

SEXUAL SLAVERY BEFORE *AD HOC* INTERNATIONAL CRIMINAL TRIBUNALS AND THE INTERNATIONAL CRIMINAL COURT

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Abstract

The article presents the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) as well as their jurisdiction. The article continues with the explanation of the terms enslavement and sexual slavery in the way that they were defined in the jurisprudence of the ad hoc international criminal tribunals mostly in the ICTY. The Statutes of both ICTY and ICTR enumerate enslavement as a crime against humanity whereas this is not the case with sexual slavery. This crime is expressly included in the International Criminal Court Statute (ICC) and in the Statute of the Special Court for Sierra Leone (SCSL). Still especially in one case before the ICTY the Tribunal dealt with a crime against humanity of sexual slavery and decided the case – although – not having jurisdiction over a crime so named. This was the case of *Kunarać, Kovać and Vuković*, which the author analyses in the article. In the end, the author mentions the ICC Statute and the provisions as well as jurisprudence of the SCSL on sexual slavery. Finally the author reaches some interesting conclusions.

Keywords: Sexual slavery, crimes against humanity, ICC, ICTY, SCSL

Introduction

For the time immemorial during armed conflicts rape and other sexual violence were committed on a broad scale against women. Rape was regarded as a weapon of war, a tool used to achieve military objectives such as ethnic cleansing, genocide, spreading political terror, breaking the resistance of a community, intimidation or extraction of information. During war, women are often more economically dependent and physically vulnerable than men. Armies used rape as a tactic of war in order to commit ethnic cleansing, and genocide.

During World War II, the Japanese forcibly appropriated women's bodies for the sexual gratification of the Japanese soldiers. Russian soldiers as well systematically abused German women¹⁴⁰. The abuse of women in armed conflict is rooted in a global culture of discrimination that denies women equal status with men. During the Rwandan genocide an estimated 250 000–500 000 women and girls were raped (during only 100 days); in Bosnia and Herzegovina in 1992-1995 about 20 000–50 000 women and girls were raped and in Sierra Leone about 215 000–257 000 women and girls were sexually attacked during the internal conflict¹⁴¹.

In international law gender violence was regarded as human rights and humanitarian law concern and its codification as among the gravest international crimes in the Rome Statute of the International Criminal Court. The 1990's saw the establishment of the two international criminal institutions - the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

In spite of the overdue recognition of gender violence (including sexual slavery) during armed conflict, several issues still remain to be discussed. The purpose of this paper is to point to the achievements of the so called *ad hoc* international criminal tribunals in paving the way for the recognition of sexual slavery as a distinct from enslavement crime against humanity. Unfortunately, sexual slavery was not included in the list of crimes against humanity falling under the jurisdiction of both *ad hoc* international criminal tribunals.

Creation and jurisdiction of the *ad hoc* Tribunals

The UN Security Council (hereinafter: SC) convened the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY) by the resolution no. 827 (1993) and the International Criminal Tribunal for Rwanda (hereinafter: ICTR) by resolution no. 955 (1994)¹⁴².

Historically one form of sexual violence, namely rape was not recognized as a war crime. There were however explicit regulations of rape

¹⁴⁰ See: <http://www.dradio.de/dkultur/sendungen/lesart/890401/> (last visited: 27 May 2013).

¹⁴¹ A. Klip, G. Sluiter (ed.), *Annotated Leading Cases of International Criminal Tribunals. Volume XXIV. The International Criminal Tribunal Rwanda 2005-2006* (Antwerp – Oxford – New York: Intersentia), 583-584. See also: S. A. Healey, "Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia", *Brooklyn Journal of International Law*, Vol. 21, issue 2 (1995-119): 361-362; C. Damgaard, "The Special Court for Sierra Leone: Challenging the Tradition of Impunity for Gender-based Crimes?" *Nordic Journal of International Law*, Vol. 73 (2004), 487.

¹⁴² UNSC resolutions no. 827 (1993) and 955 (1994), http://www.un.org/Docs/sc/unsc_resolutions.html (last visited: 26 May 2013). On the genesis, structure and jurisdiction of ICTY and ICTR see: J. Meernik, "Victor's Justice or the Law?", *Journal of Conflict Resolution*, Vol. 47 (2003), 140-162; Ch. C. Joyner, "Strengthening enforcement of humanitarian law: Reflections on the International Criminal Tribunal for the Former Yugoslavia", *Duke Journal of Comparative & International Law*, Vol. 6, issue 1 (1995-1996), 79-102; Y.Ch. Tung, "The implementation of international humanitarian law by the United Nations. Case study in the former Yugoslavia", in E. Frangou-Ikonomidou, C. Philotheou, D. Tsotsoli (ed.) *Peace and Human Rights* (Tsaloniki 2003), 411-420.

as a crime against humanity. There are many treaties that led to and culminated in the recognition of rape as a war crime and crime against humanity and the establishment of the *ad hoc* international criminal tribunals. It is important to trace the evolution of the law in that sphere. Rape was first introduced as a war crime in the Nuremberg war crimes trials at the end of World War II but it was not included among the final judgments handed down. In contrast in the Tokyo war crimes trials, also held at the end of World War II, the Tokyo Tribunal convicted Japanese commanders on the basis of command responsibility for the rapes committed by their soldiers. Direct perpetrators of rape were not convicted. Then Control Council Law No. 10 included among crimes against humanity rape (Article II c)¹⁴³. However, sexual slavery was not enumerated as a distinct crime; there was only a crime against humanity of enslavement. The Geneva Conventions of 1949 do not place rape among its “grave breaches“ (in other words war crimes). Despite that the International Committee of the Red Cross treated rape as a grave breach of “willfully causing great suffering or injury to body or health”¹⁴⁴.

In accordance with the ICTY Statute of 25 May 1993, the Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Articles 2-5 enumerate offences falling under the Tribunal’s jurisdiction:

- Article 2 pertains to the grave breaches of the Geneva Conventions of 1949 and stipulates that the Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely acts committed against persons or property protected under the provisions of the relevant Geneva Convention. Among them are for example torture or inhuman treatment and willfully causing great suffering or serious injury to body or health.

- Article 3 relating to the violations of the laws or customs of war contains non-exhaustive list of other offences not falling under Article 2. Although not expressly enumerated those violations include violations of Common Article 3 such as: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture and outrages upon personal dignity, in particular humiliating and degrading treatment.

- Article 4 penalizes genocide as well as conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. The crime of genocide has been defined in identical terms as in the 1948 Convention on the Prevention

¹⁴³Control Council Law No. 1, <http://avalon.law.yale.edu/imt/imt10.asp> (last visited: 26 May 2013).

¹⁴⁴S. A. Healey, *supra* note 2, 336.

and Punishment of the Crime of Genocide. Accordingly genocide an act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Such an act may comprise causing serious bodily or mental harm to members of the group, imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group¹⁴⁵.

- Finally Article 5 pertaining to the crimes against humanity enumerates those crimes conditioning they be “committed in armed conflict, whether international or internal in character, and directed against any civilian population”. Rape is explicitly listed as a crime against humanity¹⁴⁶.

The ICTR Statute of 8th of November 1994 states that the Tribunal “shall have to power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1st of January 1994 and 31st of December 1994”. Article 2 regulates genocide and it is identical as Article 4 of the ICTY Statute. Article 3 pertaining to the crimes against humanity lists the same crimes as the ICTY Statute with one difference of *expressis verbis* condition that those crimes shall be committed as part of a widespread or systematic attack against any civilian population **on national, political, ethnic, racial or religious grounds** (emphasis added). Lastly, Article 4 relating to the violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II lists in a non-exhaustive way war crimes that may be committed in the non-international armed conflicts. The most pertinent here are violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment and outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault¹⁴⁷.

As it is clear from the above enumeration sexual slavery was neither included among the crimes against humanity nor war crimes. It was in the International Criminal Court Statute of 1998 (hereinafter: ICC) that for the first time listed sexual slavery among crimes against humanity. It was later on defined in the ICC Elements of Crimes from 2002.

¹⁴⁵ Text of the Convention from the OHCHR website: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx> (last visited 26 May 2013).

¹⁴⁶ Statute of the ICTY from: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf (last visited 26 May 2013).

¹⁴⁷ Statute of the ICTR from: <http://www.unictr.org/Legal/StatuteoftheTribunal/tabid/94/Default.aspx> (last visited 26 May 2013).

Enslavement and sexual slavery in the *Kunarać, Kovać and Vuković case*

ICTY and ICTR Statutes did not list sexual slavery as a particular crime against humanity, distinct from the crime of enslavement. However, the former crime was regarded as such in the ICC Statute as well as in the Statute of the Special Court for Sierra Leone (hereinafter: SCSL) and later defined, its definition being partly the result of conclusions drawn in the *Kunarać, Kovać and Vuković* judgment of 22 February 2001¹⁴⁸. In that case the Trial Chamber of the ICTY for the first time analyzed the definitional elements of the crime against humanity of enslavement.

When examining the general requirements of crimes against humanity the Trial Chamber stated that Article 5 of the Statute provides a list of offences which, if committed in the context of an armed conflict and as part of “an attack directed against any civilian population”, are crimes against humanity. The Chamber specified that the expression “an attack directed against any civilian population” is commonly regarded as encompassing the following five sub-elements:

- There must be an attack.
- The acts of the perpetrator must be part of the attack.
- The attack must be “directed against any civilian population”.
- The attack must be “widespread or systematic”.
- The perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack¹⁴⁹.

The Trial Chamber adopted the definition of armed conflict from the *Tadić* Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction¹⁵⁰, according to which “an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state”¹⁵¹. The requirement that there exists an armed conflict does not necessitate any substantive relationship between the acts of the accused and the armed conflict whereby the accused should have intended to participate in the armed conflict. The Trial Chamber held that a nexus between the acts of the accused and the armed conflict is not required. The armed conflict requirement is satisfied by proof that there was an armed

¹⁴⁸ICTY, *The Prosecutor v. Dragoljub Kunarać, Radomir Kovać and Zoran Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Trial Chamber), 22nd of February 2001. For more on this judgment see: D. Buss, “Prosecuting Mass Rape: Prosecution v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic”, *The Feminist Legal Studies*, Vol. 10, issue 1 (2002), 91-99.

¹⁴⁹ICTY, *The Prosecutor v. Dragoljub Kunarać, Radomir Kovać and Zoran Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Trial Chamber), 22nd of February 2001, para. 410.

¹⁵⁰ICTY, *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2nd of October 1995, para. 70.

¹⁵¹ICTY, *The Prosecutor v. Dragoljub Kunarać, Radomir Kovać and Zoran Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Trial Chamber), 22nd of February 2001, para. 412.

conflict at the relevant time and place¹⁵². This means that it is not necessary for the crime against humanity to be committed in the exact place and time where and when the hostilities are taking place but within the wider context of the armed conflict; in the territory of the State involved in the armed conflict, whether international or internal. What is also important is that the requirement of an armed conflict has only jurisdictional nature and consequently it does not reflect the state of customary international law.

With regard to the specific crime of enslavement, there is no definition thereof in the ICTY's Statute. In the Trial Chamber's opinion the prohibition of enslavement reflects the international customary law. It is proven by the fact of almost universal ratification of the 1926 Slavery Convention¹⁵³. This Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". The Slavery Convention also prohibits the slave trade and defines it in the following terms: "the slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport of slaves" (Art. 1). In 1956 the international community adopted Supplementary Convention on the Abolition of Slavery Slave Trade, and Institutions and Practices Similar to Slavery¹⁵⁴. It defines slavery and slave trade. The former meant the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and 'slave' means a person in such condition or status. Slave trade means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves by whatever means of conveyance (Art. 7). Neither the 1926 Slavery Convention nor the 1956 Supplementary Slavery Convention did define the sexual slavery. But the definitions of slavery and slave trade are essentially the same in both Conventions as they include the element of the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. It should however be noted that Article 1 of

¹⁵²*Ibidem*, paras. 413-414.

¹⁵³The 1926 Slavery Convention is at: <http://www1.umn.edu/humanrts/instreet/flsc.htm> (last visited 26 May 2013).

¹⁵⁴The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, http://avalon.law.yale.edu/20th_century/slave56.asp (last visited 26 May 2013).

the 1956 Supplementary Slavery Convention contains a broader definition of slavery including also debt bondage, serfdom, forced marriage and trafficking in women and children.

After having examined the pertinent international humanitarian law and international human rights law instruments the Trial Chamber in the *Kunarać, Kovać and Vuković* case concluded that “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”¹⁵⁵. Accordingly, 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. Its expression 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. The issue of consent is similar as with regard to the crime of rape. The condition of the lack of consent of the victim should not be an acceptable element of either rape or sexual slavery. There are a few reasons for that. Firstly, if this element was accepted it would imply that a victim could consent. It blurs the nature of crime. Secondly, this places the victim in a painful and humiliating position and may lead to her or his re-victimization, as the victim will be asked questions about possibly expressing consent to sexual intercourse, including the sexual slavery. Such questions in a situation of coercive circumstances or force should not be relevant. Apart from that, they are also shocking and offensive to the victim. Moreover, including consent in the definition of crime places the burden of proof on the prosecutor to prove that there was no consent and thus leads the prosecutor to inquire into the victim behavior about whether or not she consented¹⁵⁶. For those reasons, the lack of consent of the victim of sexual slavery and rape should not be considered a necessary element of those crimes and coercive circumstances should be adequate as their existence in fact eliminates the possibility of giving genuine and voluntary consent. The *ad hoc* criminal tribunals correctly defined sexual slavery but unfortunately not the crime of rape where in the *Gacumbitsi* case (2006) the ICTR Appeals

¹⁵⁵ICTY, The Prosecutor v. Dragoljub Kunarać, Radomir Kovać and Zoran Vuković, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Trial Chamber), 22nd of February 2001, para. 539.

¹⁵⁶A. Klip, G. Sluiter (ed.), *Annotated Leading Cases of International Criminal Tribunals. Volume XXIV. The International Criminal Tribunal Rwanda 2005-2006* (Antwerp – Oxford – New York 2009), 590-591.

Chamber recognized the consent as a necessary element of the definition of rape¹⁵⁷.

Also V. Oosterveld notices – on the basis of this judgment – that in the case of sexual slavery the lack of consent of the victim should not be a definitional element¹⁵⁸. The ICTY Trial Chamber stated that with regard to the crime of enslavement but as was already indicated it equally applies to the crime of sexual slavery. In the circumstances of war, which by their nature, exclude the possibility of giving genuine and voluntary consent, the consent cannot be given and should not be expected to be given.

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 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 enslavement¹⁵⁹. It would be – other conditions having been met – a crime against humanity of imprisonment.

It seems that the Trial Chamber treated enslavement in the traditional meaning of this word connected with the forced labour disregarding the fact that today it has most often sexual nature. The ICTY judgment in the *Kunarać, Kovać and Vuković* case is relevant because of the factual state which embraced the systematic and methodical campaign of torture, including foremost rapes and other sexual violence committed against Muslim women and girls by the Serbian forces. Serb soldiers were granted free access to the detention centres, which became known as “rape camps”, and were allowed to select and take away girls and women whom they then raped, tortured and humiliated in the cruellest possible way. The women had no choice but to obey those men and those who tried to resist were beaten in front of the other women. Several houses within the municipality of Foča were additionally used to rape Muslim women who were locked inside with no possibilities of escape and in many cases enslaved by the Serb soldiers so as to become their personal property. They were obliged to clean, cook, wash the dishes and were repeatedly raped by their torturers, being constantly at

¹⁵⁷ICTR, *The Prosecutor v. S. Gacumbitsi*, Case No. ICTR-2001-64-A, Judgment (Appeals Chamber), 7th of July 2006, para. 155.

¹⁵⁸V. Oosterveld, “Sexual Slavery and the International Criminal Court: Advancing International Law”, *Michigan Journal of International Law*, Vol. 25, issue 3 (2003-2004), 640.

¹⁵⁹ICTY, *The Prosecutor v. Dragoljub Kunarać, Radomir Kovać and Zoran Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Trial Chamber), 22nd of February 2001, para. 542.

their mercy. Some of the women were then sold and many of them were not seen again. Muslim women were subjected to daily rape and torture for months; some of them were detained until the beginning of 1993¹⁶⁰.

Despite some disappointment caused by the insufficiencies in the *Kunarać, Kovać and Vuković* judgment, still it should be regarded as an important contribution to the development of international humanitarian law by the ICTY Trial Chamber

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A. Klip, G. Sluiter (ed.), *Annotated Leading Cases of International Criminal Tribunals. Volume XXIV. The International Criminal Tribunal Rwanda 2005-2006* (Antwerp – Oxford – New York: Intersentia),. See also: S. A. Healey, “Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia”, *Brooklyn Journal of International Law*, Vol. 21, issue 2 (1995-119); C. Damgaard, “The Special Court for Sierra Leone: Challenging the Tradition of Impunity for Gender-based Crimes?” *Nordic Journal of International Law*, Vol. 73 (2004).UNSC resolutions no. 827 (1993) and 955 (1994), http://www.un.org/Docs/sc/unsc_resolutions.html (last visited: 26 May 2013). On the genesis, structure and jurisdiction of ICTY and ICTR see: J. Meernik, “Victor’s Justice or the Law?”, *Journal of Conflict Resolution*, Vol. 47 (2003); Ch. C. Joyner, “Strengthening enforcement of humanitarian law: Reflections on the International Criminal Tribunal for the Former Yugoslavia”, *Duke Journal of Comparative & International Law*, Vol. 6, issue 1 (1995-1996); Y.Ch. Tung, “The implementation of international humanitarian law by the United Nations. Case study in the former Yugoslavia”, in E. Frangou-Ikonomidou, C. Philotheou, D. Tsotsoli (ed.) *Peace and Human Rights* (Tsaloniki 2003) *Control Council Law No. 1*,<http://avalon.law.yale.edu/imt/imt10.asp> (last visited: 26 May 2013).

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¹⁶⁰M. Fiori, “The Foča “Rape Camps”: A dark page read through the ICTY’s jurisprudence”, *The Hague Justice Portal*, <http://www.haguejusticeportal.net/eCache/DEF/8/712.html> (last visited 27 May 2013).

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