

# Sexual and Gender Based Crimes in International Criminal Law: Moving Forwards or Backwards?

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**Abstract**—Prosecution of sexual violence in international criminal law requires not only an understanding of the mechanisms employed to prosecute sexual violence but also a critical analysis of the factors facilitating perpetuation of such crimes in armed conflicts. The extrapolations laid out in this essay delve into the jurisprudence of international criminal law pertaining to sexual and gender based violence followed by the core question of this essay – has the entrenchment of sexual violence as international crimes in the Rome Statute been successful to address such violence in armed conflicts?

**Keywords**—Conflict, Gender, International Criminal Law Sexual Violence.

## I. MASCULINITY AND WOMEN AS VESSELS OF FAMILY HONOURS

THIS paper shall first draw attention to the sociological background of gender based crimes in conflicts followed by the jurisprudence of gender based crimes in international criminal law by discussing case law of the International Court for the Former Yugoslavia (ICTY) and International Court for Rwanda (ICTR). This essay will then look into the much celebrated entrenchment of gender based crimes in the Rome statute and the generated case law of the International Criminal Court (ICC) with references drawn to the roles of the victims, judges and prosecutor in providing justice to victims of gender based crimes.

As a starting point, we must understand the sociological and contextual background of gender based crimes as well as the environment that perpetuates or facilitates their commission in conflicts. According to Leatherman:

[T]he extent of gender-based violence . . . is a predisposing condition for sexual violence in war and is a principal reason why women and girls in countries with high levels of gender based discrimination and inequality are at a much greater risk of victimization and re-victimization of sexual violence from the onset to the aftermath of violent conflict [1 pp. 3-4].

Banwell explores the multi-level factors leading to such high incidents of rape and sexual violence in the DRC conflict and propounds that in countries where gender inequality and discrimination are high, there is a higher risk of gender based crimes to be committed in such societal structures because the pre-existing gender disparity is exacerbated during conflict [2 pp. 51-52]. This exacerbated gender disparity coupled with the

gendered notions of military and violence, often associated with masculinity [3 p. 852], create a conducive atmosphere for such crimes to be committed. From a gender perspective, the victim stands on the lower steps of the ladder within the social hierarchy - a victim of not only the conflict but the pre-existing gender inequality whereas the perpetrator boasting his masculinity climbs further up the ladder – his commission of gender based crimes is only another climb up the ladder of his aspiring masculinity.

Patriarchal norms also play a role in explaining why heinous crimes such as gender based crimes are befallen on women particularly in conflicts. In societies where women are seen mostly as incomplete humans and their social identities are defined as extensions of their male family members, gender based crimes are no longer isolated crimes against women but rather are crimes perpetrated as acts of emasculating or tarnishing masculinity of the male family members. Meger, in her exploration of sexual violence in the Congolese society, points out that the aim of this is twofold: firstly, it is regarded ‘as a direct attack on an individual woman as a representative of her gender or her community’; and, secondly, it should be treated as a ‘symbolic gesture, sending a message to a second target, be it the woman’s husband, father, or other men of her community’ [4 p. 130]. One may infer that gender based crimes are not committed in a vacuum, the pre-existing social order shapes the basis of these crimes. Gender based crimes in conflicts, therefore, by nature are not just acts of violence against women, children, men or third gender but are crimes that need to be viewed within the context of the conflict that is taking place and the wider ramifications and effects of these crimes. We shall now turn our attention to the evolving jurisprudence of sexual and gender based crimes by international tribunals and analyse how successful international criminal justice has been to deal with this phenomenon.

## II. THE JOURNEY FROM MERE OUTRAGE TO FAMILY HONOUR TO AN OFFENCE AGAINST A PERSON

From being categorized merely as “family honour and rights” [5], “outrages against personal dignity [6]” or “humiliating or degrading treatment [6]” in international Conventions to intersectionality of gender based crimes as genocide and crimes against humanity, the journey of gender based crimes has been fraught with difficulties. Where heinous and macabre crimes meted out to women were initially presented in the cloak of honour, dignity and degradation, the charges seldom encapsulated the gravity of the offence perpetrated against the woman herself. The aforementioned

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charged offences were in themselves so engrained in a patriarchal language that the offence or harm done to the woman herself seemed secondary to the damage caused to honour and dignity of her family. With the establishment of the International Criminal Tribunal for the Former Yugoslavia which included rape as a crime against humanity [7] in 1993 and the establishment of the International Criminal Tribunal for Rwanda which defined rape in the same manner [8] there was in part a sense of seriousness attributed to gender based crimes in international criminal law. Much to the satisfaction of many critics, both the ICTY as well as the ICTR took this opportunity to further expand upon the definitional understanding of such crimes. The ICTY established rape as a form of torture in the jurisprudence of international criminal law [9]. In the *Furundzija* case, the ICTY held the following regarding rape: 'Rape is resorted to... as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person [10 p. 163].' Furthermore, the *Furundzija* judgment defined rape as 'penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by another object. In this context, it includes penetration, however slight... [10 p. 174]' The *Furundzija* case not only highlighted rape as a form of torture but also expanded the definition of rape to include oral penetration as well as penetration by other objects contributing to the evolving jurisprudence of gender based crimes in international law.

The *Tadić* indictment of ICTY is of great significance as well where it widened the scope of torture, as a crime against humanity, to include crimes of sexual violence perpetrated against men [11]. This judgment holds significance in breaking the oft-repeated misconception of equating 'gender issues' with 'women issues' [12 p. 14] and made a clear statement that men are as much at a risk of gender based violence as are women and children. However, the contribution of the International Tribunal for Rwanda has been of no lesser significance. The case of *Akayesu* holds much relevance in this regard as a pioneer case which put forward the concept of 'genocidal rape' [13]. Copelon writes in this regard:

'*Akayesu* was a landmark: the first international conviction for genocide, the first judgment to recognize rape and sexual violence as constitutive acts of genocide, and the first to advance a broad definition of rape as a physical invasion of a sexual nature, freeing it from mechanical descriptions and required penetration of the vagina by the penis. The judgment also held that forced nudity is a form of inhumane treatment, and it recognized that rape is a form of torture and noted the failure to charge it as such under the rubric of war crimes' [9 p. 6].

The *Akayesu* judgment extrapolated that when rape is committed with the specific intent of preventing births in a particular group or adulterating the ethnic composition of a particular group then it does not remain an act of rape only but rather becomes a constitutive element of genocide. Rape as an act of penetrative violence becomes more than the act, it becomes part of a systematic violence to eradicate a race or

ethnicity by impregnating women to further or affect ethnic composition another race like in the Bosnian conflict [14]. This is especially relevant for patrilineal and patriarchal societies where the act becomes an attack on another man's honour; therefore, the ramifications of such acts are not limited to the woman alone but are resonated throughout the family and even community.

The prosecution and conviction of Pauline Nyiramasuhuko for genocidal rape [15], one may argue, is another significant example of gendered notions of sexual violence in international criminal law. Pauline's conviction raised interesting and ground breaking questions on gender identity - whereby a woman could be guilty of genocidal rape. During the trial sufficient evidence was adduced that Pauline exhibited the intent of genocide against Tutsi women and commanded rape to be used as an instrument [16]. The conviction of Pauline reveals how a woman by virtue of her position of authority, ethnicity and privilege can be a perpetrator of genocidal rape - a contribution to the jurisprudence of gender based crimes that only men cannot be convicted of rape - within the contours of 'gender' and 'gender identity' it is not an anomaly for a woman to be guilty of rape. This intersectionality of gender and genocide has both been the subject of success and discomfort for many academicians and feminists. Copelon writes:

'Genocide is an effort to debilitate or destroy a people based on its identity as a people, while rape seeks to degrade and destroy a woman based on her identity as a woman. Both are grounded in total contempt for and dehumanization of the victim, and both give rise to unspeakable brutalities... But to emphasize as unparalleled the horror of genocidal rape is factually dubious and risks rendering rape invisible once again [14 p. 199].'

The argument, one must admit, is a powerful one. While the initial international Conventions were criticized for not affording the necessary visibility to gender based crimes, the notion of 'genocidal rape' is embedded in the same patriarchal discourse where the act of violence against the woman herself becomes murky and invisible. The focus on genocidal rape subtracts the act of rape against the woman herself and couches it within patriarchal norms that reduce woman's identity to that attached to her community, family and honour as a vessel of procreation. The depth of this criticism illustrates the latent patriarchal interpretation of law that many have a blind spot to. However, the opposing argument to this view is equally compelling. Conversely, Kalajdzic's thoughts on the subject tend to address criticisms of invisibility of rape in genocidal rape with an approach where she propounds for a woman's identity not be reduced in terms of gender alone. She argues that while looking into the cause of genocidal rape one realizes that it is not only a woman's gender identity but also her ethnic identity, familial ties and ties with the larger community that make her a victim of such crime. Therefore, in the case of Rwanda genocidal rape, a victim's identity as a woman does not take precedence over her identity as a Tutsi woman rather both her identities "operate in conjunction" to

make these women the victims of genocidal rape [17 pp. 477-478]. One may reluctantly agree that the concept of genocidal rape retrogresses the jurisprudence of gender based crime back to the Geneva and Hague conventions where the language of sexual violence was stoned in terminology of honour and dignity; Kalajdzic's approach in unpacking a woman's various identities in a social hierarchy tends to reconcile the genocidal rape with feminist interpretations.

Despite criticisms and dissenting opinions, one cannot deny that the jurisprudence of gender based crimes has come a long way. In international criminal law, according to Luping [18 pp. 16-17], gender based violence has been prosecuted as acts of genocide [13], torture [10], enslavement [19], persecution [20], inhumane acts as crimes against humanity and war crimes [21], other acts of sexual violence like forced nudity [13], and other violations of international conventions like outraging of personal dignity, cruel treatment, and willfully causing great suffering' [22].

### III. SEXUAL CRIMES & ROME STATUTE – A NEW BEGINNING?

The entire development and evolution of the jurisprudence of gender based crimes culminated in the promulgation of the Rome Statute and setting up of the International Criminal Court which entrenched gender based crimes. The Rome Statute includes as crimes against humanity 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' [23] and includes as war crimes acts 'committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions' [24]. Even more commendable is the expansion of forms of gender based crimes to include persecution on the basis of gender as a crime against humanity [25] exhibiting the seriousness of the intention behind constituting the ICC to combat gender based crimes at all levels. This progressive international Statute induced high expectations, however, the ICC has disappointed many by its performance of the last decade.

With regard to framing of criminal charges in international criminal law, Dixon is of the view that 'criminal charges are framed in language designed to promote the restoration of the previous (patriarchal) "order", rather than in a more feminist language designed to challenge the construction of this "order"' [26 p. 698]. One of the ways feminist activists have challenged this inherent "order" has been to push for the voices and experiences of women to be included into the legal framework and language [2 p. 51]. The concept of 'victim participation' as enshrined in the Rome Statute is one such mechanism to instill a women-friendly approach to legal proceedings at the ICC. Victims can submit an application to participate in the trial and of successful they can be represented through their chosen or appointed legal representative. Victims can also make submissions at any point during the trial [27]. Not only is victim participation a great step forward for incorporating the voices of the victim during the legal process, it also helps weave restorative justice

with punitive justice in the trial process at the ICC [28 p. 788]. Special procedures and mechanisms have been employed by the ICC to create an environment for victims of gender based crimes to give evidence and participate in the trial process without fear or social backlash [29]. However, victim participation despite being an honest effort to provide a therapeutic voice to the victims of heinous crimes, the practice has been subject to acrid criticisms as undermining the rights of the accused during trial [28 p. 788]. The inclusion of representatives of victims obscures the adversarial nature of the trial and may also not provide the requisite solace much needed by victims owing to the strategy employed by office of the Prosecutor to ensure convictions against the perpetrator rather than provide comfort to victims. Even more important than the role of victims in the international criminal trial are the roles of the judges and the prosecutor. We shall now look into three cases to extrapolate and analyze how they have addressed gender based crimes.

While the ICTR in the Akayesu case held that forced nudity constituted as an act of sexual violence and augured 'sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact [13 p. 688];' the ICC however did not adopt the same wider interpretation of sexual violence in the Bemba case. Rather the Pre-Trial Chamber was of the opinion that allegations of forced nudity of women did not amount to 'forms of sexual violence of comparable gravity to the other crimes set forth in Article 7(1)(g) of the Statute [30 p. 40].' Where the ICC is only expected to consider the judgments of preceding tribunals, the ICC has shown utter disregard for the established jurisprudence of gender based crimes. While confirming charges in the Bemba case [31 pp. 204-205], the Pre-trial Chamber held that the practice of cumulative charging impinged upon the rights of the defence and naively subsumed within the charge of rape factual allegation of a woman who was raped in front of her family rather than two separate charges of rape as well as torture to reflect the suffering and trauma of the family members [32 p. 39]. The fact that the ICC paid no heed to the public nature of rape or the experience of the family members and missed a glorifying opportunity to document a progressive interpretation of sexual violence, in line with Meger's extrapolation of the psyche behind such crimes within the context of gender, is a disappointing set back.

While activists mourned the retrogressive approach of the ICC in the Bemba case, the Muthaura case is another instance that yielded no better results. In the Muthaura case, evidence was adduced regarding forced circumcision of Luo men, the Prosecutor pushed for the inclusion of forcible circumcision within the legal characterization of 'other forms of sexual violence', on the grounds that 'these weren't just attacks on men's sexual organs as such but were intended as attacks on men's identities as men within their society and were designed to destroy their masculinity' [33 p. 264]. The Chamber however took a different approach to the matter and held that 'not every act of violence which targets parts of the body commonly associated with sexuality should be considered an

act of sexual violence' and that 'the determination of whether an act is of a sexual nature is inherently a question of fact' [33 p. 265]. Unfortunately, the Chamber asserted that it could not find any evidence to 'establish the sexual nature of the acts of forcible circumcision and penile amputation visited upon Luo men' [33 p. 266]. The Mathuara case is an exhibition of the sad realization that while the Rome Statute incorporates the language of 'gender mainstreaming', the concept is virtually absent in spirit. Mathuara case is a daunting example of gender misconceptions where victimhood, especially of a sexual nature, is alluded to women only and 'gender' is again deemed synonymous with 'women' only [12]. While the ICC is considered to be an achievement in the field of gender based crimes in international criminal law, cases such as Bemba and Mathuara, point to not only having a gender mainstreamed language of the law but also gender sensitive judges who interpret the law in conformity with the sociological contours of gender. Conversely, the criticism of gender sensitivity is not limited to the Judges, within the framework of ICC where the Prosecutor confirms charges on which he or she intends to seek trial [34] a lack of a gender conscious approach can yield disastrous consequences as in the case of Thomas Lubanga. In Lubanga, despite evidence of sexual and gender based violence, the Prosecutor brought charges of enlisting and conscripting child soldiers but did not bring charges of sexual violence [35]. While the Prosecutor unsuccessfully argued that sexual violence was constitutive of the offence of conscripting and enlisting child soldiers or was a consequential element of the crime thereof [36 pp. 11-13] the failed strategy of encapsulating sexual violence within the charge of conscripting and enlisting child soldiers highlighted the importance of a gender sensitive and gender conscious strategy when pursuing convictions in international criminal law.

As a consequence of the acrid criticisms brought forth against the OTP, the OTP has produced and published its Policy Paper on Sexual and Gender Based Crimes in June 2014. The policy paper highlights and reaffirms the commitment of the OTP to integrate a gender conscious approach in all their investigations and work. The salient features of the Policy are: 'adopting a victim responsive approach to its work'; combining ICC's efforts to prosecute those most responsible in complementarity to national proceedings; charging gender based crimes as other crimes (broadened charges) for e.g. genocide; taking a contextual approach to sentencing for gender based crimes; and undertaking creative means to secure evidence in light of the low reporting of gender based crimes [37].

Harvard Law Review states regarding the Policy Paper: 'The Paper's development of a policy package that addresses the structural, societal, and experiential import of its prosecutions is significant, and likely impactful, in itself' [38]. However, the new policy's affirmation of broad charges raises the oft-repeated criticisms of not adopting an approach that affects change rather reinforcing the same patriarchal notions that perpetuate such crimes in the first place [38]. With regard to the approach of broad charges for gender based crimes,

reference must be drawn again to the Lubanga's case where the then OTP exercised its discretion to limit the charges to those pertaining to child soldiers, even though evidence existed that sexual and gender based violence were also committed. Lubanga's case is an unfortunate example of 'supplanting' a charge of child soldiers over the charge of sexual and gender based crimes and highlights the importance of 'supplementing' charges (rather than supplanting) to ensure that a gender conscious approach is at the forefront of prosecutions to end impunity for gender based violence [38]. "Thus, the OTP must consider its cases as they function not only to provide justice through successful prosecutions, but also to effect foundational social change" [38]. Not only this, the reiteration of a victim centric approach also seems a hollow promise given the increasing difficulty with the practice of victim participation. Also, the OTP's prime focus of convicting perpetrators may not sit too comfortably with the notions of victim-centric approach that the OTP hopes to achieve.

#### IV. CONCLUSION

To conclude, international criminal law has trudged along a treacherous journey, but has a long road ahead of it, in its pursuit to provide justice for gender based crimes. Referring to the sociological contours of gender based crimes sketched in the beginning, the victims of gender based crimes do not only need convictions to be meted out to perpetrators or reparations/compensations given to them, but rather the pre-existing gender disparities need to be rectified as well. While the ICC and the OTP are institutions expected to uphold international criminal law, justice for gender based crimes must transcend such conviction-centric notions. The quest for justice for gender based crimes should not start and stop at the ICC but, depending on each conflict's context and dynamics; civil society interventions and women empowerment initiatives to decrease gender disparities and redefine gendered notions of masculinity and femininity are needed not only to ensure re-integration of victims of gender based crimes in a dignified human environment but also, to some extent, to prevent rampant gender based violence in conflicts.

The same approach of sensitivity to and understanding of gendered notions of masculinity, femininity and identities are needed in a gender-progressive interpretation and implementation of the law. Muthaura case is a glaring representation of the stunted notions and understandings of gender within the ICC. Differentiation at the same time needs to be drawn between crimes of sexual violence and gender based violence, where the latter has much wider manifestations than the former. While the seriousness of the new Prosecutor of the ICC and the newly published OTP sexual and gender based policy is a positive indication for greater seriousness regarding gender based violence, it can only be hoped that the same seriousness ripples through the entire institution of ICC to pay more heed to gender-sensitive interpretation, convictions and needs of victims when dealing with gender based crimes.

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