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International Military Tribunals: Creation, Jurisdiction and Effectiveness in Light of Criminalizing Sexual Violence

Abstract: This essay analyzes the creation and effectiveness of international military tribunals. A specific crime — sexual violence — is focused upon to illustrate the similarities and differences between those tribunals. Crimes of sexual nature were not specifically criminalized before the Nuremberg and Tokyo proceedings. Today under the International Criminal Court regime there is a comprehensive system criminalizing those types of crimes. The International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia fall somewhere in between — there was much discussion about sexual violence then and definitions were developed for different types of sexual violence. International Military Tribunals have come a long way from *ad hoc* adjudication to an established international criminal court just as the definition of sexual violence has.

Keywords: Sexual violence, Nuremberg and Tokyo Tribunals, ICTY, ICTR, ICC, jurisdiction, war crimes, international criminal law

Introduction

International criminal law and international dispute settlement have a relatively long history. Although, modern understanding of international criminal adjudication begins with the Tribunals of Nuremberg and Tokyo. This essay will briefly discuss the establishment and jurisdiction of those tribunals, as well as the ICTY, the ICTR and finally the International Criminal Court. The historical evolution and effectiveness of the Tribunals is illustrated by a specific crime. Namely it will be discussed how crimes of sexual nature during wartime have made their way into the statutes of the Tribunals, and how have the perpetrators been punished. This is done because it helps to understand how big a difference the Tribunals have made and that they have been in a constant development, adapting to the challenges posed by modern warfare (especially to human rights). I chose the crime of sexual violence since there has been an enormous change in its criminalization in the past sixty years in which the Tribunals have played a major role. But it also shows that the ICC is not the end of the road — there are still unanswered questions and loose ends in international criminal law.

Nuremberg and Tokyo

At the end of World War II the Allies decided on an international tribunal to be held under the auspices of the four principal Allied powers — the Americans, British, French, and Soviets. The trial was held in the city of Nuremberg, which had been the heart of the Nazi movement.[1] In November 1943 Stalin, Roosevelt and Churchill met in Moscow to adopt a generally worded resolution thereafter called the Moscow Declaration of 1 November 1943. With this document the Allies affirmed their determination to prosecute the Nazis for war crimes.[2]

The UN Commission for the Investigation of War Crimes, composed of representatives of most of the Allies, was established to set the stage for post-war prosecution. The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) was formally

1 Michael R. MARRUS, *The Nuremberg War Crimes Trial 1945–46: A Documentary History* (Boston/New York: Bedford Books, 1997), pp. 1–2.

2 *Ibid*., p. 20.

adopted on 8 August 1945.[3] In October 1945, indictments were served on twenty-four Nazi leaders, of whom nineteen were convicted. The court remained in session until 31 August 1946.

In the Pacific theatre, the victorious Allies established the International Military Tribunal for the Far East, which convened on 3 May 1946 and adjourned on 12 November 1948. Japanese war criminals were tried under similar provisions to those used at Nuremberg.[4] The Tribunal's judgment was to a great extent, in so far as statements of law were concerned, merely a reaffirmation of what was decided earlier at Nuremberg, therefore this will not be elaborated in great detail here.[5]

The Nuremberg Tribunal's jurisdiction was confined to three categories of offence: crimes against peace, war crimes and crimes against humanity (class A, B, and C crimes in the Tokyo Trial accordingly). Individual responsibility was foreseen for anyone committing such acts whether as individuals or as members of organizations — a specifically important point in light of the atrocities committed.

What is interesting to note, is that the Charter of the IMT was adopted after the crimes had been committed, and thus seemed like *ex post facto* criminalization. The Tribunal rejected such arguments, referring to the Hague Conventions, for the war crimes, and to the 1928 Kellogg-Briand Pact, for crimes against peace.[6] It also answered that the prohibition of retroactive crimes was a principle of justice, and that it would "fly in the face of justice" to leave the Nazi crimes unpunished. This quite unprecedented argument was particularly important with respect to the category of crimes against humanity, for which there was little real precedent.[7] Crimes committed during the war were so atrocious and so indescribable, that the international community turned a blind eye on the traditional rules of criminal law — Nazi crimes were just outside the scope of any laws. The Trial had to "invent" adequate responses to the crimes committed.

Much like the Martens Clause, therefore, the Nuremberg Trials recognized that it "is not essential that a crime be specifically defined and charged in accordance with particular ordinance, statute, or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally".[8]

Sexual violence

In establishing the International Military Tribunals in Nuremberg and Tokyo to prosecute leaders for crimes against peace, war crimes and crimes against humanity, both trials focused principally on what was considered the "supreme" crime — crimes against peace. Thus although the IMT trial records contain extensive evidence of sexual violence, this was largely ignored for being "less important".[9] In addition sexual crimes, along with pillage,

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3 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8.8.1945, in force 8.8.1945, 82 UNTS 279.

4 William A. SHABAS, An *Introduction to the International Criminal Court* (Cambridge University Press, 2001), p. 7.

5 Leslie C. GREEN, *The Contemporary Law of Armed Conflict* (2nd edn, Manchester University Press, 2000), p. 291.

6 SHABAS, An *Introduction to the International Criminal Court, supra nota* 4, p. 6. The Tribunal thus marked that such crimes formed a part of customary law as well as having been codified in earlier instruments.

7 *Ibid*.

8 Kelly D. ASKIN, "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles", 21 *Berkeley Journal of International Law* (2003) 288–349, pp. 301–302. See the Nuremberg Trials Project: <nuremberg.law.harvard.edu/php/docs_swi.php?DI=1&text=overview> (16.04.2009).

9 *Ibid*.

were viewed as inevitable aspects of war, and therefore unpunishable. They were something too atrocious to prosecute and something so impossible to prevent that they were unworthy of prosecution.[10] The Statute of the Nuremberg Tribunal makes no mention of rape or any sexual or gender-based crimes. It is enumerated neither as a crime against humanity, nor as a war crime.[11]

Despite the fact that rape and other forms of sexual violence had been widely reported during WW II the crime of rape was not expressly included in either the IMT or the IMTFE charter and not even mentioned in the 179-page judgment of the IMT at Nuremberg; it was prosecuted at Tokyo but only as ancillary to other war crimes.[12] Some authors find that rape was subsumed under the crimes of inhumane acts, and in a few cases, Allied prosecutors entered evidence of rape on the trial record, which found its way to the final decision.[13] The Judgment, however, contained "neither distinct findings, *dicta* nor meaningful jurisprudence in relation to rape or enforced prostitution that could be readily bequeathed to the ICTY and ICTR".[14]

Sexual experimentation on women was the only specifically gendered violation subjected to legal scrutiny during the Nuremberg Trials. The "Doctors Trial" tried twenty-three defendants accused *inter alia* of carrying out sterilization procedures.[15] Nevertheless, rape as a distinct crime was condemned centuries before WW II and its omission from the Charters of both IMT and IMTFE, was quite traitorous towards hundreds of thousands of victims.

Control Council Law No. 10 was adopted by the Allied Powers in December 1945 to govern the subsequent Nuremberg proceedings. The Law established the jurisdiction of military tribunals operating in the Allied Powers' respective zones of occupation. Its definition of crimes against humanity explicitly included rape as one of the enumerated crimes.[16] Evidently the international customary law basis of rape was now educed from international instruments or practice that predated Nuremberg. In other words the inclusion of rape in Control Council Law No. 10 as an enumerated crime against humanity was arguably but a normative recognition of the customary law prohibition. Although when the Nuremberg Principles were adopted, they withheld recognizing rape as a crime against humanity in an apparent disregard of the precedent of Control Council Law No. 10.[17]

The aforementioned instruments are nonetheless highly significant in that they introduced to the international community for the first time the concept of crimes against

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[10] Sita BALTHAZAR, *"Gender crimes and the International Criminal Tribunals"* 10 *Gonzaga Journal of International Law* (2006–2007) 43–48, p. 44.

[11] *Ibid*., p. 44; Frances T. PILCH, "The Crime of Rape in International Humanitarian Law", 9 *United States Air Force Academy Journal of Legal Studies* (1998–1999) 99–120, p. 104.

[12] Susana SaCouto, "Advances and missed opportunities in the international prosecution of gender-based crimes", 15 *Michigan State Journal of International Law* (2007) 137–156, p. 137.

[13] Patricia Viseur SELLERS, "Arriving at Rwanda: Extension of Sexual Assault Prosecution Under the Statutes of the Ad Hoc International Criminal Tribunals", 90 *American Society of International Law: Proceedings* (1996) 605–610, p. 606.

[14] *Ibid*.

[15] *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*. Nuremberg, October 1946 – April 1949. Washington DC: US GPO, 1949–1953.

[16] Article II(1)(c) provides: Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20.12.1945, 3 Official Gazette Control Council for Germany 50–55 (1946); Nicole Eva Erb, "Gender-based Crimes Under the Draft Statute for the Permanent International Criminal Court", 29 *Columbia Human Rights Law Review* (1997–1998) 401–436, p. 409.

[17] SELLERS, "Arriving at Rwanda", *supra nota* 13, p. 606; Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 29.7.1950, UN Doc. A/1316 (1950).

humanity, which have come to encompass the crime of rape.[18] Very small and inconsistent, yet important steps were taken towards establishing a comprehensive regime for punishing acts of sexual violence in conflict situations.

In Tokyo, rape crimes were expressly prosecuted, albeit to a limited extent and in conjunction with other crimes. Like Nuremberg, the Tokyo Charter did not specifically enumerate any sex crime but the Indictment did include allegations of gender related crimes.[19] Rape of civilian women and medical personnel was characterized as "inhumane treatment", "mistreatment", "ill-treatment", and a "failure to respect family honor and rights", and prosecuted under the Conventional War Crimes provision in the Charter (Article 5).[20] While rape was not a major focus of the proceedings the Tokyo Tribunal nevertheless specifically included rape as a violation of recognized customs and conventions of war along with mass murder, pillage, brigandage, and torture.[21]

As a result, the IMTFE held several high-ranking officers criminally responsible for a series of crimes, including rape crimes, committed by persons under their authority.

International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda

The Geneva Conventions were the first modern day international instruments to establish protection against rape for women. However the most important development in breaking the silence of rape as an international crime has come through the jurisprudence of the ICTY and ICTR. Both of them have significantly advanced the crime of rape by enabling it to be prosecuted as genocide, a war crime, and a crime against humanity. They also have had to develop their own definitions of rape, since there was no internationally agreed definition.[22]

After WW II, Dictator Josip Tito united the republics of Serbia, Croatia, Slovenia, Bosnia-Herzegovina, Macedonia, and Montenegro to create the nation of Yugoslavia. Ethnic tension immediately began building in the newly unified nation and intensified in 1980 with Tito's death and the fall of the Soviet Union. In the late 1980s and early 1990s, Croatia, Slovenia, and Bosnia declared independence and Bosnian Serbs initiated a policy of ethnic cleansing to rid the nation of Croats and Muslims.[23] Non-Serbs were subjected to internment, torture, forced sterilization, forced pregnancy, rape, and many other forms of violence. Sexual violence against women was not just a byproduct of this conflict; it was used as a deliberate and official tool of war, an instrument of war intent on destroying the cultural fabric of a targeted group.[24]

On 22 February 1993, the SC decided upon the establishment of a Tribunal mandated to prosecute "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991". The draft proposed by the

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[18] ERB, "Gender-based Crimes Under the Draft Statute for the Permanent International Criminal Court", *supra nota* 16, p. 410.

[19] PILCH, "The Crime of Rape in International Humanitarian Law", *supra nota* 11, p. 104; Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law", *supra nota* 8, p. 301.

[20] Charter of the International Military Tribunal for the Far East, 19.1.1946, in force 19.1.1946, TIAS No. 1589.

[21] ERB, "Gender-based Crimes Under the Draft Statute for the Permanent International Criminal Court", *supra nota* 16, p. 410.

[22] PILCH, "The Crime of Rape in International Humanitarian Law", *supra nota* 11, p. 107.

[23] Simon CHESTERMAN, *Just war or just peace?* (Oxford University Press, 2001), pp. 144–147.

[24] Lindsay PETERSON, "Shared dilemmas: justice for rape victims under international law and protection for rape victims seeking asylum", 31 *Hastings International and Comparative Law Review* (2008) 509–529, p. 512.

Secretary-General was adopted without modification by the SC in its Resolution 827 of May 1993.[25]

Rwanda is one of the world's poorest countries, and one of the most densely populated. Two major ethnic groups, the Hutu and the Tutsi, lived together in relative peace until ethnic tensions erupted in April 1994. Between April and June approximately one million Rwandan men, women, and children were murdered as part of a systematic plan to rid Rwanda of the Tutsi minority. In addition, the perpetrators of the Rwandan genocide used rape as a weapon of terror and degradation.[26]

On November 8, 1994, acting on a request from Rwanda, the SC voted to create a second *ad hoc* Tribunal, charged with the prosecution of genocide and other serious violations of international humanitarian law committed in Rwanda and in neighboring countries during the year 1994. The tribunal is situated in Arusha, Tanzania and is created to render justice, aid reconciliation, and establish the historical truth of what happened.[27] Its Statute closely resembles that of the ICTY, although the war crimes provisions reflect the fact that the Rwandan genocide took place within the context of a purely internal armed conflict.

The Yugoslav and Rwanda Tribunals are in effect joined at the hip, sharing not only virtually identical Statutes but also some of their institutions. The Prosecution is the same for both Tribunals, as is the Appeals Chamber.[28]

Jurisdiction

The ICTY was established to prosecute persons responsible for serious violations of international humanitarian law, committed in the territory of the former Yugoslavia since 1991. The Tribunals jurisdiction extends to grave breaches of the Geneva Conventions (Art. 2); violations of laws and customs of war (Art. 3); genocide (Art. 4), and crimes against humanity (Art. 5).

Much like the ICTY, the ICTR's subject matter jurisdiction is limited to the prosecution of genocide (Art. 2); crimes against humanity (Art. 3), and violations of Article 3 of the Geneva Conventions and AP II. The ICTR's jurisdiction is further limited to crimes committed by Rwandans or non-Rwandans within Rwanda, or by Rwandans in neighboring countries; and temporarily to crimes committed between 1.1.1994 and 31.12.1994.[29]

Genocide is defined identically in the two instruments, but war crimes and crimes against humanity differ. Articles 2 and 3 of the ICTY Statute contain the war crime provisions, and grant the Tribunal jurisdiction over grave breaches of the 1949 GCs and serious violations of the laws or customs of war. Article 4 of the ICTR Statute contains the war crime provisions and grants the Rwanda Tribunal jurisdiction over serious violations of 1977 Additional Protocol II and Common Article 3 of the 1949 GCs. In crimes against humanity the crimes listed are identical, but the headings of the articles differ. Namely the ICTY has the power to prosecute persons responsible for crimes against humanity when

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[25] William A. SHABAS, An *Introduction to the International Criminal Court* (Cambridge University Press, 2001), p. 11.

[26] Bruce D. JONES, "Civil War, the Peace Process, and Genocide in Rwanda" — Taisier M. Ali & Robert O. Matthews (eds), *Civil Wars in Africa: Roots and resolution* (McGill-Queen's University Press, 1999) 53–86, pp. 76–77; Stephanie N. Sackellares, "From Bosnia to Sudan: Sexual Violence in Modern Armed Conflict", 20 *Wisconsin Journal of Law, Gender & Society* (2005) 137–166, p. 147.

[27] Lindsay PETERSON, "Shared dilemmas: justice for rape victims under international law and protection for rape victims seeking asylum", 31 *Hastings International and Comparative Law Review* (2008) 509–529, p. 515; Stephanie K. WOOD, "A Woman Scorned for the 'Least Condemned' War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda", 13 *Columbia Journal of Gender and Law* (2004) 274–327, p. 290.

[28] SHABAS, An *Introduction to the International Criminal Court, supra nota* 25, p. 12.

[29] PETERSON, "Shared dilemmas", *supra nota* 27, p. 515.

committed "in armed conflict, whether international or internal in character, and directed against any civilian population". Whereas the ICTR has omitted the requirement of armed conflict altogether and has the power to prosecute persons responsible for crimes against humanity when committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds".

The failure of the Geneva Conventions to make rape an explicit grave breach and the absence of rape as an enumerated crime against humanity in the Nuremberg Principles is disputed in the ICTY Statute's rape provision. Furthermore it is argued that this was not seen as an act of legislation, but recognition of its customary law status.[30] Nevertheless the incorporation of rape as a crime against humanity in Article 5(g) is the solitary explicit provision for sexual assault crimes in the ICTY Statute. Rape is not explicitly alleged under Article 2, because the article is a verbatim rendition of the enumerated grave breaches of the Geneva Conventions. Same goes to the genocide provision in ICTY Statute.[31]

The Security Council extended the explicit sex-based crimes under the ICTR jurisdiction, however. Its Article 4(e) lists rape, enforced prostitution and any form of indecent assault as outrages upon personal dignity covered by violations of Common Article 3. By excluding the term "armed conflict" as a prerequisite of its jurisdiction the sexual violence provisions can be applied also in case of internal disturbances and maybe even during peacetime.

The UN Secretary General has mandated that, in conformity with the principle *nullum crimen sine lege* the ICTY apply only those rules on international humanitarian law which are "beyond any doubt part of customary law" (1907 Hague, Nuremberg Principles, 1948 Genocide Convention, 1949 Geneva Conventions). Under the Statute, for example, rape is not explicitly enumerated as either a violation of the laws or customs of war or as a form or evidence of genocide.[32] So if rape would be prosecuted under article 2 or 3 of the Statute it would seem to violate the legality principle whereby an act must be explicitly stated as a crime under a Statute. But the case law of both Tribunals concludes that prosecutions based on sexual assault conduct are not restricted to the article 5(g) rape provision of the ICTY Statute, but are available under each article of the Statute.[33] Sexual assault conduct therefore converts into the *actus reus* for named crimes within the ICTY Statute. The prosecutor must then show that although the crime of rape is not explicitly included in the list of enumerated offenses under these articles, it is implicitly included because it satisfies the elemental requirements of one of those offenses.[34] Practice indeed shows that rape and sexual violence has been prosecuted under every possible provision of the Statutes, as we shall see below. But bringing a charge of rape under Article 5 is considerably more straightforward because the crime of rape is specifically enumerated as an offense constitutive of a crime against humanity (the Prosecutor must only satisfy the elements of rape).[35]

An interesting interaction between IHL and international criminal law can be seen here. Although sexual violence has long been condemned by international jurists and it seems

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30 SELLERS, "Arriving at Rwanda: Extension of Sexual Assault Prosecution Under the Statutes of the Ad Hoc International Criminal Tribunals", *supra nota* 13, p. 607.

31 Convention on the Prevention and Punishment of the Crime of Genocide, 9.12.1948, in force 12.1.1951, 78 UNTS 277.

32 ERB, "Gender-based Crimes Under the Draft Statute for the Permanent International Criminal Court", *supra nota* 16, p. 418.

33 SELLERS, "Arriving at Rwanda: Extension of Sexual Assault Prosecution Under the Statutes of the Ad Hoc International Criminal Tribunals", *supra nota* 13, p. 608.

34 *Ibid*., Nevertheless, for purposes of proof under the ICTY statute, it is insufficient to show only that a sexual assault occurred, the prosecution's burden is to prove all elements of the crime charged.

35 ERB, "Gender-based Crimes Under the Draft Statute for the Permanent International Criminal Court", *supra nota* 16, p. 422.

only logical to punish the perpetrators of such acts, international criminal law requires that the crimes be found in some concrete written texts (or firmly established in customary law). This has not been so with the various forms of sexual violence, written law on which has always been scarce. But it seems that the Tribunals have not found this to be an obstacle, "inventing" law as they go. If this is not followed by criticism from the international community then maybe new laws to protect women in war are not needed. The question remains whether such "inventing" will be tolerated under the International Criminal Court regime. In the future, judges will have greater difficulty undertaking the kind of judicial lawmaking that the *ad hoc* Tribunals have done, and this will make it harder for justice to keep up with the imagination and inventiveness of war criminals (there are now extremely precise and complex provisions under the ICC Statute).

The clear definition or rape by the Tribunals leaves the question open whether other crimes with a sexual nature are covered by the Statutes. The Tribunals indeed have substantially advanced the prosecution of sexual violence, by finding that sexual assault falls within the scope of other crimes punishable under international humanitarian law just like rape. As both rape and less grave forms of serious sexual assault are criminalized in IHL, the Trial Chamber in Furundžija held that the distinction between them is "one that is primarily material for the purposes of sentencing".[36] After the work of the Tribunals the ICC could more easily establish an agreed upon definition within its Statute.

All has not been that joyful in the Tribunals though. First of all charges for sexual violence often arose in the course of hearings and trials, a point at which investigation and evidentiary requirements often were difficult to meet. After that it took a lot of convincing from women's rights activists for the Tribunals to amend the charges. This is not what Justice is supposed to be. Despite of its significance, the overall prosecution rate for crimes of sexual violence at the ICTR and ICTY has been low. After the new interpretation of rape as a form of genocide and crime against humanity, the hope was that the prosecutor would be charging sexual violence in the broadest possible manner, but this proved to be a false expectation.[37]

In addition Article 5 of the ICTY Statute, which gives the Tribunal the power to prosecute persons responsible for, *inter alia*, rape "directed against the civilian population", is the only explicit reference to rape in the Statute. This approach obscures the fact that non-systematic and non-mass rapes should also be treated as grave breaches.[38] To this day it is obscure whether rape as a crime standing alone, can be prosecuted at the international level.

International Criminal Court

At its 1995 session, the General Assembly decided to convene a "Preparatory Committee", inviting participants from Member-States, NGOs, and international organizations. The PrepCom held six sessions between March 1996 and April 1998 to prepare the draft consolidated text of the convention.[39] Finally it submitted a draft text to the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court which convened on 15th of June 1998 in Rome.[40] The Statute of the International

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[36] Leo Van del HOLE, "A Case Study of Rape and Sexual Assault in the Judgments of the International Criminal Tribunal for Rwanda (Akayesu and Musema) and the International Criminal Tribunal for the Former Yugoslavia (Celébici, Furundžija, Kunarac, Todorovic, Sikirica and Kvočka)", 1 *Eyes on the ICC* (2004) 54–70, p. 61.

[37] BALTHAZAR, *"Gender crimes*", supra nota 10, p. 47.

[38] Judith GARDAM, "Women and the Law of Armed Conflict: Why the Silence?", 46 "*The International and Comparative Law Quarterly"* (1997) 55–80, p. 76.

[39] Erb, "Gender-based Crimes Under the Draft Statute for the Permanent International Criminal Court", *supra nota* 16, pp. 402, 426.

[40] SHABAS, An *Introduction to the International Criminal Court, supra nota* 25, pp. 17–18.

Criminal Court was adopted (virtually after decades of discussion) on 17th of July 1998 and entered into force on 1st of July 2002,[41] the Court is situated in the Hague.

In accordance with normal practice the Court is bound to observe the principle *non bis in idem*, the non-retroactivity of its jurisdiction which does not apply to offences committed before it comes into existence.[42] The Court is also complementary to national tribunals and so does not possess jurisdiction if a national tribunal has already been or is likely to become seized of the case, unless the tribunal in question is unable or unwilling genuinely to prosecute.[43]

The establishment of a permanent international criminal court certainly marks the beginning of a new era in international law. It can be argued that every step in the history of international criminal law and IHL has paved the way to this ultimate goal. The ICC Statute codifies much of what was first articulated in the ICTY and the ICTR, but not enumerated as a crime on their respective Statutes. In current context for example although the Tribunals have convicted persons for behavior amounting to sexual slavery and sexual violence, neither of the two crimes are codified in the Statutes. The ICC criminalizes both.

The ICC has jurisdiction only over enumerated crimes — crimes against humanity, war crimes, genocide and crimes of aggression. The crimes over which the International Criminal Court has jurisdiction are "international" because their heinous nature elevates them to a level where they are of "concern" to the international community. All four crimes within the jurisdiction of the Court were prosecuted, at least in an earlier form, by the Nuremberg Tribunal and the other post-war courts. At Nuremberg, they were called crimes against peace, war crimes and crimes against humanity. Crimes against peace in now replaced by "aggression" — at least the terms largely overlap.[44]

Jurisdiction can be obtained in three ways: (1) the state party may refer the situation itself to the Prosecutor; (2) the UN Security council may refer a situation to the ICC; (3) the Prosecution may initiate an investigation if crimes under ICC jurisdiction are suspected. After acquiring jurisdiction through complementarity, the Prosecutor has discretion to undertake a thorough investigation to determine under which articles of the Rome Statute to bring charges. Article 54(1)(b) of the Statute also requires the Prosecutor to "[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court…and take into account the nature of the crime, in particular where it involves sexual violence, gendered violence or violence against children". This last point has to be applauded for being quite progressive in light of women's rights.

In customary law, a major distinction between war crimes and other two categories, crimes against humanity and genocide, is that the latter two have jurisdictional thresholds while the former does not. Crimes against humanity must be "widespread" or "systematic", and genocide requires very high level of specific intent. War crimes, on the other hand, can in principle cover even isolated acts committed by individual soldiers acting without direction or guidance from higher up. As with crimes against humanity, the "laws and customs of war" provision significantly develops the area of sexual offences. The text of the ICC Statute in this regard is essentially new law.[45]

Sexual violence

The Rome Statute has finally recognized crimes based on gender and sexual violence explicitly as crimes against humanity and war crimes. Because the burden of proof is lower

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41 Rome Statute of the International Criminal Court, 17.7.1998, in force 1.7.2002, 2187 UNTS 90.
42 Green, *The Contemporary Law of Armed Conflict*, *supra nota* 5, pp. 314–315.
43 *Ibid*., p. 14.
44 SHABAS, An *Introduction to the International Criminal Court*, *supra nota* 25, p. 22.
45 SHABAS, An *Introduction to the International Criminal Court*, *supra nota* 25, p. 49.

for war crimes, this inclusion will allow prosecutors greater latitude in charging individuals with rape.[46]

Unlike the ICTY and ICTR, which had to synthesize a definition of rape by examining the crime in the legal systems of the rest of the world, the elements of rape are now codified by the ICC. While rape is not specifically defined in the ICC Statute, the elements of rape are included in the Elements of Crimes, which is intended to serve as a guideline for ICC judges.[47] These "unwavering" elements of rape are slightly different for crimes against humanity and war crimes. The ICC legal definition of rape most closely resembles the language used by the ICTY in the Furundžija case.

In comparison to the ICTY and ICTR Statutes, the expanded coverage of the ICC Statute for crimes against women is significant. In addition to the crime of rape, the ICC Statute now clearly codifies several other crimes against women, including sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and persecution based on gender.[48] As for forced pregnancy, the Rome Statute is the first to define this crime, but after much debate it could only be included with a disclaimer so that the international law would not take precedence over state abortion or anti-abortion laws.[49]

Where the Statute leaves the door open for some evolution is in the final paragraph of the list of crimes against humanity, dealing with "other inhumane acts". In the Akayesu decision, the *ad hoc* Tribunal for Rwanda used other inhumane acts to encompass such behavior as forced nakedness of Tutsi women. But, under the Rome Statute, the concept of other inhumane acts is actually narrowed by adding the words "of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". It is questionable whether other "minor" acts of sexual indignity condemned earlier would now fit within the restrictive language of the Rome Statute. Do the new detailed provisions then really offer women better protection than the large terms of GC IV 27?[50]

The Way Forward – conclusion

Some authors and more notably women's rights activists express doubt as to whether the Tribunals and the Court are that effective at all. The prosecution of gender-based crimes requires a meaningful, long-term political commitment involving substantial resources and extensive efforts in many related fields. It seems now that the Tribunals are solely about punishment not about providing compensation and support to those who have suffered.

The ICTR and ICTY Statutes were also set up without any mechanism of compensation; therefore victims of sexual violence are usually not compensated. From an earlier time such extreme reluctance to deal with the impact of armed conflict on women is exemplified in the case of the so-called "comfort women" in Japan.[51]

Another grave concern of some authors is that rape should stand as an international crime on its own — not as a subsection of another crime (it cannot be prosecuted in and of

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46 Mark ELLIS, "Breaking the silence: rape as an international crime", 38 *Case Western Reserve Journal of International Law* (2006–2007) 225–247, p. 239.

47 Elements of Crimes of the International Criminal Court, 9.9.2002, UN Doc. PCNICC/2000/1/Add.2 (2000).

48 Article 7(1)(h) Persecution 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.

49 SACKELLARES, "From Bosnia to Sudan: Sexual Violence in Modern Armed Conflict", *supra nota* 26, p. 155.

50 SHABAS, An *Introduction to the International Criminal Court, supra nota* 25, p. 43.

51 Yumi LEE, "Violence Against Women: Reflections on the Past and Strategies for the Future — An NGO Perspective", 19 *Adelaide Law Review* 45–58, p. 54.

itself). Past cases suggest that rape is regarded as significant only when it is part of widespread atrocities. The failure to define rape as a separate crime permits serious violence to be viewed as a "lesser" crime.[52] Linking rape with genocide in international jurisprudence may hurt rather than help the cause of denying impunity to perpetrators of rape, because genocide has a very high threshold in international criminal law. While this is certainly a truthful point, the opposite could be argued. Maybe it is more effective when sexual violence is included in some "serious" crime? Including it as part of crimes against humanity, genocide or war crimes, undoubtedly draws attention to the heinous nature of the crime. Feminist writers nevertheless strongly argue that "cases of wartime sexual assaults should legitimately be the focus of prosecutions whether they are associated with other violations or not".

The previous discussion has shown that international criminal adjudication has followed a logical path and has arrived to the ICC. A vast variety of crimes have been codified and punished with great severity. Public opinion and case law have widely contributed to such development. Sexual violence was not expressly prohibited at times of Nuremberg, but is now quite well established in the Statute of the ICC. This is so with many other crimes. Nevertheless war as such is always one step ahead of law and today's rules might not be sufficient tomorrow. Luckily we found out that in international criminal law *ex post facto* criminalization is allowed in cases with sufficient gravity.

References

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8.8.1945, in force 8.8.1945, 82 UNTS 279.

Article 7(1)(h) Persecution 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.

Article II(1)(c) provides: Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20.12.1945, 3 Official Gazette Control Council for Germany 50–55 (1946);

ASKIN Kelly D., "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles", 21 *Berkeley Journal of International Law* (2003) 288–349, pp. 301–302. See the Nuremberg Trials Project: <nuremberg.law.harvard.edu/php/docs_swi.php?DI=1&text=overview> (16.04.2009).

AUGUSTÍN, P. 2008. Boj proti korupcii. In MEPA ZEITUNG, 2008, Nr. 3, s. 26-31. Wien : Druckerei des Bundesministeriums für Inneres, ISSN 1609-2449.

Sita BALTHAZAR, *"Gender crimes and the International Criminal Tribunals"* 10 *Gonzaga Journal of International Law* (2006–2007) 43–48, p. 44.

Charter of the International Military Tribunal for the Far East, 19.1.1946, in force 19.1.1946, TIAS No. 1589.

Simon CHESTERMAN, *Just war or just peace?* (Oxford University Press, 2001), pp. 144–147.

Convention on the Prevention and Punishment of the Crime of Genocide, 9.12.1948, in force 12.1.1951, 78 UNTS 277.

[52] ELLIS, "Breaking the silence: rape as an international crime", *supra nota* 46, 246.

Elements of Crimes of the International Criminal Court, 9.9.2002, UN Doc. PCNICC/2000/1/Add.2 (2000).

Mark ELLIS, "Breaking the silence: rape as an international crime", 38 *Case Western Reserve Journal of International Law* (2006–2007) 225–247, p. 239.

Nicole Eva ERB, "Gender-based Crimes Under the Draft Statute for the Permanent International Criminal Court", 29 *Columbia Human Rights Law Review* (1997–1998) 401–436, p. 409.

Judith GARDAM, "Women and the Law of Armed Conflict: Why the Silence?", 46 "*The International and Comparative Law Quarterly"* (1997) 55–80, p. 76.

Leslie C. GREEN *The Contemporary Law of Armed Conflict* (2nd edn, Manchester University Press, 2000), p. 291.

Leo Van del HOLE, "A Case Study of Rape and Sexual Assault in the Judgments of the International Criminal Tribunal for Rwanda (Akayesu and Musema) and the International Criminal Tribunal for the Former Yugoslavia (Celébici, Furundžija, Kunarac, Todorovic, Sikirica and Kvočka)", 1 *Eyes on the ICC* (2004) 54–70, p. 61.

Bruce D. JONES, "Civil War, the Peace Process, and Genocide in Rwanda" — Taisier M. Ali & Robert O. Matthews (eds), *Civil Wars in Africa: Roots and resolution* (McGill-Queen's University Press, 1999) 53–86, pp. 76–77; Stephanie N. Sackellares, "From Bosnia to Sudan: Sexual Violence in Modern Armed Conflict", 20 *Wisconsin Journal of Law, Gender & Society* (2005) 137–166, p. 147.

Yumi LEE, "Violence Against Women: Reflections on the Past and Strategies for the Future — An NGO Perspective", 19 *Adelaide Law Review* 45–58, p. 54.

Michael R. MARRUS, *The Nuremberg War Crimes Trial 1945–46: A Documentary History* (Boston/New York: Bedford Books, 1997), pp. 1–2.

Lindsay PETERSON, "Shared dilemmas: justice for rape victims under international law and protection for rape victims seeking asylum", 31 *Hastings International and Comparative Law Review* (2008) 509–529, p. 512.

Frances T. PILCH "The Crime of Rape in International Humanitarian Law", 9 *United States Air Force Academy Journal of Legal Studies* (1998–1999) 99–120, p. 104.

Rome Statute of the International Criminal Court, 17.7.1998, in force 1.7.2002, 2187 UNTS 90.

SACKELLARES, "From Bosnia to Sudan: Sexual Violence in Modern Armed Conflict", *supra nota* 26, p. 155.

Susana SACOUTO, "Advances and missed opportunities in the international prosecution of gender-based crimes", 15 *Michigan State Journal of International Law* (2007) 137–156, p. 137.

Patricia Viseur SELLERS, "Arriving at Rwanda: Extension of Sexual Assault Prosecution Under the Statutes of the Ad Hoc International Criminal Tribunals", 90 *American Society of International Law: Proceedings* (1996) 605–610, p. 606.

Patricia Viseur SELLERS, "Arriving at Rwanda", *supra nota* 13, p. 606; Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 29.7.1950, UN Doc. A/1316 (1950).

William A. SHABAS, An *Introduction to the International Criminal Court* (Cambridge University Press, 2001), p. 7.

Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10. Nuremberg, October 1946 – April 1949. Washington DC: US GPO, 1949–1953.

Stephanie K. WOOD, "A Woman Scorned for the 'Least Condemned' War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda", 13 *Columbia Journal of Gender and Law* (2004) 274–327, p. 290.

Kľúčové slová: Sexuálne násilie, Norimberský a Tokijský tribunál, Medzinárodný trestný tribunál pre bývalú Juhosláviu, Medzinárodný trestný tribunál pre Rwandu, Medzinárodný trestný súd, jurisdikcia, vojnové zločiny, medzinárodné trestné právo

Resumé

Tento príspevok analyzuje vznik a efektívnosť medzinárodných vojenských tribunálov. Pre jasnejšie priblíženie podobností a rozdielov medzi týmito súdmi, je zameraný na konkrétnu trestnú činnosť - sexuálne násilie. Zločiny sexuálneho charakteru neboli považované za trestný čin pred Norimberským a Tokijským konaním. Dnes, v rámci Medzinárodného trestného súdneho režimu, jestvuje komplexný systém kriminalizácie tohto druhu trestných činov. Medzinárodný trestný tribunál pre Rwandu a Medzinárodný trestný tribunál pre bývalú Juhosláviu sa tiež zaraďujú početnými diskusiami o sexuálnom násilí, ktorých výsledkom bolo stanovenie definícií pre rôzne druhy sexuálneho násilia. Medzinárodné vojenské tribunály majú za sebou dlhú cestu od *ad hoc* adjudikácie až po založenie medzinárodného trestného súdu, práve tak ako stanovenie definície sexuálneho násilia.

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