



Gender Crimes and the ICC

CHAPTER 5

This chapter discusses how the gender crimes provisions in the ICC Statute can be used to deal with gender violence, and discusses the importance of religious leaders and communities in truly supporting violated women.

5.1 Introduction

Discrimination and violence against women is an everyday reality worldwide. In situations of armed conflict the vulnerability of women to human rights violations is even stronger. Until recently, very little attention to sexual and gender violence had been paid in the development of international legislation. Therefore the progressive provisions on gender crimes in the Rome Statute are a historic development.

But you must note that in all these situations sexual violence is going on. After a woman is tortured and kicked around left, right and center, she is sexually abused.

When she is displaced, those who are supposed to protect her are the ones who come in the night in her hut to violate her sexually. When she is abducted, she is not only a girl soldier, but after going into the front lines and fighting, in the night, she has to sleep with not one man, but probably up to ten.

(Statement from Ruth Ojiambo, Isis-WICCE, Uganda, at FENICC meeting in New York, March 2005)



5.2 Gender crimes as weapon of war

In recent years, mass rape in war has been documented in various countries.

- At least 250,000, perhaps as much as 500,000 women were systematically raped during the 1994 genocide in Rwanda.
- More than 20,000 Muslim women were reportedly raped during the war in Bosnia.
- During five years of armed conflict in the DRC, tens of thousands of women and girls in the eastern part of the country have suffered crimes of sexual violence. Even after the signing of the peace agreement in 2002 and the installation of a transitional government in 2003 women and girls – as young as three years old – continue to be targeted for crimes of sexual violence.
- In Darfur (Sudan) rape and sexual violence against women and girls has been a prominent feature of the “ethnic cleansing” campaign carried out by government forces and militias, both during and following displacement. Once displaced into camps in Darfur, or into refugee camps in Chad, women and girls continue to suffer sexual and gender-based violence.

Violence against women in conflict situations assumes many forms; rape is often one of the ways in which women are targeted.

Rape has been downplayed as an unfortunate but inevitable side effect of sending men to war, rather than recognised as a strategic tool in war

But while other abuses (such as murder and various forms of torture) have long been documented as war crimes, rape has been downplayed as an unfortunate but inevitable side-effect of sending men to war. Rape is often ignored as a human rights abuse; then when rape is reported and condemned the abuses are called unprecedented and unique in their scale.

The historical record demonstrates that wartime rape has never been limited to a certain era or to a particular part of the world. It is neither incidental nor private. As the representative of one women’s NGO in DRC commented:



We could write a whole library about the use of rape here in Ituri. It is just too awful. We now have to live with the legacy of all this and I don't know how we will cope.
(Human Rights Watch interview in Bunia, 10 October 2004)

Rape routinely serves as a **systematic and strategic tool** in war and acts as an integral weapon for achieving particular military objectives. It is being used to drive the enemy population into flight, as a way to terrorise civilians. Women and girls are singled out because the harm and humiliation inflicted not only hurts them, but also deeply affects the men in the targeted community. It erodes the fabric of a community in a way that few weapons can.

Furthermore, combatants have been abducting women and girls **to service the men and to boost their morale**. In northern Uganda many abducted women have been forced into marriage with guerrilla commanders. In this case rape is used as part of the military machinery to **fuel** the fighting soldiers.

The reason that rape affects the entire community is because in every culture in the world societies define themselves – in an overt or a less clear-cut fashion – relative to their ability to protect and control women's sexual purity. Thus the violation of women's "protected" status has the effect of shaming women and their community. By virtue of being a rape survivor, a woman becomes the perceived agent of her community's shame. In a bizarre twist, she can change from a victim into a guilty party, responsible for bringing dishonour upon her family or community. As a result, women survivors, whether for fear of being seen this way, or because they see themselves this way, are reluctant to report rape. Only changes in women's protected status coupled with a better understanding of rape's function as a political or tactical abuse, will help communities resist shaming and punishing the victim and put the responsibility on the attacker where it belongs.

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Of all the abuses committed in war, rape is inflicted most often against women (though men – to a lesser degree - are victims of rape too). But the focus should not be on the gender motivation only. Women's experience of rape in war is always determined by a variety of factors, such as race, class,



In the past the inferior treatment of gender crimes has lead to their under-investigation and under-prosecution

religion, ethnicity and nationality. To focus on gender alone, would be an oversimplification.

5.3 Gender crimes provisions in the Rome Statute

The attitudes toward women that permit rape with impunity, and the mischaracterisation of such violations as “personal” in nature or as “an attack against honour” rather than as a crime against the physical integrity of the victim, have often been reinforced and even shared by those in a position to prohibit and punish the abuse. This inferior treatment of gender crimes perpetuated their under-investigation and under-prosecution. For example, in the tribunals established after World War II to prosecute German and Japanese war criminals, gender crimes were not pursued with the same degree of diligence as other crimes. It was not until 1993 and 1994 that rape, and sexual violence, respectively, were specifically codified for the first time as a recognisable and independent crime within the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and for Rwanda (ICTR). These two instruments, and the subsequent case-law that reinforced that rape and sexual violence are forms of genocide, laid the foundation upon which these gender crimes were incorporated into the Rome Statute.

Jurisdiction of the ICC

The Rome Statute therefore represents a significant step to overcoming the discriminatory and inadequate treatment of sexual violence crimes under international law. The Rome Statute includes gender crimes as both war crimes and as crimes against humanity. But rape and sexual violence can also be considered as acts of genocide.



Not covered by the Rome Statute are sexual crimes that take place outside conflict, which should ordinarily be tried by national courts.

Gender crimes as war crimes (Article 8)	As crimes against humanity (Article 7)	As genocide (Article 6)
<p>Acts committed:</p> <ul style="list-style-type: none"> ■ individually ■ in the context of international or internal armed conflict ■ as part of a plan or policy or as part of a large-scale commission of such crimes 	<p>Acts committed:</p> <ul style="list-style-type: none"> ■ as part of widespread or systematic attack against a civilian population ■ with knowledge of the attack 	<p>Acts committed:</p> <ul style="list-style-type: none"> ■ with intent to destroy a national, ethnical, racial or religious group
<p>These acts include amongst others:</p> <ul style="list-style-type: none"> ■ rape, sexual slavery, trafficking, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity 	<p>These acts include amongst others:</p> <ul style="list-style-type: none"> ■ rape, sexual slavery, trafficking, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity ■ crime of gender persecution and enslavement 	<p>These acts can be one of the following:</p> <ul style="list-style-type: none"> ■ serious bodily or mental harm, including rape or sexual violence ■ to prevent women in a certain group from giving birth

Significance of the ICC gender crimes provisions

- i. For the first time gender crimes have been defined as both a crime against humanity and as war crimes. This is significant because the definition of crimes against humanity requires that the acts in question be either widespread or systematic. The ways in which sexual violence is committed during war means that it is not always possible to prove these conditions. War crimes, in contrast, do not require any proof of systematic planning and are therefore easier to prove.
- ii. Rape and other forms of sexual violence are broadly defined in the Rome Statute and related documents. The focus is on the coercive acts of the perpetrator, including threats and psychological oppression, rather than focusing on physical force alone. The definition of rape is gender-



neutral (acknowledging that men and boys can also be raped) and refers generally to the invasion of the victim's body, including e.g. rape with objects.

- iii. The Rome Statute tackles some of the most common procedural and evidentiary rules that have traditionally undermined women's claims of abuse, thus preventing the unnecessary ridiculing and humiliation of victims of sexual violence that often occurs during trials. For example, silence or a lack of resistance by the victim during a crime of sexual violence cannot be used to imply that the victim consented to the act. Evidence of the victim's prior or subsequent sexual conduct is inadmissible in most cases. There is also no requirement that the victim's testimony be supported by another source.
- iv. The Rome Statute recognises a broad spectrum of gender crimes in addition to rape. Here the distinct characteristics of the different crimes are respected.

Right to special protective measures

One of the problems in prosecuting persons accused of gender crimes, is that some women survivors are often reluctant to come forward to testify. To address this, the Rome Treaty obliges the ICC to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, in particular where the crimes involve sexual or gender violence. For example, as an exception to the principle of public hearings, the Judges may conduct a part of the proceedings behind closed doors or allow the presentation by video link or other measures.

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The Rome Statute specifies that Judges and staff members will include experts on violence against women. Therefore, several judges have a background on adjudication of gender-based violence. Of the first 18 Judges elected to the ICC in 2002, 7 were women.

■ ***The Office of the Prosecutor (OTP)***

At all stages of the investigation and the prosecution phase, special focus and attention must be laid on gender-related crimes to ensure that they are adequately investigated and



properly prosecuted. Therefore, the entire OTP staff is mandated to uphold this focus. The investigators and other ICC staff have undergone gender-sensitive training as part of the ongoing training process.

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The OTP has a **Gender and Children Unit**. This Unit has drafted the policy on gender issues that provides guidelines on how to ensure gender equality in investigation, monitoring, evaluation and prosecution. This Unit also assists with the assessment of the psychological condition of witnesses prior to their interview and specialised support for traumatised individuals.

There is also the special post of **Gender Legal Adviser** to the operational divisions and to the immediate office of the Prosecutor. She or he provides legal advice and expertise on gender issues to the Prosecutor and the Executive Committee in order to ensure the inclusion of a gender perspective and analysis in all decisions, policies and strategies of the OTP.



■ **Victims and Witnesses Unit (VWU)**

See also Chapter 4

The Registrar has established a Victims and Witnesses Unit (VWU) to advise the Court on protective measures, security arrangements, counselling and assistance for victims who appear before the Court, as well as witnesses and others who are at risk because of witness testimony. The staff of the Unit includes expertise in trauma related to crimes of sexual violence. The VWU cooperates and coordinates its work with the OTP. The VWU has established relations with local NGOs experienced in trauma-counselling and physical assistance, given also the shame surrounding acts of sexual violence.

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5.4 The role of religious leaders and communities

In situations of conflict and war, religious leaders and institutions are often the only authorities left behind upon which people can place their trust. Inspired by their religious teachings, faith-based institutions actively support victims and promote reconciliation. Nevertheless, the issue of gender



violence and the support of affected women requires a comprehensive and collaborative effort to develop expertise, policies and activities by both women and men within religious communities.

Survivors of sexual violence are in need of physical and psychological support as soon as possible, especially when



they may have contracted HIV/AIDS. However, because of the shame surrounding rape crimes and other gender violations, it is difficult to talk about what happened, both for the women violated by violence as well as for religious leaders and communities. By remaining silent the women suffer from double victimisation. They are victimized by the violation and then they continue to be victimized thereafter by the communities and their families because of social taboos. Religious groups are well-equipped to exorcise

and lift the existing double victimization and set these women free.

“After all, they are still children of God and nothing can take that away from them. The notion that a woman who has been violated then somehow bears a responsibility that makes her different from others within society, is not acceptable to everything that we believe. Religious leaders and communities need to have the courage to lift that burden, to lift that second stage of victimization.”

(Mr. Olara Otunnu, former UN Special Representative for Children and Armed Conflict, at FENICC meeting in New York, March 2005)

Religious leaders should indeed use the moral authority and the wonderful rituals of their faiths to bring about the reconciliation within the community.

In order to do this a change in the use of language would be needed. Many religious institutions are not used to speak about sexuality, sex and sexual abuse. Thus, they will have

to begin at the level of what their religions actually teach about sexuality, sex, human dignity, justice, and cruelty. They can then relate their religious teachings to the communities where they are based.

Religious leaders and institutions can also participate in changing the language that is currently used to describe sexual abuse against women. For example, when a woman is raped, words such as “defiled” are often used to describe the condition of the woman. This word means “to be made dirty and unclean” and thus taints women even more. This kind of language does not free women from what they have experienced. Religious organisations can help campaign for the changes needed in the language used.



5.5 Key questions

1. Which gender violence crimes does the Rome Statute specifically enable the ICC to prosecute? And which gender crimes can the ICC not prosecute?
2. Under what conditions are gender crimes seen by the Court as war crimes, as genocide, and as crimes against humanity?
3. What role can religious leaders play to support:
 - violated women to heal and be accepted in their community
 - the ICC to prosecute gender crimes?

