War Crimes and the Conduct of Hostilities

Challenges to Adjudication and Investigation

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8. Criminalizing rape and sexual violence as methods of warfare

Ludovica Poli

I. INTRODUCTION

Although national codes have historically prohibited rape, for a long time States failed to prosecute it as a war crime. Rape was often condoned and seen as a private act, committed by indecent soldiers who went unpunished.

The International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) made significant progress in this respect and filled some critical gaps in the law. The International Committee of the Red Cross (ICRC) confirmed that the prohibition of rape and other forms of sexual violence constitutes a norm of customary international law, applicable in both international and internal armed conflicts[1]. Prior to the 1990s and the establishment of the ICTY and ICTR rape was considered a by-product of war[2]; now, however, sex crimes are correctly considered key strategies of war designed to inflict pain and terror on or even to wipe out entire communities.

This chapter evaluates the criminalization of rape and other forms of sexual violence as violations of IHL. The prosecution of sex crimes as war crimes is one of the foremost accomplishments of international criminal law and a great step towards repressing the unlawful conduct of hostilities.

[1] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (CUP 2005) vol I, 323–7; vol II, 2190–225.

[2] Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill ILJ* 217, 220.

II. THE PROHIBITION OF RAPE UNDER IHL: A CRIME AGAINST WOMEN, MEN AND COMMUNITIES

Both women and men can be victims of sexual offences during armed conflicts, however the numbers affirm that a majority of the victims of rape are women (and girls)[3].

In ancient times, rape constituted a crime against property during peacetime but was considered acceptable behavior during armed conflicts: a legitimate booty or a trophy for the victors[4]. All women were considered men's property and thus akin to spoils of war since there was no obligation to respect the enemy's property[5]. Accordingly in the Middle Ages soldiers did not necessarily commit rape to terrorize populations but believed they earned it as a reward and a *memento* of the enemy's defeat[6]. Over time sexual assault against women evolved into a crime against chastity, but it was still considered a violation of men's right to woman's sexual purity and not as an offence against women[7]. Since sexual violence against women was only an affront to men, raping the enemy's females 'had a salutary military effect'[8]: aiming to humiliate the adversary and prove the victors' supremacy.

However, rape against a man during an armed conflict was always intended to emasculate the victims and deplete their capacity as warriors or rulers[9].

Occasionally rape was prohibited, as in the Ordinances of War adopted by Richard II in 1385 and by Henry V in 1419[10], but the ban was rarely enforced[11] and did not apply to cities under siege.

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[3] On male rape see Sandesh Sivakumaran, 'Sexual Violence against Men in Armed Conflict' (2007) 18 *EJIL* 253; Dustin A Lewis, 'Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law' (2009) 27 *WisILJ* 1.

[4] Kelly D Askin, *War Crimes Against Women - Prosecution in International War Crimes Tribunals* (Nijhoff 1997), 21.

[5] Catherine N Niarcos, 'Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia' (1995) 17 *HRQ* 649, 659.

[6] Askin, *supra* fn 4, at 27–8.

[7] Ibid at 28.

[8] Niarcos, *supra* fn 5, at 659.

[9] Hilmi M Zawati, 'Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime against Humanity' (2007) 17 *Torture* 27, 33–4.

[10] Theodor Meron, 'Rape as a Crime under International Humanitarian Law' (1993) 87 *AJIL* 424–5.

[11] A significant exception is the conviction in 1474 of Peter von Hagenbach for, inter alia, acts of rape committed by his soldiers in the town of Breisach.

The legal protection of women improved during the nineteenth and twentieth centuries and IHL instruments progressively prohibited sexual assaults. However, IHL was (and still is) completely blind with respect to male rape. In fact, rape has been defined in gender-neutral terms only in the 1990s, through the ad hoc Tribunals case law.

The 1863 Lieber Code explicitly banned sexual violence under the penalty of death (Art 44). This codification was largely based on international custom and thus implicitly 'signifies the firm position of the prohibition of rape in customary humanitarian law'[12].

Nonetheless by the twentieth century the international prohibition of sexual violence was largely ignored. The 1864 Geneva Convention and the 1899 Hague Convention (II) both failed to include an ad hoc provision, while Art 46 of the Regulations annexed to the 1907 Hague Convention (IV) – the duty to respect family honor and rights – was only later interpreted as including a prohibition against sexual violence[13].

Some decades later, in 1949, Art 27 (2) of the Fourth Geneva Convention (GC IV) addressed the issue more explicitly and protected women 'against any attack on their honor, in particular against rape, enforced prostitution, or any other form of indecent assault'. Art 76 (1) of the 1977 Additional Protocol I (AP I) similarly reiterated the right of women to be free from sexual assaults. While Art 27 (2) GC IV applies to civilians in the hands of a party to the conflict or under an Occupying Power of which they are not nationals, Art 76 (1) AP I protects all the civilians under the power of a party to the conflict, including a party's own population. Therefore AP I 'represents an advance for international humanitarian law . . . , since it widens the circle of beneficiaries'[14].

Furthermore Additional Protocol II (AP II) expanded the protection of women from sexual abuses during an internal armed conflict. Moreover, and in furtherance of Art 3 common to the Geneva Conventions (GCs) (common Art 3), Art 4 (2)(e) AP II contains the first explicit prohibition of rape.

These IHL provisions have been criticized as unsatisfactory because of their gender-charged language and of the values they aim to protect. In particular, feminist scholars criticized the prevalent reference to protecting

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12 Askin, *supra* fn 4, at 36.

13 Meron *supra* fn 10, at 425; Michael Cottier, 'Article 8 para 2(b)(xxii) Rape and Other Forms of Sexual Violence', in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes Article by Article*, 2nd ed (Nomos 2008), 431, 433.

14 Françoise Krill, 'The Protection of Women in International Humanitarian Law' (1985) *IRRC* 337, 342.

women in comparison with the scarce explicit prohibitions of rape[15]. They argue that the focus on 'protection' bolsters the fallacy that women are 'objects'[16] and impedes efforts to unambiguously ban acts of sexual violence[17]. Moreover such language emphasizes 'the social condition of women, rather than the [rights of] women themselves'[18].

Scholars also deplored GC IV's improper qualification of rape as a crime against honor rather than as a crime of violence[19]. The ICRC Commentary correctly identified the rationale behind this provision as denouncing the outrages and abuses suffered by women and children during World War II, however it failed to link this prohibition of rape with the right to one's physical integrity as laid out in the first paragraph of this same provision[20]. Moreover rape was not explicitly mentioned in Art 32 GC IV, which bans 'measure[s] of such a character as to cause the physical suffering or extermination of protected persons'.

This normative choice advanced concepts such as 'soiled' or 'disgraced' women, which may have fuelled further bias against women and failed to adequately characterize the physical and psychological trauma suffered by the victims. Furthermore, this missed opportunity to classify rape as an assault to one's physical integrity discouraged the prosecution of sexual violence: 'on the scale of wartime violence, rape as a mere injury to honour and reputation appears less worthy of prosecution than injuries to the person'[21]. As a matter of fact, Art 147 GC IV does not mention rape or sexual abuse. Although it is now clear that sexual violence and rape are considered grave breaches of the GCs, the original *lacuna* indicates that rape was previously considered a minor offence: 'the failure to recognize the violent nature of rape is one reason that it has been assigned a secondary status in IHL'[22].

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[15] On the protection of women under IHL see Charlotte Lindsey, 'Women and War' (2000) 82 *IRRC* 561; Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' (1997) 46 *ICLQ* 55.

[16] Copelon, *supra* fn 2, at 221.

[17] Christine Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1994) 5 *EJIL* 326, 331–2; Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93 *AJIL* 159, 170–2; Judith Gardam & Hilary Charlesworth, 'Protection of Women in Armed Conflict' (2000) 22 *HRQ* 148.

[18] Adrienne Kalosieh, 'Consent to Genocide? The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca' (2003) 24 *Women's Rights L Rep* 121, 122, as quoted by Noëlle N.R. Quénivet, *Sexual Offenses in Armed Conflict & International Law* (Transnational Publishers 2005), 85.

[19] Art 27 (2) GC IV.

[20] ICRC, *Commentary on the Geneva Conventions of 12 August 1949*, vol IV (1958), 206.

[21] Niarcos, *supra* fn 5, at 674.

[22] *Ibid,* at 676.

However, criticism about IHL provisions may be partially abandoned. First, the language of Art 27 (2) GC IV and of Art 76 (1) AP I (focusing on general protection of women) were complemented by other relevant norms. The APs unequivocally prohibited rape (Art 4 (2)(e) AP II) and banned 'any form of indecent assault' (Art 75 (2)(b) AP I). Furthermore, in light of its object and purpose, the GC IV was interpreted to include rape: 'rape is prohibited via the protection formula'[23]. ICTY case law supported this approach[24]. Finally this 'protection norm' was interpreted to include more than a mere 'prohibition'; it also created 'a duty to prevent the commission of an act, to take precautionary measures to ensure that this right will not be infringed'[25].

Secondly, it is indisputable that the qualification of rape as a crime against honor does not offer a proper description of the pain suffered by the victims. The improvement of gender issues in national and international contexts belittled the concept that women's rights exist insofar they are connected to different human rights like family rights. However, the mistaken focus on honor and on social groups (and not on women's rights per se) allows one to take into account the long-term effects of rape on the community in which the victims live. In addition to the pain suffered by the individual victim[26], the community suffers consequences of rape as an act of war: sexual violence against women and men in wartime destroys community ties and interferes with post-conflict reconciliation efforts.

Finally, despite the absence of a clear reference to sexual violence under Art 147 GC IV and Art 85 AP I, it is now unanimously recognized that rape represents a grave breach of IHL. The ICRC's Commentary explained that 'inhuman treatment' under Art 147 had to be read in conjunction with Art 27 and thus encompassed rape[27]. At the beginning of the 1990s, the ICRC issued an aide memoire clarifying the prohibition of rape under the GCs. In particular, it declared that the grave breach of 'wilfully causing great suffering or serious injury to body or health' includes rape and any other attack on a woman's dignity[28].

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[23] Quénivet, *supra* fn 18, at 93.

[24] See for example *Prosecutor* v *Furundžija*, ICTY Case No IT-95-17/1T, Trial Judgement, 10 December 1998, para 165 (*Furundžija* Trial Judgement); and *Prosecutor* v *Delalić et al*, ICTY Case No IT-96-21-T, Trial Judgement, 16 November 1998, para 476 (*Delalić* Trial Judgement).

[25] Quénivet, *supra* fn 18, at 91.

[26] Chinkin, *supra* fn 17, at 329–30; Sharon A. Healey, 'Prosecuting Rape under the Statute of the War Crimes Tribunal for the Former Yugoslavia' (1995) 21 *Brooklyn J Int'l L* 327, 339.

[27] *Supra* fn 20, at 598.

[28] ICRC, *Aide-memoire* (1992) para 2, quoted by Patricia Viseurs Seller, 'The

In addition, many States recognized that rape as a grave breach constitutes customary international law and is outlawed by the GCs[29]. The argument was also pressed by the Commission of Experts established pursuant to Resolution 780 (1992): 'rape and other sexual assaults constitute "grave breaches" as they can be considered to be a form of torture or inhuman treatment and wilfully causing great suffering or serious injury to body and health'[30]. The ICTY's case law affirmed this interpretation[31]. Finally, the drafting history of the Statute of the International Criminal Court (ICC), its Elements of Crimes (EoC), the States' views emerged during the negotiations and, to some extent, the last part of Art 8 (2)(b)(xxii)[32] demonstrate that sexual violence may amount to a grave breach[33].

III. ENFORCING THE LAW: THE PROSECUTION OF RAPE AND OTHER SEX CRIMES AS METHODS OF WAR

IHL Rules outlawing rape during armed conflicts have existed for a long time, but these prohibitions were scarcely enforced[34] and one of the main

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Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation' (www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf, accessed 15 February 2013).

[29] Meron mentions a statement made by the US Department of State in 1993 and some documents containing draft charters for the ICTY, submitted by many States to the UN Secretary-General pursuant to Security Council (UNSC) Res 808 (1993), *supra* fn 10, at 427.

[30] UN Commission of Experts established pursuant to UNSC res 780 (1992), *Final Report – Annex II: Rape and Sexual Assault: A Legal Study* (UN doc S/1994/674/Add.2 – vol I, 28 December 1994), para II.

[31] See, for example, *Furundžija* Trial Judgement, para 165 fn 192; *Prosecutor* v *Kvočka et al*, ICTY Case No IT-98-30/1-T, Trial Judgement, 2 November 2001, para 166 fn 321 (*Kvočka* Trial Judgement). In *Tadić* an episode of rape was described as a grave breach of the GCs: *Prosecutor* v *Tadić*, ICTY Case No IT-94-1-I, Second Amended Indictment, 14 December 1995.

[32] Art 8 (2)(b)(xxii) lists, under 'other serious violations of the laws and customs applicable in international armed conflict', rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, 'or any other form of sexual violence also constituting a grave breach of the Geneva Conventions'. While these sex crimes are not considered under sub-para (a), dedicated to the grave breaches of the GCs, the wording 'also constituting a grave breach of the Geneva Conventions', according to Cottier, implies that the five specific sex crimes amount, in any event, to grave breaches. Cottier, *supra* fn 13, at 453.

[33] Cottier, *supra* fn 13, at 432 fn 789.

[34] On the challenges of the prosecution of sex crimes see Morten Bergsmo,

reasons is most likely to be found in the failure to identify its 'public' dimension[35].

Despite the huge sectors of the population affected, rapes were considered 'private' acts committed by undisciplined soldiers or regrettable acts of individual combatants in situations of generalized violence. The use of rape and sexual violence as a strategy of fighting armed conflicts was completely overlooked; sexual violence is a cheap, easy method of combat, aimed at injuring victims, destabilizing families and undermining social ties.

A. Rape at the International Military Tribunals of Nuremberg and Tokyo

Despite the use of rape as a tool of conquest or domination in most of the conflicts of the twentieth century[36], the prosecution of rape as a war crime has been largely unsatisfactory.

One such failure was omitting such crimes from the jurisdiction of the International Military Tribunals (IMTs) of Nuremberg and Tokyo. The Charters of both Tribunals failed to outlaw rape and enforced prostitution even though both crimes were considered violations of the laws or customs of war under the Responsibility Commission's Report of the 1919 Paris Peace Conference[37]. Nonetheless the Tokyo Tribunal[38] and the US Military Commission in Manila[39] convicted the defendants for rape as a violation of the laws or customs of war.

Rape as a crime against humanity was outlawed by Control Council Law Number 10[40], which provided the basis for the trial of 'lesser' war crimes committed in the occupied areas. However, despite the large number of reported rapes, sex crimes were not prosecuted[41].

Alf Butenschøn Skre and Elisabeth J Wood (eds), *Understanding and Proving International Sex Crimes* (Torkel Opsahl Academic EPublisher, 2012).

[35] Danise Aydelott, 'Mass Rape During War, Prosecuting Bosnian Rapist under International Law' (1993) 8 *Emory ILR* 585, 587–8; Justin Wagner, 'The Systematic Use of Rape as a Tool of War in Darfur: A Blueprint for International War Crimes Prosecutions' (2005–2006) 37 *Geo JIL* 193, 212.

[36] Aydelott, *supra* fn 35, at 588–96.

[37] Askin, *supra* fn 4, at 42–3.

[38] In the cases against Foreign Minister *Hirota* and General *Matsui*: IMT for the Far East, Judgement of 12 November 1948, in John Pritchard and Sonia M. Zaide (eds), *The Tokyo War Crimes Trial* (Garland 1981), vol 22, 788–93, 814–16.

[39] US Military Commission, Trial of General Tomoyuki Yamashita, in *Law Reports of Trials of War Criminals. Selected and Prepared by the United Nations War Crimes Commission* (HMSO 1948), vol IV, 35.

[40] Control Council Law No 10, Art II(c) lists rape as a crime against humanity.

[41] Askin, *supra* fn 4, at 125 fn 434.

B. The Contribution of the Jurisprudence of the ICTY and the ICTR

The use of rape as a wartime strategy became apparent in the 1990s: the atrocities committed in the former Yugoslavia and in Rwanda provided a glimpse into the strategized nature of the commission of sex crimes during armed conflict and an incentive for their prosecutions. The widespread commission of sex crimes in these contexts clarified that indecent assaults were used as a policy of warfare and even as an means of ethnic cleansing or genocide. In the former Yugoslavia and Rwanda rapes and sex crimes 'were centrally planned, systematic, and [represented] an attempt to annihilate an entire ethnic group'[42].

In Bosnia and Herzegovina, in particular, the use of rape as a weapon of war (mainly against Muslims and Croats) was evident[43]. Many victims and some Serb deserters reported that Serb officers ordered the committing of sex crimes with the intent of forcing people to leave their region[44]. Such instructions confirm the existence of a generalized combat strategy: 'when employed, supervised or incited by the architects of armed conflict, the phenomenon is not "rape out of control", but "rape under orders"'[45].

The 'linkage between the prevalence of sexual violence and the political agenda behind identity-based conflict' was further illuminated by the ICTR, which recognized that 'sexual violence and military objectives could be one and the same'[46]. By committing crimes of sexual violence in public and in the presence of family members, the perpetrators demonstrated that they were aware of the devastating impact of inflicting sexual violence.

Both the ICTY and the ICTR Statutes list rape as a crime against humanity (Art 5 ICTY Statute and Art 3 ICTR Statute), but only the latter explicitly lists rape under the category of war crimes (Art 4 ICTR Statute).

The ICTY largely contributed to the identification of rape as a violation

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42 Wagner, *supra* fn 35, at 215.

43 Fionnuala Ni Aolain, 'Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War' (1997) 60 *Alb LR* 883.

44 Aydelott, *supra* fn 35, at 624–5.

45 Letitia Anderson, 'Politics by Other Means: When Does Sexual Violence Threaten International Peace and Security?' (2010) *INPE* 244, 252. On the opportunity to prosecute high officials, see Christin B Coan, 'Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia' (2000) 26 *NCJ Int'l & Com Reg* 183, 203–5.

46 Jennifer Park, 'Sexual Violence as a Weapon of War in International Humanitarian Law' (2007) 1 *Int'l Pub Pol Rev* 13, 17.

of the laws or customs of war while the ICTR (with few exceptions[47]) classified rape as an act of genocide[48] or as a crime against humanity[49].

In *Tadić* the accused was charged with a grave breach of the GCs, a violation of the laws or customs of war and a crime against humanity for forced sexual intercourse with a female prisoner (counts 2–4). The indictment also alleged that the accused forced two prisoners to commit oral sexual acts on a third detainee and to sexually mutilate him: these acts were classed as grave breaches, violations of the laws or customs of war and crimes against humanity (counts 5–11). Unfortunately the charges contained in counts 2–4 were withdrawn during the trial, because the main witness refused to testify. Tadić, however, was convicted for aiding and abetting the sexual mutilation as a violation of the laws or customs of war (cruel treatment) and as a crime against humanity (inhumane act)[50].

In the ICTY decisions, rape was often considered in connection with torture. In many cases, acts of sexual violence were committed with the intention of obtaining information from the victims and thus met the threshold of torture. Initially, the Prosecutor charged rape only as a form of torture and hesitated to prosecute rape as such as a violation of IHL.

In the *Delalić* case, the Trial Chamber determined when rape may constitute torture. The indictment charged one accused with torture for the rape of two women both as a grave breach (counts 18 and 21) and as a violation of the laws or customs of war (counts 19 and 22)[51]. The Court stated that whenever rape was committed for an intended prohibited purpose it shall constitute torture[52] and found the accused guilty for the

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[47] Despite the possibility of charging rape as a violation of the laws or customs of war proving the nexus between the armed conflict and the sex crimes committed remains difficult. *Semanza* is one of the few cases where the accused was found guilty of rape as a serious violation of common Art 3 and AP II, *Prosecutor* v *Semanza,* ICTR Case No ICTR-97-20-T, Trial Judgement, 15 May 2003 (*Semanza* Trial Judgement).

[48] See in particular *Prosecutor* v *Akayesu*, ICTR Case No ICTR-96-4-T, Trial Judgement, 2 September 1998 (*Akayesu* Trial Judgement).

[49] On the results achieved by the ICTY and ICTR see Kelly D Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley JIL* 288.

[50] *Prosecutor* v *Tadić*, ICTY Case No IT-94-1-T, Trial Judgement and Opinion, 7 May 1997, paras 722–30. Kelly D Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status' (1999) 93 *AJIL* 97, 101.

[51] *Prosecutor* v *Delalić et al*, ICTY Case No ICTY IT-96-21, Indictment, 9 March 1996 (*Delalić* Indictment).

[52] *Delalić* Trial Judgement, paras 494–6.

same conduct as a grave breach and as a violation of the laws or customs of war[53].

The Prosecutor also charged three accused under their position as superiors with grave breaches (inhumane treatments) and violations of the laws or customs of war (cruel treatments) for different inhumane acts including forcing two brothers to commit *fellatio* on each other (counts 44 and 45[54]). The *Delalić* Trial Chamber recognized in particular that this last episode represented an inhuman act and stated that it 'could constitute rape for which liability could have been found, if pleaded in the appropriate manner'[55]. The Trial Chamber left the door open for classifying as rape situations in which the perpetrator does not take active part in the sexual abuse but forces other people to perform sex in his presence or in public.

The *Furundžija* case better contextualized such instances of rape. The facts were similar to the *Delalić* case: the victim was raped, sexually assaulted and subjected to many other forms of ill treatment during an interrogation. Rape was charged both as a form of torture (count 13), and as an outrage upon personal dignity including rape (count 14), under Art 3 ICTY Statute. The Prosecutor alleged these acts constituted torture as recognized under common Art 3[56] and an outrage upon personal dignity, in particular rape, as prohibited by Art 4 (2)(e) AP II[57]. The accused was found guilty of co-perpetrating torture and aiding and abetting outrages upon personal dignity including rape[58]. Similarly in the *Kunarac* case[59] intra-article 3 cumulative convictions for torture and rape were issued by the Trial Chamber and upheld by the Appeals Chamber[60].

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[53] The Appeals Chamber later dismissed the charges of violations of the laws or customs of war upholding the accused's appeal against cumulative convictions based on the same acts. *Prosecutor* v *Delalić et al*, ICTY Case No IT-96-21-A, Appeal Judgement, 20 February 2001, para 425.

[54] *Delalić* Indictment.

[55] *Delalić* Trial Judgement, para 1066.

[56] *Furundžija* Trial Judgement, para 43.

[57] Ibid, para 44.

[58] Ibid, paras 269 and 275.

[59] *Prosecutor* v *Kunarac et al*, ICTY Case No IT-96-23-T and IT-96-23/1-T, Trial Judgement, 22 February 2001 (*Kunarac* Trial Judgement). For a comment on the case, see Christopher Scott Maravilla, 'Rape as a War Crime: The Implications of the International Criminal Tribunal for the former Yugoslavia's Decision in Prosecutor v Kunarac, Kovač, & Vuković on International Humanitarian Law' (2000–2001) 13 *Fla JIL* 321.

[60] *Prosecutor* v *Kunarac et al*, ICTY Case No IT-96-23 and IT-96-23/1-A, Appeal Judgement, 12 June 2002, paras 188–96 (*Kunarac* Appeal Judgement). All grounds of appeal were rejected.

The way in which sexual violence is qualified in the indictment may have relevant consequences. For example in the *Kvočka* case, the indictment charged all of the accused with persecution for various acts including sexual assault and rape[61]. Additionally acts of rape were considered per se with reference to one accused, because of his proved personal involvement in many episodes of rape committed against identified victims. The indictment (unlike those in *Furundžija*, *Kunarac* and *Haradinaj et al*[62]) charged the accused of 'outrages upon personal dignity' without any explicit reference to rape. Because of this lack of qualification, the Trial Chamber considered the episodes of rape to be subsumed within the torture conviction for acts of sexual violence[63]. According to the Trial Chamber:

> it is permissible to enter convictions for rape and torture based on the same acts when elements of both crimes have been satisfied [but] it is not permissible . . . to enter multiple convictions for torture and outrages upon personal dignity, as torture is the more distinct crime[64].

The *Furundžija* and *Kunarac*[65] cases clarified that rape and sexual violence are prohibited during armed conflict. These cases recognized rape as a war crime per se in situations where rape may have been seen as 'just' one of the available means of inflicting torture. The *Kunarac* judgement was outstanding in this perspective because the Trial Chamber considered rape as a violation of the laws or customs of war per se and not as an outrage against dignity, as it was charged in *Furundžija.* On the other hand, the prosecution of rape as a form of genocide, torture or persecution is necessary and appropriate to describe the overall framework in which those violent acts take place and the final aim of the perpetrators.

In conclusion, although the number of indictments that charged rape 'does not accurately reflect the high incidence of sex crimes during the war'[66], the ad hoc Tribunals, in particular the ICTY greatly contributed

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61 *Prosecutor* v *Kvocka et al*, ICTY Case No IT-98-30/1, Amended Indictment, 26 October 2000, Counts 1–3.

62 Prosecutor v *Haradinaj et al*, ICTY Case No IT-04-84-T, Fourth Amended Indictment, 16 October 2007.

63 *Kvocka* Trial Judgement, para 579.

64 Ibid, para 577.

65 Peggy Kuo, 'Prosecuting Crimes of Sexual Violence in an International Tribunal' (2002) 34 *Case W Res J Int'l L* 305, 314.

66 Simon Jennings, 'Lukić Trial Ruling provokes Outcry' (*Institute for War and Peace Reporting*, 15 August 2008, at http://iwpr.net/report-news/lukic-trial-ruling-provokes-outcry, accessed 15 February 2013). In the case against Milan and Sredoje Lukić the Prosecutor decided not to amend the indictment to add sex

to the undeniable prohibition of different forms of sexual violence as methods of war.

C. The Special Court for Sierra Leone (SCSL): the Relevance of Sexual Slavery and Forced Marriages as Combat Methods

The SCSL Statute listed rape and other forms of sexual violence under the categories of crimes against humanity (Art 2) and violations of common Art 3 as 'outrages upon personal dignity' (Art 3). Furthermore Art 5 of the statute extended the Court's jurisdiction to include crimes under Sierra Leonean law, including offences relating to the abuse of girls.

SCSL jurisprudence significantly contributed to the identification of sexual slavery and forced marriage as violations of the laws or customs of war. Although forced marriages are not considered predominantly sex crimes, their commission was largely connected with other forms of sexual assault (including forced pregnancy).

In the case against *Brima, Kamara and Kanu*, the Trial Chamber convicted three members of the Armed Forces Revolutionary Council (AFRC), inter alia, for rape as a crime against humanity and sexual slavery as a war crime. The Trial Chamber used, by analogy, the category of sexual slavery to condemn forced marriages or the abduction of girls forced to become 'bush-wives' of rebels and soldiers. The victims of forced marriages were at their 'husband's' disposal and forced to perform different activities connected to the imposed marital status. These tasks included regular sexual intercourse and a variety of domestic assignments. Despite also containing elements that were non-sexual in nature, the Trial Chamber rejected the argument that the crime of forced marriage was independent from the crime of sexual slavery[67]. This inclusion of forced marriages within the category of sexual slavery was later overturned by the Appeals Chamber, which considered that forced marriage was not predominantly a sexual crime[68] and determined that these incidents constituted a distinct crime against humanity (inhumane act) prohibited by Art 2 (i) SCSL Statute.

The *Sesay* Trial Judgement affirmed the distinction between sexual

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crimes charges for reasons of expediency.

[67] *Prosecutor* v *Brima, Kamara, Kanu*, Case No SCSL-04-16-T, Trial Judgement, 20 June 2007, para 704.

[68] *Prosecutor* v *Brima, Kamara, Kanu*, Case No SCSL-2004-16-A, Appeal Judgement, 22 February 2008, para 195 (*Brima* Appeal Judgement). See Micaela Frulli, 'Advancing International Criminal Law – The Special Court for Sierra Leone Recognizes Forced Marriage as a New Crime against Humanity?' (2008) 6 *JICJ* 1033.

slavery and forced marriage. In particular, it identified the 'forced conjugal association based on exclusivity between the perpetrator and victim' as the distinct element between the two crimes[69] and stressed how this imposed marital status 'carried with it a lasting social stigma which hampers [the victims'] recovery and reintegration into society'[70]. Once again, forced marriage was considered to constitute a crime against humanity distinct from the outlawed crime of sexual slavery. Moreover, the *Sesay* Trial Chamber found that the acts of rape, sexual slavery and 'forced marriage', constituting outrages upon personal dignity, also constituted violations of common Art 3 and AP II. This advanced the criminalization of sexual and other related crimes as unlawful methods of warfare. While the *Brima* Appeals Chamber considered that the 'society's disapproval of the forceful abduction and use of women and girls as forced conjugal partners' was adequately reflected by the conviction for a crime against humanity[71], the *Sesay* Trial Judgement suggested that, once the nexus between the crimes committed and the conflict was established, it was also appropriate to classify them as war crimes. This recognition of the concurrent commission of specific offences was significant because it was 'designed to draw attention to serious crimes that have been historically overlooked and to recognize the particular nature of sexual violence that has been used, often with impunity, as a tactic of war to humiliate, dominate and instil fear in victims, their families and communities during armed conflict'[72].

The *Sesay* case recognized that rape and other sexual violence also constitute acts of terrorism, listed in the SCSL Statute as violations of common Art 3 and AP II[73]. The Trial Chamber characterized sex crimes committed by the Revolutionary United Front (RUF) as strictly linked to its larger combat strategy. In particular, the RUF implemented a 'calculated and concerted pattern' of sexual violence, not only against women, but also against men 'of all ages'[74] in order to 'effectively [disempower] the civilian population, (. . .) ha[ve] a direct effect of instilling fear on entire communities'[75] and distort 'cultural values and relationships which held the societies together'[76].

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[69] *Prosecutor* v *Sesay, Kallon, Gbao*, Case No SCSL-04-15-T, Trial Judgement, 2 March 2009, para 2307 (*Sesay* Trial Judgement).
[70] Ibid, para 1296.
[71] *Brima* Appeal Judgement, para 203.
[72] *Sesay* Trial Judgement, para 156.
[73] Ibid, paras 1347–9.
[74] Ibid, para 1347.
[75] Ibid, para 1348.
[76] Ibid, para 1349.

The *Taylor* Trial Judgement[77] also considered sex crimes, including sexual slavery to be key elements of the AFRC/RUF's strategy to terrorize the civilian population and force it into submission. Notably, The Trial Chamber diverged from its initial *Brima* formulation according to which sexual slavery could not constitute the crime of terrorizing the civilian population, because it had not been committed with the intent to cause fear among civilians, but instead 'to take advantage of the spoils of war, by treating women as property and using them to satisfy their sexual desires and to fulfill other conjugal needs'[78].

IV. THE ICC STATUTE: A COMPLETE LIST OF SEXUAL WAR CRIMES

The inclusion of an explicit list of sex crimes under Art 8 ICC Statute represents the convergence of the normative evolution criminalizing sexual violence as war crimes and embodies the great progress made in protecting people during armed conflict: both women and men, given the gender-neutral terms of the relevant provisions[79].

Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity are enumerated as war crimes outlawed both in international and internal conflicts. This was to some extent 'a creative legislating exercise'[80] because at the time rape had mainly been considered under the *chapeau* of 'outrages upon personal dignity' and some of the other acts had never been previously considered in any treaty[81].

Sex crimes are no longer simply subsumed under outrages upon personal dignity: given that 'the ICC represents the normative benchmark of international criminal law', it codified the illegality of numerous acts of sexual violence that had been erroneously and historically denied[82].

In two cases currently pending before the ICC (*Prosecutor* v *Katanga and*

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[77] *Prosecutor* v *Taylor*, Case No SCSL-03-1-T, Trial Judgement Summary, 26 April 2012, paras 56–7.

[78] *Brima* Appeals Judgement, para 1459.

[79] With the sole exception of 'forced pregnancy'.

[80] Cottier, *supra* fn 13, at 435.

[81] Michael Bothe, 'War Crimes', in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002), vol 1, 414–6, 422.

[82] Richard J Goldstone, 'Prosecuting Rape as a War Crime' (2002) 34 *Case W Res J Int'l L* 277, 285.

Chui and *Prosecutor* v *Bemba Gombo*)[83], the Pre-Trial Chamber confirmed charges of rape as a war crime. In *Katanga and Chui*, it also confirmed the charges of sexual slavery with reference to instances of forced marriage[84].

V. THE DEFINITION OF RAPE AND ITS SPECIFIC FEATURES DURING ARMED CONFLICTS

The ad hoc Tribunals defined rape as an international crime in partially varying terms.

The first discrepancy concerns the description of the violence as predominately *general/conceptual* at the ICTR[85], opposed to the *specific/mechanical* explanation applied at the ICTY[86]. However, as the ICTR Trial Chamber has pointed out in *Muhimana*:

> the *Akayesu* [ie conceptual] definition and the *Kunarac* elements [ie mechanical description] are not incompatible or substantially different in their application. Whereas *Akayesu* referred broadly to a 'physical invasion of a sexual nature', *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape[87].

The second difference concerns the explicit reference to a lack of consent by the victim versus reference to a general situation of coercion. This implies consequences in terms of the burden of proof: if non-consent is an element of the crime, the Prosecutor must prove, beyond reasonable doubt, that the victim did not consent to the conduct in question otherwise, if the victim's consent is just a possible affirmative defence, then the accused must prove that the victim consented.

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[83] *Prosecutor* v *Germain Katanga and Mathieu Ngudjolo Chui,* Case No ICC-01/04-01/07, PTC Decision on the Confirmation of Charges, 30 September 2008 (*Katanga* Decision); *Prosecutor* v *Jean-Pierre Bemba Gombo*, Case No ICC-01/05-01/08, PTC Decision on the Confirmation of Charges, 15 June 2009.

[84] *Katanga* Decision, paras 343–4, 348–9.

[85] Referring to a general 'physical invasion of sexual nature' see *Akayesu*, Trial Judgement, para 688; *Prosecutor* v *Musema*, Case No ICTR-96-13-T, Trial Judgement, 27 January 2000, para 220–9; *Prosecutor* v *Niyitegeka*, Case No ICTR-96-14-T, Trial Judgement, 16 May 2003, para 456. Compare to *Semanza* Trial Judgement, paras 344–6 and *Prosecutor* v *Kajelijeli*, Case No ICTR-98-44A-T, Trial Judgement, 1 December 2003, paras 910–16.

[86] Listing acts constituting a 'physical invasion of sexual nature': see *Furundžija* Trial Judgement**,** para 185; *Kunarac* Trial Judgement, para 437.

[87] *Prosecutor* v *Muhimana*, case No ICTR-95-1B-T, Trial Judgement, 28 April 2005, para 550.

This focus on the absence of the victim's consent was stressed for the first time in the *Kunarac* Trial Judgement, which focused on the protection of the victim's sexual autonomy and pointed out that, in addition to force and coercion other circumstances may give rise to classifying sexual intercourse as an act of violence[88].

Nonetheless, others contend that the reference to a generic situation of coercion, rather than to the element of non-consent is preferable because instead of focusing on the victim's reaction, '[s]uch an approach takes into account the realities of how rape is used as a weapon of war'[89]. Rape during warfare is distinct from 'merely' undesired sex: 'it seems more appropriate to speak of "sexualized violence" which, in addition to seriously infringing upon sexual autonomy, violates the victim's physical well-being'[90].

A review of the jurisprudence of the ad hoc Tribunals shows that attention has always been paid to the surrounding circumstances in which episodes of rape were committed. For example, the Appeals Chamber in the *Kunarac* case affirmed that the absence of consent is a *condicio sine qua non* of rape and eventually concluded that the coercive circumstances of the case negated any possibility of genuine consent[91]. The ICTR Appeals Chamber agreed stating that 'the Prosecutor can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible'[92]. Finally, the ICC EoC describe this element in broad terms mentioning the use and threat of use of force against the victim or a third person, the recourse to

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[88] *Kunarac* Trial Judgement, para 457.

[89] Thekla Hansen-Young, 'Defining Rape: A Means to Achieve Justice in the Special Court for Sierra Leone' (2005) 6 *Chi JIL* 479, 489. See also Catharine A MacKinnon, 'Defining Rape Internationally: A Comment on Akayesu' (2006) 44 *Col JTL* 940, 956.

[90] Wolfgang Schomburg and Ines Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law' (2007) 101 *AJIL* 121, 127. In his dissenting opinion attached to the Appeal judgement in the case against *Rukundo*, Judge Pocar points out the need to distinguish between the perpetrator's 'motive' and 'intent' and recalls the *Kunarac* Appeal Judgement at para 153: 'even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical, consequence of his conduct': *Prosecutor* v *Rukundo*, Case No ICTR-2001-70-A, Appeal Judgement, 20 October 2010, Partially Dissenting Opinion of Judge Pocar, para 10.

[91] *Kunarac* Appeal Judgement, paras 129–32.

[92] *Prosecutor* v *Gacumbitsi,* Case No ICTR-2001-64-A, Appeal Judgement, 7 July 2006, para 155.

a situation of coercion ('such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power'), the taking advantage of a coercive environment and situations in which the victim is unable of giving genuine consent (because affected by natural, induced or age related incapacity)[93].

In conclusion, whenever rape is committed as a war crime, a crime against humanity or an act of genocide, 'the international element [of such crimes] requires the establishment of circumstances that are inherently coercive and make the question of consent redundant'[94].

VI. CONCLUSION: RAPE IN WAR CONSTITUTES A THREAT TO INTERNATIONAL PEACE AND SECURITY

This analysis of the ICTY, ICTR and SCSL's case law has revealed how frequently rape and other sex crimes have been used as a means of warfare in recent armed conflicts. While sexual violence always occurred during war, in the 1990s the recourse to rape as a method of warfare was widespread and produced extremely cruel episodes of violence.

The scope and impact of such a practice have been recognized by the international tribunals, which strongly contributed to the classification of rape both as a separate violation of IHL and as an underlying offence of other international crimes.

The UNSC expressed its concern for the continuation of such a practice, by adopting various resolutions[95] and a Special Representative on Sexual Violence in Conflict was appointed[96].

Most significantly, the UNSC acknowledged that the widespread and systematic use of sex crimes as methods of war constitutes a threat to international peace and security because it aims to distort or destroy the victims' social context, and thus exacerbates the conflict and impedes the peace and reconciliation process. Impunity for sex crimes committed during the conflict may 'feed the cycle of conflict'[97], and contribute to the spread of post-conflict sexual violence. The criminalization of sexual violence as method of war is a significant contribution towards the possible deterrence of these most heinous of crimes that plague our times.

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93 EoC, Arts 7 (1)(g)-1, §2; 8 (2)(b)(xxii)-1, §2; 8 (2)(e)(vi)-1, §2.
94 Schomburg and Peterson, *supra* fn 90, at 128.
95 S/RES/1325; S/RES/1820; S/RES/1888.
96 UN doc SG/A/1220.
97 Anderson, *supra* fn 45, at 253.