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ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY

Working paper by Françoise Hampson on the criminalization, investigation and prosecution of acts of serious sexual violence*

* This working paper was submitted late in order to allow the expert sufficient time to complete her research.

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Summary

At its fifty-fifth session, the Sub-Commission on the Promotion and Protection of Human Rights, in its decision 2003/108, requested Ms. Françoise Hampson to prepare a working paper on the criminalization, investigation and prosecution of acts of serious sexual violence. In her working paper, Ms. Hampson addresses the definition of the relevant international crimes and charging practice. She indicates that issues concerning rules of procedure, rules of evidence and court mechanisms for protecting witnesses and victims are not within the scope of her report.

In her discussion of the definition of the relevant international crimes, Ms. Hampson explores the definitions of rape and other forms of sexual violence, making extensive reference to international law and jurisprudence. In the part of the paper devoted to charging practice, Ms. Hampson details how a defendant that is alleged to have committed rape, sexual assault or another form of sexual violence may in certain circumstances not be charged with that particular offence, but with torture, a crime against humanity, a war crime or genocide. However, she points out that in order for the latter offences to be asserted, further elements need to be proved, in addition to those necessary for rape, sexual assault or sexual violence. Through extensive reference to international law and jurisprudence, Ms. Hampson describes under what circumstances rape, sexual assault and other forms of sexual violence may constitute torture, a crime against humanity, a war crime or genocide.

In her conclusions, Ms. Hampson poses several questions. She asks if the sessional working group on the administration of justice wishes to pursue the examination of issues relating to crimes of sexual violence, whether the focus would be limited to cases involving international criminal law or whether the way national criminal legal systems handle such questions would be included, which would allow the collection of evidence of good and bad practices. If the issue of how national criminal legal systems address sexual violence generally is to be considered, she asks whether this would include children as well as adults, and whether pornography would be treated as a form of sexual violence. She also indicates that while the Sub-Commission has already decided to examine the issue of international criminal law at its fifty-sixth session, she observes that it is not clear whether this refers only to crimes within the jurisdiction of the International Criminal Court or whether there is an intention to consider international criminal law more broadly. Ms. Hampson also raises the question whether the working group would wish to continue gathering information on human rights law issues arising out of recent developments in international criminal law or whether to adopt a plan of work, looking at particular issues at particular times.

Introduction

1. In the report of the sessional working group on the administration of justice adopted at the fifty-fifth session of the Sub-Commission on the Promotion and Protection of Human Rights (E/CN.4/Sub.2/2003/6) it was agreed to include as an agenda item for the fifty-sixth session of the Sub-Commission the criminalization, investigation and prosecution of acts of serious sexual violence occurring in the context of an armed conflict or committed as part of a widespread or systematic attack directed against any civilian population.

2. This report deals with two aspects of that question: the definition of the relevant international crimes and charging practice. Issues concerning rules of procedure, rules of evidence and court mechanisms for protecting witnesses and victims come within the scope of the report by Ms. Rakotoarisoa. This report does not address general issues of criminal liability, such as incitement, liability for joint enterprises, command responsibility, etc. Such questions will often have a very important part to play in individual cases involving sexual violence, but they are not particular to such crimes.

A. The definition of the crimes and the charging practice matter

3. The first question is why the issue of crimes of sexual violence in situations of conflict poses difficulties. Historically, such crimes have, in situations of conflict, both international and non-international, been both widespread, that is to say occurring in many different places, and unusually prevalent, that is to say occurring in high numbers.[1] Various explanations have been offered for the phenomenon, including the lack of effective control over armed forces, the reduction in normal inhibitions, the sense on the part of armed forces that they are entitled to some form of reward and the desire to humiliate a defeated enemy.[2] Almost as widespread as the crime has been the failure to take effective legal action against the perpetrators. Whilst some part of that problem may be attributable to legal difficulties, such as issues of jurisdiction in relation to acts committed abroad, it seems likely that the main reason for inaction was a general failure to take the crimes seriously.

4. It should be noted that the issue is not confined to crimes of sexual violence in situations of conflict. There are common complaints from many jurisdictions that crimes of sexual violence are not addressed effectively by national criminal tribunals. The difficulties include not only the definition of the crimes but also the way in which the crimes are investigated by the police, the basis of decisions regarding prosecution, the rules of procedure and the rules of evidence. In some countries, the past three decades have seen dramatic changes in the way in which such crimes are handled.

5. At the international level, two significant developments occurred in the early 1990s. The coverage of the conflict in Bosnia and Herzegovina gave a good deal of attention to the use of sexual violence as a tool in the conflict. It was not simply that the conflict gave rise to the opportunity for high levels of sexual violence. It was suggested that such a practice was deliberate and systematic. That heightened awareness was carried forward into the conflict and genocide in Rwanda and has been the subject of considerable media attention in conflicts since then, most recently in the Democratic Republic of the Congo and in the Darfur region of the Sudan.[3]

6. Alongside this heightened awareness, there also occurred a significant legal development. The creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) created an opportunity to address the issue of sexual violence. Very effective lobbying, notably by women's groups, resulted in the crimes being taken seriously by both the prosecutorial staff and the judges themselves. This not only resulted in investigations, indictments, proceedings and convictions. In addition, the tribunals adopted special rules of evidence and of procedure for the handling of such issues and special mechanisms for meeting the needs of witnesses and victims. The work of the tribunals showed what could be done when there was the political will.[4]

7. This was followed by the adoption of the Rome Statute of the International Criminal Court (ICC) and the adoption of elements of the crime and rules of procedure by representatives of the parties. Again, there was effective lobbying by women's groups, which secured the inclusion of provisions based on the lessons learned from the experience of ICTY and ICTR.[5]

8. Whilst these developments are to be welcomed, there remains a very real problem. It is unrealistic to expect ICC to handle more than a fraction of the cases potentially coming within its jurisdiction. Whilst the Statute speaks of the Court having a jurisdiction complementary to that of States, in fact it would be more accurate to describe it as subsidiary to that of States. The first priority is for national courts to exercise jurisdiction. Only where the State cannot or will not exercise jurisdiction does the question of ICC jurisdiction arise. That being so, it is vital to ensure that national legal systems adopt the definition of crimes, rules of evidence and rules of procedure applicable to crimes of sexual violence before ICC when addressing crimes of sexual violence in situations of conflict. A failure to do so would result in acquittals which would not have arisen before the Court itself.[6]

9. A few hypothetical examples illustrate the danger. The case law of ICTY and ICTR make it clear that the actus reus of rape is the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by some other object. It will be clear from the definition that a man can be the victim of rape. In certain jurisdictions, whilst sexual violence against men may well be criminal, it will not be characterized as rape. This has an impact on the way in which the crime is viewed and often on the sentence. In other jurisdictions, rape may be limited to the penetration of the vagina or anus by the penis. It would therefore not include penetration by a bottle or truncheon. Whilst such an act would be criminal, if it were characterized simply as sexual assault, the charge would not accurately reflect the gravity of what had occurred. Similar problems arise in certain jurisdictions with issues such as proof of consent, as a defence, and the need for corroboration of witnesses before a conviction can be secured.[7]

10. The Rome Statute only binds contracting Parties. ICTY and ICTR, however, claim to base their case law not only on their respective Statutes but also on customary law. They have relied on the latter to define the crimes within their jurisdiction. To that extent, the definitions of crimes advanced by ICTY and ICTR represent prima facie the definitions of those crimes under international criminal law generally. This has significant implications for domestic implementation of the Geneva Conventions of 1949 and the Protocols of 1977. In addition, these definitions are having an impact on the definition of other concepts under human rights law, such as torture. The need to take account of developments in international criminal law therefore does not only arise in the case of States parties to the ICC Statute. It affects all States.

11. There may be a need for systematic monitoring of national criminal law to ensure that the definitions of crimes take account of developments in international criminal law, at least where the conduct in question constitutes an international crime. For these purposes, an international crime means an act for which any State is free to exercise jurisdiction over a person in their territory or jurisdiction, irrespective of the nationality of the suspect or victim or of the territory where the act is alleged to have occurred.

B. The definition of crimes[8]

12. It is necessary to distinguish between the crime itself and the way in which it is charged. There are circumstances in which rape, for example, can be charged as torture, a grave breach of the Geneva Conventions, a violation of the laws and customs of war applicable in international or non-international armed conflict, a crime against humanity or even genocide. This section deals with the crimes. The following section will deal with evidence of charging practice. There is an overlap between the two concepts. For example, sexual taunts may not be crimes in and of themselves but may constitute humiliating or degrading treatment, which in some circumstances is a crime.

13. The definition of the crimes will be explored by examining the case law of ICTY and ICTR and then by examining the provisions of the Rome Statute and elements of the crime.

14. The principal crimes are rape and sexual assault. Other forms of sexual exploitation may also represent violations of international criminal law.

1. Rape

15. Rape is regarded as more serious than other forms of sexual assault but both are prohibited.[9] International treaty law, notably the Geneva Conventions of 1949 and the Protocols of 1977, prohibit rape both expressly and, in the case of common article 3 of the 1949 Conventions, by necessary implication. There is no definition of rape in international treaty law.[10]

16. The first of the ad hoc courts to define rape was ICTR. In the case of *Akayesu*, the accused had been charged with rape as a crime against humanity and as a violation of common article 3 of the Geneva Conventions.[11] The Court therefore had to define rape but it was not doing so in a context which required it to examine the elements of the offence per se. The Court stated:

> "The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of State sanctioned violence. This approach is more useful in international law. 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."

> "The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive."[12]

17. Very shortly afterwards, ICTY was required to define rape in circumstances in which it had to determine precisely the acts constitutive of the crime and the precise form taken by the lack of consent. In order to define the elements of rape, the Court examined the domestic laws of several States. In that regard, it observed:

> "a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a stricter attitude towards serious forms of sexual assault: the stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced physical penetration."[13]

18. In the same case, the Trial Chamber noted "the unchallenged submission of the Prosecution in its Pre-trial Brief that rape is a forcible act: this means that the act is 'accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression'. This act is the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object. In this context, it includes penetration, however slight, of the vulva, anus or oral cavity, by the penis and sexual penetration of the vulva or anus is not limited to the penis",[14] and referred to the definition of rape formulated by ICTR in *Akayesu*, quoted in paragraph 16 above.

19. This definition means that, in certain circumstances, sexual assault against a male can constitute rape. In *Cesic*, the defendant admitted that he intentionally forced two Muslim brothers detained at Luka Camp to perform fellatio on each other in the presence of others. Ranko Cesic acknowledged that he was fully aware that this was taking place without the consent of the victims.[15] This was treated as a particularly serious and depraved example of rape.

20. The area of greatest difference between different jurisdictions is the criminalization of forced oral penetration. Whilst that virtually always represents some form of sexual assault, in certain jurisdictions it is not classified as rape. The Court explained why it regarded such acts as falling within the definition of rape and explained why this did not give rise to a problem of *nullem crimen sine lege*, even where, under the law of the defendant's home country, the act would be classified as a serious assault.[16]

21. The Chamber concluded that the following may be accepted as the objective elements of rape:

"(i) The sexual penetration, however slight:

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

(b) of the mouth of the victim by the penis of the perpetrator;

(ii) By coercion or force or threat of force against the victim or a third person."[17]

22. This decision was confirmed by the Trial Chamber in the "Foča" case, in which the Court clarified the second element above, the coercive environment.[18] The Court examined the domestic law of States to determine the context which must be proved in order to establish the crime of rape:

"a large range of different factors which will classify the relevant sexual acts as the crime of rape. These factors for the most part can be considered as falling within three broad categories:

(i) The sexual activity is accompanied by force or threat of force to the victim or a third party;

(ii) The sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or

(iii) The sexual activity occurs without the consent of the victim."[19]

23. Following its examination of these concepts, the Court suggested that the key element was not the presence of force but the absence of consent. The Court stated:

"The matters identified in the *Furundžija* definition - force, threat of force or coercion - are certainly the relevant considerations in many legal systems but the full range of provisions referred to in that judgement suggest that the true common denominator which unifies the various systems may be a wider or more basic principle of penalizing violations of sexual autonomy. The relevance not only of force, threat of force, and coercion but also of absence of consent or voluntary participation is suggested in the *Furundžija* judgement itself where it is observed that:

'[…] all jurisdictions surveyed by the Trial Chamber require an element of force, coercion, threat, or acting without the consent of the victim: force is given a broad interpretation and includes rendering the victim helpless.'

A further consideration of the legal systems surveyed in the *Furundžija* judgement and of the relevant provisions of a number of other jurisdictions indicates that the interpretation suggested above, which focuses on serious violations of sexual autonomy, is correct."[20]

24. In *Furundžija*, the Court had formulated its analysis as follows:

> "In light of the above considerations, the Trial Chamber understands that the actus reus of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."[21]

25. The judgement in *Kunarac* was appealed on various grounds, including the definition of rape. The Appeal Chamber rejected the appellants' claim that it was necessary to show continuous resistance in order to establish lack of consent.[22] The Appeal Chamber examined the relationship between force and lack of consent; in other words, it examined the extent to which the Court's conclusions in the *Kunarac* case had effected a significant change in its analysis in the *Furundžija* case. The Appeal Chamber stated:

> "Force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape. In particular, the Trial Chamber wished to explain that there are 'factors [other than force] which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim'. A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force."[23]

26. The Court went one step further. In certain environments, people are particularly vulnerable to coercion, the obvious example being detention. In some jurisdictions, persons in a situation of acute vulnerability are deemed not to be able to freely consent. For this reason, no sexual activity with such a person will be regarded, legally at least, as consensual. The victims in Foča had been detained. The Chamber stated:

> "For the most part, the Appellants in this case were convicted of raping women held in de facto military headquarters, detention centres and apartments maintained as soldiers' residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors. Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. (Those who initially sought help or resisted were treated to an extra level of brutality.) Such detentions amount to circumstances that were so coercive as to negate any possibility of consent.
>
> In conclusion, the Appeals Chamber agrees with the Trial Chamber's determination that the coercive circumstances present in this case made consent to the instant sexual acts by the Appellants impossible."[24]

27. The reasoning of the Appeal Chamber was applied, both with regard to the act and the context, in the case of *Stakic*.[25]

28. The Rome Statute ICC refers explicitly to rape in the context of crimes against humanity (art. 7, subpara. g) and war crimes in both international and non-international conflicts (art. 8, subparas. b (xxii) and e (vi)).[26] In the report of the Preparatory Commission dealing with the elements of the crimes, the Parties defined rape. The definition addresses rape *as* a crime against humanity or *as* a war crime. Certain elements of the definitions therefore relate to establishing those contexts. The elements specific to rape per se are:

> "1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
>
> 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."[27]

These elements are the same for each express reference to rape. The influence of the case law of the ICTR and ICTY on the definition of these elements is clear.

2. Other forms of sexual violence

29. The harm suffered by victims of sexual violence which does not take the form of rape as defined above may, nevertheless, be of a very serious character. This has been recognized by the two ad hoc tribunals. The context in which they have had to examine the issue has usually been a charge of serious harm to physical or mental health or humiliating or degrading treatment. Nevertheless, the focus, on the part of both tribunals, on the sexual character of the harm, requires it to be addressed in this context and not merely as an issue of charging practice.

30. In the *Akayesu* case, ICTR stated that:

> "Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. […] Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal. Sexual violence falls within the scope of 'other inhumane acts', set forth in Article 3 (i) of the Tribunal's Statute, 'outrages upon personal dignity', set forth in Article 4 (e) of the Statute, and 'serious bodily or mental harm', set forth in Article 2 (2) (b) of the Statute."[28]

This provides a negative definition - sexual violence does not require penetration or even physical contact - but it is not clear what are the positive elements which must be proved. The other examples provided by the Court not involving rape all involve public nudity.[29]

31. ICTY has had to consider this issue in relation to the prohibition of torture and of outrages upon personal dignity. In examining the possible relationship between international criminal law, international humanitarian law, and international human rights law, the Court has been at pains to distinguish between them.[30] In its analysis in the *Kunarac* case, the Court was able to analyse these concepts in the light of its two earlier decisions in the cases of *Delalic and Aleksovski*.[31] The nature of the harm that must be inflicted, by act or omission, to constitute torture is "severe pain or suffering, whether physical or mental".[32] Other elements must also be established but, in this context, the only question is whether acts of sexual violence can constitute prohibited conduct of one form or another. In relation to outrages upon personal dignity, the Court has expressly stated that the harm does not need to be long-term but that it does need to be of a serious character.[33] The Court has also ruled that the test of what is humiliating and degrading is objective. The Court has determined that:

> "the offence of outrages upon personal dignity requires:
>
> (i) That the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity; and
>
> (ii) That he knew that the act or omission could have that effect."[34]

The Appeals Chamber, in its judgement of 12 June 2002, confirmed the use of an objective test.[35] Sexual violence is obviously capable of coming within such a formulation.

32. In the case of *Furundžija*, the Court expressly addressed the issue of sexual assault. The Court pointed out that the Tokyo International Military Tribunal, in the proceedings against Generals Toyoda and Matsui in relation to events at Nanking, dealt with both rape and sexual assault.[36] The Court concluded:

> "It is indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators."[37]

33. The Court sought to define serious sexual assaults:

> "As pointed out above, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity. As both these categories of acts are criminalized in international law, the distinction between them is one that is primarily material for the purposes of sentencing."[38]

It is not clear whether the Court limits the crime to sexual *assaults* or whether it can apply to other forms of sexual violence. An assault would normally require actual or threatened physical contact. The suggestion that the difference between rape and sexual assault is essentially one of degree and therefore primarily only relevant in sentencing may suggest that the Court, at least in this observation, is limiting itself to sexual assaults.

34. The Rome Statute may have gone further than ICTY in addressing sexual violence generally. In addition to crimes such as enforced prostitution and sexual slavery, there is reference to sexual violence generally. It can constitute a crime against humanity and/or a war crime in international and non-international conflicts under articles 7, paragraph 1 (g) and 8, paragraph 2 b (xxii) and e (vi). The elements of the crime, insofar as it relates to sexual violence, rather than the additional elements required to establish a crime against humanity or a war crime, are:

> "1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
>
> 2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute.
>
> 3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct."[39]

The definition of sexual violence is the same in the three contexts in which it is used.

C. Charging practice

35. As seen above, where the defendant is alleged to have committed rape, sexual assault or another form of sexual violence, he/she may, in certain circumstances, be charged not with that particular offence but with torture, crime against humanity, war crime or even genocide. In order for the act to come within one of these categories, further elements need to be proved, in addition to those necessary for rape, sexual assault or sexual violence.

36. It is important that prosecutors before national criminal courts take account of international charging practice. The label attached to a crime affects the degree of opprobrium attached to a conviction and normally affects the sentence. Just as a conviction for sexual assault is not appropriate in the case of male rape, so a conviction for rape is not appropriate where, in the circumstances, it constitutes a crime against humanity or a war crime. States may be in breach of their obligations under human rights law where they fail to criminalize certain forms of conduct and where charges are inappropriate to the seriousness of the offence.[40] An issue may also arise for ICC regarding the adequacy of national criminal proceedings, where the defendant is not charged appropriately.[41]

37. It is therefore necessary to consider in what circumstances rape, sexual assault and other forms of sexual violence may constitute torture, a crime against humanity, a war crime or genocide. The case law of ICTY and ICTR provide a considerable degree of guidance. This section will not consider indicting rape as such or rape, sexual assault or other sexual violence as humiliating and degrading treatment, those issues having, in effect, been dealt with in the last section.

1. Charging sexual violence as torture

38. Torture is a not a separate category of crime. It may, depending on the circumstances, constitute a crime against humanity or a war crime.[42] In this context, the only issue is whether some forms of sexual violence can constitute torture. Additional elements will have to be established for the torture to constitute a crime against humanity or a war crime.

39. In the *Kunarac* case, ICTY determined that:

> "Three elements of the definition of torture contained in the Torture Convention are, however, uncontentious and are accepted as representing the status of customary international law on the subject:
>
> (i) Torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental;
>
> (ii) This act or omission must be intentional;
>
> (iii) The act must be instrumental to another purpose, in the sense that the infliction of pain must be aimed at reaching a certain goal."[43]

The Court continued:

> "There is no requirement under customary international law that the conduct must be solely perpetrated for one of the prohibited purposes. As was stated by the Trial Chamber in the Delalic case, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose."[44]

On appeal, appellants Kunarac and Vukovic claimed that their only motives had been sexual.[45] The Appeal Chamber confirmed the view of the Trial Chamber that "acts need not have been perpetrated solely for one of the purposes prohibited by international law. If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial".[46]

40. The Appeal Chamber in the Kunarac case, dealing with cases of rape, confirmed the finding of the Trial Chamber that:

> "Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering. The Appeals Chamber thus holds that the severe pain or

suffering, whether physical or mental, of the victims cannot be challenged and that the Trial Chamber reasonably concluded that that pain or suffering was sufficient to characterize the acts of the Appellants as acts of torture."[47]

41. Following a careful analysis of both human rights law and international humanitarian law, the Trial Chamber had concluded that:

> "the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.
>
> On the basis of what has been said, the Trial Chamber holds that, in the field of international humanitarian law, the elements of the offence of torture, under customary international law are as follows:
>
> (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental;
>
> (ii) The act or omission must be intentional;
>
> (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person."[48]

It should be noted that international humanitarian law does not require that the perpetrator be a State agent.

42. Since the Trial Chamber carefully explained the difference between the elements required to establish torture under human rights law and under international humanitarian law, it would appear that the analysis of the Court in the *Kunarac* case should be preferred to the previous analysis of ICTR and ICTY, principally based on human rights law, in the cases of *Akayesu* and *Mucic et al*. The analysis of the Trial Chamber in the *Furundzija* case more closely resembles that in the *Kunarac* case.[49]

43. Where all these elements are present, rape may constitute torture:[50]

> "Damage to physical or mental health will be taken into account in assessing the gravity of the harm inflicted. The Trial Chamber notes that abuse amounting to torture need not necessarily involve physical injury, as mental harm is a prevalent form of inflicting torture. For instance, the mental suffering caused to an individual who is forced to watch severe mistreatment inflicted on a relative would rise to the level of gravity required under the crime of torture. Similarly, the *Furundzija* Trial Chamber found that being forced to watch serious sexual attacks inflicted on a female acquaintance was torture for the forced observer. The presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped."[51]

44. Article 7, paragraph 2 (e) of the Rome Statute ICC defines torture, which can be charged as a crime against humanity or a war crime, as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions".

2. Charging sexual violence as a crime against humanity

45. Whilst this subsection is concerned with sexual violence generally, it should be noted that other activities of a broadly sexual nature can also constitute crimes against humanity, such as enforced prostitution, forced pregnancy and enforced sterilization.[52] In particular, in the *Kunarac* case, the Trial Chamber discussed the definition of enslavement as a crime against humanity, and indicated that among the numerous circumstances that could indicate enslavement, sexual exploitation could be, inter alia, one such indication.[53] In its judgement in *Tadic*, ICTY concluded that "[T]o convict an accused of crimes against humanity, it must be proved that the crimes were *related* to the attack on a civilian population (occurring during an armed conflict) and that the accused *knew* that his crimes were so related."[54] According to the terms of its Statute, ICTY must establish a nexus with an armed conflict in order to prosecute under article 5 of the Statute. This is however not generally true with regard to crimes against humanity. Article 7 of the Rome Statute states that it is sufficient to establish that the act was related to a widespread or systematic attack against the civilian population. It is not necessary to establish a discriminatory intent with regard to all crimes against humanity but only with regard to those crimes based on persecution.[55]

46. In the *Akayesu* case, ICTR interpreted "widespread or systematic attack" as follows:

> "The concept of 'widespread'may be defined as massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of 'systematic' may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a State. There must however be some kind of preconceived plan or policy.
>
> The concept of attack may be defined as a unlawful act of the kind enumerated in article 3 (a) to (I) of the Statute, like murder, extermination, enslavement etc. An attack may also be non-violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner."[56]

47. The Statute of ICC, in article 7, paragraph 2 (a), defines "widespread or systematic attack" as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".[57] The Preparatory Commission established that "The acts need not constitute a military attack. It is understood that 'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population."[58]

48. It must also be shown that the accused "… knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population".

49. Where these requirements are met, serious sexual violence can be charged as a crime against humanity.

3. Charging sexual violence as a war crime

50. A war crime is another term for a violation of the laws and customs of war. It can take two forms. Where the violation occurs in an international armed conflict, it may be a "grave breach" of the four Geneva Conventions of 1949 or Additional Protocol I of 1977. The term "grave breach" is a technical term. Alternatively, still in the context of an international armed conflict, the act may be a violation of the laws and customs of war applicable in such conflicts. The second category concerns violations of the rules applicable in non-international conflicts. That includes violations of common article 3 of the Geneva Conventions and Additional Protocol II of 1977 and also, since the case law of ICTY and ICTR confirmed the existence of such a category, violations of the laws and customs of war applicable in non-international conflicts.

51. It is necessary, first, to establish whether the conflict is international or non-international and, second, to establish a nexus between the action and the conflict. The first issue is not an element of the crime but the second is one.[59]

52. With regard to the characterization of the conflict, the Statute of ICC, in article 8, paragraph 2 (d) and (f), defines the minimum threshold for the application of rules applicable in non-international armed conflict. It does not, however, define international armed conflicts, either in relation to minimum levels of conflict or in relation to a conflict where its international/non-international character is uncertain. The difficulties to which the need for such a characterization give rise have been repeatedly made clear in cases before ICTY. The Appeal Chamber gave guidance in the *Tadic* case as to how conflicts should be characterized, overturning the majority in the Trial Chamber in the process.[60]

53. With regard to the required nexus between the act and the armed conflict, it is not that the act has to be in furtherance of the conflict. The requirement is simply that the act be related to the conflict.

54. This can give rise to difficulties in the case of sexual violence, which might easily be claimed to be unrelated to the conflict and simply the private act of a private individual.[61] In fact, however, as the case law of ICTY and ICTR previously discussed has made clear, a court can readily distinguish between the two in practice.

55. The Preparatory Commission has defined the required nexus to the conflict. In addition to the elements particular to the crime, in order to establish that the conduct was a *war* crime the following elements must be established:

> "The conduct took place in the context of and was associated with an international armed conflict.

> "The perpetrator was aware of factual circumstances that established the existence of an armed conflict."[62]

This has been further clarified by the Preparatory Commission as follows:

> "With respect to the last two elements listed for each crime:
>
> "There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
>
> "In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
>
> "There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms 'took place in the context of and was associated with'."[63]

56. In order for an act of sexual violence to be charged as a war crime, it is first necessary to determine whether the conflict is international or non-international, if reference is being made to particular provisions in the ICC Statute, and then to establish the nexus with the armed conflict.

4. Charging sexual violence as genocide

57. Whilst popular belief might suggest that genocide can only occur when a significant proportion of the relevant population is exterminated, that is not in fact the case. In order to charge a person with genocide, it is necessary to be able to prove the commission of at least one of a list of five actions and to prove that the defendant had a particular intent at the time of the commission of the act. According to ICTR in *Akayesu*, sexual violence could, in some circumstances, come within the prescribed actions. The second type of action is "causing serious bodily or mental harm to members of the group".[64] In this judgement, ICTR has interpreted the nature and level of suffering as meaning "acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution" (para. 504). The third activity is "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part". It is difficult to see how individual acts of sexual violence could come within the definition but, where sexual violence takes place against the enslaved, their conditions of life might come within the requirement.[65] Finally, the Court suggested, with regard to "measures intended to prevent births within the group", that these measures "may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate" (para. 508).

58. In order for a charge of genocide to succeed, it is necessary to show that the victims were not targeted individually but were chosen *on account of* the group to which they belonged (*Akayesu*, para. 508).

59. The most unusual feature of the crime of genocide is the very specific intent that must be proved in order to secure a conviction. The prosecutor must establish that, in taking one of the listed actions, the defendant had "the intent to destroy, in whole or in part, a particular group".[66]

60. In *Akayesu*, ICTR suggested that:

> "intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act".

61. On the basis of all the charges laid against him, including but not limited to condoning and/or encouraging acts of sexual violence, Jean-Paul Akayesu was convicted of genocide and direct and public incitement to commit genocide.

62. Article 6 of the Rome Statute prohibits genocide, which is defined in the same way as in the Convention on Genocide. The potentially genocidal acts are the same. In the case of "serious bodily or mental harm to one or more persons", the report of the Preparatory Commission makes it clear that "This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment." The meaning of the other potentially genocidal acts, is not clarified in relation to their applicability to patterns of sexual violence. In particular, there is no indication of whether the imposition of measures calculated to prevent births in the group is thought to be potentially applicable to women who choose not to give birth as a result of sexual violence or who physically cannot give birth as a result of their experience of sexual violence.

63. The Preparatory Commission added a contextual element in its definition of the crime. In every case, it is necessary to show "the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction".

D. Conclusion

64. If the sessional working group on the administration of justice wishes to pursue its examination of issues relating to crimes of sexual violence, it would be helpful to determine whether the focus is limited to cases involving international criminal law or whether it also wishes to examine the way in which national criminal legal systems handle such questions, so as to collect evidence of good and bad practice.

65. There seem to be two quite separate issues. The first is the one referred to in the preceding paragraph - the way in which national criminal legal systems handle issues of sexual

violence generally. If it is to be taken further, it would be necessary to determine whether this issue includes children as well as adults and whether pornography and sexual slavery as defined in the report by Ms. McDougall were to be treated as forms of sexual violence.

66. The second issue relates specifically to international crimes within the jurisdiction of ICC. The working group has already decided to examine the issue of international criminal law at the fifty-sixth session of the Sub-Commission. It is not clear whether that refers only to crimes within the jurisdiction of ICC or whether it is intended to consider international criminal law more broadly. Does it include international or regional judicial cooperation, at least in the case of international crimes? Some of the issues in this report are relevant in this context, in particular the problem of ensuring that the domestic criminal law of parties to the Rome Statute is in conformity with the Statute, not only as a matter of form but also of substance. Other reports, submitted in the context of the discussion on international criminal law, may well throw up proposals for action or future consideration. The recommendations made by Ms. McDougall in her report also need to be considered in this context. It would seem likely that during the fifty-sixth session, the working group will need to consider whether to continue gathering information on human rights law issues arising out of recent developments in international criminal law or whether to adopt a plan of work, looking at particular issues at particular times.

Notes

[1] Update to the final report submitted by Ms. Gay J. McDougall, Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict (E/CN.4/Sub.2/2000/21), paras. 10-19. The principal focus of that report was sexual slavery and slavery-like practices. The focus of the present report is sexual violence.

[2] Ibid., paras. 20-21.

[3] "DR Congo's shameful sex secret: young refugees sell their bodies to UN peacekeepers", Kate Holt, BBC, 3 June 2004 (http://news.bbc.co.uk/1/hi/world/africa/3769469.stm); "Sudanese tell of mass rape", Alexis Masciarelli and Ilona Eveleens, BBC, 10 June 2004 (http://news.bbc.co.uk/1/hi/world/africa/3791713.stm).

[4] See Ms. McDougall's report, op. cit. (see note 1 above), paras. 44-67.

[5] Ibid., paras. 23-43.

[6] Ibid., para. 42.

[7] Ibid., para. 83.

[8] I should like to thank Michael Duttwiler and Maurice Voyaume for research assistance with the case law of the two ad hoc tribunals.

[9] *Furundžija* (IT-95-17/1), "Lasva River Valley", judgement of Trial Chamber II, 10 December 1998, para. 175.

[10] See also *Mucic et al.* (IT-96-21), "Celebici", Trial Chamber II, judgement of 16 November 1998, which was concerned principally with the circumstances in which rape can be charged as torture. It did not focus on the definition of rape but simply endorsed the approach of ICTR in *Akayesu* (see note 11 below).

[11] *Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR-96-4-T, Trial Chamber I, 2 September 1998.

[12] Ibid., paras. 597-598.

[13] *Furundzija*, op. cit. (see note 9 above), para. 179; see para. 180 for variations in domestic laws discussed by the Court.

[14] Ibid., para. 174.

[15] *Ranko Cesic* (IT-95-10/1), "Brcko", Trial Chamber I, Sentencing judgement of 11 March 2004. The issue before the Court was whether the particularly severe humiliation was an aggravating element which should be taken into account when sentencing. The Court determined that, where the charge was humiliating and degrading treatment, the humiliation was not an aggravating element because it is part of the charge. It is not, however, explicitly an element of the crime of rape, even though it is an inherent feature of rape. It can, therefore, be treated as an aggravating element in the sentencing for rape. Two elements were seen as aggravating the humiliation: the fact that the men were brothers and the fact that others were watching. See also *Mucic et al.*, op. cit. (see note 10 above).

[16] *Furundžija*, op. cit. (see note 9 above), paras. 182-184. International humanitarian law and human rights law are based on protecting human dignity. Such assaults are a "most humiliating and degrading attack upon human dignity". "… [S]o long as an accused, who is convicted of rape for acts of forcible oral penetration, is sentenced on the factual basis of coercive oral sex - and sentenced in accordance with the sentencing practice in the former Yugoslavia for such crimes, pursuant to Article 24 of the Statute and Rule 101 of the Rules - then he is not adversely affected by the categorization of forced oral sex as rape rather than as sexual assault. His only complaint can be that a greater stigma attaches to being a convicted rapist rather than a convicted sexual assailant. However, one should bear in mind the remarks above to the effect that forced oral sex can be just as humiliating and traumatic for a victim as vaginal or anal penetration. Thus the notion that a greater stigma attaches to a conviction for forcible vaginal or anal penetration than to a conviction for forcible oral penetration is a product of questionable attitudes. Moreover, any such concern is amply outweighed by the fundamental principle of protecting human dignity, a principle which favours broadening the definition of rape". (ibid., para. 184).

[17] Ibid., para. 185.

[18] *Kunarac et al*. (IT-96-22 and IT-96-23/1), judgement of Trial Chamber II, 22 February 2001.

[19] Ibid., para. 442.

[20] Ibid., paras. 440-441.

[21] *Furundžija*, op. cit. (see note 9 above), para. 185.

[22] *Kunarac…*, judgement of the Appeals Chamber, 12 June 2002, paras. 125 and 128.

[23] Ibid., para. 129.

[24] Ibid, paras. 132-133. There is an analogy with the approach taken by certain human rights bodies dealing with allegations of torture. Where, for example, a detainee is uninjured at the time of detention but is injured at the time of release, the European Court of Human Rights puts the burden of proof on the respondent Government to provide a plausible explanation as to how the applicant sustained the injuries. If no explanation is forthcoming or if it is not regarded as plausible in the circumstances of the case, the State will be found responsible for some form of ill-treatment. See European Court of Human Rights, *Tomasi v. France*, judgement of 27 August 1992 and *Ribitsch v. Austria*, judgement of 4 December 1995.

[25] *Stakic* (IT-97-24) "Prijedor", Trial Chamber II, judgement of 31 July 2003.

[26] The Statute also refers to concepts such as "inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" (art. 7, subpara. k), under which rape could also be charged; see, generally, the next section.

[27] Report of the Preparatory Commission for the International Criminal Court, Part II (Finalized draft text of the Elements of Crimes) (PCNICC/2000/1/Add.2). The concept of "invasion" is intended to be broad enough to be gender-neutral. As concerns the notion of consent, it is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This also applies to other relevant provisions of article 7.

[28] *Akayesu* (see note 11 above), paras. 598 and 688.

[29] See ibid., paras. 692-694 and 697.

[30] See, for example, *Kunarac et al.* (see note 18 above), paras. 470-496.

[31] *Delalic*, see *Mucic et al.* (note 10 above); *Aleksovski* (IT-95-14/1) "Lasva Valley", Trial Chamber I, judgement of 25 June 1999.

[32] *Kunarac et al.* (see note 18 above), para. 497.

[33] Ibid., para. 501.

[34] Ibid., para. 514.

[35] *Kunarac* … (see note 22 above), para. 162.

[36] *Furundžija* (see note 9 above), para. 168.

[37] Ibid, para. 169. See also *Mucic et al.* (see note 10 above), paras. 476-477.

[38] Ibid., para. 186.

[39] Report of the Preparatory Commission … (see note 27 above).

[40] European Court of Human Rights, *X and Y v. the Netherlands*, judgement of 26 March 1985.

[41] See para. 8 above.

[42] See Ms. McDougall's report, op cit. (see note 1 above), para. 34.

[43] Para. 483 of the judgement; see also note 32 above.

[44] Ibid., para. 486.

[45] Para. 137 of the appeals judgement (see above).

[46] Ibid., para. 155.

[47] Ibid., para. 151.

[48] Ibid., paras. 496-497.

[49] See, in particular, paras. 159-164.

[50] See, for example, *Kvocka et al.* (IT-98-30/1), "Omarska and Keraterm camp", judgement of 2 November 2001, para. 145.

[51] Ibid., para. 149.

[52] See para. 34 above.

[53] "… enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person. Thus, the Trial Chamber finds that the actus reus of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person. The mens rea of the violation consists in the intentional exercise of such powers. [...] Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible

or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. [...] The 'acquisition' or 'disposal' of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement. Detaining or keeping someone in captivity, without more, would, depending on the circumstances of a case, usually not constitute enslavement" (paras. 539-542 of the judgement).

54 *Tadic*, Appeal Chamber (IT-94-1) "Prijedor", 15 July 1999, para. 271.

55 Ibid., paras. 284 and 292. Ms. McDougall, op. cit., with regard to article 7 of the Rome Statute, states in her report: "It is particularly noteworthy that article 7 (1) (h), in stating that '[p]ersecution against any identifiable group or collectivity' may constitute a crime against humanity, includes gender among the grounds for persecution 'that are universally recognized as impermissible under international law'." This recognition of gender as an individual and collective identity which, like race, ethnicity and religion, is capable of being targeted for persecution, and thus merits specific protection under international law, is an explicit articulation of what has been an obvious omission in earlier codifications and formal definitions of crimes against humanity" (para. 31).

56 *Akayesu* (note 11 above), paras. 580-581.

57 The acts referred to include enslavement, torture, "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity", "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender … grounds" and "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". The inclusion of apartheid in the list may suggest that an attack does not need to be violent in nature, as indicated by ICTR.

58 *Report of the Preparatory Commission* … (see note 27 above).

59 Ibid.

60 *Tadic* (note 55 above), paras. 83-145.

61 Ms. McDougall's report, op cit. (see note 1 above), para. 30.

[62] *Report of the Preparatory Commission* … (see note 27 above). Every war crime defined in the elements of the crime.

[63] Ibid.

[64] The definition of genocide in article 2 of the Statute of the ICTR comes verbatim from articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide.

[65] As discussed by ICTY in *Kunarac* et al.; see note 53 above.

[66] This is a requirement of the Convention on Genocide, the Statute of ICTR and the Rome Statute.
