

SEXUAL VIOLENCE
AS AN INTERNATIONAL CRIME:
INTERDISCIPLINARY APPROACHES

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The Editors
June 2012

FOREWORD

Patricia VISEUR SELLERS

“The act of rape, ... had a terrible effect on them. They could, perhaps, explain it to themselves when somebody steals from them, or even beatings or even some killings. When rapes started, everybody lost hope, everybody in the camp, men and women. There was such fear, horrible”
Mr. Gutic, inmate at Omarska Detention Center

Prosecutor v. Dusko Tadic, IT-94-I-T, 7 May 1997

International judicial institutions have shepherded in a “coming of age” of sexual violence prosecutions under international criminal law and humanitarian law. The task is promising yet tenuous: It requires vision and vigilance. The chapters in this book deliver both prerequisites by their articulation of tools to fortify enforcement of international criminal law’s safeguards against sexual violence.

Enforcement is complex and entails more than well intended drafting of express legal provisions into a statute or convention. Edicts banning wartime sexual assaults were inserted into ancient warrior codes. International conventions, such as the 1929 Geneva Convention prohibited infliction of sexual assaults upon female and male prisoners of war. In the immediate aftermath of the World War II, martial law decrees such as Control Council No. 10 explicitly proscribed rapes as acts of crimes against humanity. Indeed, the Nuremberg and Tokyo international military tribunals investigated, prosecuted and handed down convictions for war crimes based upon sexual violence. Still, these precedents heralded no manifest undertaking of sexual violence prosecutions as international crimes in national courts and, along with other illicit conduct endured the dearth of adjudications at the international level. Derelict attention, unapologetic impunity and ignored or misconstrued jurisprudence openly paraded the inability to enforce prohibitions of sexual violence under international law.

During the past two decades, in a welcomed realignment of intent, the international community directed concerted scrutiny at the pervasiveness of impunity for war crimes, crimes against humanity and genocide. International and internationalized judicial institutions emerged to respond to the calls for enforcement and to conduct the tripartite process of investigations, prosecution and adjudications of international crimes. Whether generated by Chapter VII of

the United Nations Charter, by a United Nations agreement or by the multilateral consensus of a treaty, the responsibility of most of these judicial institutions was to redress the heretofore pithy enforcement of wartime prohibitions and acts of crimes against humanity or genocide related to specific geographical and time bound situations, with the exception of the International Criminal Court that will exercise prospective jurisdiction. Their constitutive instruments, namely the Rome Statute, the Statutes of the Yugoslav Tribunal, the Rwandan Tribunal, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, each mandated the diligent pursuit of criminal conduct, including sexual violence that could be susceptible to characterization as genocide, war crimes, or crimes against humanity. Accordingly, sexual violence investigations, prosecutions and adjudications cloaked in the mantel of these internationally endorsed institutions are integral to the litmus test of enforcement.

Redress, *cum*, enforcement of sexual violence, and other gender-based conduct actionable under international crimes merit an analysis, to discern, if you will, the “*supra*-national enforcement” obligations and to detect a gendered approach to such obligations. Enforcement of sexual violence proscriptions interacts with the dual nature of the international crimes – meaning the crimes’ status amid international laws and its internal doctrinal nature. War crimes, crimes against humanity and genocide, as international offences are accepted peremptory norms. They prescribe human created scourges that are recognized as *erga omnes*, of concerned to all. The judicial pursuit of peremptory norms violators gives voice to the international community’s highest values. As a consequence of their peremptory norm status, genocide, crimes against humanity and war crimes bind States to fulfill procedures that are non-derogatory duties, or *obligatio erga omnes*. Every State must exercise jurisdiction to investigate, to prosecute and to adjudicate alleged perpetrators of war crimes, genocide or crimes against humanity. In the alternative, a State unable to perform its duties is bound to extradite alleged perpetrators to a State who shall perform these obligations. Acts characterized as genocide, crimes against humanity or war crimes must be pursued at all times, irrespective of the factual basis of an act, be it a massacre or rape. The non-derogatory duties activate an interdependent enforcement mechanism among States. Each State’s execution of their obligations ensures redress of the harm to the international community, or otherwise stated, redress of the international crime.

Significantly, modern international and internationalized judicial institutions are recipients of a mandated “transfer” of States’ peremptory norm obligations. The governing statutes of today’s international judicial institutions expressly include war crimes, crimes against humanity and/or genocide. These international judicial institutions act on behalf of states and the international community through the exercise of jurisdiction under the respective governing statutes, whether jurisdiction is complimentary, concurrent or *via* primacy to

national courts. As such, these judicial institutions execute similar non-derogatory duties – namely investigation, prosecution and adjudication of peremptory norm recognized crimes. The synchronized functions of the peremptory norm status and of the non-derogatory duties erect a type of “supranational-enforcement,” that underpins the redress mechanism that has been transferred to international judicial institutions.

Examination of the internal doctrinal nature of crimes designated as peremptory norms surfaces and confirms the compulsory responsibility to redress sexual violence, and other gender based violence. The crime of genocide is illustrative. To thoroughly comply with the “supranational enforcement” triggered by the peremptory norm status of genocide acts committed against an ethnic, racial, national or religious group demands a gendered analysis of the group and an understanding of the genocidal conduct perpetrated upon group members, such as sexual violence. The legal rationale of the Genocide Convention forthrightly encompassed gender-based violence. Article 2(b) recalls the egregious Nazi torture regime replete with the sexual and reproductive experiments conducted upon males and females, while the Article 2(d) outlaws the imposing of measures to prevent births, as a direct consequence of the Nuremberg laws that controlled the sexual reproduction of non-Aryans. Factually, the Rwandan genocide was comprised of killings and rapes, and the alleged genocide in Darfur is replete with a mixture of sexual violence, massacres and debilitating conditions. Thus, historically, the internal doctrinal nature of the genocide, legally and factually contemplated sexualized violence within the context of genocide.

Possibly, future manifestations of genocide might entail rapes against females and male genital mutilations intertwined with acts of direct, public incitement in the form of sexual propaganda against the group. Such acts might be judged to be inextricable from the massacres of both sexes. Each act that potentially qualifies as a manifestation of genocide, compels the non-derogatory duties to ensure its prevention, suppression or its punishment by investigation, prosecution and adjudication. Moreover, activation of the non-derogatory duties to investigate, prosecute and adjudicate genocide do not countenance restrictions based upon gender identity or age. The only qualification for protection is that survivors and victims of the inflicted acts of genocide are members of the targeted group.

Females are not *per se* a separate protected genocide group, however, neither, are males. Genocides that solely target gender identity are not recognized under international law. Notwithstanding, comprehension of the gender composition of a targeted group and acute analysis of the gender-based violence contained in the genocide is necessary to inform and drive the non-derogatory obligations that are executed by way of investigations, prosecution and adjudication.

Crimes against humanity, also compels an invocation of the attendant transfer of “*supra-enforcement*” at the aforementioned international judicial institutions. Internally, crimes against humanity has readily lent itself to prosecutions of sexual violence. The accepted jurisprudence of the Yugoslav and Rwandan Tribunals, the Special Court for Sierra Leone and Extraordinary Chambers in the Courts of Cambodia consistently, have ruled that females as well as males are potential victim/survivors of any of the provisions of crimes against humanity. The criminal conduct is often inflicted in an obviously gendered manner. For example, the males and females were routinely imprisoned and deported separately in the former Yugoslavia. Girl soldiers captured by rebel groups in Sierra Leone, unlike the boy soldiers, were invariably raped and frequently assigned to men as their slaves within the pretext of “marriage”. Unhesitant findings of fact within the crimes against humanity prosecutions have held rapes to satisfy both underlying acts as well as evidence of an attack against the civilian population. Keen judicial observations has also ruled that sexual violence could fulfill the factual basis of other, non-sexually explicit provisions of crimes against humanity, such as enslavement, torture, inhumane acts and persecution. The Rome Statute of the International Criminal Court expanded the sexually explicit provisions of the crimes against humanity and included gender in the basis of persecution – a positive development for broadening enforcement. Jurisprudence on these, and other non-sexually explicit provisions is eagerly awaited.

The rationale for crimes against humanity, to protect the civilian population from attacks, again demands a gendered analysis of civilians as the targeted group. Statistically females constitute a majority of the population, and logically, comprise the majority of the civilian or non-militarized population destined to be shielded from crimes against humanity. Non-militarized males, including boys are also within the protected group. Enforcement proscriptions of crimes against humanity, thus, must be vigilant about the manner by which females and males are attacked as civilians. Enforcement measures must be cognate of the breadth of incidents and their toll on victim/survivors according to gender. If an attack against the civilian population is examined by its systematic nature, policies that impact female civilians could reveal the gendered contours of the attack. Absence of a gender analysis of the civilian population and of the design of the attack risks dilution of the outcome of investigation and the factual findings and legal conclusions in the judicial examination.

War crimes, in particular, the grave breaches of the Geneva Conventions trigger “*supra-enforcement*” for all States. International judicial institutions in receipt of the mandated transfer of the non-derogatory duties have rendered substantial jurisprudence on prohibitions concerning war crimes perpetrated in international and non-international armed conflict. While the peremptory norm status of humanitarian law aims at ensuring enforcement of the prohibitions, the

internal, pre-breach functioning of humanitarian law demands special protection for women, children, the aged, those most vulnerable, *and* assurances of non-adverse distinction to secure humane treatment of the group. Prohibited conduct that might be characterized as war crimes, is not circumscribed by the sexual nature of the act. To the contrary jurisprudence confirms several, non-sexually explicit war crimes, such as torture, to be satisfied by sexually violent conduct that, readily traverses precepts of humane treatment. Likewise, gender-based violence would seemingly contravene the safeguard erected by disallowance of any adverse distinction that would impede humane treatment.

Among humanitarian law's overriding objective is protection of certain groups – civilians, prisoners of war, the wounded on land, the shipwrecked and persons *hors de combat* from exposure to inhumane treatment. Similar to the gender analysis of genocidal groups or the civilian population within crimes against humanity, females, undoubtedly, can comprise part of each protected groups. Protection from war crimes is determined solely by membership in the protected groups. Protection is comprehensive and exist irrespective of the gender, age, ethnicity or any other qualification of the protected person, as long as membership in the group is established. Similar to genocide and crimes against humanity, enforcement of war crimes compels investigation, prosecution and adjudication of alleged war crimes.

An overdue coming of age of sexual violence prosecution is materializing at the international judicial institutions. To be sustained and strengthened, compliance with non-derogatory obligations must be buttressed by the judicial institutions' consistent resort to apt methodologies of enforcement. To paraphrase from the human rights cannon, enforcement is reliant upon interdependent and indivisible pursuit of investigation, prosecutions and the adjudication of sexual violence. The authors in the present volume offer such adept methodologies regarding approaches to the investigation of sexual violence. Prosecutions are dependent upon rigorous investigation.

The chapters demonstrate how criminal investigators when partnered with forensic and social scientists, or other professionals are primed to develop pointed techniques that distill patterns of gender-based acts against males and females and that discard distracting stereotypes that serve only to abet the propagation of impunity. Social science studies can expose the synchronicity of events, such as hate speech, genocidal propaganda or other contemporaneous inhumane acts, with the occurrence of sexual violence, whether in displacement camps or in villages. Refinement of analytical tools is crucial to identifying the segments of group afflicted sexually and to revealing the myriad forms of sexual violence used by perpetrators. Furthermore, the development of productive relations with civil society groups and members who provide expertise, to indicate witness leads or to furnish other essential services can be paramount to securing sexual violence testimony. These intricate collaborative efforts increase

an investigation's potential outcome while heightening the competence of investigators to uncover, inspect, collect, process and safeguard evidence of sexual violence. Such alliances assist investigators and other court personnel in their dealings with survivors and in the preservation of their own personal and professional persona.

Adjudications, in turn, depend upon skillful prosecutions, vigorous defenses and, more recently at the International Criminal Court, the conscientious representation of victims. Prosecutors, defense attorneys and victims' representatives need to submit relevant and pertinent evidence and to advancement persuasive legal arguments at proceedings concerning sexual violence. Judges need to ensure unfailingly fair trials and appeals. Several authors' contribution in the present volume acknowledge the challenges of litigating sexual violence at international judicial institutions. There are many instances of *de novo* legal situations wherein judges must craft decisions that resonate with customary law, emerging doctrine and the spirit of redress. Interpretation of substantive provisions of international crimes that are peremptory norms and their accompanying requirements of proof, such as the individual liability, especially of political and military leaders, as well as defenses and procedural issues is a solemn responsibility. The bench needs to deliver well-reasoned decisions that soberly examine the facts and the law that substantiate ultimate acquittals or conviction of alleged perpetrators of sexual violence. The judicial pronouncement and the release or imprisonment of the accused is the *sine qua non* of *supra*-national enforcement and completes the institution's non-derogatory duties to enforce the peremptory norm based international crimes.

The task to fortify enforcement of international crimes, and in particularly sexual violence prosecutions, is being honed at today's international and internationalized judicial institutions. These institutions have earnestly commenced a retreat from impunity and the march toward redress. Nonetheless, this goal must be shouldered broadly by State and members of the international community. This book – *Sexual Violence as an International Crime: Interdisciplinary Approaches* – represents a determined step.

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CONCLUDING REMARKS

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ABBREVIATIONS

ADS	Atrocities Documentation Survey
BIH	Bosnian War Crimes Court
BWCC	Bosnian War Crimes Chamber
CAR	Central African Republic
CDR	Coalition for the Defence of the Republic
CIOMS	Council for International Organizations of Medical Sciences
CPK	Communist Party
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
EMD	El Mujahed Detachment
ETO	École Technique Officielle (Official Technical School)
FARDC	Forces Armées de la République Démocratique du Congo
FDLR	Forces démocratiques de libération du Rwanda
FNI	Front des Nationalistes et Intégrationnistes
FPLC	Forces Patriotiques pour la libération du Congo
FRPI	Force de Résistance Patriotique en Ituri
FRY	Federal Republic of Yugoslavia
FWCW	Fourth World Conference on Women
GBV	Gender-Based Violence
GBVIMS	GBV Information Management System
GCU	Gender and Children Unit
GoS	Government of Sudan
HLM	Hierarchical Linear Modeling
ICC	International Criminal Court
ICPD	International Conference on Population and Development
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced Person
IHT	Iraq High Tribunal
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
INTERVICT	International Victimology Institute Tilburg
IRB	Institutional Review Board
IWHRC	International Women's Human Rights Law Clinic

JCE	Joint Criminal Enterprise
KR	Khmer Rouge
LRA	Lord's Resistance Army
MLC	Mouvement de Liberation du Congo (Movement for the Liberation of Congo)
NGO	Non-Governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Cooperation
OTP	Office of The Prosecutor
PTSD	Post Traumatic Stress Disorder
RAF	Rwandan Armed Forces
RMA	Rape-Myth Acceptance
RPF	Rwandan Patriotic Front
RTL	Radio Télévision Libre des Mille Collines
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
SGBV	Sexual Gender Based Violence
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNFPA	United Nations Population Fund
UNHCR	United Nations High Commissioner for Refugees
UPC	Union des Patriotes Congolais
UPDF	Ugandan People's Defence Force
VRS	Bosnian Serb Army
VWU	Victim and Witnesses Units
WCC	World Criminal Court
WESU	Witness and Expert Support Unit
WWII	World War II