, enforced prostitution, or any form of indecent assault'.

Article 76 stipulates detailed protective measures for women and children in three sub-articles.[4] To this end, Article 76(1) specifies that women, in particular, shall be 'the object of special respect and shall be protected against rape, forced prostitution and any other form of indecent assault'. The fundamental guarantees enshrined in Article 75 of Additional Protocol I specifically capture 'outrages upon personal dignity, in particular, humiliating and degrading treatment, enforced prostitution and any form of indecent assault'.

In the case of a non-international armed conflict,[5] Article 4(2)(e) of Additional Protocol II likewise prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'. These considerations are also expressed in Common Article 3 of the Geneva Conventions.[6]

There exists general agreement that the events in the former Yugoslavia and Rwanda demanded a realistic and sober appreciation of the protection traditionally granted to women under IHL.[7] The treatment of sexual violence against women as an attack on personal honour or dignity (instead as a separate war crime)[8] began to pose distinct conceptual and practical challenges.[9] Out of the Balkan and Rwandan conflicts emerged evidence of direct, widespread and systematic attacks against women on a massive scale that were – almost without exception – of a sexual nature. Women were specifically targeted as a calculated strategy of war.[10] The Special Rapporteur for Rwanda[1] informed the international community of this horrific reality:

---

[1] The special protection of women combatants relates to issues of detention, internment and repatriation. To this end, Article 25 para 4 of the Third Geneva Convention stipulates that 'in any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them'. See, in this regard, also Article 29 para 2 of the Third Geneva Convention as well as Articles 25, 97 and 108 of Additional Protocol I.

[2] See the Geneva Convention Relative to the Treatment of Prisoners of War of 1929. This Convention was a revision of the Geneva Convention of 1864 and was intended to clarify and supplement the Hague Regulations of 1899 and 1907 on the Laws and Customs of War on Land.

[3] See note 16 *supra.*

[4] In terms of Article 76(2) and Article 76(3) of Additional Protocol I, arrested, detained or interned pregnant women and mothers with dependent infants shall have their cases considered 'with the utmost priority' and the pronouncement and execution of the death penalty on such women 'shall be avoided'.

[5] See note 17 *supra.*

[6] See, in particular, Common Article 3 sub-article 3(1)(c) which prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment'.

[7] See, in particular, G Werle *Principles of International Criminal Law* (2005) marginal no 909 p 312; and JG Gardam and MJ Jarvis *Women, Armed Conflict and International Law* (2001) 109 – 110.

[8] On the significance of this, see par 2.2 note 78 and note 79 *infra.*

[9] Some argued rightly that the problem is situated therein that the honour of women is inextricably linked to ideas of chastity and modesty that are, in turn, based on certain assumed sexual attributes, and thus steeped in cultural prejudice: see, for example, JG Gardam and MJ Jarvis *Women, Armed Conflict and International Law* (2001) 97 and 108.

[10] A series of UN Security Council resolutions was adopted as a consequence of reports of the massive, organized and systematic detention and rape, in particular of Muslim women, in Bosnia and Herzegovina. See UN Doc

'[r]ape was the rule and its absence the exception . . . Under-age children and elderly women were not spared . . . Pregnant women were not spared. Women about to give birth or who had just given birth were also the victims of rape in hospitals . . . Women who were "untouchable" according to the custom (e.g. nuns) were also involved and even corpses, in the case of women who were raped just after being killed.'[2]

The detention, mass rape, sexual slavery and forced prostitution of women during the Yugoslav conflict, with little regard for human dignity and life, called for an urgent and appropriate response from the international community.[3] These atrocities set in motion a legal response that gained increased momentum subsequent to the conflict in Rwanda, and with the entry into force of the Rome Statute and the creation of the first permanent International Criminal Court.[4]

2.1.2T he incorporation of the principles of 'sameness' and 'difference' into IHL

Essentially all of feminist theory is centred on the key principles of 'sameness' and 'difference'. These two principles inform all gendered (or 'women-centred')[5] arguments that seek to enhance the recognition and enforcement of women's protection under law and their universally recognized rights and freedoms.

The notion of 'sameness' is premised on the assumption that men and women are essentially similar and that women, as a consequence of this similarity, should be treated the same as (or similarly to) men. Such an argument seeks to advance, what is generally referred to in human rights discourse as, formal equality.[6] In this particular instance, the formal equality thus sought would be either gender-based or sex-based. On the other hand, the notion of 'difference' assumes that men and women are essentially different (or differently situated) to one another, hence women should enjoy different treatment by comparison to men.[7] An argument premised on the inherent difference(s) between the sexes (or genders) seeks to enhance so-called

---

S/RES/820 (17 April 1993), UN Docs R/RES/827 (25 May 1993) and S/RES/1019 (9 November 1995). During the same period, a Commission of Experts to investigate violations of IHL was established by the UN Secretary-General at the request of the Security Council: see UN Doc S/RES/780 (1992).

[1] The UN Human Rights Commission appointed a Special Rapporteur for Rwanda in 1994 pursuant to resolution E/CN.4/S-3/1 (25 May 1994). The Special Rapporteur published six reports on the situation of human rights in Rwanda during the period 28 June 1994 – 20 January 1997.

[2] See *Special Rapporteur of the Commission on Human Rights, Report on the Situation of Human Rights in Rwanda* UN Doc E/CN.4/1996/68 (29 January 1996) para 16. The number of rape victims in Rwanda was estimated at between 250 000 and 500 000: see *Special Rapporteur of the Commission on Human Rights, Report on the Situation of Human Rights in Rwanda* UN Doc E/CN.4/1997/61 (20 January 1997) para 29.

[3] In 1996, the 26th International Conference of the Red Cross and Red Crescent adopted a resolution entitled 'Protection of the civilian population in periods of armed conflict' which urged that 'strong measures be taken to provide women with the protection and assistance to which they are entitled under national and international law'. At its 27th International Conference in 1999, a Plan of Action was adopted which contains several specific references to the protection of women in armed conflict. It requested that 'the ICRC formulate a set of guidelines aimed at better addressing the protection and assistance needs of women and girl children affected by armed conflict'. See Resolutions of the 27th International Conference of the Red Cross and Red Crescent, Geneva, 1995, (1996) 310 *International Review of the Red Cross* 9 – 10; and Resolution 1 of the 27th International Conference of the Red Cross and Red Crescent, Geneva, 1999, (1999) 836 *International Review of the Red Cross* 878. These efforts culminated in two published ICRC studies on the impact of armed conflict on women: see C Lindsey *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women* (2001), ICRC, Geneva; and C Lindsey-Curtet, F Tercier Holst-Roness and L Anderson *Addressing the Needs of Women Affected by Armed Conflict* (2004), ICRC, Geneva.

[4] See note 15 *supra*.

[5] This term is understood to mean arguments from women's unique perspective, articulated in women's own and unique voice: see, for example, CA MacKinnon *Feminism Unmodified: Discourses on Life and Law* (1987).

[6] See KE Mahoney 'Canadian Approaches to Equality Rights and Gender Equality in the Courts' in RC Cook *Human Rights of Women: National and International Perspectives* (1994) 442.

[7] *Ibid.* See also CA MacKinnon *Feminism Unmodified: Discourses on Life and Law* (1987) 32 – 33.

substantive equality.[1] Substantive equality can thus not be realized (and is indeed conceptually impossible) without some degree of differentiation.

As shown above,[2] both the principle of 'sameness' and the principle of 'difference' (and thus the ideas of formal and substantive equality) have been incorporated into IHL by virtue of the nature of the protection accorded to women during armed conflict through the four Geneva Conventions and their two Additional Protocols.

2.2 Sexual violence and the significance of 'gender'

For an act committed during an armed conflict to fall within the ambit of international criminal law, it must be regarded as sufficiently serious and must shock the conscience of mankind.[3] The rationale for the creation of, as well as the overall mandate conferred on, the ICTY and the ICTR indeed underscore both elements.[4] Sex-specific factors (as well as gender) are fundamental considerations to both determine how seriously an act committed during an armed conflict is viewed and whether such act will be prosecuted at the international level.[5]

Yet IHL has traditionally shied away from embracing the notion of 'gender', placing the focus on 'women', and thus on distinctions of sex, instead.[6] The term 'gender' is, however, widely used and understood in feminist discourse to signify the socially constructed identity of men and women expressed in terms of being 'male' and 'female'.[7] 'Sex' is thus understood to be a biological term; 'gender' a politically and culturally defined one.[8] But since distinctions of gender, based on sex, structure virtually every aspect of our human reality, gender becomes both the way in which one group is socially differentiated from – and subordinated to – the other.[9] The sex/gender distinction thus in effect becomes blurred and the terms could be used interchangeably.[10] This is particularly evident in instances of so-called 'gender-based' and so-called 'sexually-based' violence. The former would include the latter.[11]

Gender and sex-specific considerations are, of course, also relevant in terms of the rules of evidence, the treatment accorded to victims and witnesses, as well as related procedures. It cannot be denied that the way in which prosecutions are conducted, must be responsive to the (gendered) needs of women to ensure that the process does not cause further emotional damage, physical danger or restrain women from coming forward.[12] The Special Court for Sierra Leone (SCSL) is a case in point. Although it was agreed from the outset that the SCSL would differ

---

[1] *Ibid* 441 – 449; *ibid* 36 - 37.

[2] See para 2.1.1 *supra.*

[3] See, in general, G Werle *Principles of International Criminal Law* (2005) marginal no 74 p 26. See also JG Gardam and MJ Jarvis *Women, Armed Conflict and International Law* (2001) 181 who refer to the existence of a 'two-tiered hierarchy' in the determination of whether the harms associated with armed conflict are addressed by international criminal law.

[4] These are to 'prosecute persons responsible for serious violations of international humanitarian law'. See, in particular, Article 1 of the Statutes of the ICTY and the ICTR.

[5] See, in particular, JG Gardam and MJ Jarvis *Women, Armed Conflict and International Law* (2001) 181.

[6] See, in particular, C Lindsey *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women* (2001) para 2(c) pp 35 – 36.

[7] N Chodorow 'Gender Personality and the Sexual Sociology of Adult Life' in AM Jaggar and PS Rothenberg *Feminist Frameworks: Alternative Theoretical Accounts of the Relations between Women and Men* 3ed (1993) 414 – 416.

[8] *Ibid.*

[9] CA MacKinnon 'Sex Equality: Difference and Dominance' in AM Jaggar and PS Rothenberg *Feminist Frameworks: Alternative Theoretical Accounts of the Relations between Women and Men* 3ed (1993) 182 – 186.

[10] See, in particular, L van der Poll *The Constitutionality of Pornography* (2001) unpublished LLD thesis, University of Stellenbosch, 281 – 183.

[11] *Ibid.*

[12] See, in particular, JG Gardam and MJ Jarvis *Women, Armed Conflict and International Law* (2001) 182.

from the ICTY and ICTR in several ways,[1] the Statute of the SCSL explicitly includes gender-based/sex-specific violence in the definitions of several categories of crimes. To this end, the Statute of the SCSL lists 'rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence'[2] under crimes against humanity, when 'committed as part of a widespread or systematic attack against any civilian population'.[3] Also expressly included are 'outrages upon personal dignity, in particular humiliating and degrading treatment, [and] rape' as violations of Common Article 3 of the Geneva Conventions and Additional Protocol II.[4]

Yet despite the clear and explicit criminalization of sexual violence (as well as compelling judicial precedent)[5] the Trial Chamber of the SCSL,[6] in a majority decision,[7] excluded any evidence of sexual violence from being admitted in a case against three members[8] of the Civilian Defence Force (CDF), a pro-government militia comprised in part of a traditional hunting society, which fought against rebel groups during the conflict in Sierra Leone.[9]

Before closing its case, the prosecution intended to call nine women to testify against the three accused regarding acts of sexual violence they had either experienced or witnessed, including rape, sexual slavery, outrages upon personal dignity and forced marriage.[10] For over a year the Office of the Prosecutor had sought, yet failed, to obtain leave to amend the indictment to include charges of sexual violence.[11] Despite noting the 'importance that gender crimes occupy in international criminal justice', the majority of the Trial Chamber nevertheless implied that granting leave to add sexual violence charges in the pre-trial proceedings would amount to

---

[1] Unlike the ICTY and ICTR which were established by virtue of resolutions of the UN Security Council and thus constituted as subsidiary organs of the UN (see notes 4 and 5 *supra*), the SCSL was established by an Agreement between the UN and the Government of Sierra Leone: see Security Council Resolution 1315, UN Doc No S/2000/1315, 14 August 2000. The SCSL is therefore a treaty-based *sui generis* court of mixed jurisdiction and composition incorporated at the national level. Its material jurisdiction would comprise international and Sierra Leonean law and it would be staffed by international and Sierra Leonean judges, prosecutors and administrative support staff. See Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc S/2000/915, 4 October 2000, para 9.

[2] Article 2 of the Statute of the SCSL lists the following crimes against humanity: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; (h) persecution on political, racial, ethnic or religious grounds; and (i) other inhumane acts.

[3] *Ibid* Article 2(g) of the Statute of the SCSL. See also para 3.3 *infra*.

[4] Article 3 of the Statute of the SCSL provides that serious violations of Common Article 3 of the Geneva Conventions and Additional Protocol II shall include: (a) violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape; (f) pillage; (g) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; and (h) threats to commit any of the foregoing acts.

[5] In *Prosecutor v Akayesu* ICTR-96-4-T, Judgment, 2 September 1998, the ICTR permitted the amendment of the indictment to include charges of sexual violence as late as five months into the trial.

[6] In *Prosecutor v Norman* (Case No SCSL-03-08), *Fofana* (Case No SCSL-03-11) *and Kondewa* (Case No SCSL-03-12), *Decision and Order on Prosecution Motions for Joinder*, 27 January 2004.

[7] Boutet J dissenting.

[8] Notably, Samuel Hinga Norman (national coordinator of the CDF and Minister of Internal Affairs and National Security), Moinina Fofana (Director of War for the CDF) and Allieu Kondewa (Chief Initiator and High Priest of the Kamajors).

[9] See, in general, T Cruvellier and M Wierda 'The Special Court for Sierra Leone: The First Eighteen Months' March 2004 Case Study Series, International Center for Transitional Justice, 4 – 5. Available at <http://www.ictj.org> (accessed 6 May 2007).

[10] *Decision on Prosecution Request for Leave to Amend the Indictment*, SCSL-04-14 (CDF), 20 May 2004, para 6.

[11] See, in particular, S Kendall and M Staggs 'From Mandate to Legacy: The Special Court for Sierra Leone as a Model for "Hybrid Justice"' April 2005 *Interim Report on the Special Court for Sierra Leone* War Crimes Studies Center, University of California, Berkeley, 10 – 11.

'creating exceptions' for gender offences.[1] This conclusion was, however, questioned in the dissenting opinion where it was stated that the majority did not give

'due consideration to the special features related to the proper exercise of discretion by the Prosecution and to the nature of the counts to be added to the consolidated indictment: gender-based crimes.'[2]

Moreover, it was rightly noted that 'a special consideration should be brought to bear' when dealing with gender-based crimes, particularly in light of the reluctance of victims to come forward to report and testify.[3] As a consequence of the prior ruling, three of the witnesses were not called and the remainder of the witnesses, who did testify, were actively silenced by the bench whenever any of the testimony they sought to give related to sexual violence in any respect.[4] As a result, the witnesses were only permitted to give evidence in respect of other crimes, including physical violence and mental suffering, killings, theft and the destruction of property; crimes they had witnessed as a consequence of being subjected to acts of sexual violence.[5]

In anticipation of the creation of the SCSL, Human Rights Watch wisely forewarned that since '[c]rimes of sexual violence are typically under-investigated and under-prosecuted', it will be critical for the Office of the Prosecutor to ensure that 'investigators rigorously pursue leads and thoroughly investigate serious allegations of crimes of sexual violence'.[6] Perhaps it was assumed, rather naively, that the SCSL itself would have a due appreciation of the gravity of crimes of sexual violence?

Gender stereotypes no doubt both contribute to – and reinforce – the subordination of women during situations of armed conflict. Stereotypes of women are often manipulated for propaganda purposes by all parties to a conflict. The conflict in Rwanda serves as a pertinent example, where constructed images of Hutu and Tutsi women were used as propaganda to incite violence.[7] In addition, the conflict in the former Yugoslavia has revealed evidence of belligerents capitalizing upon reports of sexual violence against 'their' women to gain sympathy and support for their side, and thus to strengthen resolve against the opposition.[8]

In the context of international criminal law, the scale of an act committed during an armed conflict increases the seriousness with which it is viewed and the likelihood of

---

[1] Prosecutor v Norman (Case No SCSL-03-08), Fofana (Case No SCSL-03-11) and Kondewa (Case No SCSL-03-12), Decision and Order on Prosecution Motions for Joinder, 27 January 2004; Decision on Prosecution Request for Leave to Amend the Indictment, SCSL-04-14 (CDF), 20 May 2004.

[2] Dissenting Opinion of Judge Pierre Boutet on the Decision on Prosecution Request for Leave to Amend the Indictment, 20 May 2004, para 8.

[3] *Ibid* para 26.

[4] See S Kendall and M Staggs 'From Mandate to Legacy: The Special Court for Sierra Leone as a Model for "Hybrid Justice"' April 2005 *Interim Report on the Special Court for Sierra Leone* War Crimes Studies Center, University of California, Berkeley, 11.

[5] Prosecutor v Norman (Case No SCSL-03-08), Fofana (Case No SCSL-03-11) and Kondewa (Case No SCSL-03-12), Decision and Order on Prosecution Motions for Joinder, 27 January 2004; Decision on Prosecution Request for Leave to Amend the Indictment, SCSL-04-14 (CDF), 20 May 2004.

[6] See letter dated 7 March 2002 from P Takirambudde (Executive Director, Africa Division) and R Dicker (Director, International Justice Program) to Ms Laila Stenseng (Second Secretary, Permanent Mission of Norway to the United Nations), para B.5.

[7] See, for example, *Report of the Special Rapporteur on Violence against Women, Ms Radhika Coomaraswamy*, UN Doc/E/CN.4/1998/54 (1998) pt 1A.

[8] See, for example, *Prosecutor v Karadzic and Another*, Rule 61 Hearing, Case No IT-95-18, Transcript of Proceedings, 2 July 1996 (evidence of Christine Cleiren, member of the Commission of Experts established by the UN Security Council to investigate violations of IHL in the former Yugoslavia).

prosecution.[1] As a consequence, crimes against humanity and genocide are considered particularly grave crimes that justify the most severe sanctions.[2] In the case of the former, a prosecutor must produce evidence to show that the acts in question were, inter alia, committed 'as part of a widespread or systematic attack directed against any civilian population'.[3] Genocide (as defined by the Convention on the Prevention and Punishment of the Crime of Genocide)[4] requires proof of specified acts committed with the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[5]

Although not within the scope of this article, it is useful to point out that war crimes (i.e. serious violations or grave breaches of the Geneva Conventions, Additional Protocols as well as the laws and customs of war)[6] could arise from isolated acts.[7] In such instances, no proof of a widespread or systematic attack, or even the intent to target an expressly enumerated or designated group, will accordingly be required.[8]

3. THE AD HOC INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA AND THE ROME STATUTE

3.1. Rape and other forms of sexual violence reconsidered

It could safely be argued that the most significant legacy of the armed conflict in the former Yugoslavia has been the increased recognition of sexual violence as a crime under

[1] See, for example, Article 5 of the Rome Statute which provides that the International Criminal Court shall have jurisdiction over the 'most serious crimes of concern to the international community as a whole', notably genocide, crimes against humanity, war crimes and aggression.

[2] The interests protected in the case of crimes against humanity (which consist of the systematic or widespread attack on a civilian population) would be the threat to peace, security and well-being of the world. The crime thus affects not only the individual victim, but also the international community as a whole. The criminalization of genocide seeks to protect the right to exist of certain groups. To this end, UN General Assembly Resolution 96(1) of 1946 defined genocide as 'denial of the right of existence of entire human groups in the same way as homicide is the denial of the right to live for individual human beings', thus acknowledging that the definition of the crime protects not only the physical but also the social existence of the group: see UN Doc A/RES/1/96 (1946). See also paras . . . . – . . . . *infra.*

[3] See Article 7(1) of the Rome Statute. For a discussion of the contextual elements of crimes against humanity, see, in general, G Werle *Principles of International Criminal Law* (2005) marginal nos 646 – 671 pp 221 – 231.

[4] Article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (hereinafter referred to as the Genocide Convention). General agreement seems to exist that this list is exclusive, as the drafters of the Genocide Convention purposely limited Article II to the protection of the four listed groups that had in the past been the repeated targets of hostility and that were defined by homogeneity, involuntariness of membership and permanence. For a critical evaluation of this traditional conception of genocide, see para 3.4.3 *infra.*

[5] See also Article 6(a) – (e) of the Rome Statute.

[6] See, in particular, M Sassòli and AA Bouvier How Does Law Protect In War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law Vol I 2ed (2006) 303. See also G Abi-Saab and R Abi-Saab in H Ascensio, E Decaux and A Pellet (eds) Droit International Pénal (2000) para 42, cited in G Werle Principles of International Criminal Law (2005) marginal no 773 p 269 note 3.

[7] See, for example, *Prosecutor v Delalic and Others*, ICTY, Case No IT-96-21, Judgment, 16 November 1998, para 178, which confirmed that there is no requirement that grave breaches and violations of the laws and customs of war be committed on a widespread or systematic scale.

[8] The grave breach of 'destruction and appropriation of property' is, however, an exception to this and must arguably be extensive in order to qualify as a grave breach. See, in particular, JS Pictet (ed) *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention Relative to the Treatment of Civilians* (1960) 596.

international law.[1] Although rape is expressly listed and prohibited by the Fourth Geneva Convention and both Additional Protocols,[2] some doubt prevailed as to whether rape was a crime under international law. As pointed out above,[3] this uncertainty could largely be attributed to the fact that rape was not expressly conceptualized under international law as a grave breach or a war crime, but as an attack upon the personal honour and dignity of women.[4]

The particular character of the conflicts in the former Yugoslavia and in Rwanda necessitated a critical re-evaluation of the extent to which sexual violence (and rape in particular) was implicitly encompassed within torture, genocide and crimes against humanity. An assessment of these conceptions of sexual violence, together with relevant provisions of the Rome Statute, will follow next.

3.2. The significance of international human rights discourse on torture

The existing international human rights discourse on the legal implications of sexual violence has had a significant impact on the interpretation of torture within the context of international criminal law.[5] The European Court of Human Rights[6] and the Inter-American Commission on Human Rights[7] have on occasion found that the act of rape could amount to torture in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms[8] and the Inter-American Convention on Human Rights.[9]

In these instances, both the European Court and the Inter-American Commission emphasized that the physical and mental violence inflicted on the victim through the act of rape constituted torture, and thus a violation of fundamental human rights guaranteed under the European Convention and the Inter-American Convention. This particular conception of sexual violence as torture – albeit in a human rights context – has established a framework that greatly

---

[1] See, in particular, C de Than and E Shorts *International Criminal Law and Human Rights* (2003) marginal nos 11-019 – 11-020 pp 362 – 364; G Werle *Principles of International Criminal Law* (2005) marginal no 909 p 312; and JG Gardam and MJ Jarvis *Women, Armed Conflict and International Law* (2001) 186 – 187.

[2] For a discussion of these, see para 2.1.1 *supra.*

[3] *Ibid.*

[4] See note 33 *supra.*

[5] See, in general, G Werle *Principles of International Criminal Law* (2005) marginal nos 712 - 713 pp 244 – 245; and T Meron 'Human Rights and Humanitarian Law: Growing Convergence' in *Human Rights in Internal Strife: Their International Protection* (1987) 10 – 14.

[6] See, for example, *Aydin v Turkey*, ECtHR, Reports of Judgments and Decisions, 1997-VI, par 86, p 1891, where the European Court of Human Rights held that 'the accumulation of acts of physical and mental violence inflicted on the applicant and especially the cruel act of rape to which she was subjected amounted to torture in breach of article 3 of the [European] Convention'.

[7] See, in particular, *Fernando and Raquel Mejia and Another v Peru*, IACiH, 1996, where the Inter-American Commission on Human Rights found that the rape of Raquel Mejia amounted to torture in breach of the Inter-American Convention on Human Rights.

[8] Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Also compare the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) which came into force in February 1989. Although no definition of torture is contained in the provisions of the ECPT, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is acknowledged as the basis upon which the ECPT operates: see, in general, C de Than and E Shorts *International Criminal Law and Human Rights* (2003) marginal no 7-021 p 208.

[9] See also the Inter-American Convention to Prevent and Punish Torture adopted at Cartagenade de Indias, Colombia, by the Organization of American States on 9 December 1985, 25 ILM (1986) 519, which contains a definition of torture in Article 2 that differs slightly from the Convention on Torture. For a basic discussion of these instruments, see C de Than and E Shorts *International Criminal Law and Human Rights* (2003) marginal nos 7-005 – 7-008 pp 186 – 190; and K Dörmann *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2004) (reprinted) 47 notes 13 – 14.

enabled the ICTY and ICTR to consider whether sexual violence could constitute torture within the contexts of the Balkan and Rwandan armed conflicts.

3.3. Crimes against humanity: a brief (historical) introduction

Crimes against humanity, manifesting as 'mass crimes committed against a civilian population',[1] were first explicitly formulated in Article 6(c) of the Nuremburg Charter. The Nuremburg Charter expressly included in its definition:

'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.'

Unlike war crimes,[2] crimes against humanity would include acts committed against the perpetrator's own nationals. A general provision in the Preamble to the Hague Regulations of 1899 and 1907[3] obligated the belligerent parties to obey the 'laws of humanity'. The idea of criminalizing violations of such laws of humanity was not yet, however, hinted at in the Martens Clause,[4] the application of which was limited to wartime.

The term 'crimes against humanity' was coined in 1915 when France, the United Kingdom and Russia employed it to refer to the massacres of the Armenian population in Turkey.[5] Crimes against humanity were also included in Article 5(c) of the Tokyo Charter, yet in contrast to Nuremberg, no convictions on crimes against humanity followed in Tokyo.[6]

Apart from the trial of Adolf Eichmann in Israel[7] and the conviction of Claus Barbie in France,[8] no other particularly noteworthy trials for crimes against humanity were conducted before international criminal courts until the ICTY and ICTR commenced their work in the 1990s. The Statutes of the Yugoslavia and Rwanda Tribunals have both affirmed the customary

---

[1] G Werle *Principles of International Criminal Law* (2005) marginal no 633 p 216.

[2] On war crimes, see note 78 and note 79 *supra.*

[3] Respectively, the *Second Convention with Respect to the Laws and Customs of War on Land* of 29 July 1899 and the *Fourth Convention respective the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land* of 18 October 1907. Available at <http://www.icrc.org/ihl> (accessed 6 May 2007).

[4] The Martens Clause (which is a tribute to the Russian delegate who proposed it), prescribes that in cases not covered by treaties (and traditional customary international law) 'civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'. The Martens Clause also appears in the Preamble to the 1980 UN Weapons Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, in Articles 63, 62, 142 and 158 respectively of the four Geneva Conventions and in Article 1(2) of Additional Protocol I. The Preamble to Additional Protocol II contains similar wording. For more on the Martens Clause, see; M Sassoli and AA Bouvier *How Does Law Protect In War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* Vol I 2ed (2006) 139; A Cassese 11 (2000) *European Journal of International Law* 187; and T Meron 94 (2000) *American Journal of International Law* 78.

[5] Declaration of 28 May 1915, reprinted in United Nations War Crimes Commission (ed) *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) 35. On the history of the term, see also D Luban 29 *The Yale Journal of International Law* (2004) 85 – 86.

[6] G Werle *Principles of International Criminal Law* (2005) marginal no 637 p 217 note 10.

[7] *Attorney General of the Government of Israel v Eichmann*, District Court of Jerusalem, Judgment 12 December 1961, in 36 *International Law Reports* (1968) 18; *Attorney General of the Government of Israel v Eichmann*, Supreme Court of Israel, Judgment 29 May 1962, in 36 *International Law Reports* (1968) 277.

[8] *Féderation National des Deportées et Internés Resistants et Patriots* et al *v Barbie*, Cour de Cassation, Judgment 20 December 1985, in 78 *International Law Reports* (1988) 136; *Advocate General v Barbie*, Cour de Cassation, Judgment 3 June 1988, in 100 *International Law Reports* (1995) 330. Summarized in LN Sadat 32 (1994) *Columbia Journal of Transitional Law* 289.

law character[1] of crimes against humanity. The scope and object of this article does not, however, entail a discussion of crimes against humanity per se, except in so far as torture and specific acts of sexual violence committed against women during armed conflict constitute crimes against humanity. The significance of this, with particular reference to the crime of torture, will be examined next.

3.3.1. Torture as a crime against humanity

The crime against humanity of torture is addressed under Article 7(1)(f) of the Rome Statute. This provision is based on Article 5(f)[2] and Article 3(f)[3] of the Statutes of the ICTY and ICTR respectively. Article 7(2)(e) of the Rome Statute defines torture as a crime against humanity in terms of:

'[the] intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the 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'.[4]

Under this definition, torture thus includes pain caused even without a particular purpose, for example, for purely arbitrary reasons.[5]

Historically, the identified purpose of torture was to obtain information from the victim, but the jurisprudence of the ICTY reveals that the tribunal both considered and accepted additional motives. The characteristic objective criterion for torture as a crime against humanity is the infliction of severe physical or mental pain or suffering. As this criterion is also a core element of the definition of torture under (international) human rights law,[6] the ICTY considered, inter alia, reports by the UN Human Rights Committee and/or relevant jurisprudence on the prohibition of torture.[7]

3.3.2. Could rape and other acts of sexual violence constitute torture?

The evolution of the prohibition of rape and serious sexual violence in customary international law was first traced by the ICTY in Prosecutor v Furundžija, which led the Trial Chamber to conclude that the definition of torture in Article 1 of the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[8] 'codifies, or contributes to developing or crystallizing customary international law'.[9] The Appeals Chamber subsequently

---

[1] See para 3.3.2 *infra.*

[2] See note 112 *infra.*

[3] See note 130 *infra.*

[4] This definition is taken from Article 1(1) of the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention on Torture) of 10 December 1984, 1465 UNTS (1987) 112.

[5] G Werle *Principles of International Criminal Law* (2005) marginal no 711 p 244.

[6] See para 3.2, note 86 and note 87 *supra.*

[7] See, for example, *Prosecutor v Mucić and Others*, ICTY (Trial Chamber), Judgment, 16 November 1998, para 461; *Prosecutor v Kvočka and Others*, ICTY (Trial Chamber), Judgment, 2 November 2001, para 142.

[8] 1465 UNTS (1987) 112. Article 1(1) of the Convention on Torture provides: '(1) For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent of or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions'.

[9] Judgment, 10 December 1998, para 160.

confirmed that 'the definition in Article 1 reflects customary international law'.[1] The existing jurisprudence on torture affirms that all the circumstances of the individual case should be considered, especially the duration of the abuse and its physical and psychological effects.[2] Severe mental pain and suffering, such as forcing a person to be present during the torture of a family member (as was the case in Prosecutor v Furundžija)[3] also conforms to the definition of the crime.

Indictments issued by the Prosecutor of the ICTY conceptualized sexual violence as torture under relevant articles of the Statute of the ICTY, namely Article 2 (grave breaches of the four Geneva Conventions),[4] Article 3 (violations of the laws and customs of war),[5] and most notably, Article 5 (crimes against humanity).[6]

In Prosecutor v Kunarac and Others,[7] the ICTY confirmed the possibility of prosecuting sexual violence committed during armed conflict as an act of torture. The Appeals Chamber acknowledged that sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and agreed that it was accordingly not necessary to provide visual evidence of suffering by the victim, as this could be assumed.[8]

The pertinent question whether rape could constitute torture was considered by the ICTY in Prosecutor v Delalic and Others.[9] In this instance, one of the four accused was charged with the rape of two women who were detained in the Celebici prison camp in the Konjic municipality in central Bosnia and Herzegovina during 1992. The Prosecutor for the ICTY motivated that, in light of the circumstances, these rapes amounted to torture, thus constituting a grave breach of the four Geneva Conventions and a violation of the laws and customs of war.[10]

In considering these arguments, the Trial Chamber found that there was no question whether the acts of rape could constitute torture under international law.[11] In their view, 'rape

---

[1] Judgment, 21 July 2000, para 111.

[2] While the ICTY conceded on various occasions that it is not possible to formulate a complete list of torture practices (see, for example, *Prosecutor v Mucić and Others*, ICTY (Trial Chamber), Judgment, 16 November 1998, paras 461 and 469; *Prosecutor v Kvočka and Others*, ICTY (Trial Chamber), Judgment, 2 November 2001, para 147; and *Prosecutor v Kunarac and Others*, ICTY (Appeals Chamber), Judgment, 12 June 2002, para 149), the following conduct is, as a rule, classified as torture *per se*: (a) pulling out of teeth, fingernails or toenails; (b) electric shocks to sensitive parts of the body; (c) blows to the ears that cause the eardrums to burst; (d) breaking bones; (e) burning parts of the body; (f) spraying eyes or other sensitive parts of the body with acid; (g) hanging from a pole; (h) submersion in water until symptoms of drowning occur; (i) plugging nose and mouth to cause asphyxiation; (j) causing hypothermia with strong fans; (k) administration of medication (psychotropic drugs); (l) withholding food, water or sleep; and (m) rape.

[3] ICTY (Trial Chamber), Judgment, 10 December 1998, para 267. See also *Prosecutor v Kvočka and Others*, ICTY (Trial Chamber), Judgment, 2 November 2001, para 149.

[4] Article 2 of the Statute of the ICTY stipulates that the ICTY shall have the power to prosecute persons committing (or ordering to be committed) grave breaches of the Geneva Conventions against protected persons or property, namely, (a) willful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement; and (h) tasking of hostages.

[5] See note 30 *supra.*

[6] Article 5 of the Statute of the ICTY stipulates that the ICTY shall have jurisdiction to prosecute persons responsible for the following crimes against humanity, irrespective of whether committed in an international or internal armed conflict, notably (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; and (i) other inhumane acts.

[7] Case No IT-96-23 and IT-96-23/1-A, Judgment, 12 June 2002.

[8] *Ibid* para 150.

[9] *Prosecutor v Delalic and Others*, ICTY, Case No IT-96-21, Judgment 16 November 1998.

[10] Para 459.

[11] Paras 494 – 497.

causes severe pain and suffering, both physical and psychological'. Moreover, the Trial Chamber argued that:

'it is difficult to envisage circumstances in which rape by, or at the instigation of a public official, or with the consent or acquiescence of an official could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict'.[1]

On the question of the identified purpose of the crime of torture, the Trial Chamber accepted that the required purpose could include 'obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind'.[2]

In the course of its deliberation, the Trial Chamber consulted the work of the Committee on the Elimination of Discrimination against Women[3] which holds the position that violence directed against a woman, merely because she is a woman, constitutes a form of discrimination.[4] The accused was consequently found guilty of torture as a grave breach and as a violation of the laws and customs of war for the rape of the two women.[5] The Trial Chamber commented that the rapes were inflicted for the purposes specified in the definition of torture, including to acquire information, to punish, to coerce and to intimidate.[6] Furthermore, the violence was inflicted on each of the victims solely on the basis of them being women. This, the Trial Chamber found, is a form of discrimination that constitutes a prohibited purpose for the offence of torture.[7]

Subsequent to Prosecutor v Delalic and Others, sexual violence has been recognized as torture in other ICTY judgments[8] and the ICTR has indicated its agreement on this point.[9]

3.3.3. Rape and other acts of sexual violence as crimes against humanity

Crimes against humanity through sexual violence were not contained as such in the Nuremburg Charter,[10] but could be incorporated by way of the broad clause of 'other inhumane acts'.[11] Both the Statutes of the ICTY[1] and the ICTR,[2] however, expressly include rape as a

---

[1] Para 495.

[2] Para 494.

[3] The task of monitoring the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has been entrusted to the Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) set up in 1982 in terms of Article 17 of CEDAW. The Committee reports annually to the UN General Assembly on its activities and may make suggestions and general recommendations based on the examination of reports and information submitted by States Parties. For more on the work of the Committee, see, in particular, Articles 18 – 21 of CEDAW as well as RMM Wallace and K Dale-Risk *International Human Rights: Text and Materials* 2ed (2001) marginal nos 2-025 – 2-028 pp 31 – 33.

[4] Para 493.

[5] Paras 943 and 965.

[6] Paras 941 and 963.

[7] *Ibid.*

[8] See, for example, *Prosecutor v Furundžija*, ICTY (Trial Chamber), Judgment, 10 December 1998, para 267.

[9] See, for example, *Prosecutor v Akayesu*, ICTR (Trial Chamber), Judgment 2 September 1998, paras 598 and 687; and *Prosecutor v Nyiramasuhuko and Another*, ICTR, Indictment, Case No ICTR-97-21 charging sexual violence (rape and forced nudity) as a violation of Common Article 3 by way of torture.

[10] Charter of the International Military Tribunal, Nuremburg, as reported in (1945) 39 *American Journal of International Law* 257. Article 6(c) of the Nuremburg Charter defined crimes against humanity with reference to expressly enumerated acts which could also be perpetrated against one's own nationals: see para . . . . note . . . . *supra.*

[11] See, in general, G Werle *Principles of International Criminal Law* (2005) marginal no 722 p 248; and WA Schabas *An Introduction to the International Criminal Court* 2ed (2004) 46.

separate crime. Yet other forms of sexual violence are not expressly mentioned in these instruments and can thus only be incorporated as (other) crimes against humanity or, again, through the catch-all clause of 'other inhumane acts'. The latter could encompass behaviour such as the forced nakedness of women[3] as well as the forced evacuation by bus of women, children and elderly persons under severely overcrowded and unbearably hot conditions.[4]

The Rome Statute effects a significant clarification on this point by bundling together various acts of sexual violence as crimes against humanity. The Rome Statute, in Article 7(1)(g), thus encompasses rape, sexual slavery,[5] enforced prostitution,[6] forced pregnancy,[7] enforced sterilization[8] and any other forms of sexual violence of comparable gravity.[9] Since no definition of rape as a crime against humanity had been developed by the time that negotiations commenced on the Rome Statute, the Women's Caucus for Gender Justice in the International Criminal Court played a significant role in the development of the core elements of the crime of rape.

Also, within a few months after the adoption of the Rome Statute, deliberations of the ICTY and the ICTR had developed two somewhat different definitions of the crime of rape. The first was proposed by the ICTR in Prosecutor v Akayesu,[10] which cautioned that 'the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts'. The ICTR accordingly followed a contextualized approach and defined rape as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'.[11]

---

[1] See Article 5(g) of the Statute of the ICTY in note . . . . *supra.*

[2] See Article 3(g) of the Statute of the ICTR. Article 3 stipulates that the ICTR shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds, namely: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecution on political, racial and religious grounds; and (i) other inhumane acts.

[3] See, for example, *Prosecutor v Akayesu* Case No ICTR-96-4-T, Judgment, 2 September 1998.

[4] See, for example, *Prosecutor v Krstic* Case No IT-98-33-T, Judgment, 2 August 2001, paras 50 – 52 and 519. However, under the Rome Statute, the concept of 'other inhumane acts' may indeed be narrowed by the addition of the words 'of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'. It remains to be seen whether the acts of sexual indignity condemned by the ICTR (see note 126 *supra*) would fit within the restrictive language of the Rome Statute. This provision was criticized by the Trial Chamber of the ICTY in *Prosecutor v Kupreskic and Others* Case No IT-95-16-T, Judgment, 14 January 2000, para 565 for failing 'to provide an indication, even indirectly, of the legal standards which would allow us to identify the prohibited inhumane acts'.

[5] Sexual slavery is a specific manifestation of enslavement, coupled with the element that the perpetrator must cause the victim to engage in sexual acts: see the Elements of Crimes for Article 7(1)(g)-2 of the Rome Statute.

[6] Enforced prostitution is for the first time recognized as a separate crime against humanity by the Rome Statute. According to the Elements of Crimes, the material element requires that the perpetrator cause one or more persons to engage in sexual acts through the exercise of force or threat of force or coercion. The perpetrator or another person must receive or expect financial or other advantages in exchange for or in connection with the sexual act: see the Elements of Crimes for Article 7(1)(g)-3 of the Rome Statute.

[7] Forced pregnancy as a crime against humanity is a unique feature of the Rome Statute. The material element requires the illegal imprisonment of a forcibly pregnant woman. It is sufficient if the perpetrator holds prisoner a woman who has been impregnated by someone else: see the Elements of Crime for Article 7(2)(f) of the Rome Statute.

[8] Although enforced sterilization is listed for the first time as a special manifestation of a crime against humanity, the Rome Statute contains no definition of enforced sterilization. According to the Elements of Crimes, the perpetrator must permanently deprive at least one person of his or her biological reproductive capacity: see Elements of Crimes for Article 7(1)(g)-5 of the Rome Statute.

[9] The inclusion of other forms of sexual violence of comparable gravity suggests that the conduct must be of a coerced and sexual nature comparable in gravity to the acts listed in Article 7(1)(g) of the Rome Statute. See the Elements of Crimes Article 7(1)(g)-6 of the Rome Statute. The Elements of Crimes are based on the judgment of the ICTR in *Prosecutor v Akayesu*, ICTR (Trial Chamber), Judgment, 2 September 1998, para 598. *In casu*, a female student was ordered to strip and forced to perform gymnastics naked before a large crowd of people: *ibid* para 688.

[10] Case No ICTR-96-4-T, Judgment, 2 September 1998.

[11] *Ibid* para 325. This definition was affirmed in *Prosecutor v Mucić and Others*, ICTY (Trial Chamber), Judgment, 16 November 1998, para 478; and in *Prosecutor v Musema*, ICTR (Trial Chamber), Judgment, 27 January 2000, para 229. See also *Prosecutor v Delalic and Others* Case No IT-96-21-T, Judgment, 16 November 1998, paras 477 – 478.

This definition was broad enough to encompass forced penetration by the perpetrator's tongue, a definition most legal systems would not classify as rape,[1] although such an act might well be prosecuted as a form of sexual (or indecent) assault.

In Prosecutor v Furundžija,[2] the Trial Chamber of the ICTY reverted to a more mechanical and technical definition of rape instead. It defined rape as:

'(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of 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'.[3]

However, in Prosecutor v Kunarac and Others,[4] the Trial Chamber of the ICTY found the emphasis on the coercive element too restrictive and argued that a comprehensive comparison of international criminal law systems revealed a lesser accent on the exercise of coercion (or use of force) than on an absence of consent.[5] Element (ii) was therefore reformulated to read:

'(ii) where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances'. [6]

The Appeals Chamber has since affirmed the definition in Prosecutior v Kunarac and Others,[7] with the result that the focus of the ICTY's conception of the crime of rape has shifted from the perpetrator's objective behaviour to the victim's opposing will.

The ICTR too has since endorsed the definitions of rape espoused in Prosecutor v Akayesu and Prosecutor v Kunarac and Others. In Prosecutor v Muhimana,[8] the Trial Chamber of the ICTR even found both definitions to be substantially aligned and compatible, to the extent that the latter decision merely articulated the parameters of what could constitute a physical invasion of a sexual nature. It thus concluded that the 'conceptual definition of rape established in Akayesu encompasses the elements set out in Kunarac'.[9]

It is doubtful, however, whether the two approaches adopted by the ICTY in Prosecutor v Furundžija[10] and Prosecutor v Kunarac and Others[11] are likely to produce significantly different results. There exists an undeniable correlation between the presence of force, threats of force or coercion and the absence of genuine and freely given consent. Moreover, the jurisprudence of the ICTY on rape also does not suggest that the concepts coercion, force or

---

[1] See WA Schabas *An Introduction to the International Criminal Court* 2ed (2004) 48.

[2] Case No IT-95-17/1-T, Judgment, 10 December 1998.

[3] *Ibid* para 185.

[4] ICTY (Trial Chamber), Judgment, 22 February 2001.

[5] *Ibid* para 441.

[6] *Ibid* para 460.

[7] See *Prosecutor v Kunarac and Others*, ICTY (Appeals Chamber), Judgment, 12 June 2002, para 128.

[8] Case No ICTR-95-1B-T, Judgment, 28 April 2005.

[9] *Ibid* para 550. Some have argued rightly that the Trial Chamber's approach in *Prosecutor v Muhimana* constitutes somewhat of an oversimplification of the issue of rape, particularly in so far as the compatibility of the two respective definitions are concerned, and also as to whether the ICTY had in fact tacitly accepted the ICTR's definition of rape in *Prosecutor v Akayesu*: see, in particular, JA Williamson 'Case Commentary: Prosecutor v Mikaeli Muhimana' (2006) *African Yearbook on International Humanitarian Law* 173.

[10] Case No IT-95-17/1-T, Judgment, 10 December 1998.

[11] ICTY (Trial Chamber), Judgment, 22 February 2001.

threat of force have ever been interpreted restrictively,[1] which further suggests that the two approaches do not differ substantially. Besides, in armed conflict a nearly universal situation of coercion exists with the result that, as a rule, no genuine consent on the part of the victim can be assumed.[2] This reality is further underscored by the Rules of Procedure of the Rome Statute applicable to evidence in cases of sexual violence which expressly stipulate that '[c]onsent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking an advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent'.[3]

The Elements of Crimes of the Rome Statute lean towards the first of the two ICTY approaches to rape, albeit with some slight deviations. To this end, a more specific definition of the criminal conduct is provided and the material element requires an invasion of the victim's body by the perpetrator which must result in penetration. The Elements of Crimes for Article 7(1)(g)-1 of the Rome Statute define rape as follows:

'1. 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. 2. 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 a 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.'

The Elements of Crimes for Article 7(1)(g)-1 of the Rome Statute furthermore require that the conduct must be committed 'as part of a widespread or systematic attack directed against a civilian population'. And in the final instance, the element of mens rea requires that the perpetrator 'knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population'.

It is significant to note that Article 7(3) of the Rome Statute also contains a special provision that defines 'gender', not only for the purposes of crimes against humanity, but for all other purposes within the context of the Statute. The formulation (which is taken from the Beijing Conference of 1995)[4] states that 'it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society'. Consequently, the concept of 'invasion' within the definition of rape is specifically intended to be broad enough to be gender-neutral, as it is understood that both men and women can be victims of rape. Rape does not include only

---

[1] See also the respective comments by the Trial Chamber and the Appeals Chamber in *Prosecutor v Kunarac*, ICTY (Trial Chamber), Judgment, 22 February 2001, paras 458 – 459; *Prosecutor v Kunarac*; ICTY (Appeals Chamber), Judgment 12 June 2002, para 129.

[2] This truth is reinforced under conditions where the victim is held captive: see *Prosecutor v Furundžija*, ICTY (Trial Chamber), Judgment, 10 December 1998, para 271 ('any form of captivity vitiates consent').

[3] See Rule of Procedure 70 'Principles of evidence in cases of sexual violence' of the Rome Statute. Rule of Procedure 70(a) – (d) provides: 'In cases of sexual violence, the Court shall be guided by and where appropriate, apply the following principles: (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking an advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent; (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; (c) Consent cannot be inferred by reason of the silence of , or lack of resistance by, a victim to the alleged sexual violence; (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.'

[4] The theme of the Beijing Conference, held in 1995, was 'Action for Equality, Development and Peace'. The objectives of the Conference related to the mobilization of women and men at the level of policy-making; the identification of critical areas of concern; and the priority actions to be taken between 1996 and 2001 by the international community, including the United Nations system. See also, in general, RMM Wallace and K Dale-Risk *International Human Rights: Texts and Materials* 2ed (2001) marginal nos 2-047 – 2-048 pp 46 – 47.

forced sex, for the crime also proscribes sexual conduct connected with the insertion of the perpetrator's sexual organ into other body cavities or the insertion of other body parts of the perpetrator's body (or even objects) into the vagina or other parts of the body of the victim. The definition of the crime of rape under Article 7(1)(g) also requires the use of violence or the threat of violence or force, thereby correctly acknowledging that rape is a question of (sexual) power and violence instead of (sexual) lust and/or desire.[1]

The remainder of this article will evaluate whether sexual violence targeting women (as a group) during an armed conflict would constitute genocide. This analysis, together with a brief overview of the crime of genocide, follows next.

3.4. The crime of genocide: a brief introduction

The 20th century was marked by various extermination campaigns in which the estimated death toll ranged from 500,000 to millions.[2] The term 'genocide' was coined by Raphael Lemkin, a Polish lawyer, to describe the extermination of the Jews during World War II. The term is composed from the Greek genos, for race, and the Latin caedere, for killing.[3] Although Lemkin defined genocide as actions intended to destroy the essential foundations of life, guided by a plan to annihilate the group, the international community could only agree on a corresponding definition of the crime in 1948.[4] The question whether sexual violence could constitute genocide will be considered next.

3.4.1. Sexual violence and the crime of genocide

As indicated above,[5] conduct is punishable as genocide if it intents to destroy in whole or in part a national, ethnical, racial or religious group. In Attorney-General of the Government of Israel v Eichmann,[6] the Court emphasized the 'all-embracing, total form' of the crime of genocide, recognizing that in the case of the Holocaust,

'[the] extermination campaign was a single comprehensive act, not to be split up into the acts or operations performed by sundry people at sundry times and in sundry places. One team of men carried it out in concert the whole time and everywhere'.[7]

Sexual violence against women was neither referred to during the drafting of, nor finds any specific expression in, the Genocide Convention. The exclusion of any gender-specific considerations in the Genocide Convention may be partly explained by the perception that both men and women were targeted equally during the Holocaust. However, many of the acts

[1] This particular conception of rape and sexual violence is widely endorsed in feminist jurisprudence. See, in particular, CA MacKinnon 'Not a Moral Issue' (1984) 2 *Yale Law & Policy Review* 321; BP Ashley and D Ashley 'Sex as Violence: The Body Against Intimacy' (1984) 7 *International Journal of Women's Studies* 352; CA MacKinnon 'Reflections on Sex Equality Under Law' (1991) 100 *Yale Law Journal* 1281; D Réaume 'The Social Construction of Women and the Possibility of Change: Unmodified Feminism Revisited' (1992) 5 *University of Toronto Law Review* 132; KT Bartlett 'Gender Law' (1994) 1 *Duke Journal of Gender Law & Policy* 1; and KT Bartlett 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829.

[2] These included the extermination of Armenians in Turkey at the start of World War I; the Holocaust during World War II; the massacres in Nigeria in the late 1960s; the mass killings in the Soviet Union (under Stalinist rule) and in Cambodia (under Pol Pot); and the horrific events in Bangladesh, Burundi, Ethiopia, Guatemala, Rwanda and in the former Yugoslavia. See, in general, G Werle *Principles of International Criminal Law* (2005) marginal nos 555 – 559 pp 188 – 190.

[3] *Ibid* marginal no 560 p 190 note 16.

[4] See UN General Assembly Resolution 260 A(III) of 9 December 1948, RES 3/260, UN GA (1948).

[5] See para 2.2 *supra.*

[6] (1961) 36 *International Law Reports* 5 p 233 – 234. The accused was prosecuted and convicted under an Israeli law of 1951 for war crimes, crimes against the Jewish people and crimes against humanity.

[7] *Ibid.*

specified in Article II of the Genocide Convention can be interpreted to encompass sexual violence. Article II of the Genocide Convention and Article 6 of the Rome Statute (which is similar to the former) define genocide in terms of five specific acts, namely: killing members of the group;[1] causing serious bodily or mental harm to members of the group;[2] imposing conditions on the group calculated to destroy it;[3] preventing births within the group;[4] and forcibly transferring children from the group to another group.[5]

Although the majority of these specified acts constitute no more than general categories (with little indication given as to their precise content) rape and other acts of sexual violence are surely capable of bringing about the destruction of a specified group in whole or in part, thus constituting a direct threat to the group's physical and social existence, and a violation of the dignity[6] of the victim.

Three of the categories of acts specified in Article II of the Genocide Convention may be of particular importance in the present context. It could, for example, be argued that rape and other sexual abuse constitute 'serious bodily or mental harm' in accordance with Article II(b) of the Genocide Convention.[7] The United Nations Compensation Commission[8] has on occasion expressly recognized that 'serious personal injury' includes physical or mental injury arising from sexual assault.[9] The classification of sexual violence as torture (which requires the infliction of severe physical or mental pain or suffering)[10] further supports this argument. In fact, both the ICTY[11] and the ICTR[12] have acknowledged that sexual violence can result in the kind of bodily harm that leads to the physical destruction of women forming part of the targeted group. The inclusion of the words 'mental harm' in Article II(b) of the Genocide Convention is intended to target genocide committed through the administration of narcotics.[13] At the time of its adoption, some controversy existed as to whether the phrase 'mental harm' was restricted to physical impairment or intended to also include non-physical impairment of the mental faculties. The

---

[1] See Article II(a) of the Genocide Convention and Article 6(a) of the Rome Statute.

[2] See Article II(b) of the Genocide Convention and Article 6(b) of the Rome Statute.

[3] See Article II(c) of the Genocide Convention and Article 6(c) of the Rome Statute.

[4] See Article II(d) of the Genocide Convention and Article 6(d) of the Rome Statute.

[5] See Article II(e) of the Genocide Convention and Article 6(e) of the Rome Statute.

[6] See G Werle *Principles of International Criminal Law* (2005) marginal no 563 p 191.

[7] See also Article 6(b) of the Rome Statute which requires the perpetrator to have caused serious bodily or mental harm to at least one member of the group.

[8] As part of the settlement of the (first) Persian Gulf conflict (1990 – 1991), the UN Security Council established a Fund to pay compensation for 'any direct loss, damage . . . or injury to foreign governments, nationals and corporations, as a result of the unlawful invasion and occupation of Kuwait by Iraq' (see UN Doc S/RES/687 (3 April 1991) para 16). Such losses included, but were not limited to, violations of IHL. The United Nations Compensation Commission (UNCC) was created to administer the Fund and functions as a subsidiary organ of the UN Security Council.

[9] Six categories of claims were established for which compensation could be awarded by the UNCC. Four of the categories specifically relate to loss incurred by individuals, namely (a) departures from Iraq or Kuwait between 2 August 1990 and 2 March 1991 ('Category A'); (b) serious personal injury or death of a spouse, child or parent ('Category B'); (c) individuals claiming personal damages for losses up to $100 000 ('Category C'); and (d) individuals claiming personal damages for losses exceeding $100 000 ('Category D'). The latter two categories cover death or personal injury or losses of income, support, housing or personal property, medical expenses or costs of departure: see *UNCC Decision No 1, 'Criteria for Expedited Processing of Urgent Claims'*, UN Doc S/AC.26/1991/1 (2 August 1991).

[10] For a discussion of torture and particularly of rape as torture, see para 3.3.2, especially para 3.3.3 *supra.*

[11] See, for example, *Prosecutor v Tadic*, Opinion and Judgment, Case No IT-94-1 (7 May 1997), paras 154 and 165 (recounting the devastating physical and mental harm of sexual violence on women in the Trnopolje camp). See also *Aydin v Turkey*, ECtHR, Reports of Judgments and Decisions, 1997-VI, para 86, p 1891 (see note 86 *supra*); and *Fernando and Raquel Mejia and another v Peru*, IACiHR, 1996, (see note 87 *supra*).

[12] See, for example, *Prosecutor v Muhimana*, Case No ICTR-95-1B-T, Judgment, 28 April 2005, para 502, where the Trial Chamber defined serious bodily harm under the count of genocide as 'any serious physical injury to the victim, such as torture and sexual violence'.

[13] See Proceedings of the Sixth Committee, UN GAOR 6th Comm, 3rd Sess, 81st meeting (1948) 175 (detailing the use of narcotics by the Japanese against the Chinese population).

view that non-physical mental impairment is indeed encompassed by the Genocide Convention has subsequently received international support.[1] Mental trauma caused by sexual violence could therefore fall within this particular category.

It could furthermore be argued that sexual violence also falls foul of Article II(c) of the Genocide Convention which proscribes 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.[2] As alluded to in Attorney-General of the Government of Israel v Eichmann,[3] Article II(c) of the Genocide Convention is concerned with acts intended to produce 'slow death',[4] such as 'placing a group of people on a subsistence diet, reducing required medical services below a minimum, withholding sufficient living accommodations etc.',[5] as well as forced labour.[6] The narrative accounts of women who had survived the Nazi concentration camps confirm that a broad spectrum of material conditions was imposed on the detainees as an integral part of the strategy for their extermination. One survivor wrote:

'[w]hat had struck me as disorder was thoroughly planned. What had seemed ignorance was the result of great subtlety . . . Nothing was accidental, all was consciously accomplished, all to a specific end.'[7]

In common with acts such as forced labour, sexual violence can form part of the oppressive conditions imposed on a group which, in combination with other acts, may lead to the destruction of its members. The experiences of the Japanese 'comfort women'[8] underscore this reality. Historians estimate that less than 30% of these women survived World War II,[9] thereby illustrating the likelihood that rape and other forms of sexual violence can indeed result in physical destruction.

The third and final category of acts that may be of particular significance in the present context is listed under Article II(d) of the Genocide Convention and includes the prevention of births and the destruction of sexual and reproductive organs.[10] It is logical to conclude that in instances where sexual violence is used to prevent births within the targeted group through, for example, the destruction of the sexual and reproductive organs of women and thereby their capacity to bear children, such sexual violence will in all probability fall foul of Article II(d) of the Genocide Convention.

The armed conflicts in the former Yugoslavia and Rwanda likewise prompted the international community to consider, for the first time, the relationship between sexual violence

---

[1] See, for example, Report of the Preparatory Committee's Working Group on the Definition of Crimes, UN Doc A/AC.249/1007/L.5 (12 March 1997) 3 note 4.

[2] See also Article 6(c) of the Rome Statute which covers the infliction of conditions of life on a group that are calculated to bring about its physical destruction, in whole or in part.

[3] (1961) 36 *International Law Reports* 5.

[4] So-called 'slow death' measures include conduct that does not immediately kill, but that can (and is intended to) bring about the death of group members over the long term. This covers 'extermination through slow death': see G Werle *Principles of International Criminal Law* (2005) marginal no 593 p 201 note 94.

[5] (1961) 36 *International Law Reports* 5 p 236.

[6] *Ibid.*

[7] A Holocaust survivor by the mane of Lewinska, cited in JG Gardam and MJ Jarvis *Women, Armed Conflict and International Law* (2001) 192 note 84.

[8] See note 8 *supra.*

[9] *Ibid* 192 note 85.

[10] See also Article 6(d) of the Rome Statute which encompasses the imposition of measures aimed at preventing births within the group and thereby targeting its continued biological existence through, for example, sterilization, forced birth control, prohibitions on marriage and segregation of the sexes. See, in general, *Prosecutor v Akayesu*, ICTR (Trial Chamber), Judgment, 2 September 1998, para 507.

and the crime of genocide. Some key aspects of the applicable jurisprudence of the ICTY and the ICTR will be considered next.

3.4.2. Sexual violence: an integral part of the process of destruction?

Various indictments which conceptualize sexual violence as genocide have been issued by the Prosecutor of both the ICTY[1] and the ICTR.[2] The first jurisprudence on this issue arose from Prosecutor v Akayesu.[3] The accused was bourgmestre of the Taba commune during the conflict in Rwanda in 1994. The Prosecutor did not allege that the accused had personally committed the acts of sexual violence, but instead argued that the accused had known that sexual violence was occurring and that he had facilitated and encouraged it by various means, such as by allowing sexual violence to take place on or near the bureau's communal premises, by his presence, and by failing to prevent any acts of sexual violence.[4] The Prosecutor argued that, in the circumstances, the sexual violence constituted, inter alia, 'serious bodily or mental harm to members of the group', thus constituting genocide as proscribed in Article 2 of the Statute of the ICTR.[5]

The Trial Chamber of the ICTR accepted that the accused had known that the sexual violence was occurring and that he had 'ordered, instigated and otherwise aided and abetted sexual violence'.[6] The Trial Chamber specifically found that:

'[s]exual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole'.[7]

The Trial Chamber continued:

'[s]exual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself.'[8]

The Trial Chamber was accordingly satisfied that the sexual violence was accompanied by the specific intent required for the crime of genocide. This intent was evident, in particular, from the fact that many rapes were committed near mass graves and that statements were made to the effect that the women who were taken away would later be collected for execution.

---

[1] See, for example, *Prosecutor v Karadzic and Another*, Indictment, Case No IT-95-5 (under Article 4(b) of the Statute of the ICTY, causing serious bodily or mental harm to members of the group and under Article 4(c) of the Statute of the ICTY, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part).

[2] See, for example, *Prosecutor v Akayesu*, Indictment as Amended, 17 June 1997, Case No ICTR-96-4-I; and *Prosecutor v Musema*, Indictment as Amended, 6 May 1999, Case No ICTR-96-13-I.

[3] Case No ICTR-96-4, Judgment, 2 September 1998.

[4] *Ibid* para 616.

[5] Article 2 of the Statute of the ICTR stipulates that the ICTR shall have the power to prosecute persons committing genocide as defined in para 2 or of committing any other acts as enumerated in para 3. Paras 2 and 3 of Article 2 read: '2. Genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. 3. The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.'

[6] Case No ICTR-96-4-T, Judgment, 2 September 1998, paras 452 and 706.

[7] *Ibid* para 731.

[8] *Ibid* para 732.

Moreover, after some of the rapes, witnesses heard the accused say that 'tomorrow they [i.e. the women] would be killed'[1] and these killings would then indeed be carried out.[2]

The Trial Chamber subsequently considered the meaning of the phrase 'serious bodily or mental harm' as contained in the Genocide Convention and reflected in Article 4 of the Statute of the ICTR. The Trial Chamber emphasized that such harm need not be permanent and irreversible.[3] Drawing on the case of Attorney-General of the Government of Israel v Eichmann,[4] the Trial Chamber determined that serious bodily and mental harm include 'acts of torture, be they bodily or mental, inhumane or degrading treatment [and] persecution'[5] and expressly stated that sexual violence falls within the scope of 'serious bodily and mental harm'.[6] The accused was found to have abetted the infliction of serious bodily and mental harm through 'acts of sexual violence, mutilations and rape'.[7] In particular, the Trial Chamber emphasized that:

'rape and 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 infliction of serious bodily and mental harm on victims and are even . . . one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm.'[8]

The Trial Chamber furthermore considered the meaning of the phrases 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'[9] and 'imposing measures intended to prevent births within the group'.[10] Within the context of the latter, particular attention was given to various acts of sexual violence, such as sexual mutilation, sterilization, forced birth control and deliberate impregnation. Furthermore, rape was found to be a measure that, due to the mental harm inflicted, may be imposed to prevent births within a group.[11] Rape with the purpose of changing the ethnic composition of a group in, for example, a patriarchal society where children are seen to belong to the father's ethnic group, would also fall foul of the prohibition on imposing measures intended to prevent births within the group.[12]

The classification of sexual violence as genocide was subsequently confirmed by the ICTR in Prosecutor v Musema,[13] where the accused was found guilty of, inter alia, genocide constituted by acts of sexual violence.[14] The accused was found to be the perpetrator of rape and was also held responsible for abetting others to commit rape and for encouraging rape through

---

1 *Ibid* para 733.

2 *Ibid.*

3 *Ibid* para 502. See also *Prosecutor v Kayishema and Ruzindana*, ICTR (Trial Chamber), Judgment, 21 May 1999, para 108; and *Prosecutor v Krstić*, ICTY (Trial Chamber), Judgment, 2 August 2001, para 513.

4 (1961) 36 *International Law Reports* 5.

5 Case No ICTR-96-4-T, Judgment, 2 September 1998, para 504.

6 *Ibid* para 275.

7 *Ibid* paras 706 – 707.

8 *Ibid* para 731.

9 *Ibid* paras 502 – 506.

10 *Ibid* paras 507 – 508. See also *Prosecutor v Musema*, Case No ICTR-96-13-T, Judgment, 27 January 2000, para 158.

11 *Ibid* para 508.

12 *Ibid* para 507. Whether, and to what extent, so-called 'ethnic cleansing' (a term used to refer to the practice in the former Yugoslavia of Serb forces driving Muslims and Croats out of their traditional areas of settlement in Bosnia and Herzegovina) can be classified as genocide, depends on the individual circumstances of the case: see, in general, G Werle *Principles of International Criminal Law* (2005) marginal nos 604 – 605 p 204. It is also noteworthy that the Prosecutor for the ICTY indicted Slobodan Milosevic for crimes against humanity and not genocide with respect to allegations of 'ethnic cleansing' in Kosovo during 1999: see *Prosecutor v Milosevic and Others* (Case No IT-99-37-I), Indictment, 22 May 1999.

13 Case No ICTR-96-13-T, Judgment, 27 January 2000.

14 *Ibid* para 936.

his actions.[1] In its judgment, the Trial Chamber specifically stated that 'serious harm need not entail permanent or irremediable harm'.[2] As in the case of Prosecutor v Akayesu,[3] the Trial Chamber emphasized the connection between sexual violence and statements evincing an intention to harm the Tutsi population. For example, immediately prior to the rape of one woman, the accused was heard to say '[t]he pride of the Tutsi is going to end today'.[4] Overall, the Trial Chamber concluded that:

'acts of serious bodily and mental harm, including rape and other forms of sexual violence were often accompanied by humiliating utterances, which clearly indicated that the intention underlying each specific act was to destroy the Tutsi group as a whole . . . [i]n this context, the acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such.'[5]

There has been further judicial recognition that rape can constitute genocide.[6] In a number of Rule 61 hearings,[7] the ICTY heard evidence regarding the physical and psychological harm inflicted on women as a result of sexual violence as well as the proximity of the sexual violence and the killings in Bosnia and Herzegovina.

3.4.3. Could the specific and intentional targeting of women (as a group) constitute genocide?

The question has been posed whether the category of sex ought to form the basis of a separate group to be added to the four target groups included under the crime of genocide.[8] As indicated above,[9] Article II of the Genocide Convention expressly refers only to 'national, ethnical, racial or religious groups'.[10] Historical accounts have shown that when women are specifically targeted, they frequently also fall within one of these four groups, thus constituting part of an enumerated group within the meaning of Article II of the Genocide Convention.[11]

Yet in instances where women are targeted solely on the basis of their sex (and/or possibly even gender)[12] judgments of the ICTR could provide support for a more flexible and nuanced interpretation of the crime of genocide. In considering whether any additional groups would meet the criterion intended by the drafters of the Genocide Convention, the Trial Chamber stated in Prosecutor v Akayesu[13] that the intention was 'patently to ensure the protection of any

---

[1] *Ibid* para 908.
[2] *Ibid* para 156.
[3] Case No ICTR-96-4-T, Judgment, 2 September 1998.
[4] Case No ICTR-96-13-T, Judgment, 27 January 2000, paras 907.
[5] *Ibid* para 933.
[6] See, for example, *Prosecutor v Furundžija*, ICTY (Trial Chamber), Judgment, 10 December 1998, para 172.
[7] In cases where an arrest warrant has been issued but not executed, Rule 61 allows the Prosecutor to submit the indictment to a Trial Chamber, together with supporting evidence. As this procedure takes place in the absence of the accused, the Trial Chamber determines whether there are any reasonable grounds for believing the accused has committed the acts alleged. If so, an international arrest warrant is issued and the UN Security Council can be informed: see Rule 61(D) and Rule 61(E) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, adopted 11 February 1994 (as amended). Available at <http://www.un.org/icty/rpe> (accessed 6 May 2007). See also the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, adopted 29 June 1995 (as amended). Available at <http://www.ictr.org/rules.1> (accessed 6 May 2007).
[8] See, in particular, JG Gardam and MJ Jarvis *Women, Armed Conflict and International Law* (2001) 196 and the authority cited in note 111; and W Schabas *An Introduction to the International Criminal Court* 2ed (2004) 40. But compare G Werle *Principles of International Criminal Law* (2005) marginal nos 585 – 586 pp 198 – 199.
[9] See paras 3.4.1 and 3.4.2 *supra*.
[10] See note 76 *supra*.
[11] See, in particular, Proceedings of the Sixth Committee, UN GAOR 6th Comm, 3rd Sess, 81st meeting (1948) 93.
[12] On the significance of this, see para 2.2 *supra*.
[13] Case No ICTR-96-4-T, Judgment, 2 September 1998.

stable and permanent group'.[1] This would accordingly include only groups 'constituted in a permanent fashion and membership of which is determined by birth' and thus exclude 'more mobile groups which one joins through individual voluntary commitment, such as political and economic groups'.[2] Moreover, in Prosecutor v Musema,[3] the ICTR expressly stated that:

'in assessing whether a particular group may be considered protected from the crime of genocide, it [the Trial Chamber] will proceed on a case-by-case basis, taking into account both the relevant evidence proffered and the specific political, social, and cultural context in which the acts allegedly took place.'[4]

These two decisions provide considerable support for the proposition that the targeting of women intentionally and exclusively on the basis of their sex, may well justify a reconsideration of the four groups included under the (and thus by implication the traditional) conception of the crime of genocide. The reasons commonly advanced for the retention of the traditional protection accorded in terms of the Genocide Convention, such as that the enumerated groups' members are in greatest need of protection, that individuals cannot separate themselves from the group by merely distancing themselves from it and that the groups are relatively easy to distinguish,[5] all apply equally to women. Numerous historical accounts[6] as well as events in the former Yugoslavia and Rwanda underscore the regular impunity with which women (as a group) are specifically and systematically targeted during armed conflict. A due appreciation of the involuntary and permanent nature of the membership of a particular sex (and/or designated gender) as well as a careful assessment of the specific political, social and cultural context in question may well justify the inclusion of this particular category within the definition of the crime of genocide.

4. CONCLUSION

Prior to the establishment of the two ad hoc international criminal tribunals for the former Yugoslavia and Rwanda and the entry into force of the Rome Statute, the question whether rape and other forms of sexual violence committed during armed conflict were punishable as crimes under international law, hinged on notions of women's honour, chastity and modesty. Since these notions are unavoidably based on certain assumed sexual attributes, they are, by definition, steeped in cultural prejudice. And since acts of sexual violence and rape are specifically directed against women solely because they are women, it becomes highly problematic to address the very issue of sexual violence with reference to women's assumed (and culturally-defined) sexual attributes and characteristics. Such an understanding of sexual violence can all too easily reinforce the idea that the harm that women suffer (and that rape in particular) is a random, yet unavoidable, consequence of war.

Although the traditional understanding of rape and other acts of sexual violence continues to permeate certain provisions contained in the Statutes of the ICTY and the ICTR (particularly in respect of war crimes), the jurisprudence of these two Tribunals has led the way to a new understanding of sexual violence perpetrated against women during armed conflict. This has largely been the result of a due appreciation of the actual consequences and particular harm suffered by women during war. The re-conception of rape and other acts of sexual violence

[1] *Ibid* para 516.
[2] *Ibid* para 511.
[3] Case No ICTR-96-13-T, Judgment, 27 January 2000.
[4] *Ibid* para 163.
[5] These three distinct reasons are advanced in G Werle *Principles of International Criminal Law* (2005) marginal nos 585 – 586 pp 198 – 199.
[6] See, in particular, note 6, note 7 and note 8 *supra.*

by the ICTY and the ICTR as torture, crimes against humanity, genocide and, in particular, war crimes has, for the first time, accentuated both the reality, and dire sex-specific consequences, of armed conflict.

It is accordingly to be welcomed that the human rights discourse on torture has been reflected in the norms of international criminal law and thus constitute an enabling framework to treat rape and other acts of sexual violence as crimes against humanity. A careful analysis of sexual violence as genocide, characterized by the specific and intentional targeting of women that constitutes an integral part of the process of destruction, may well justify the inclusion of the category of sex (and/or possibly even gender) under the crime of genocide. It has been shown that the reasons commonly advanced for the retention of the traditional categories of protection all apply equally to women. A due appreciation of the involuntary and permanent nature of the membership of a particular sex (and/or designated gender) as well as a careful assessment of the specific political, social and cultural context may well justify a more nuanced interpretation of the crime of genocide.

Although not part of the direct focus of this article, the emancipation of sexual violence as a separate war crime under the Rome Statute is furthermore to be welcomed.[1] The extension and recognition of sexual violence in the Rome Statute as a war crime in both international[2] and internal[3] armed conflicts is of particular significance, as this constitutes due recognition of the fact that acts of a sexual nature, committed in a context of organized violence, count among the most serious of crimes. It is accordingly no longer necessary to revert to less suitable definitions of sexual violence in order to prosecute such acts as independent crimes under international law.

It remains to be seen to what degree the groundwork prepared by the ICTY and ICTR (and the Rome Statute in particular) will be reinforced and developed by other comparable institutions. Various challenges remain. On the African continent, in particular, logistical, political and financial obstacles are common. The SCSL, for example, has struggled to receive all the pledged financing, with a shortfall of US$ 82 million for its first three-year budget.[4] Since the SCSL is not a subsidiary organ of the UN Security Council,[5] it must rely on the goodwill and political stability of (African) states to obtain the arrest and transfer of all accused and to assist with the movement and relocation of witnesses. The arrest and transfer of Charles Taylor (former president of Liberia), for example, starkly highlighted the intricacies of state co-operation on the African continent.[6]

Whilst some milestones have been achieved in the recognition of the particular plight of women (both during and in the aftermath of armed conflict), considerably more remains to be done. Although some uncertainty continues to exist regarding the exact date of closure of the ICTR[7] and the SCSL,[8] in reality both will have tried only a handful of individual perpetrators. And within these, still an even smaller number of indictments will have captured acts of sexual

---

[1] In terms of Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) of the Rome Statute.

[2] See Article 8(2)(b)(xxii) of the Rome Statute applicable to international armed conflict.

[3] See Article 8(2)(e)(vi) of the Rome Statute applicable to internal armed conflict.

[4] See JA Williamson 'An overview of the international criminal jurisdictions operating in Africa' (2006) 861 *International Review of the Red Cross* 124.

[5] See note 54 *supra*.

[6] For a brief summary of these events, see JA Williamson 'An overview of the international criminal jurisdictions operating in Africa' (2006) 861 *International Review of the Red Cross* 125.

[7] See Completion Strategy of the International Criminal Tribunal for Rwanda, UN Doc S/2005/336, 24 May 2005; and ICTR President Address UN Security Council, ICTR/Info-9-2-460, Arusha, 16 December 2005. Available at <http://www.ictr.org> (accessed 6 May 2007).

[8] See letters dated 26 May 2005 from the UN Secretary-General addressed to the President of the UN General Assembly and the President of the UN Security Council, forwarding the SCSL Completion Strategy (18 May 2005) (Completion Strategy), UN Doc A/59/816-S72005/350, 27 May 2005.

violence, so as to provide but a brief glimpse, a true account, of the grim reality and fate of women caught up in the horrific consequences of an armed conflict.