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Prosecuting gender-based international crimes: An appraisal of the *ad hoc* tribunals' jurisprudence

Summary

This paper investigates the historical role of international criminal law in addressing human rights violations against women[1] during armed conflict, as it obtained at Nuremberg in the 1940s through to the Yugoslavian and Rwandan conflicts in the 1990s. The extent, to which the *ad hoc* tribunals have contributed to holding individuals accountable for human rights violations of a sexual nature against women, is explored. This paper also defines rape and sexual violence as they obtain at international law, gives an overview of the evolution of the legal treatment of sexual violence, and evaluates the impact of the jurisprudence both from the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), on gender-related crimes to the development of international law. A brief comparison is conducted of the gender legal provisions of the *Rome Statute* of the International Criminal Court (ICC) with those of the Special Court of Sierra Leone (SCSL) Statute, especially insofar as the ICC seeks to improve the protection of witnesses and victims. The paper concludes by assessing the sufficiency or otherwise of the existing substantive and procedural international law safeguards in punishing perpetrators, taking into account the needs of the victims of gender-related crimes.

Die vervolging van geslagsgebaseerde internasionale oortredings: 'n Beoordeling van die *ad hoc*-tribunaal se regsleer

Hierdie artikel onderneem 'n ondersoek na die historiese rol van die internasionale strafreg in die aanspreek van menseregte-skendings teen vroue tydens gewapende konflik, vanaf Nuremberg in die 1940s tot die Joegoslawiese en Rwandese konflikte in die 1990s. Dit sal spesifiek fokus op die mate waarin *ad hoc* tribunale bygedra het daartoe om indiwidue aanspreeklik te hou vir menseregte-skendings van 'n seksuele aard teenoor vroue. Hierdie stuk sal ook verkragting en seksuele geweld definieer in die konteks van internasionale reg, 'n oorsig gee oor die ontwikkeling van die reg se hantering van seksuele geweld, asook die impak van die regspraak van die internasionale strafregtribunaal vir Rwanda (die ICTR) en die internasionale strafregtribunaal vir die vorige Joegoeslawië (die ICTY) op die gebied van geslags-verwante misdade evalueer ten opsigte van die ontwikkeling van internasionale reg. Die stuk sal voorts 'n kort vergelyking insluit van die geslags-relevante regsbepalings van die *Rome Statute* van die internasionale strafhof (die ICC) met soortgelyke bepalings van die Statuut van die spesiale hof vir Sierra Leone (die SCSL), veral in soverre die ICC poog om die beskerming van getuies en slagoffers te bevorder. Die stuk sal afsluit deur die bestaande substantiewe en prosedurele beskermingsmaatreëls vir die strafoplegging van oortreders te evalueer, met inagneming van die belange van die slagoffers van geslags-verwante misdade.

1 While both men and women can be raped, numerically the crime is disproportionately committed against women. This paper essentially deals with the sexual abuse of women in Yugoslavia and Rwanda.

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1. Introduction

By 1993 the Zenica Centre for the Registration of War and Genocide Crime in Bosnia-Herzegovina had documented 40 000 cases of war-related rape. Of the sample of Rwandan women surveyed in 1999, 39 percent reported being raped during the 1994 genocide and 72 percent stated that they knew someone who had been raped. An estimated 23 200 to 45 600 Kosovar Albanian women are believed to have been raped between August 1998 and August 1999, the height of conflict in Serbia.[2] The conflicts in Yugoslavia and Rwanda brought about a new breed of war crimes. While rape has historically been used as a weapon of war to "terrify, humiliate, degrade, destroy and subordinate",[3] the rapes committed during these conflicts went beyond the usual; they were perpetrated as part of a deliberate system of "ethnic cleansing"[4] of the regions and occurred with unabashed regularity, thus needing an international response.

2. Historical background

Throughout history, women have commonly been targeted as victims of sexual assault during times of conflict, yet the perpetrators of those crimes have rarely been prosecuted. According to Copelon, all too often, acts of violence, power and control of and against women have been regarded as a "natural consequence of war … rape was largely invisible. If not invisible, it was trivialized, if not trivialized; it was considered a private matter or justified as an inevitable by-product of war, the necessary reward of fighting men".[5] A stark example of this phenomenon is that at the end of World War 2, rape was largely invisible in the trials of Japanese and German war criminals.[6] None of the accused was ever prosecuted for rape or sexual violence, yet data made available in the 1990s show that the Japanese "comfort women" were virtually enslaved by the Japanese army to provide sexual services to the soldiers.[7] In ignoring gender-based crimes, the international community characterised them as "outrages upon personal dignity", as "humiliating and degrading treatment"[8] or as "attacks against family honour and rights".[9]

2 See report: '*Broken Bodies, Broken Dreams: Violence against Women Exposed*' IRIN/OCHA (2005) 187-199 quoted by Marsh 2005:2.

3 Campanaro 2001:1.

4 See note 38 of this paper for a definition of "ethnic cleansing".

5 Copelon 2000:220. See also Balthazar 2006:11-12.

6 Although listed as a crime against humanity in the Control Council Law 10 under which intermediate-ranking Nazi war criminals were prosecuted, rape was never actually charged.

7 Karkera 2004:198. See also the *Judgment on the Common Indictment and the Application of Restitution and Reparation* 2001: paras 874-875.

8 Article 46 of the Fourth Convention Respecting the Laws and Customs of War on Land and its Annex 1907:187.

9 See for example the Convention for the Amelioration of the Conditions of the Wounded and the Sick in the Armed Forces in the Field (Geneva Convention I) 1949:31 and article 3 common to all the four Geneva Conventions.

The 1977 Protocols to the Geneva Conventions mentioned rape, forced prostitution and any other form of indecent assault but only as "humiliating and degrading treatment".[10] Copelon points out that such a characterisation reinforced the secondary importance as well as the shame and stigma of the victimised women. For her, "the offence was against male dignity and honour or national or ethnic honour. In this scenario women were the objects of shaming attacks, the property or objects of others, needing protection perhaps but not the subjects of rights".[11]

Gender-based violence[12] is particularly prevalent in armed conflict when civilian populations are especially vulnerable. During conflict, sexual violence against women is commonly used as a deliberate tactic of war to destabilise populations, to destroy community bonds and to humiliate victims and their families. In its landmark Resolution 1325,[13] the United Nations (hereafter the UN) Security Council specifically addressed the impact of armed conflict on women and made a series of recommendations to the UN member states with respect to preventing and addressing gender-based violence, especially during conflicts. The Security Council reaffirmed the need to fully implement international humanitarian law and human rights law, and urged member states to increase the representation of women at all decision-making levels for the prevention, management and resolution of conflict.[14]

Between The Hague Conventions of 1899 and 1907, there is only one article that prohibits sexual violence.[15] Rape is not included in the list of war crimes in Article 6 of the Nuremberg Charter although the list was not specifically stated to be exhaustive. Rape is however mentioned in the definition of crimes against humanity in Article II(c) of Control Council Law No. 10 (CCL) enacted in December 1945.[16] Although more comprehensive than Article 6 of the Nuremberg Charter, the CCL is primarily intended for use as a national instrument.[17] It may nevertheless

10 Article 76 of the Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1949:1125/3 and Article 4 of the Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1949:1125/609.

11 Copelon 2001:221.

12 General Comment No.19 of the Committee on the Elimination of Discrimination against Women (CEDAW) defined gender-based violence as "violence that is directed against a woman because *she is a woman*, or affects women disproportionately". The UN Declaration on the Elimination of Violence Against Women has defined the same term as "an act of violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, arbitrary deprivation of liberty whether occurring in public or private life."

13 The United Nations Security Council Resolution 1325 on Women, Peace and Security, 2000.

14 Article 2 of the United Nations Security Council Resolution 1325 on Women, Peace and Security.

15 Article 46 of the Fourth Hague Agreement, 1907:187.

16 On 10 December 1945 the acting legislative body for all Germany (the Allied Control Council for Germany) enacted the Control Council Law No. 10 for the purpose of punishing people guilty of war crimes, crimes against peace and crimes against humanity.

17 Roberge 1997:652.

be credited with having contributed to the later development of the concept of crimes against humanity.[18] The Fourth Geneva Convention provides protection for civilians in international armed conflict and specifically requires that women be protected against rape.[19] Protocol 1[20] reiterates a similar provision by stating *inter alia* in article 76, that "women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault". Article 3, common to the Geneva Conventions, provides that "persons taking no active part in hostilities … shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth, or wealth or any other similar criteria". In 1993 the World Conference on Human Rights affirmed that "violations of the human rights of women in situations of armed conflict are violations of humanitarian principles of international human rights and humanitarian law" and that they require a particularly effective response.[21]

3. The conflicts in Yugoslavia and in Rwanda

Both Resolutions 808 and 827 of the Security Council determined that the continued reports of widespread violations of international humanitarian law in the former Yugoslavia, including reports of mass killings and the continuance of the practice of ethnic cleansing constituted a threat to international peace and security.[22] The Security Council Resolutions established an International Criminal Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The Tribunal was accorded jurisdiction over crimes against humanity, war crimes, violations of customs and laws of war and indeed genocide as defined and established by existing conventions.

For the first time in the history of international tribunals, rape was explicitly listed as a crime against humanity in article 5(g) of the ICTY Statute. This explicit enumeration of rape is a great advance from the Nuremberg and Tokyo Tribunals. However, the ICTY Statute remains inadequate because it does not recognise other forms of gender crimes as constituting grave breaches of international law or as genocide.

The ICTR was established by the UN Security Council through Resolution 955 of 1994 authorising the prosecution of persons responsible for the genocide and other serious violations of international humanitarian law that occurred in

18 Roberge 1997:653.

19 Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Times of War states that "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault". Article 27(2) has also been criticised on the grounds that, like many of the provisions relating to women, it categorises rape as an attack on the victim's honour and thus does not reflect the seriousness of the offence of sexual violence as the violation of international law.

20 Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts.

21 Article 38 of the Vienna Declaration and Programme of Action, 1993: Part 1.

22 Biegbeder 1999:150.

Rwanda in 1994. The ICTR Statute empowers the ICTR to prosecute persons for the crimes of genocide, as set out in the Genocide Convention, crimes against humanity as defined in the Nuremberg Charter, and violations of article 3 common to the Geneva Conventions and Additional Protocol II thereto. The ICTR Statute enumerates the crimes for which the Tribunal is authorised to hold persons individually criminally responsible, particularly in respect of crimes they "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution"[23] thereof, together with crimes committed by their subordinates. Article 4(e) of the ICTR Statute further provides a broad category of conduct that may constitute sexual violence.

4. Defining gender-based crimes in international law

In *Prosecutor v Jean-Paul Akayesu*,[24] the ICTR noted that traditionally rape has been defined narrowly in many jurisdictions. For instance in South Africa rape is defined as "the intentional unlawful sexual intercourse with a woman without her consent".[25] However, the growing international jurisprudence emanating from the International Tribunals indicates that the definition of rape cannot be captured in a "mechanical description of objects and body parts".[26] This view is reflected in the definition given in *Akayesu*, that rape is "the physical invasion of a sexual nature committed on a person in circumstances that are coercive".[27] The Trial Chamber in the same case considered sexual violence (which includes rape) "to be any act of a sexual nature which is committed on a person under circumstances that are coercive".[28] The Trial Chamber reasoned that sexual violence is not limited to the physical invasion of the human body, but may also include acts not involving penetration, emphasising that a violation of the *human dignity* of a victim needs to be strongly condemned. An example of such a type of sexual violence was evident in an incident described by a witness in the *Akayesu* trial where the accused Akayesu had ordered the *Interahamwe*[29] to undress a student and force her to do gymnastics naked before a crowd in the public courtyard.[30]

In the ICTY, the Trial Chamber in *Prosecutor v Delalic, Mucic, Delic & Lanzo* (hereafter *Celebici*)[31] adopted the conceptual definition of rape and sexual violence as articulated in *Akayesu*.

23 Articles 2-4 of the ICTR Statute.
24 *Prosecutor v Jean-Paul Akayesu* 1998.
25 *Prosecutor v Jean-Paul Akayesu* 1998: paras 597 and 599. See also Burchell & Milton 2002:489. For further commentary about the reconceptualisation of the definition of rape and sexual violence see Askin 1999:109.
26 *Prosecutor v Jean-Paul Akayesu* 1998: para 687.
27 *Prosecutor v Jean-Paul Akayesu* 1998: para 598.
28 *Prosecutor v Jean-Paul Akayesu* 1998: para 690.
29 The *Interahamwe* was the most important of the militias formed by the Hutu ethnic majority of Rwanda. Together with the state army and police forces they were responsible for over 800 000 deaths in the Rwandan genocide of 1994.
30 *Prosecutor v Jean-Paul Akayesu* 1998: para 599.
31 *Prosecutor v Delalic et al* (The *Celebici* case) 1998.

In *Prosecutor v Anto Furundzija*[32] (hereafter *Furundzija*) the ICTY Trial Chamber held that:

> The forced penetration of the mouth by the male sexual organ constitutes a *most humiliating and degrading attack upon human dignity*. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of *human dignity* of every person, whatever his or her gender. The general principle of respect for *human dignity* is the basic principle underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law ... This principle is indeed to shield human beings from outrage against their *personal dignity* whether such outrages are carried out by unlawfully attacking the body or humiliating and debasing the honour, the self-respect of the mental well-being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.[33]

In *Furundzija*, the two objective elements of rape were set out as: (i) sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or *any other object used by the perpetrator*; or (b) of the mouth of the victim by the penis of the perpetrator; and (ii) by coercion or force or threat of force against the victim or a third person.[34] This innovation effectively expands the definition of rape substantially.

5. Universal jurisdiction for international crimes of sexual violence

That grave breaches of the Geneva Conventions, crimes against humanity and genocide are crimes of universal jurisdiction, is now recognised by customary international law. These crimes are universally acknowledged as so abhorrent that it is in the interests of the entire international community to suppress them. As such, any nation may exercise the duty of *aut dedere aut judicare* (extradite or prosecute) irrespective of the perpetrators' nationality, or the nationality of the victims and regardless of where the crime took place. While a few nations, such as Spain, France and Belgium,[35] have exercised such jurisdiction, both the ICTY and the ICTR are specifically empowered to prosecute rape and sexual assault as crimes against humanity. It is noticeable that to date, the Tribunals have successfully prosecuted rape and sexual assault as genocide (*Akayesu*), as torture (the *Akayesu* and *Celebici* decisions) under the rubric of crimes against humanity and as war crimes (*Furundzija*).[36] Since these offences are international crimes in terms of customary international law, it would be desirable for more States to exercise the will to prosecute them in their national jurisdictions other than collectively under the ICC regime.

32 *Prosecutor v Anto Furundzija*, 1998.
33 *Prosecutor v Anto Furundzija* 1998: para 183.
34 *Prosecutor v Anto Furundzija* 1998: para 185.
35 See for example the *Pinochet* cases (Spain), the *Barbie*, *Touvier* and *Papon* cases (France) and the Belgian scenario where four Rwandans — two Catholic nuns, a university professor and a businessman — were imprisoned for their role in the 1994 genocide.
36 *Prosecutor v Anto Furundzija*, 1998: para 183.

5.1 Rape and sexual violence as tools for ethnic cleansing and genocide

Article 2 of the Genocide Convention defines genocide.[37] In terms of the definition, there must be an intention to destroy, in whole or in part, a national ethnic, racial or religious group through the commission of such acts as killing or causing serious bodily or mental harm to members of a group, imposing measures intended to prevent births within the group, forcibly transferring its children to another group or deliberately inflicting conditions of life to bring about its destruction in whole or in part. Inherent in this definition is the suggestion that rape, sexual enslavement, forced prostitution, forced sterilisation, forced abortion and forced pregnancy can all be used as instruments to impose conditions calculated to destroy the victims, to sunder their families or to destroy their group's capacity to reproduce.

According to Petrovic:

> [E]thnic cleansing is a well defined policy of a particular group to systematically eliminate another group from a given territory on the basis of religious, ethnic or national origin. Such a policy involves violence and is very often connected with military operations. It is to be achieved by all means, from discrimination to extermination, and it entails violations of human rights and international humanitarian law.[38]

While geography, history, culture, political and economic conditions set apart Yugoslavia and Rwanda and their conflicts, a few similarities may be noted. In both countries and regions, the cycle of violence had been reinforced by a culture of impunity. Ethnic cleansing was committed in both territories.[39] For the first time, the ICTR trial chamber in the *Akayesu* case[40] applied the Genocide Convention at international law and subsequently convicted Akayesu. The trial stressed the link between Akayesu's crimes and the pattern throughout the conflict with regard to rape and other forms of sexual violence when it stated that:

> [Rape and sexual violence] constitute genocide in the same way as any other act *as long as they are 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 … one of the worst ways of inflict [*sic*] harm on the victim as he or she suffers both bodily and mental harm … sexual 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 … *Sexual 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.*[41] (emphasis added).

37 Convention on the Prevention and Punishment of the Crime of Genocide 1948:277.
38 Petrovic 1993:3.
39 Biegbeder 1999:182.
40 *Prosecutor v Jean-Paul Akayesu* 1998: para 12.
41 *Prosecutor v Jean-Paul Akayesu* 1998: paras 731-34.

5.2 Rape as a crime against humanity

The widespread or systematic commission of acts of sexual violence against a civilian population may be prosecuted as a crime against humanity, regardless of whether they take place in the context of war or peace.[42] In the *Akayesu* decision, the ICTR found the accused guilty of crimes against humanity[43] based on the evidence that he had witnessed and encouraged the rapes of Tutsi women while he was a communal superior. Jean-Paul Akayesu was the bourgmestre (mayor) of the Taba commune, "where at least 2 000 Tutsis were killed".[44] The Tribunal found that the rapes were both systematic and carried out on a massive scale. Witnesses testified that Akayesu had publicly incited the perpetrators, by stating "don't ever ask again what a Tutsi woman tastes like".[45] In holding that some rapes in the Taba Commune had reached the threshold of torture, the Trial Chamber stated that: "Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".[46] Akayesu was convicted of crimes against humanity for rape and other inhumane acts. In so finding, the Trial Chamber held that the acts of violence had been committed as part of a widespread and systematic attack directed against a civilian population on discriminatory grounds, namely, on ethnic grounds.

In the *Celebici* case, the ICTY, after examining the prohibition of torture under international human rights law and humanitarian law, characterised the rape of Bosnian Serb women prisoners at the Celebici prison camp as acts of torture within the rubric of crimes against humanity. The prosecutor charged that Delic, a Serbian prison-camp guard, had repeatedly raped two non-Serbian female prisoners, and that these rapes had amounted to torture in violation of articles 2 and 3 of the ICTY Statute. In concluding that the rape in *Celebici* rose to the level of torture, the ICTY articulated a standard based on the Torture Convention.[47] Because the ICTY found that a public official had committed the rapes in *Celebici*, it determined that the rapes amounted to torture. In consequence, Delic was convicted of violations of articles 2 and 3

42 See Articles 5 and 3 of the ICTR Statute.
43 As defined in Article 3 (g) of the ICTR Statute.
44 *Prosecutor v Jean-Paul Akayesu* 1998: para 12.
45 *Prosecutor v Jean-Paul Akayesu* 1998: para 422.
46 *Prosecutor v Jean-Paul Akayesu* 1998: paras 597 and 687.
47 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. Article 1 defines torture as "any act by which severe pain or suffering, whether physical or mental, 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 or acquiescence of a public official or other person acting in an official capacity".

of the ICTY Statute and sentenced to four consecutive twenty-year sentences, reduced by two years, six months, and fourteen days for time served.[48]

In *Furundzija* the Trial Chamber adopted a similar approach to the Trial Chamber in *Celebici* and stated that rape could amount to torture. The Trial Chamber examined the prohibition of torture under both international humanitarian law and international human rights law and concluded that torture has acquired the status of *ius cogens* and thus cannot be derogated from,[49] and that the prohibition against torture imposes upon states obligations that are *erga omnes*.[50] In yet another landmark case, that of *Kunarac*,[51] where for the first time in history an international tribunal indicted individuals solely for crimes of sexual violence against women, the Appeals Chamber also found that rape constitutes torture. In this instance, the Appeals Chamber stated that: "[S]ome acts establish *per se* the suffering of those upon whom they were inflicted. Rape is … such an act … Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterization as an act of torture".[52]

In the *Kunarac* case, Kunarac and his co-accused were charged with violations of law or customs of war and crimes against humanity, rape, torture, enslavements and outrages upon personal dignity. The acts that gave rise to the outrages upon personal dignity included holding four young women captive in a flat; forcing them to dance naked while one of the accused watched; and selling three women, two for 500 deutschmarks and the third for 200 deutschmarks. In convicting Kunarac and his co-accused of rape, enslavement, torture and outrages upon personal dignity, the Trial Chamber held that rape had been used by members of Bosnian Serbs armed forces as a weapon of terror and as an instrument that they could use at any time whenever and against whomever they wished.

5.3 Rape as a war crime

Serious violations of humanitarian law of a customary or conventional nature, including grave breaches and violations of common article 3 of the Geneva Conventions, prohibit "violence to life and person", "cruel treatment", "torture or other outrages upon personal dignity". Protocol II to the Geneva Conventions governing the protection of civilians in internal armed conflicts explicitly outlaws "outrages upon personal dignity", in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.[53]

48 *Prosecutor v Celebici* 1998: paras 1285-1286.
49 *Prosecutor v Furundzija* 1998: paras 153-156.
50 *Prosecutor v Furundzija*, 1998: para 151. Obligations *erga omnes* in respect of torture effectively entail that the prohibition of torture is an obligation owed towards all the other members of the human family, each of which then gives rise to a correlative right.
51 *Prosecutor v Kunarac et al* 2002.
52 *Prosecutor v Kunarac et al* 2002: paras 150-151.
53 See also Article 4(2) (e) of Protocol II and Article 27 of the Fourth Geneva Convention.

Article 4 of the ICTR Statute grants the ICTR jurisdiction over serious violations of common article 3 and of the Additional Protocol II, while the ICTY's jurisdictional mandate covers war crimes in Articles 2 and 3 respectively. The Tadic Appeals Chamber held that article 3 of the ICTY Statute "functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal".[54] In *Furundzija*, the accused, a paramilitary leader, was charged with torture and rape for interrogating a woman in front of laughing soldiers while a fellow soldier forced her to have oral and vaginal intercourse with him. Furundzija was convicted by the Trial Chamber for being a co-perpetrator of torture in violation of laws and customs of war, and as an aider and abettor of outrages upon personal dignity, including rape. He was sentenced to ten years imprisonment.

6. Criminal responsibility of civilian and military leaders for rape and other gender-based offences

The ICTR has not hesitated to apply the doctrine of superior responsibility to civilian leaders.[55] In *Prosecutor v Alfred Musema*,[56] the first conviction under Article 6(3) at the ICTR, the prosecution, in attributing civilian superior responsibility to the accused, a director of a tea factory at the time of the conflict, charged him with genocide, crimes against humanity (rape and other inhuman acts) and serious violations of article 3 common to the Geneva Conventions. The Trial Chamber convicted him of genocide for raping a Tutsi woman in April 1994 and cutting off her breast to feed to her son. In finding that Musema had an influence above and beyond his job title; the Trial Chamber opined that his power stemmed from his control of socio-economic resources.[57] The Trial Chamber found Musema guilty on the basis of both individual and superior responsibility for a number of massacres perpetrated by his factory employees while he was present but the Chamber refrained from convicting him of the rapes (except the rape perpetrated personally by him) as there was insufficient evidence to show that he had aided and abetted the rapes.

In *Akayesu*, the Trial Chamber attributed individual criminal responsibility to the accused for acts of rape and sexual violence, pursuant to Article 6 of the ICTR Statute. Although the accused had not personally perpetrate any sexual acts, he was held to have acquiesced in their commission by allowing them to happen near or at the premises of which he was in control. Unlike in *Musema*, the Trial Chamber made the determination that the accused had committed genocide by verbally ordering and encouraging the commission of the acts of rape and sexual violence by his "presence, attitude and utterances".[58] In

54 *Prosecutor v Tadic* 1995: para 91.

55 In *Akayesu* the doctrine of superior responsibility was applied although Akayesu was acquitted in that respect on procedural grounds as the indictment did not specify that the perpetrators (*Interhamwe*) were subordinates of the accused. *Prosecutor v Jean-Paul Akayesu* 1998: para 591.

56 *Prosecutor v Alfred Musema* 2000.

57 *Prosecutor v Alfred Musema* 2000: para 869.

58 *Prosecutor v Jean-Paul Akayesu* 1998: para 708.

the *Celebici* decision, the ICTY found the accused Mucic, guilty of inhuman treatment based on command responsibility for violations of international humanitarian law committed by the guards at the Celebici prison camp.[59]

In *Tadic*, while dealing with the question of individual criminal responsibility for crimes against humanity, the court held that: "A single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual responsibility".[60] Articles 25, 27 and 28 of the ICC Statute maintain the *status quo*, that there shall be individual criminal responsibility for perpetrators of war crimes, crimes against humanity and genocide, regardless of whether or not the perpetrator holds an official position. Consequently, in terms of the Statute, civilian and military leaders who fail to prevent or punish human rights atrocities would themselves attract liability on the basis of superior responsibility.

7. Comparison of the ICC and SCSL[61] statutory provisions

The Statute adopted in Rome for the establishment of the International Criminal Court goes a long way in redressing the pre-existing gender imbalances by recognising a broad spectrum of sexual and gender violence as crimes of the most serious nature. These provisions make it possible to investigate and prosecute gender crimes effectively.[62] As Bedont points out, gender-specific provisions contained in the Rome Statute include:[63] the explicit recognition of a broad range of sexual and gender violence as crimes of a most grave character;[64] procedural and structural provisions for the proper investigation and prosecution of gender violence cases[65] and the inclusion of women and experts in violence against women in the staff of the ICC.[66]

The *Rome Statute* of the ICC has extended the definition of crimes against humanity to recognise explicitly both gender-based persecution[67] and rape. In contrast, only rape was included in the Statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda. Gender-based persecution had previously not

59 The *Celebici* Trial Decision 1998: paras 346 and 1065. The Trial Chamber in *Celebici* was the first forum in which the elements of superior responsibility were addressed.

60 *Prosecutor v Tadic* 1995: para 649. See also the commentary by van Sliedregt 2003: 44-145.

61 Statute of the Special Court of Sierra Leone.

62 While the ICC is intended to be complimentary to national jurisdictions which retain primary responsibility to try war crimes, crimes against humanity and genocide, where States are unwilling or unable to prosecute, *inter alia*, gender based crimes, the court will be a refugee especially in countries that fail to comply with the standards set by the Statute in terms of reforming their domestic laws to allow them to prosecute gender related crimes.

63 Bedont 1999:2.

64 *Rome Statute*, Article 7(g), (h), Article 8(b) (xxi), (xxii), (c) (ii), (d) (vi).

65 *Rome Statute*, Article 68 (4), Articles 43 and 75.

66 *Rome Statute*, Article 36 (8) (a) (iii), Article 36 (8) (b), Article 44 (2) and Article 42 (9).

67 The *Rome Statute*'s grant of jurisdiction over persecution is broader. Article 7(1)(h) explains persecution as 'against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3 or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court'.

been included in international law despite the prohibition of discrimination based on sex having arguably become part of customary international law. As regards war crimes, article 8 of the *Rome Statute*, which delineates the jurisdiction of the court over war crimes in international and internal armed conflict, explicitly lists "rape, sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilization or any other form of sexual violence" as constituting either grave breaches or violations of common article 3 to the Geneva Conventions.[68]

The ICC specifically provides for the participation of women as judges and prosecutors; and the employment of individuals with special expertise in investigating sexual and gender violence.[69] This is a very significant development as it tends to increase the needed sensitivity required in sexual violence matters.

The Statute of the Special Court of Sierra Leone (SCSL) also marks a major milestone in the history of women's rights to be afforded legal protection within the transitional criminal justice system in Africa. This Statute explicitly expands the categories of gender-based crimes falling within war crimes and crimes against humanity to transcend that of rape.[70] Article 15(4) of the SCSL Statute requires that due consideration be given to appointing staff members (prosecutors and investigators) who are experienced in gender-related crimes due to the "particular sensitivities of girls, young women and children victims of rape, sexual assault and slavery of all kinds". In May 2005 the SCSL held that other acts of sexual violence must be charged as article 2(g) crimes and not as Article 2(i).[71]

8. Are women still getting a raw deal?

Vogelman argues that "rape, the violent face of sexism, will continue to exist as long as women are oppressed and as long as women's subjugation is anchored in the structure of our society".[72] Moreover, while headway has certainly been made to get women to come forward to testify, the statistical estimates of raped women in Yugoslavia and Rwanda[73] did not at all translate into prosecutions, considering only a handful of accused persons were prosecuted for gender-based crimes in the two tribunals. Various feminist writers[74] have postulated

68 Articles 3 and 4 of the SCSL has similar provisions that give the court jurisdiction to prosecute violations of article 3 common to the Geneva Conventions and of Additional Protocol II, as well as other serious violations of international humanitarian law respectively.

69 *Rome Statute*, Articles 42(9), 43(6) and 44 (2).

70 Articles 2(g) and 3 of the Statute empowers the court to try persons who committed crimes against humanity such as 'torture, rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence'. The Statute further criminalises violations of article 3 common to all the Geneva Conventions and of Additional Protocol II and prohibitions include; outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.

71 *Prosecutor v Norman, Fofana and Kondewa*, Case No. SCSL-04-14-PT (24 May 2005).

72 Vogelman 1990:20.

73 See note 2 of this submission.

74 Fitzgerald 1997:640. Also see generally Askin 2004:16.

that the reasons for this gross under-reporting include, amongst others, the following: fear of being ostracised and shamed by communities that tend to blame the victims of violence for the abuses they have suffered; fear of reprisal; the general climate of indifference towards violence against women in society; the tacit acceptance of sexual abuses as an unavoidable part of war; and amnesty granted to perpetrators as part of peace agreements.[75]

The international criminal justice system itself is in dire need of reform. One weakness is the rigid evidentiary rules where only relevant testimony is elicited from witnesses. Dixon[76] points out that in this scenario women are not afforded an opportunity to speak about crimes of secondary victimisation committed by their own inmates and communities ... "[i]n the criminal process, women are treated as "witnesses" rather than complainants in the prosecution of crimes of sexual violence against them and have no ownership of the process, which allows their stories to be heard".[77] McGoldrick further points out that the legal nature of trial proceedings makes it impossible for the "victim-witnesses to tell their story in their own words. Consequently only a partial story is elicited from their testimony and the Tribunal often failed [*sic*] to respect their consciousnesses".[78]

Finally, the sentences meted out in some of the ICTY cases such as in the *Furundzija* and *Celebici* decisions, may have created the impression of a miscarriage of justice, with the victims of sexual violence crimes possibly feeling shortchanged and that their suffering was largely trivialized. While Furundzija received a ten-year imprisonment sentence for torture, and eight years for outrages upon personal dignity, the court ordered that the sentences run concurrently. In *Celebici*, although Mucic was convicted of eleven crimes and sentenced to seven years imprisonment in respect of each count, the court ordered that his sentences run concurrently. This means that in effect, he only serves seven years in jail.

9. The ICC: a 'beacon of hope'?

Prior to the Decision of the Trial Chamber on Protective Measures for Victims and Witnesses in the *Tadic* case, there was no indication of how the competing interests of ensuring a fair trial and of affording victims protection and a voice, might be reconciled. In *Tadic*, the question arose whether it was lawful to withhold the identity of the victim-witness from the public and from the accused. The majority judgment, after considering the various interests to be reconciled, determined that it was possible to protect the identity of the witness without violating the accused's right to a fair trial.[79] The court acknowledged that it was

75 Pillay 2001:69.
76 Dixon 2002:705.
77 Dixon 2002:705.
78 McGoldrick 2004:318.
79 See *Tadic Protective Measures Decision* 1995: paras 38, 39, and 55 where the Trial chamber stated, *inter alia*, that "the International Tribunal must interpret its provisions within its own context and determine where the balance lies between the accused's right to a fair and public trial and the protection of victims and witnesses within its unique legal framework".

necessary to engage in a balancing act to make just determinations based on the specific considerations of each case and proceeded to set out various guidelines to aid such a process.[80]

Unlike the *ad hoc* Tribunals, the ICC Statute explicitly recognises the competing legal interests of the accused and the witnesses that will testify and seeks to balance them so that victims and witnesses no longer have to be passive bystanders in the courts. Article 68 of the *Rome Statute* provides for protective measures for victims and witnesses and for their participation in the ICC proceedings, while article 69 deals with special safeguards allowing for the protection of vulnerable witnesses by allowing them to testify via the means of video or audio technology to protect their "safety, physical and psychological well-being, dignity and privacy".[81] Furthermore, victims can submit their views and concerns at many stages in the proceedings, including at trial, sentencing, appeal and at reparation hearings. The ICC also actively encourages and assists victims to have their own legal representatives so that their best interests are taken into consideration.

10. Recommendations

The discussion on the groundbreaking treatment of the gender-based crimes by International Criminal Tribunals demonstrates that there have been marked improvements from Nuremberg to Rome. The challenges that remain, however, include the prevention of armed conflict itself, an extremely tall order, by interrogating the causes of armed conflict which invariably leads to the brutalisation of women. Moreover, war crimes tribunals must be supplemented by long term practical assistance from governments, such as medical care, shelter, support and counselling. Survivors of sexual violence must be provided with the space to specify their own needs within their respective communities. Appropriate support must be made available to all concerned within the community to enable survivors to regain control of their own lives. The health and emotional needs of those who were not themselves victims (but are third parties traumatised by watching the brutalisation of their loved ones) must be given consideration too.

At a national policy level, member States must ensure that they have sufficient capacity within their national systems to respond to serious crimes against women appropriately. This entails criminalising such crimes as war crimes, crimes against humanity, torture and indeed genocide in their domestic legislation. Moreover, establishing the capacity to investigate and prosecute is paramount. Member states should provide support to survivors who face difficulty in reporting gender-based crimes as a result of social stigmas and fear of reprisals. Needless to say, prevention is also a necessary imperative.

Finally, there is a need for relevant training including psychological counselling for those providing such assistance. Sensitivity and accurate and objective reporting is indispensable when dealing with such crimes. Adequate

80 *Prosecutor v Tadic (Protective Measures Decision)* 1995: para 30.

81 *Rome Statute*, Article 68(1). See also Fitzgerald 1997:645 on the practical effect of Rule 96 of the Tribunals' Rules of Procedure and Evidence.

witness protection still needs to be revisited as studies in Yugoslavia and Rwanda, among other conflict ridden areas, have demonstrated that women remain fearful of retribution and publicity and can thus be reluctant to testify before the tribunals.[82] Some of the reasons for this fear may be "severe traumatization, feelings of shame, lack of trust, fear of awakening bad memories and fear of reprisals against themselves and members of their families".[83]

11. Conclusion

While gender-based crimes were ignored at Nuremberg and Tokyo, the last decade has seen significant advances in the treatment of sexual violence experienced by women in armed conflicts. No doubt the permanency of the ICC signifies the major milestone for gendered justice because, while the special Tribunals (ICTY and ICTR) competently addressed major issues of gender violence, they were temporary, with a determined short-term life, dealing with issues specific to Yugoslavian and Rwandan societies. Moreover, the investigation and successful prosecution of war crimes, crimes against humanity and genocide have actively taken gender concerns into account. Consequently, a respectable body of international criminal law that progressively reconceptualises sexual violence has evolved, ensuring that never will egregious crimes against women be met with impunity. However, notwithstanding the profound advances made so far, much remains to be accomplished as borne out largely by the recommendations made above. Additionally, sentences emanating from the ICTY, not commensurate with the gravity of the violence against women, should not to be emulated in future decisions. Furthermore, more women need to participate in the prosecution and adjudication of matters dealing with gendered sexual violence particularly as the jurisprudence from the special tribunals have demonstrated that greater gender sensitivity exists in cases where female personnel are involved in the prosecution and adjudication of sexual offences.

82 SàCouto 2006:4.

83 Report of the Secretary-General, Rape and Abuse of Women in the territory of the former Yugoslavia, 1993: para 13. See also Chinkin 1994:339.

Bibliography

ASKIN KD

1999. Sexual violence in decisions and indictments of the Yugoslav and Rwandan tribunals: Current status. *The American Journal of International Law* 1(1999):97-123.

2004. A decade of the development of gender crimes in international courts and tribunals: 1993 to 2003. *Human Rights Brief* 11(3):16.

BALTHAZAR S

2006. Gender crimes and the international criminal tribunals. *Gonzaga Journal of International Law*. 10:11-12. http://www.gonzagajil.org.

BANKS AM

2005. Report 'Overview of sexual violence and international criminal law': http://www.iccwomen.org.

BEDONT BC

1999. Gender specific provisions in the Statute of the ICC. In Lattanzi F and Schabas W (eds) *Essays on the Rome Statute of the ICC*. Naples.

BIEGBEDER Y

1999. *Judging war criminals: The politics of international justice*. Great Britain: McMillan Press.

BURCHELL J AND MILTON J

2002. *Principles of criminal law*. 2nd ed. Lansdowne: Juta.

CAMPANARO J

2001. Women, war and international law: The historical treatment of gender-based war crimes. *Georgetown Law Journal* 89(8):2557-2592.

CHINKIN C

1994. Rape and sexual abuse of women in international law. *European Journal of International Law* 5(3):326-341.

COPELON R

2000. Gender crimes as war crimes: Integrating crimes against women into international law. *McGill Law Journal* 46(1):217-240.

DIXON R

2002. Rape as a crime in international humanitarian law: Where to from here? *European Journal of International Law* 13(3):697-719.

FITZGERALD K

1997. Problems of prosecution and adjudication of rape and other sexual assaults under international law. *European Journal of International Law* 8(4):638-663.

KARKERA TR

2004. The International Criminal Court's protection of women: The hands of justice at work. *Journal of Gender, Social Policy and the Law* 12(3):198.

MARSH JW

2005. Sexual violence against women and girls in war and its aftermath: Realities, responses and required resources. http://www.unfpa.org/emergencies/symposium/docs/finalbrusselsbriefingpaper.pdf

MCGOLDRICK D *et al*

2004. *The permanent International Criminal Court: Legal and policy issues*. Oxford: Hart Publishing.

PETROVIC D

1994. Ethnic cleansing — An attempt at methodology. *European Journal of International Law* 5(1):342-359.

PILLAY N

2001. Sexual violence in times of conflict; the jurisprudence of International Criminal Tribunal for Rwanda. 69 In Chesterman S (ed) *Civilians in war*. Lynne Rienner Publishers Inc.

ROBERGE M-C

1997. Jurisdiction of the *ad hoc* tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide. *International Review of the Red Cross*:651-664. http://wwwicrc.org/Web/Eng/siteeng0.nsf/html.

SàCouto S
2006. Advances and missed opportunities in the international prosecution of gender-based crimes. *Gonzaga Journal of International Law* 10(1):49-56.

van Sliedregt E
2003. *The criminal responsibility of individuals for violations of international humanitarian law*. The Netherlands: TMC Asser Press.

Vogelman L
1990. *The sexual face of violence: Rapists on rape*. Ravan Press.