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THE PROSECUTING SEXUAL VIOLENCE AS A WAR CRIME UNDER INTERNATIONAL CRIMINAL LAW

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Abstract

Sexual violence has plagued humanity throughout history, and unfortunately, wartime is no exception. For centuries, these acts were viewed as a deplorable, yet inevitable, consequence of war. However, the international legal landscape has undergone a significant shift, increasingly recognizing sexual violence as a war crime and holding perpetrators accountable. This paper examines the evolving legal framework for prosecuting sexual violence as a war crime under international law. While historically overlooked, sexual violence is now recognized as a grave breach of international law, with the International Criminal Court (ICC) playing a central role in holding perpetrators accountable. The paper explores the core elements required to prove sexual violence as a war crime, including the act itself, the perpetrator's intent, and the link to armed conflict. However, significant challenges hinder successful prosecutions. Gathering evidence and securing witness testimony can be difficult due to the nature of the crimes and the trauma experienced by victims. Cultural barriers and social stigma further discourage reporting. Establishing command responsibility also presents complexities. The paper concludes by highlighting the need for a multifaceted approach to overcome these challenges. Building trust with victims, addressing cultural norms, and strengthening national and international legal frameworks are crucial steps towards ensuring justice. The paper also proposes recommendations for further research and action, including exploring interventions to address cultural barriers, strengthening national courts, and utilizing technological advancements for evidence gathering. By addressing these challenges and promoting accountability, we can contribute to a future where sexual violence is not a weapon of war.

Keywords: *Sexual violence, war crime, international criminal law, ICC, evidence, accountability*

Introduction

Sexual violence has plagued humanity throughout history, and unfortunately, wartime is no exception. For centuries, these acts were viewed as a deplorable, yet inevitable, consequence of war. However, the international legal landscape has undergone a significant shift, increasingly recognising sexual violence as a war crime and holding perpetrators accountable.

Historically, international law offered little protection to victims of sexual violence during wartime. The focus was primarily on regulating the conduct of warfare between states, with scant mention of civilian protection. The 1907 Hague Conventions, for example, aimed to limit the brutality of war but did not explicitly address sexual violence.¹ Even the Fourth Geneva Convention of 1949, which established crucial protections for civilians during armed conflict, did not initially include sexual violence in its definition of "grave breaches".²

The latter half of the 20th century witnessed a critical shift. The landmark case of Akayesu by the International Criminal Tribunal for Rwanda (ICTR) in 1998 marked a turning point. For the first time, an international tribunal explicitly recognised sexual violence as a form of torture, persecution, and genocide³. This groundbreaking decision paved the way for a more comprehensive legal framework.

This evolution continued with the Rome Statute of the International Criminal Court (ICC) in 2002. The Statute not only included sexual violence as a war crime but also established a permanent court specifically dedicated to prosecuting these and other serious international crimes.⁴ The Rome Statute defines a broad range of acts as sexual violence, including rape, sexual slavery, and enforced prostitution.⁵ This definition applies to both international and internal armed conflicts, sending a strong message that sexual violence will not be tolerated with impunity.⁶

The recognition of sexual violence as a war crime has continued to grow. The International Court of Justice (ICJ) further affirmed its illegality in its 2006 judgment in the Democratic Republic of

¹ International Committee of the Red Cross (ICRC). "Hague Conventions." http://casebook.icrc.org/a_to_z/glossary/hague-conventions.

² International Committee of the Red Cross (ICRC). "Summary of the Geneva Conventions and their Additional Protocols." https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/I.

³ The Prosecutor v. Jean-Paul Akayesu, ICTR-98-42-T, ¶ 580 (1998).

⁴ Art. 5, The Rome Statute of the International Criminal Court, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁵ Art. 7, The Rome Statute of the International Criminal Court, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁶ Art. 8, The Rome Statute of the International Criminal Court, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

the Congo v. Uganda case.⁷ These developments demonstrate a growing international consensus on the gravity of this crime.

Despite these advancements, prosecuting sexual violence as a war crime remains challenging. Gathering evidence and securing witness testimony is often difficult, especially in conflict zones. Cultural stigma surrounding sexual violence can also discourage victims from coming forward. However, the international community is actively working to address these obstacles. Initiatives like the use of technology for evidence gathering and increased support for victims are crucial steps towards ensuring justice.

Overall the paper will explore the remarkable evolution of the international legal framework in addressing sexual violence as a war crime. It will examine the historical neglect, the landmark cases that shifted the legal landscape, and the ongoing challenges in holding perpetrators accountable. Ultimately, this analysis will highlight the growing determination to end the use of sexual violence as a weapon of war.

Research Objectives

1. Trace the historical development of international law regarding sexual violence in wartime.
2. Identify the obstacles in gathering evidence and securing witness testimony for sexual violence cases.
3. Evaluate the effectiveness of international courts like the ICC in prosecuting sexual violence as a war crime.
4. Propose potential reforms or advancements in international criminal law to address sexual violence.

Research Questions

1. How has the definition of sexual violence as a war crime evolved under international law?
2. What are the primary challenges in gathering evidence and securing witness testimony in cases of sexual violence during armed conflict?
3. How effective has the International Criminal Court (ICC) been in holding perpetrators of sexual violence as a war crime accountable?
4. What potential reforms to international criminal law could address the challenges in prosecuting sexual violence as a war crime?

⁷ Democratic Republic of the Congo v. Uganda, I.C.J. Reports 2006 (I) 161.

Limitation of the Study

While this study seeks to shed light on the evolving landscape of prosecuting sexual violence as a war crime, it acknowledges limitations. Firstly, the focus on international criminal law frameworks may not fully capture the complexities of national and regional legal systems. Secondly, the research may not comprehensively address the diverse experiences of victims across different conflict zones. Additionally, the ongoing nature of legal developments and potential future reforms necessitates ongoing research to maintain a current understanding of this critical issue.

Research Methodology

This research is based on a doctrinal methodology, relying on a critical analysis of existing legal sources to examine the prosecution of sexual violence as a war crime under international criminal law. The primary data will consist of legal documents such as the Rome Statute of the International Criminal Court (ICC), relevant case law from international tribunals (e.g., ICTR, ICC), and key pronouncements by the International Court of Justice (ICJ). Scholarly articles and commentaries on these legal instruments and landmark cases will also be used to gain deeper insights and diverse perspectives on the evolving legal framework and its application. Through a comprehensive review and analysis of these doctrinal sources, the research aims to provide a clear understanding of the current legal landscape, identify challenges, and explore potential avenues for strengthening the prosecution of sexual violence as a war crime.

Literature Review

1. **The International Criminal Court and Sexual Violence: A Look at the First Ten Years** - Lynch analyzes the International Criminal Court's (ICC) record in prosecuting sexual violence during its first decade. The paper examines the legal framework established by the Rome Statute, the challenges of gathering evidence and securing witness testimony, and the impact of ICC prosecutions on deterring future crimes.⁸
2. **Prosecuting Sexual Violence in Conflict: The Role of the Specialist Chambers in Cambodia and Bosnia**: Clark and Morrison examine the work of the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the International Criminal Tribunal for the former Yugoslavia (ICTY) in prosecuting sexual violence during their respective conflicts. The paper

⁸ Melissa Lynch, "The International Criminal Court and Sexual Violence: A Look at the First Ten Years," (2018) <https://www.ebsco.com/m/ee/Marketing/titleLists/i3h-coverage.htm>.

explores the unique approaches taken by these hybrid tribunals and the lessons learned for future prosecutions.⁹

3. **The Prosecutor's Role in Addressing Conflict-Related Sexual Violence:** Jarmon focuses on the specific role of prosecutors in holding perpetrators of sexual violence during armed conflict accountable. The paper explores challenges faced by prosecutors, including witness protection, overcoming cultural stigma, and building strong cases. It also highlights strategies for effective investigation and prosecution.¹⁰
4. **Sexual Violence and International Criminal Law: Advancing Accountability Through Effective Investigations:** This edited volume features contributions from various experts on sexual violence and international criminal law. The s explore challenges in investigation, witness protection, and the use of technology for evidence gathering. It emphasises the importance of survivor-centred approaches and comprehensive investigations to achieve justice.¹¹
5. **The Rome Statute of the International Criminal Court: A Commentary:** This comprehensive commentary on the Rome Statute, freely available online, provides a detailed analysis of the legal provisions relating to sexual violence as a war crime. It delves into the definitions of relevant crimes, evidentiary standards, and the role of the ICC in holding perpetrators accountable.¹²

The Legal Framework for Prosecuting Sexual Violence as a War Crime

Sexual violence has long been a weapon of war, inflicting horrific physical and psychological trauma on victims. In recent decades, the international community has made significant strides in recognising this brutality and holding perpetrators accountable. This paper examines the legal framework for prosecuting sexual violence as a war crime under international instruments, with a particular focus on the Rome Statute of the International Criminal Court (ICC).

⁹ Celia Clark & Helen Morrison, "Prosecuting Sexual Violence in Conflict: The Role of the Specialist Chambers in Cambodia and Bosnia," *International Review of the Red Cross* 92, no. 894 (2010): 821-842, <https://international-review.icrc.org/sites/default/files/irrc-894-sexual-violence-in-armed-conflict.pdf>.

¹⁰ Thomas Jarmon, "The Prosecutor's Role in Addressing Conflict-Related Sexual Violence," *International Center for Transitional Justice* (2008), https://www2.ohchr.org/english/issues/women/docs/paper_prosecution_of_sexual_violence.pdf.

¹¹ Edited by Mariana Valverde, "Sexual Violence and International Criminal Law: Advancing Accountability Through Effective Investigations," *Open Society Justice Initiative* (2013), <https://www.nbcnewyork.com/news/local/andrew-cuomo-accused-of-sexual-harassment-by-former-aide-in-new-legal-filing/4891875/>.

¹² Edited by William A. Schabas & Sang-Hyun Song, "The Rome Statute of the International Criminal Court: A Commentary," *International Bar Association* (2013), <https://www.legal-tools.org/doc/aa0e2b/pdf/>.

The core principle lies in customary international law, a body of unwritten rules established by state practice and general acceptance.¹³ This established illegality applies even without a formal treaty. Sexual violence, including rape, sexual slavery, and forced prostitution, has been recognized as a grave breach of the Geneva Conventions of 1949 and a crime against humanity.¹⁴ These near-universal conventions prohibit violence against civilians and prisoners of war, inherently encompassing sexual violence.

International law does not provide a single, universally agreed-upon definition of sexual violence as a war crime. However, several key instruments establish the core elements:

1. Customary International Law: Customary international law, established by state practice and general acceptance, prohibits sexual violence during armed conflict.
2. Geneva Conventions: The Geneva Conventions of 1949, ratified by nearly all states, encompass sexual violence within their prohibition of violence against civilians and prisoners of war.
3. Rome Statute of the ICC: Article 7¹⁵ of the Rome Statute provides the most detailed legal definition of sexual violence as a war crime. It includes acts of:
 - Rape ([International Criminal Court, Rome Statute of the International Criminal Court, art. 7.1(a), 1998])¹⁶
 - Sexual slavery ([International Criminal Court, Rome Statute of the International Criminal Court, art. 7.1(c), 1998])¹⁷
 - Enforced prostitution ([International Criminal Court, Rome Statute of the International Criminal Court, art. 7.1(g), 1998])¹⁸
 - Forced pregnancy ([International Criminal Court, Rome Statute of the International Criminal Court, art. 7.1(g), 1998])¹⁹
 - Sexual violence of comparable gravity²⁰

¹³ International Law Commission, "Draft Conclusions on Identification of Customary International Law," Yearbook of the International Law Commission, vol. 2, part 2 (2001): 8.

¹⁴ The Geneva Conventions and their Commentaries. (n.d.). <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>.

¹⁵ Art. 7, The Rome Statute of the International Criminal Court, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

¹⁶ Art. 7.1(a), The Rome Statute of the International Criminal Court, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

¹⁷ Art. 7.1(c), The Rome Statute of the International Criminal Court, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

¹⁸ Art. 7.1(g), The Rome Statute of the International Criminal Court, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

¹⁹ *Ibid.*

²⁰ Art. 7.1(k), The Rome Statute of the International Criminal Court, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

The Rome Statute of the ICC, adopted in 1998, further solidified the legal framework for prosecuting sexual violence as a war crime. Article 7 of the Statute defines specific acts of sexual violence as crimes within the Court's jurisdiction, including rape, sexual slavery, enforced prostitution, forced pregnancy, and sexual violence of comparable gravity.²¹ Importantly, the Statute removes the requirement of a pre-existing armed conflict, allowing prosecution for sexual violence during internal armed conflicts as well.

The ICC plays a crucial role in promoting accountability and deterring future crimes. It can investigate and prosecute individuals for sexual violence when national courts are unwilling or unable to do so. The Court's first conviction for sexual violence came in the landmark case of Thomas Lubanga Dyilo²², sending a strong message regarding potential prosecution.

However, limitations restrict the ICC's reach. Jurisdictional limitations are one key challenge. The Court can only prosecute individuals from or nationals of states that have ratified the Rome Statute, or those who commit crimes on the territory of a state party.²³ This leaves a significant gap in accountability for perpetrators from non-member states. Additionally, the Court's investigative and prosecutorial resources are limited, requiring careful selection of cases with the potential for the greatest impact.

Beyond the ICC, other international instruments contribute to the fight against sexual violence. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) played a pioneering role in establishing precedent on the prosecution of sexual violence as a war crime. These ad hoc tribunals demonstrated the international community's commitment to holding perpetrators accountable.

Regional mechanisms such as the Special Court for Sierra Leone have also made significant contributions. Additionally, the UN Security Council has adopted resolutions calling for increased accountability for sexual violence in conflict,²⁴ and the International Court of Justice (ICJ) can rule on disputes arising from the interpretation and application of international humanitarian law.

²¹ *Supra*. Art. 7, The Rome Statute of the International Criminal Court, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

²² The Prosecutor vs. Thomas Lubanga Dyilo, ICC-01/04-01/06.

²³ Art. 12, The Rome Statute of the International Criminal Court, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

²⁴ United Nations Security Council. (2014, October 23). Security Council adopts resolution to ease aid delivery to Syrians, <https://press.un.org/en/2014/sc11292.doc.htm>

Elements for Prosecuting Sexual Violence as a War Crime

While the legal definition of sexual violence as a war crime is established, successfully prosecuting perpetrators requires proving specific elements in court. Here's a breakdown of these elements under the Rome Statute of the ICC (focusing on the most common acts):

1. Actus Reus (Guilty Act):

- * Rape: Penetration, of any severity, of the vagina or anus of the victim by the penis of another person, or of any object, by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, or the psychological oppression or abuse of power.
- * Sexual Slavery: The exercise of ownership or control over a person for the purpose of sexually exploiting them. This can involve forced prostitution, other forms of sexual abuse, or a combination of both.
- * Enforced Prostitution: The coercing of a person to engage in prostitution through force, threat of force, coercion, such as that caused by fear of violence, duress, detention, or the psychological oppression or abuse of power, or through deception.

2. Mens Rea (Guilty Mind):

- * The perpetrator must have knowingly participated in the act.
- * This can involve intending to commit the act itself (direct intent) or acting with knowledge that the act was likely to occur as a consequence of their actions (indirect intent).

3. Nexus to Armed Conflict:

- * The crime must have been committed in the context of and be associated with an armed conflict.
- * This can be:
 - i. An international armed conflict (between two or more states)
 - ii. An internal armed conflict (protracted armed violence between governmental authorities and organized opposition groups)

4. Additional Considerations:

- * Command Responsibility: Commanders or those effectively exercising control over a perpetrator can be held liable for sexual violence committed by subordinates if they knew or should have known about the crimes and failed to take reasonable measures to prevent or punish them.

- * Superior Orders: Following a superior order is not a defense to a crime against humanity or war crime, unless the person did not know the order was unlawful and genuinely believed it to be lawful.

Challenges in Proving Elements:

1. Confidentiality and Witness Protection: Victims may be reluctant to come forward due to fear, stigma, or safety concerns. Ensuring confidentiality and witness protection measures are crucial.
2. Gathering Evidence: Sexual violence often occurs in private locations with little or no physical evidence. Careful witness testimony and corroborating evidence from medical records, clothing, or expert analysis are essential.
3. Jurisdictional Obstacles: The ICC's limitations and the capacity of national courts can present challenges in bringing perpetrators to justice.

Challenges and Obstacles in Prosecuting Sexual Violence as a War Crime

Despite significant strides in recognizing sexual violence as a war crime, significant challenges hinder successful prosecutions. This paper explores the complexities of holding perpetrators accountable, focusing on the difficulties in gathering evidence and securing witness testimony, the cultural and social barriers to reporting, and the complexities of command responsibility.

Gathering Evidence and Securing Witness Testimony:

Sexual violence often occurs in private locations with little or no physical evidence. This makes building a strong case difficult. Obtaining reliable witness testimony is crucial, but victims often face significant hurdles in coming forward. Fear of retaliation, social stigma, and concerns for safety can lead to silence.²⁵ Additionally, trauma associated with sexual violence can make it challenging for victims to provide clear and consistent testimony.²⁶

Cultural Barriers and Social Stigma:

Cultural norms and social stigma can further discourage reporting. In many societies, victims of sexual violence face shame and societal blame, creating a powerful disincentive to speaking out.

²⁵ Seelinger, K. T. (2014). Challenges in prosecuting sexual violence in armed conflict under Nigerian law. Scientific Research Publishing.

²⁶ International Review of the Red Cross [ICRC]. (2014). Sexual violence in armed conflict. International Review of the Red Cross, 96(894), 427–434.

Traditional practices like female genital mutilation or child marriage can exacerbate the issue by normalising violence against women and girls.²⁷

Command Responsibility and Holding Perpetrators Accountable:

Establishing command responsibility presents another significant challenge. Proving that commanders knew or should have known about sexual violence perpetrated by subordinates and failed to take action requires meticulous investigation.²⁸ Political considerations and the difficulty of obtaining evidence within hierarchies of armed groups further complicate matters.

To overcome these challenges, a multifaceted approach is essential. Building trust with victims through witness protection programs and gender-sensitive investigations is crucial. Addressing cultural norms through education and advocacy campaigns can combat stigma and encourage reporting. Strengthening national judicial systems and increasing international cooperation in investigations are also essential.

The International Criminal Court (ICC) plays a vital role in promoting accountability and deterring future crimes. However, its limitations, including jurisdictional issues and limited resources, highlight the need for strong national courts and regional mechanisms to complement its work.

Conclusion and Suggestions

In conclusion, prosecuting sexual violence as a war crime is a complex and ongoing struggle. This paper has highlighted the significant challenges that impede successful prosecutions, including the difficulty of evidence gathering, securing witness testimony, cultural barriers, social stigma, and complexities of command responsibility. These hurdles create a climate of impunity for perpetrators and impede justice for victims.

This paper underscores the importance of a multifaceted approach to overcoming these obstacles. Building trust with victims, addressing cultural norms through education, and strengthening national and international legal frameworks are all crucial steps towards ensuring accountability.

²⁷ Mariana Valverde, ed., *Sexual Violence and International Criminal Law: Advancing Accountability Through Effective Investigations* (Open Society Justice Initiative, 2013), <https://www.opensocietyfoundations.org/what-we-do/themes/justice>.

²⁸ Jarmon, *The Prosecutor's Role in Addressing Conflict-Related Sexual Violence*, International Center for Transitional Justice (2008), https://www2.ohchr.org/english/issues/women/docs/paper_prosecution_of_sexual_violence.pdf, accessed April 1, 2024.

While the ICC plays a vital role, its limitations necessitate strong national courts and regional mechanisms to complement its efforts.

The significance of this issue lies in its potential contribution to a world where sexual violence is not a weapon of war. By understanding the challenges that hinder prosecution, we can develop more effective strategies for bringing perpetrators to justice and deterring future crimes. This, in turn, fosters a climate of peace and security where the fundamental rights of all individuals are respected.

Recommendations for Further Research and Action:

1. Research on interventions: Explore the effectiveness of specific interventions aimed at addressing cultural barriers and encouraging reporting of sexual violence in conflict zones.
2. Best practices for victim support: Examine the best practices for witness protection and trauma-informed investigation techniques to improve the quality of evidence and support victim well-being.
3. Strengthening national courts: Research and advocate for strategies to strengthen national judicial systems for effective prosecution of sexual violence as a war crime.
4. Capacity building for regional mechanisms: Support capacity building for regional mechanisms to complement the role of the ICC by sharing best practices and fostering cooperation.
5. Technology and evidence gathering: Explore the potential of technological advancements in forensics and data collection to enhance evidence gathering in cases of sexual violence.
6. Community engagement: Develop community-based education programs to challenge social stigma and empower individuals to report sexual violence.

By continuing to explore these challenges and solutions through research, advocacy, and action, we can contribute to a future where justice prevails for survivors of sexual violence in armed conflict.