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# **Sexual Exploitation and Beyond: Using the Rome Statute of the International Criminal Court to Prosecute UN Peacekeepers for Gender-based Crimes**

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## **Abstract**

Allegations and confirmed cases of misconduct by peacekeeping personnel have been revealed by non-governmental organisations, the press and UN investigations. The majority of misconduct has fallen under the term 'sexual exploitation and abuse'. Sexual exploitation and abuse has encompassed rape, sex with minors, trafficking, prostitution-related conduct, sexual exploitation, and other sexual abuse. This article discusses accountability in international criminal law for such conduct, first exploring the development of gender-based crime in international criminal law. The core of this article consists of an examination of the applicable law under the Rome Statute of the International Criminal Court, to determine whether or not the provisions could be used to prosecute peacekeepers for the crimes of rape, sexual slavery, sexual exploitation, prostitution-related conduct, and trafficking. Real life examples of criminal conduct by peacekeeping personnel will be given to test the applicability of the Rome Statute provisions.

## **Keywords**

International Criminal Court, peacekeeping, prostitution, rape, sexual exploitation, sexual slavery, trafficking

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## 1. Introduction

‘These women are not prostitutes who talk to [UN CivPol] but they are hungry. They will sell their bodies for money’.<sup>1</sup>

Women in post-conflict situations often find themselves in insecure socio-economic circumstances. One of the consequences of this vulnerability can be that these women (and girls) are driven to a state where they become victims of sexual exploitation, and other gender-based crimes with a sexual component.<sup>2</sup> In a post-conflict territory where a United Nations (UN) peacekeeping operation<sup>3</sup> is located, peacekeepers<sup>4</sup> are supposed to be protecting civilians. A principle of peacekeeping is to ‘do no harm’: ‘It is the duty of each peacekeeper to protect the vulnerable and to refrain from doing harm’.<sup>5</sup> Unfortunately, some peacekeepers do not always fulfil their role of protector. Allegations and confirmed cases of misconduct have been revealed by non-governmental organisations, the press and UN investigations.<sup>6</sup> The majority of misconduct has fallen

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<sup>1</sup> Sarah Martin, *Must Boys be Boys? Ending Sexual Exploitation & Abuse in UN Peacekeeping Missions*, Refugees International, (2005), p 5.

<sup>2</sup> Vanessa Kent, ‘Protecting civilians from UN peacekeepers and humanitarian workers: Sexual exploitation and abuse’, in Chiyuki Aoi, et al., (eds.), *Unintended Consequences of Peacekeeping*, (United Nations University Press, Tokyo, New York, Paris, 2007), 44-66, p. 52.

<sup>3</sup> Peacekeeping was never defined or addressed by the UN Charter, and the concept itself has evolved over the years to include missions that keep peace, support peace, enforce peace, build peace, and many other roles such as disarmament, de-mining, and transitional administration. In this article, the term ‘peacekeeping operation’ (PKO) or ‘mission’ will be used, and will encompass all varieties of missions.

<sup>4</sup> The term ‘peacekeeping personnel’ or word ‘peacekeepers’ will be used to refer to the military personnel and those civilians who fall under military jurisdiction when deployed as part of a mission.

<sup>5</sup> The Peacekeepers’ Duty of Care; *see*

<[http://www.un.org/en/peacekeeping/publications/yir/2005/duty\\_of\\_care.htm](http://www.un.org/en/peacekeeping/publications/yir/2005/duty_of_care.htm)>, 7 July 2011; MINURSO’s *Conduct & Discipline/Welfare* newsletter, Vol. I, Issue I, March 2007.

<sup>6</sup> *E.g. Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo (A/59/661) (2005) (OIOS Congo Investigation); Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary General (A/59/782) (2005), (A/60/861) (2006), (A/61/957) (2007), (A/62/890) (2008), (A/63/720) (2009), (A/64/669) (2010), (A/65/742) (2011) (SG’s SEA reports);* Martin, *supra* note 1; Martina Vandenberg, *Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution*, Human Rights Watch, (2002); Paul Higate, *Gender and Peacekeeping Case Studies: The DRC and Sierra Leone*, Institute for Security Studies, (2004). The SG’s SEA reports are the only official numbers available of allegations.

under the term 'sexual exploitation and abuse' (SEA). The UN defines sexual exploitation as: '[T]he term 'sexual exploitation' means 'any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.'<sup>7</sup> The definition emphasises that there is an exchange involved for the sexual activity; that there is a purpose to the commission of the sexual activity. Generally, the situations of sexual exploitation that occur involving peacekeepers entail the peacekeepers offering food or money in exchange for sex- habitually with girls, only rarely boys.<sup>8</sup> Exploitation has much in common with prostitution, in that it involves the exchange of goods, money or services for sexual favours. However, it is differentiated from prostitution-related conduct by the element of abuse of position, power or trust.

Allegations have included conduct such as sex with minors, rape, sexual slavery, human trafficking, and prostitution-related conduct, in missions in the Democratic Republic of the Congo (DRC), Sierra Leone, Liberia, Haiti, East Timor, and Cambodia.<sup>9</sup> The increase in peacekeeping personnel, in particular military personnel, acts as a magnet for an increase in the sex industry and sexually exploitative relationships in mission areas. This increase in demand for sex services also results in an augmentation in trafficking and forced prostitution.<sup>10</sup> This is evident in the example of Cambodia, where

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<sup>7</sup> *Secretary-General's Bulletin on Special measures for protection from sexual exploitation and sexual abuse (ST/SGB/2003/13) (2003) (Secretary-General's SEA Bulletin).*

<sup>8</sup> OIOS Congo Investigation, *supra* note 6; the Secretary-General's Reports' statistics confirm that the most common forms of sexual exploitation and abuse committed are sex with minors, sexually exploitative relationships and sex with prostitutes; *see SG's SEA reports, supra* note 6; Paul Higate, 'Peacekeepers, Masculinities and Sexual Exploitation', 10 (1) *Men and Masculinities* (2007) 99-119, p. 107.

<sup>9</sup> *Ibid.* note 6.

<sup>10</sup> For discussion addressing demand as the principle factors in increasing trafficking and prostitution of women, *see* N Hotaling and L Levitas-Martin, 'Increased Demand Resulting in the Flourishing Recruitment and Trafficking of Women and Girls: Related Child Sexual Abuse and Violence Against Women', 13 *Hastings Women's Law Journal* (2002) 117-126 at 117-126; Keith J. Allred, 'Peacekeepers and Prostitutes:

in one year the number of prostitutes rose from 6,000 to 25,000 (including child prostitutes) due to the influx of peacekeeping personnel from 1992.<sup>11</sup> A dramatic increase was also notable in the former Yugoslavia, particularly in the regions of Kosovo and Bosnia-Herzegovina.<sup>12</sup> 'According to local NGOs, prior to the war in 1999 and the consequent international presence in Kosovo, not only trafficking but also prostitution was very uncommon.'<sup>13</sup> Within six months of the arrival of UNMIK<sup>14</sup> peacekeeping forces in 1999, brothels had appeared in the immediate vicinity of the mission centres, the majority of whose clients 'were reported to be members of the international military presence, while some KFOR soldiers were allegedly also involved in the trafficking process itself.'<sup>15</sup>

Official statistics reported by the Secretary-General demonstrate that, while allegation numbers are decreasing, sexual exploitation and abuse by peacekeepers continues to be a

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How Deployed Forces Fuel the Demand for Trafficked Women and New Hope for Stopping It', 33 (1) *Armed Forces & Society* (2006) 5-23.

<sup>11</sup> UN Transitional Authority in Cambodia (UNTAC). Martin, *supra* note 1 at 4; Shukuko Koyama and Henri Myrntinen, 'Unintended consequences of peace operations on Timor Leste from a gender perspective', in Chiyuki Aoi, et al., (eds.), *Unintended Consequences of Peacekeeping Operations*, (United Nations University Press, Tokyo, New York, Paris, 2007), 23-43, p. 32.

<sup>12</sup> United Nations Mission in Kosovo (UNMIK) and NATO Kosovo Force (KFOR). *Kosovo (Serbia and Montenegro) "So does it mean that we have the rights?" Protecting the human rights of women and girls trafficked for forced prostitution in Kosovo*, Amnesty International, (2004), pp. 7-8, <<http://www.amnesty.org/en/library/info/EUR70/010/2004>>, 7 July 2011. See also *Trafficking, Slavery and Peacekeeping: The Need for a Comprehensive Training Program. A Conference Report.*, Transnational Crime and Corruption Centre & UN Interregional Crime and Justice Research Institute, (2002), pp. 12-13; and Jane Gronow, *Trafficking in Human Beings in Southeastern Europe*, UNICEF, (2000), p. 47, <[http://www.unicef.org/evaldatabase/files/CEE\\_CIS\\_2000\\_Trafficking.pdf](http://www.unicef.org/evaldatabase/files/CEE_CIS_2000_Trafficking.pdf)>, 7 July 2011.

<sup>13</sup> *Trafficking in Human Beings in Southeastern Europe: Current Situation and Responses to Trafficking in Human Beings*, UNICEF, UNOHCHR, OSCE ODIHR, (2002), p. 96, <[http://www.iom.md/materials/1\\_traff\\_human\\_beings\\_se.pdf](http://www.iom.md/materials/1_traff_human_beings_se.pdf)>, 7 July 2011.

<sup>14</sup> UNMIK, authorised by (S/RES/1244) (1999) of 10 June 1999. Missions were present in the former Yugoslavia during the 1990s prior to the conflict, such as the UN Protection Force (UNPROFOR) and the UN Mission in Bosnia and Herzegovina (UNMIBH).

<sup>15</sup> 'So does it mean we have the rights?' *supra* note 12, p 7; *U.N. Peacekeeping: United Nations Faces Challenges in Responding to the Impact of HIV/AIDS on Peacekeeping Operations*, United States General Accounting Office, (2001).

problem, despite the preventative actions being taken by the UN.<sup>16</sup> The first of the Secretary-General's reports stated that there were 105 allegations of sexual exploitation and abuse by personnel from the Department of Peacekeeping Operations (all categories of personnel).<sup>17</sup> However, with the augmentation of reporting mechanisms, the figure grew to 340 in 2005 and 357 in 2006.<sup>18</sup> Most recently, figures for 2009 show 112 allegations and for 2010, 85 allegations.<sup>19</sup> Allegations continue to be made for exploitative relationships, sex with minors, sexual abuse, rape, and transactional sex.

There is a need to ensure accountability for peacekeeping personnel who commit such crimes against women. Such conduct is harmful to the women, violating their human rights on many levels. A principal reason women are driven to a situation of sexual exploitation is their socio-economic vulnerability in post-conflict situations.<sup>20</sup> For example, one Haitian woman stated that UN CivPol (civilian police) on patrol are only interested in talking to the local women: "These women are not prostitutes who talk to them but they are hungry. They will sell their bodies for money."<sup>21</sup> Peacekeepers engaging in sexual exploitation results in a proliferation of human trafficking and prostitution;<sup>22</sup> the spread of sexually transmitted infections (including HIV/AIDS)

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<sup>16</sup> *Ibid.* note 6.

<sup>17</sup> (A/59/782) (2005).

<sup>18</sup> (A/60/861) (2006); (A/61/957) (2007).

<sup>19</sup> (A/64/669) (2010); (A/65/742) (2011).

<sup>20</sup> Kent, *supra* note 2, p. 52.

<sup>21</sup> Martin, *supra* note 1.

<sup>22</sup> May Chang, 'Sex Trade Flourishing in Capital', *Phnom Penh Post*, 12 February 1993, 6; 'So does it mean we have the rights?' *supra* note 12, p. 9; U.N. Peacekeeping: United Nations Faces Challenges, *supra* note 15; *Trafficking, Slavery and Peacekeeping: The Need for a Comprehensive Training Program. A Conference Report.*, Transnational Crime and Corruption Centre & UN Interregional Crime and Justice Research Institute, (2002); Subcommittee on International Operations and Human Rights of the Committee on International Relations, Second Session, 'The U.N. and the Sex Slave Trade in Bosnia: Isolated Case or Larger Problem in the U.N. System?' (U.S. Government Printing Office, Washington D.C., 24 April 2002) Document No. 107-85; Madeleine Rees, 'Intergovernmental actions in Bosnia-Herzegovina: the cost of ignoring gender', in Cynthia Cockburn and Dubravka Zarkov, (eds.), *The Postwar Moment: Militaries, Masculinities and International Peacekeeping*, (Lawrence and Wishart, 2002), 61; Sarah E. Mendelson,

amongst the local population, peacekeepers, and sending state populations;<sup>23</sup> and even in abandoned 'peacekeeper babies'.<sup>24</sup> In addition, the commission of sexual exploitation and other sexual abuse has negative effects on the mission itself. Exploitative behaviour creates mistrust amongst the local population of the peacekeepers, jeopardising the elements of cooperation with and support of the local population, which are vital to the success of a peace operation.<sup>25</sup> Acceptable conduct must be exercised by mission personnel at all times to ensure the best possible relations with local communities, which in turn contributes towards the effectiveness of the mission.<sup>26</sup> It is this betrayal of trust and the role of protector that makes sexual exploitation by peacekeepers of the very civilians they are entrusted to protect so devastating.

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*Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans*, Center for Strategic and International Studies (CSIS), (2005), pp. 14-17.

The sex trade is a supply-demand industry; *see e.g.*, Julia O'Connell Davidson, 'The Rights and Wrongs of Prostitution', 17 (2) *Hypatia* (2002) 84-98, p. 91; M. Madden Dempsey, 'Rethinking Wolfenden: Prostitute-Use, Criminal Law, and Remote Harm', June *Criminal Law Review* (2005) 444-455, p. 453; Keith J. Allred, 'Peacekeepers and Prostitutes: How Deployed Forces Fuel the Demand for Trafficked Women and New Hope for Stopping It', 33 (1) *Armed Forces & Society* (2006) 5-23.

<sup>23</sup> *See e.g.*, Katharine H. S. Moon, *Sex among Allies: Military Prostitution in U.S.-Korea Relations* (Columbia University Press, New York, 1997); Emily Nyen Chang, 'Engagement Abroad: Enlisted Men, U.S. Military Policy and the Sex Industry', 15 *Notre Dame Journal of Law, Ethics & Public Policy* (2001) 621-653, pp. 632-634; Lieut. Colonel Thomas B. Turner, 'The Suppression of Prostitution in Relation to Venereal Disease Control in the Army', 7 *Federal Probation* (1943) 8-11; Joshua S. Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa* (Cambridge University Press, Cambridge, 2001), pp. 339-342; Martin Foreman, *Combat AIDS: HIV and the World's Armed Forces*, Healthlink Worldwide, (2002); UNAIDS, 'On The Front Line: A review of policies and programmes to address HIV/AIDS among peacekeepers and uniformed services', 2003, Copenhagen, Doc. UNAIDS/03.44E; Paul Higate, *Gender and Peacekeeping Case Studies: The DRC and Sierra Leone*, Institute for Security Studies, (2004); Sue Sun, 'Where the Girls Are: The Management of Venereal Disease by United States Military Forces in Vietnam', 23 (1) *Literature and Medicine* (2004) 66-87; Kent, *supra* note 2, p. 52.

<sup>24</sup> Elisabeth Rehn and Ellen Johnson Sirleaf, *Women, War and Peace: The Independent Experts Assessment on the Impact of Armed Conflict on Women and Women's Role in Peacebuilding* (UNIFEM, 2002); Koyama and Myrntinen, *supra* note 11.

<sup>25</sup> Martin, *supra* note 1, p. 7 (specific reference to distrust in the Democratic Republic of the Congo).

<sup>26</sup> Hilaire McCoubrey and Nigel D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Dartmouth Publishing Company Limited, Aldershot, 1996), p. 177.

The UN does not have jurisdiction to undertake criminal prosecutions,<sup>27</sup> so jurisdiction will usually be granted to the sending state (in the case of military personnel) or the host state (for civilian personnel) if the legal system is functional.<sup>28</sup> Unfortunately, these crimes have gone largely unprosecuted, leaving personnel to engage in sexual exploitation and other misconduct with impunity.<sup>29</sup> A potential solution for the lack of

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<sup>27</sup> The juridical capacity of the UN consists of the capacity: “(a) to contract; (b) to acquire and dispose of in movable and movable property; (c) to institute legal proceedings.” *Convention on the Privileges and Immunities of the United Nations* (1 UNTS 15) 13 February 1946; Article I, Section 1.

<sup>28</sup> Two instruments deal with jurisdiction over mission personnel. A Status of Forces Agreement (SOFA) is an agreement between the UN and a host state. The agreement covers issues like transport and communications, as well as privileges and immunities of the PSO. Under paragraph 47(b), military personnel are deemed to be subject to the exclusive jurisdiction of their sending state for any criminal offences committed within the host state or territory. (A/45/594, Annex) paras. 15, 24-31. Jurisdiction is covered in paragraphs 46-49.

The second instrument to address jurisdiction is the mission Memorandum of Understanding (MoU). an MoU is an agreement between the UN and troop contributing countries (TCCs) detailing the obligations and rights in the form of administrative, logistics and financial terms and conditions of both parties to the agreement in relation to the personnel, equipment and services contributed to an operation. The Model MoU (A/C.5/60/26, Chapter 9, p. 148) which is used as a template for MoUs concluded for all PSOs has been amended to include provisions on sending states’ criminal jurisdiction over their troops. There are two new provisions particular to jurisdiction with regards to discipline and criminal offences, Article 7 ter Discipline, and Article 7 quinquies Exercise of jurisdiction by the Government. The amendments are set out in the *Report of the Special Committee on Peacekeeping Operations* (A/61/19) (Part III), and were adopted by the General Assembly in a resolution on *Comprehensive review of the whole question of peacekeeping operations in all their aspects* (A/RES/61/291) 24 August 2007.

<sup>29</sup> See e.g., Jackson Nyamuya Maogoto, 'Watching the Watchdogs: Holding the UN Accountable for Violations of International Humanitarian Law by the 'Blue Helmets'', 5 (1) *Deakin Law Review* (2000) 47-80; Jennifer Murray, 'Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina', 34 *Columbia Human Rights Law Review* (2003) 475-527; Paul Higate and Marsha Henry, 'Engendering (In)security in Peace Support Operations', 35 (4) *Security Dialogue* (2004) 481-498; Paul Higate, *Gender and Peacekeeping Case Studies: The DRC and Sierra Leone*, Institute for Security Studies, (2004); Paul Higate, 'Peacekeepers, Masculinities and Sexual Exploitation', 10 (1) *Men and Masculinities* (2007) 99-119; Marten Zwanenburg, *Accountability of Peace Support Operations* Vol. 9 (Martinus Nijhoff Publishers, Leiden, 2005); Ray Murphy, 'An Assessment of UN Efforts to Address Sexual Misconduct by Peacekeeping Personnel', 13 (4) *International Peacekeeping* (2006) 531-546; Dianne Otto, 'Making sense of zero tolerance policies in peacekeeping sexual economies', in Vanessa Munro and Carl F. Stychin, (eds.), *Sexuality and the Law: Feminist Engagements*, (Glasshouse Press, London, 2007), 259-282; Lauren Rumble and Swati B. Mehta, 'Assisting children born of sexual exploitation and abuse', (27) *Forced Migration Review* (2007) 20-21; Keir Starmer, 'Responsibility for troops abroad: UN mandated forces and issues of human rights accountability', (3) *European Human Rights Law Review* (2008) ; Kathleen Jennings, 'Protecting Whom? Approaches to sexual exploitation and abuse in UN peacekeeping operations', (2008); Melanie O'Brien, 'Issues of the Draft Convention on the Criminal Accountability of United Nations Officials and Experts on Mission', in Noëlle Quéniévet and Shilan Shah-Davis, (eds.), *International Law and Armed Conflict: Challenges in the 21st Century*, (TMC Asser Press, The Hague, 2010), 57-75; Olivera Simic, 'Rethinking 'sexual exploitation' in UN peacekeeping operations', 32 *Women's Studies International Forum* (2009) 288-295.



state prosecutions of such conduct is to turn to the jurisdiction of the International Criminal Court (ICC), which currently exercises jurisdiction over war crimes, crimes against humanity, and genocide. It may seem controversial to consider a peacekeeper as, e.g., a 'war criminal', however if a peacekeeper commits a crime in the right context, it can and indeed should be considered a war crime. In these circumstances, if states are proving unwilling or unable to prosecute their own personnel for these crimes, the ICC needs to be considered as a jurisdictional option. The ICC as a potential prosecutorial forum in this context has really only been mentioned in passing,<sup>30</sup> without any real analysis of the applicability of the Rome Statute to peacekeeper crimes.

This article will assume that the preconditions to exercise of jurisdiction under Article 12,<sup>31</sup> and issues of admissibility under Article 17<sup>32</sup> of the Rome Statute of the ICC have been met, and instead engage in discussion of substantive law.<sup>33</sup> To begin with, the article will introduce gender-based crimes in international criminal law, tracking the evolution of these crimes. Particular emphasis is on the ad hoc tribunals and courts established in the late 20<sup>th</sup> and early 21<sup>st</sup> centuries such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL). These bodies have made significant progress in advancing the law on crimes such as rape, sexual slavery, and forced marriage.

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<sup>30</sup> *Report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations (A/60/980)*, para. 70.

<sup>31</sup> The crime was committed in the territory of or by a national of a state party.

<sup>32</sup> The state is unwilling or unable to investigate or prosecute the crime; the case of sufficient gravity; the person has not already been tried in fair proceedings; the case has not been or is not being investigated or prosecuted by a state.

<sup>33</sup> *Rome Statute of the International Criminal Court* (2187 UNTS 90) entered into force 1 July 2002. It will also be assumed that the chapeau elements of war crimes and crimes against humanity have been met.

However the core of this article consists of an examination of the applicable law under the Rome Statute of the ICC, to determine whether or not the provisions could be used to prosecute peacekeepers for the crimes of rape, sexual slavery, sexual exploitation, prostitution-related conduct, and trafficking. Real life examples of criminal conduct by peacekeeping personnel will be given to test the applicability of the Rome Statute provisions.

## **2. Development of Gender-based Crimes in International Criminal Law**

The past two decades have seen a significant advancement in international criminal law of the development of the law of crimes against women, particularly sexual offences. Crimes such as rape and sexual slavery have become a common weapon of war.<sup>34</sup> After so many years of impunity for perpetrators of these crimes, the late 20<sup>th</sup> Century brought about changes in the way the international community views such crimes, and it has become customary law that rape and sexual violence are prohibited in armed conflict.<sup>35</sup> Rape was prohibited for US armed forces under the Lieber Code of 1863.<sup>36</sup> In international humanitarian law,<sup>37</sup> Common Article 3 of the Geneva Conventions proscribes outrages upon personal dignity, in particular humiliating and degrading treatment, and Article 27 of the Fourth Geneva Convention states ‘Women shall be especially protected against any attack on their honour, in particular against rape,

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<sup>34</sup> *Security Council Resolution 1820 (2008) on Women, Peace and Security (S/RES/1820) (2008); Prosecutor v. Akayesu*, 2 September 1998, Trial Judgement, ICTR-96-4-T, paras. 416-460, 685-695.

<sup>35</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (Cambridge University Press, Cambridge, 2005), p. 323.

<sup>36</sup> Article 44, Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, LL.D., Originally Issued as General Orders No. 100, Adjutant General's Office, 1863, Washington 1898: Government Printing Office.

<sup>37</sup> Theodor Meron, 'Rape as a Crime under International Humanitarian Law', 87 (3) *American Journal of International Law* (1993) 424-428.

enforced prostitution, or any form of indecent assault'.<sup>38</sup> The Additional Protocols specifically mention rape: 'Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.'<sup>39</sup>

Neither of the International Military Tribunals (IMT) established after World War II included rape as an express crime in their Charters. However, a US military tribunal and the IMT of the Far East (Tokyo Tribunal) convicted Generals Toyoda<sup>40</sup> and Matsui<sup>41</sup> of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking. These violations included widespread rapes and sexual assaults. In *Yamashita*, the former general<sup>42</sup> was convicted of war crimes committed by troops under his command, which included rape.<sup>43</sup>

Since the establishment of the two *ad hoc* tribunals, the prohibition of gender-based crimes against women, and jurisprudence on the crimes, particularly sexual violence, has developed exponentially. The crimes of sexual violence against women were of such a massive scale in Rwanda and the former Yugoslavia that they could not be ignored.<sup>44</sup> A number of cases in the *ad hoc* tribunals have become extremely prominent in discussion about sexual violence in international criminal law: *Akayesu*, *Celebici*, *Furundzija*, *Foca*,

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<sup>38</sup> *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (75 UNTS 287) entered into force 21 October 1950.

<sup>39</sup> API, Article 76(1) Protection of Women. APII, Article 4(2)(c) Fundamental guarantees prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault'.

<sup>40</sup> *Soemu Toyoda*, United States, US Military Tribunal sitting in Tokyo, 6 September 1949, *Official Transcript of Record of Trial*, 4998-5007.

<sup>41</sup> *Iwane Matsui*, International Military Tribunal for the Far East, November 1948 at 453-4.

<sup>42</sup> Yamashita was formerly Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands.

<sup>43</sup> *In re Yamashita* (1945) 327 US 1.

<sup>44</sup> Alexandra Stiglmayer (ed.), *Mass Rape: The War against Women in Bosnia-Herzegovina*, (University of Nebraska Press, Lincoln and London 1994); Kelly D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff Publishers, The Hague, 1997).

*Semanza*, *Gacumbitsi*, *AFRC Case* and *RUF Case*.<sup>45</sup> *Akayesu* was the first case in any of the *ad hoc* tribunals to address rape.<sup>46</sup> The ICTR Trial Chamber sought to create a definition of rape and sexual violence in international criminal law, which was previously non-existent:

The Tribunal notes that while rape has been historically defined in national jurisdictions as non-consensual sexual intercourse, variations on the form of rape may include acts which

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<sup>45</sup> *Akayesu*, Trial Judgement, *supra* note 34; *Prosecutor v. Delalic et al. (Celebici)*, 16 November 1998, Trial Judgement, IT-96-21-T; *Prosecutor v. Furundzija*, 10 December 1998, Trial Judgement, IT-95-17/1-T; *Prosecutor v. Kunarac et al. (Foca)*, 22 February 2001, Trial Chamber Judgement, IT-96-23-T & IT-96-23/1-T; *Prosecutor v. Semanza*, 15 May 2003, Judgment and Sentence, ICTR-97-20-T; *Prosecutor v. Gacumbitsi*, 17 June 2004, ICTR-2001-64-T, Trial Judgement; *Prosecutor v. Brima, Kamara and Kanu (AFRC Case)*, 20 June 2007, SCSL-2004-16-PT, Trial Judgement; *Prosecutor v. Sesay, Kallon and Gbao (RUF Case)*, 2 March 2009, Trial Judgement, SCSL-04-15-T. For literature discussing the cases, see e.g., Sharon A. Healey, 'Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia', 21 *Brooklyn Journal of International Law* (1995) 327-383; Kelly D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff Publishers, The Hague, 1997); Kelly D. Askin, 'The International War Crimes Trial of Anto Furundzija: Major Progress Toward Ending the Cycle of Impunity for Rape Crimes', 12 *Leiden Journal of International Law* (1999) 935-955; Rosalind Dixon, 'Rape as a Crime in International Humanitarian Law: Where to from Here?', 13 (3) *European Journal of International Law* (2002) 697-719; Doris Buss, 'Prosecuting Mass Rape: Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic', 10 *Feminist Legal Studies* (2002) 91-99; Patricia Viseur Sellers, 'Sexual Violence and Peremptory Norms: The Legal Value of Rape', 34 *Case Western Reserve Journal of International Law* (2002) 287-303; 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) 288-316; Alex Obote-Odora, 'Rape and Sexual Violence in International Law: ICTR Contribution', 12 *New England Journal of International and Comparative Law* (2005) 135-159; Wolfgang Schomburg and Ines Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law', 101 (1) *American Journal of International Law* (2007) 121-140; Neha Jain, 'Forced Marriage as Crime against Humanity: Problems of Definition and Prosecution', 6 *Journal of International Criminal Justice* (2008) 1013-1032; Alison Cole, 'Prosecutor v. Gacumbitsi: The New Definition for Prosecuting Rape Under International Law', 8 *International Criminal Law Review* (2008) 55-86; Micaela Frulli, 'Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a 'New' Crime against Humanity', 6 *Journal of International Criminal Justice* (2008) 1033-1042; Cecily Rose, 'Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-based Crimes', 7 *Journal of International Criminal Justice* (2009) 353-372; Doris Buss, 'Rethinking 'Rape as a Weapon of War'', 17 *Feminist Legal Studies* (2009) 145-163; Teresa Doherty, 'Developments in the Prosecutions of Gender-based Crimes- The Special Court for Sierra Leone Experience', 17 *American University Journal of Gender, Social Policy & Law* (2009) 327-335; Beth Van Schaak, 'Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson', 17 *American University Journal of Gender, Social Policy & Law* (2009) 361-406; Bridgette A. Toy-Cronin, 'What Is Forced Marriage? Towards a Definition of Forced Marriage as a Crime against Humanity', 19 *Columbia Journal of Gender and Law* (2010) 539-590; Kiran Grewal, 'Rape in Conflict, Rape in Peace: Questioning the Revolutionary Potential of International Criminal Justice for Women's Human Rights', 33 *The Australian Feminist Law Journal* (2010) 57-79.

<sup>46</sup> Catharine A. MacKinnon, 'Defining Rape Internationally: A Comment on Akayesu', 44 *Columbia Journal of Transnational Law* (2006) 940-958; Catharine A. MacKinnon, 'The ICTR's Legacy on Sexual Violence', 14 *New England Journal of International and Comparative Law* (2008) 101-110.

involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. ... The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts... Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...

*The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact... The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or... military presence... among refugee... women...*<sup>47</sup>

Both *Celebici* and *Furundzija* upheld the definition of rape as found in *Akayesu*. The *Celebici* Trial Chamber agreed that rape constitutes ‘a physical invasion of a sexual nature, committed on a person under circumstances that are coercive’,<sup>48</sup> and declared that ‘[t]here can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law’.<sup>49</sup> However, the Trial Chamber in *Furundzija* engaged in a more in-depth discussion of the definition of rape,

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<sup>47</sup> *Akayesu*, Trial Judgement, *supra* note 34, paras. 686-688 (emphasis added). The Trial Chamber found that forcing a young girl to do gymnastics naked in front of a crowd constitutes sexual violence; para 688.

<sup>48</sup> *Celebici*, Trial Judgement, *supra* note 45, para. 479.

<sup>49</sup> *Ibid.*, para. 476.

acknowledging the *Akayesu* judgement,<sup>50</sup> but also considering domestic laws of States.<sup>51</sup> From this consideration, the Trial Chamber acknowledged that ‘most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus’.<sup>52</sup> However, the Trial Chamber found there to be a distinction in domestic law with regards to whether forced oral penetration was categorised as rape or as sexual assault. The Trial Chamber held ‘that the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity’, and thus ‘such an extremely serious sexual outrage as forced oral penetration should be classified as rape’.<sup>53</sup> The Trial Chamber went on to define rape as:

(i) the sexual penetration, however slight:

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

(b) of the mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person.<sup>54</sup>

This definition is more refined, more definitive than that created by the *Akayesu* Trial Chamber. It is also more restrictive, a factor which was recognised by the Trial Chamber in *Foca*,<sup>55</sup> which did substantially apply the definition, but ensured a broad interpretation of ‘coercion or force or threat of force against the victim or a third person’. The Trial Chamber stated that ‘coercion in particular would encompass most conduct which

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<sup>50</sup> *Furundzija*, Trial Judgement, *supra* note 45, para. 176.

<sup>51</sup> *Ibid.*, paras. 178-182. *See also Foca*, Trial Judgement, *supra* note 45, paras. 439-456.

<sup>52</sup> *Furundzija*, Trial Judgement, *supra* note 45, para. 181.

<sup>53</sup> *Ibid.*, para. 183.

<sup>54</sup> *Ibid.*, para. 185.

<sup>55</sup> *Foca*, Trial Judgement, *supra* note 45, para. 438.

negates consent'.<sup>56</sup> A definition of the *actus reus* of rape was developed from the *Furundzija* one:

the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.<sup>57</sup>

The *mens rea* of the crime was held to be 'the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim'.<sup>58</sup> The notable difference between the *Furundzija* and *Foca* definitions is that any reference to force or threat of force, as found in *Furundzija*, has been removed in *Foca*, and the emphasis is on lack of consent of the victim. The *Foca* Trial Chamber held that there are factors other than force or threat of force 'which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim',<sup>59</sup> such as general circumstances that would 'have the effect that the victim's will was overcome or that her ability freely to refuse the sexual acts was temporarily or more permanently negated'.<sup>60</sup> In the facts of the case, lack of consent of victims was proven by factors such as their captivity (enslavement) and threats of violence and death.<sup>61</sup> However, it is notable that in these cases, there was a move away from the use of non-consent as a factor in rape, and a preference for coercion as a defining element. In using coercion, lack of consent is almost

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<sup>56</sup> *Ibid.*, para. 459.

<sup>57</sup> *Ibid.*, para. 460.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, paras. 438, 459.

<sup>60</sup> *Ibid.*, para. 452.

<sup>61</sup> *Ibid* at e.g., paras 646-647; 739-741.

irrelevant, as non-consent is to be assumed by the coercive circumstances:<sup>62</sup> ‘circumstances prevailing in most cases charged under international criminal law, as either genocide, crimes against humanity, or war crimes, will be almost universally coercive, thus vitiating true consent’.<sup>63</sup>

Other than rape, *Foca* also involved accusations of forced naked dancing, which were charged as outrages upon personal dignity.<sup>64</sup> Victims were forced to strip and to dance naked in front of the defendant Kovac and other men. The Trial Chamber held this to be a ‘painful and humiliating experience for the three women involved, even more so because of their young age’.<sup>65</sup> The defendants were also found guilty of enslavement, as many of the victims were enslaved in apartments by the defendants, in order to do household duties, but principally to provide sexual services for the defendants and other men.<sup>66</sup>

In *Furundzija*, the Trial Chamber referred to sexual violence other than rape:

international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity.<sup>67</sup>

The *Akayesu* Trial Chamber held that forcing a young woman to undress and do gymnastics naked in a public courtyard constituted sexual violence, which fell within the scope of other inhumane acts, outrages upon personal dignity, and serious bodily or

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<sup>62</sup> *E.g.*, *Akayesu*, Trial Judgement, *supra* note 34, paras. 686-688; MacKinnon, *supra* note 46 at 951.

<sup>63</sup> *Prosecutor v. Muhimana*, 28 April 2005, Judgement and Sentence, ICTR-95-1B-T, para. 546.

<sup>64</sup> *Foca*, Trial Judgement, *supra* note 45, paras. 766-774; 782.

<sup>65</sup> *Ibid.*, para. 773.

<sup>66</sup> *Ibid.*, para. 782.

<sup>67</sup> *Furundzija*, Trial Judgement, *supra* note 45, para. 186.



mental harm as set forth in the ICTR Statute. The Tribunal defined sexual violence as ‘any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do involve penetration or even physical contact.’<sup>68</sup>

The SCSL has also addressed certain gender-based crimes- rape, sexual slavery and forced marriage. The SCSL’s development of the crime of forced marriage has been quite prominent. In the *AFRC Case*, the trial judgement held that forced marriage was not a separate crime against humanity, and that the elements constituted sexual slavery.<sup>69</sup> This decision was appealed by the Prosecutor and reversed by the Appeals Chamber, which established forced marriage as a separate crime against humanity, falling under the category of ‘other inhumane acts’- rather than ‘sexual violence’.<sup>70</sup> The reason for this categorisation was the finding that the crime is not necessarily sexual in nature, and while non-consensual sex is usually an element of the crime it does not have to be. Forced marriage was found to consist of elements such as non-consensual sex, and deprivation of liberty. However, the Appeals Chamber established that the two distinct aspects of forced marriage are the compulsion of a person by force or threat of force into a forced conjugal association, and the subsequent relationship of exclusivity which includes disciplinary consequences for breaches of that exclusivity. Thus, forced marriage is not predominantly a sexual crime, but nonetheless remains a gender-based crime, as it is women who are abducted (under violent circumstances) to be wives for men. Forced

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<sup>68</sup> *Akayesu*, Trial Judgement, *supra* note 34, para. 688.

<sup>69</sup> *AFRC Case*, Trial Judgement, *supra* note 45, paras. 703-714.

<sup>70</sup> *Prosecutor v. Brima, Kamara and Kanu (AFRC Case)*, 22 Feb 2008, SCSL-2004-16-A, Appeal Judgement, paras. 183-203. This has been upheld in *RUF Case*, Trial Judgement, *supra* note 45, paras. 164-166.

marriage results in severe suffering, or physical, mental or psychological injury to the victim.<sup>71</sup>

Thus what has emerged from the *ad hoc* jurisprudence is a very broad definition of sexual violence. As with rape, coercion is a material element, but what constitutes the sexual violence itself is not subject to a limited definition, and will depend on the particular circumstances of a case. It includes forced nudity and forced naked activity (such as dancing or gymnastics), and other cases have also determined sexual mutilation, forced marriage, forced abortion, sexual molestation,<sup>72</sup> and biting and kicking of the genital area, to constitute sexual violence.<sup>73</sup> It has also been developed that gender-based crimes do not necessarily involve a sexual element, as with forced marriage, although sexual conduct is habitual.

### **3. The Rome Statute of the International Criminal Court**

The Rome Statute was constructed in the 1990s, at a time following the start of the development of the *ad hoc* tribunal jurisprudence on gender-based crimes. Thus, the crimes included in the Rome Statute are influenced by some of this jurisprudence. However, the Elements of Crimes were not adopted until 2002,<sup>74</sup> and therefore were able to draw on more significant jurisprudence, such as the *Furundzija* and *Foca* rulings. For example, the emphasis on lack of consent and coercive circumstances, rather than force, as developed in *Furundzija* and *Foca*, is echoed in the Elements of Crimes.<sup>75</sup>

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<sup>71</sup> *AFRC Case*, Appeal Judgement, *ibid.*, para. 196.

<sup>72</sup> *Prosecutor v. Kvočka et al.*, 2 November 2001, Trial Judgement, IT-98-30/1-T, para. 180 (fn. 343).

<sup>73</sup> *Prosecutor v. Todorovic*, 31 July 2001, Sentencing Judgement, IT-95-9/1-S paras. 38 and 66.

<sup>74</sup> The Elements of Crimes were adopted under Article 9 of the Rome Statute, which provides for Elements of Crimes to assist the Court in interpretation and application of Articles 6, 7 and 8. *Elements of Crimes* (ICC-ASP/1/3 part II-B), September 2002.

<sup>75</sup> See discussion below on elements of crimes for rape, enforced prostitution and sexual violence.

Under Article 7(g) of the Rome Statute, crimes against humanity include ‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity’.<sup>76</sup> The definitions of these crimes found in Article 7(g) apply to the same crimes found under Article 8, as war crimes. Article 8(2)(b)(xxii) includes almost identical crimes as war crimes in international armed conflict: ‘Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions’. The text of Article 8(2)(e)(vi) (non-international armed conflict) is the same except the last phrase is ‘any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions’. Thus, there are six main categories of sexual offences<sup>77</sup> under the Rome Statute: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and sexual violence.<sup>78</sup>

The ICC currently has several cases before it which will address one or more of these crimes:

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<sup>76</sup> A definition is provided for forced pregnancy in Article 7(2)(f): “Forced pregnancy” means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.’

<sup>77</sup> The sexual offences were included in the Rome Statute after the intensive lobbying of the Women’s Caucus for Gender Justice in the ICC, a coordinated group of NGOs. They are sometimes referred to as the ‘gender crimes’, although, with the exception of forced pregnancy, the application of the sexual offences is gender-neutral. See Michael Cottier, ‘Article 8 War crimes para. 2(b)(xxii)’, in Otto Triffterer, (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden, 2008), pp 435-6. A footnote to the elements of rape notes that ‘[t]he concept of ‘invasion’ is intended to be broad enough to be gender-neutral’.

<sup>78</sup> Dianne Luping, ‘Investigation and Prosecution of Sexual and Gender-based Crimes before the International Criminal Court’, 17 *American University Journal of Gender, Social Policy & Law* (2009) 431-496; Susana SaCouto and Katherine Cleary, ‘The Importance of Effective Investigation of Sexual Violence and Gender-based Crimes at the International Criminal Court’, 17 *American University Journal of Gender, Social Policy & Law* (2009) 337-359.

Uganda situation, Joseph Kony- sexual slavery and rape as crimes against humanity, and rape as a war crime<sup>79</sup>

*Prosecutor v Katanga and Chui*- sexual slavery and rape both as war crimes and crimes against humanity<sup>80</sup>

*Prosecutor v Bemba Gombo*- rape as a war crime<sup>81</sup>

*Prosecutor v Al Bashir*- rape as a crime against humanity<sup>82</sup>

*Prosecutor v Harun and Ali Kushayb*- rape as a crime against humanity and a war crime<sup>83</sup>

*Prosecutor v Mbarushimana*- rape as a war crime and a crime against humanity<sup>84</sup>

However, due to the fact that no case has been completed as yet, there has been little discussion by the ICC Chambers on the elements of these crimes. Where applicable, such discussion will be mentioned in the relevant sections below. The Office of the Prosecutor (OTP) has appointed a Gender Advisor, Catharine MacKinnon, who, since November 2008, has been designing and providing the court with advice and training on gender crimes. She is currently consulting on some of the cases as well as advising on the

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<sup>79</sup> Situation in Uganda, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, ICC-02/04-01/05.

<sup>80</sup> *Prosecutor v. Katanga and Chui*, 30 September 2008, Decision on the confirmation of charges, ICC-01/04-01/07,.

<sup>81</sup> *Prosecutor v. Bemba Gombo*, 15 June 2009, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08,.

<sup>82</sup> *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09.

<sup>83</sup> *Prosecutor v. Ahmad Harun and Ali Kushayb*, Warrant of Arrest for Ahmad Harun, Warrant of Arrest for Ali Kushayb, 27 April 2007, ICC-02/05-01/07.

<sup>84</sup> *Prosecutor v. Mbarushimana*, 28 September 2010, Warrant of Arrest for Callixte Mbarushimana, ICC-01/04-01/10.

development of an OTP policy paper on gender crimes,<sup>85</sup> and has assisted with the drafting of the *Mbarushimana* arrest warrant. It remains to be seen what impact this policy paper will have on OTP decisions with regard to the prosecution of gender crimes.

To determine whether any of the offences under the Rome Statute could be applicable to the sexual exploitation and abuse misconduct committed by peacekeeping personnel, namely rape, sexual slavery, trafficking-related offences, sexual exploitation, and prostitution-related activities, the individual definitions of the four relevant crimes (rape, sexual slavery, enforced prostitution and sexual violence) must be examined. The definitions of the crimes are found in the Elements of Crimes.

### *3.1 Rape*

The elements of rape are as follows:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

It is clear that this definition was designed to be broad, and to capture the essence of rape as a violation of sexual autonomy of the victim.<sup>86</sup> Avoidance of the word

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<sup>85</sup> Catharine MacKinnon, *The International Criminal Court and Gender Crimes*, Consultative Conference on International Criminal Justice, New York, 11 September 2009, available at <<http://www.icc-cpi.int/NR/rdonlyres/2B344A20-EBDC-406C-8837-3973274F4501/280839/speech110909.pdf>>, 7 July 2011.

<sup>86</sup> The *Foca* Trial Chamber judgement recognised rape as a violation of sexual autonomy; *Foca*, Trial Judgement, *supra* note 45, para. 457; Machteld Boot and Christopher K. Hall, 'Article 7 Crimes against

‘penetrated’, instead preferring the term ‘invaded’, voices the experience of the victim, who feels invaded by the act of rape,<sup>87</sup> and ensures the provision is gender-neutral.<sup>88</sup> Reference to ‘any part of the body of the victim or of the perpetrator’ means that non-consensual oral sex or sexual intercourse qualifies as rape.<sup>89</sup> In addition, rape can be committed ‘with any object or any other part of the body’, and is not restricted to penetration by the penis. Application to peacekeeper conduct can be demonstrated using the example of allegations against Italian peacekeeping personnel, supported by photographic evidence, of the rape of a Somali woman with a flare gun.<sup>90</sup> This would clearly fall within the elements of rape, as her genital opening was physically invaded by an object. Likewise, the circumstances of the case of *Ronghi*, in which a US soldier engaged as part of the American peacekeeping contingent in Kosovo raped and murdered a 10 year old girl.<sup>91</sup> Such conduct would also constitute rape, as he invaded the anal opening of his young victim with his sexual organ.

The second element of the crime of rape is quite detailed. While the direction taken by the ICTY in *Furudzija* and *Foca* has been followed to a certain extent, there is a distinct lack of express reference to ‘lack of consent’. The requirement of lack of consent may possibly be implied from the wording of the second element, as the Preparatory

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humanity para. 1 (g)’, in Otto Triffterer, (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (C.H. Beck, Hart, Nomos, Muenchen, Oxford, Baden-Baden, 2008), 206-216, p. 210.

<sup>87</sup> Rape has typically been defined in domestic law around penetration; ‘defined according to what men think violates women’. However, ‘what women experience as degrading and defiling when we are raped includes as much that is distinctive to us as is our experience of sex’. Catharine A. MacKinnon, *Feminism Unmodified* (Harvard University Press, Cambridge, Mass., London, 1987), p 87.

<sup>88</sup> Eva La Haye, ‘Article 8(2)(b)(xxii)’, in Roy S. Lee, (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers, Inc., Ardsley, NY, 2001), 187-198, p. 188.

<sup>89</sup> The terminology retains a gender-neutral phrasing, enabling male rape to be prosecuted under this provision.

<sup>90</sup> Lea Thompson, ‘Disturbing the Peace’, *Dateline NBC*, (22 January 1999),

<sup>91</sup> *United States v. Ronghi*, No. ARMY 20000635, (A. Ct. Crim. Aat May 27, 2003); *United States v. Ronghi*, 60 M.J. 83, 86 (C.A.A.F. 2004).

Commission did recognise that lack of consent was an inherent element of the crime of rape.<sup>92</sup> However, the ultimate decision was not to phrase the second element in terms of consent,<sup>93</sup> and thus this leads to uncertainty as to whether the ICC can or should consider lack of consent as such as an element of the crime. Despite this, it must be remembered that the Elements of Crimes are not binding, but form guidance, and the Court is not precluded from taking a more expansive interpretation of what constitutes the crimes under the Rome Statute in its judgements.<sup>94</sup> From this perspective, it is open to the Court to regard ‘lack of consent’ as an element of rape. Cassese has interpreted ‘coercion, or force, or threat of force’ ‘in essence [to] imply or mean’ ‘lack of consent’, and thus views the two definitions as ‘in substance equivalent’.<sup>95</sup> It is true that some case law has used the terms ‘lack of consent’ and ‘coercion’ in a manner which could be seen as interchangeable.<sup>96</sup> However, to grant the same meaning to non-consent and coercion is inaccurate. In *Muhimana*, the ICTR clearly separated consent and coercion, viewing coercion as ‘an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape’.<sup>97</sup>

As MacKinnon points out, there is a distinction between consent and coercion: ‘emphasis on nonconsent as definitive of rape views the crime fundamentally as a deprivation of sexual freedom, a denial of individual self-acting. Emphasis on coercion as

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<sup>92</sup> Cottier, *supra* note 77, p. 440.

<sup>93</sup> La Haye, *supra* note 88, p. 189.

<sup>94</sup> Article 9(1) of the Rome Statute: ‘Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8’. Elements of Crimes General Introduction ‘1. Pursuant to article 9, the following Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8...’

<sup>95</sup> Antonio Cassese, *International Criminal Law* (Oxford University Press, Oxford, 2008), p. 112.

<sup>96</sup> *Celebici*, Trial Judgement, *supra* note 45, para. 479; *Foca*, Trial Judgement, *supra* note 45, para. 460.

<sup>97</sup> *Muhimana*, Trial Judgement, *supra* note 63, para. 546.

definitive... sees rape fundamentally as a crime of inequality, whether of physical or other force, status or relation'.<sup>98</sup>

This differentiation also exists in the application in court proceedings:

Consent definitions accordingly have proof of rape turn on victim and perpetrator mental state: who wanted what, who knew what when... Coercion definitions by distinction turn on proof of physical acts, surrounding context, or exploitation of relative position: who did what to whom and sometimes why...Accordingly, while consent definitions tend to frame the same events as individuals engaged in atomistic one-at-a-time interactions, coercion definitions are the more expressly social, contextual, and collective in the sense of being group-based.<sup>99</sup>

As the second element stands, the sexual invasion must be committed by force, threat of force,<sup>100</sup> coercion, or by taking advantage of a coercive environment. Pre-Trial Chamber II has held that in the circumstances of vaginal or anal penetration, committed 'by several MLC perpetrators in turn,... their clothes... ripped off by force,... pushed to the ground, immobilised by MLC soldiers standing on or holding them, raped at gunpoint, in public or in front of or near their family members', force, threat or force or coercion is a prevailing factor.<sup>101</sup> Situations amounting to force or threat of force in rape are listed in Bemba, and include being held down by other soldiers, having a gun directed at the victim, being threatened with a knife, and watching family members being raped.<sup>102</sup>

The second element definition is clearly taken from the case law of the *ad hoc* tribunals, which moved in the direction of coercion rather than non-consent, and the idea

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<sup>98</sup> MacKinnon, *supra* note 46, p. 941.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Katanga and Chui*, Confirmation of charges, *supra* note 80, para. 443.

<sup>101</sup> *Bemba*, Decision on charges, *supra* note 81, para. 165.

<sup>102</sup> *Bemba*, Decision on charges, *supra* note 81, paras. 165-18



that non-consent is essentially irrelevant in such coercive circumstances.<sup>103</sup> The ICC is likely to follow the direction of the *ad hoc* tribunals, in which the Chambers are ‘free to infer non-consent from the background circumstances’.<sup>104</sup> However the *ad hoc* tribunals recognised that ‘inquiring into individual consent to sex for acts that took place in a clear context of mass sexual coercion’ makes no sense.<sup>105</sup> They also deemed certain circumstances to be inherently coercive- such as enslavement, armed conflict or a military presence.<sup>106</sup> This finding has been followed by Pre-Trial Chamber I in *Katanga and Chui and Bemba*.<sup>107</sup> ‘The term ‘coercive environment’ can be understood as referring to, *inter alia*, vertical power relations between troops conquering a village and the inhabitants of that village or between a detained person and his or her guards.’<sup>108</sup> This can specifically be applied to rape when committed by peacekeeping personnel. Peace support operations take place either in the context of armed conflict, or in a post-conflict society. In addition to those circumstances, the power differential between peacekeeping personnel and the local community can create a situation of coercion, where a woman may feel intimidated and powerless to refuse the sexual advances of a peacekeeper. This may be defined as coercion, or as taking advantage of a coercive environment. The coercive environment would be constituted from the existence of armed conflict,<sup>109</sup> or of

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<sup>103</sup> E.g., *Akayesu*, Trial Judgement, *supra* note 34, paras. 686-688; MacKinnon, *supra* note 46, p. 951.

<sup>104</sup> *Gacumbitsi*, Trial Judgement, *supra* note 45, para. 155.

<sup>105</sup> MacKinnon, *supra* note 46, p. 950.

<sup>106</sup> *Akayesu*, Trial Judgement, *supra* note 34, para. 688; *Foca*, Trial Judgement, *supra* note 45, e.g., paras. 452; 646-647; 739-741.

<sup>107</sup> *Katanga and Chui*, Confirmation of charges, *supra* note 80, para. 440; *Bemba*, Decision on charges, *supra* note 81, para. 162.

<sup>108</sup> Cottier, *supra* note 77, pp. 440-1.

<sup>109</sup> The Special Rapporteur for Slavery has determined that ‘the manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negates the need for the prosecution to establish a lack of consent as an element of the crime’; *Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict* (hereinafter ‘*Special Rapporteur for Slavery Report 1998*’) (E/CN.4/Sub.2/1998/13), para. 25.

the instability and insecurity of a post-conflict society including the lack of access to adequate financial and living resources, as well as lack of structured and effective rule of law. Such circumstances result in trauma, poverty and displacement of the local population- in turn creating a situation of desperation.<sup>110</sup> Clearly this does not generate circumstances under which a woman has the true freedom of consent. The presumption of coercion also exists with regard to crimes against humanity. The ICTY has held that ‘circumstances ... charged as ... crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible’.<sup>111</sup>

If we take the example of the case of *Ronghi*,<sup>112</sup> involving a rape which was committed in post-conflict Kosovo, the elements of force (the violence used in subduing his victim) and taking advantage of a coercive environment (exploiting the trust his victim had in him by luring her to an empty basement) exist. It may be noted that there is no specific differentiation within the Rome Statute crimes with regards to the age of the victim. However, this is a factor likely to be considered as aggravating in sentencing decisions by the Court. It is also likely to be considered in relation to consent, as the Elements note that ‘[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity’.<sup>113</sup> It may be inferred from this that lack of consent will be presumed in the case of rape of a child. Thus in *Ronghi*’s case there would be a presumption of lack of consent due to the young age of his victim (10 years old).

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<sup>110</sup> Paul Higate and Marsha Henry, ‘Engendering (In)security in Peace Support Operations’, 35 (4) *Security Dialogue* (2004) 481-498, p. 488.

<sup>111</sup> *Foca*, 12 June 2002, Appeals Chamber Judgement, IT-96-23-A, para. 130.

<sup>112</sup> *Ronghi*, *supra* note 91.

<sup>113</sup> Footnote 16 to Elements of Article 7(1)(g)-1.

### 3.2 Sexual Slavery

The elements of sexual slavery are:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

A footnote to element 1 notes that the deprivation of liberty may ‘include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.’<sup>114</sup> It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.’<sup>115</sup>

The elements of sexual slavery differ from rape in that they do not require force, threat of force, or coercive circumstances. The elements are different as the concept of slavery

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<sup>114</sup> *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (226 UNTS 3) entered into force 30 April 1957. Article 7(b) states that ‘A person of servile status’ means a person in the condition or status resulting from any of the institutions or practices mentioned in article I of this Convention’, which in turn covers ‘(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.’

<sup>115</sup> Footnotes 53 and 65, Elements of Crimes.

itself is the basis for the crime, with the additional element being the involvement of sexual acts. The emphasis is on the concepts of ownership or deprivation of liberty. It includes ‘situations where women and girls are forced into ‘marriage’, domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors’.<sup>116</sup> The ICC has further held that sexual slavery can encompass “‘ practices such as the detention of women in ‘rape camps’ or ‘comfort stations’, forced temporary ‘marriages’ to soldiers and other practices involving the treatment of women as chattel, and as such, violations of the peremptory norm prohibiting slavery’”.<sup>117</sup> The second element requiring a perpetrator to have caused a slave to engage in sexual acts- in addition to the restrictions placed on the individual’s autonomy, freedom of movement and power- engages a particular parameter of sexual slavery: ‘the ability to decide matters relating to his or her sexual activity’.<sup>118</sup> A perpetrator must intend to impose this deprivation of liberty and cause the victim to engage in sexual acts.<sup>119</sup>

It is clear that the activities of some peacekeeping personnel would amount to sexual slavery; such as the purchase of a Moldovan woman by an American in Bosnia, who kept the woman in a house with her passport confiscated and forced her to engage in sexual acts.<sup>120</sup> Trafficking in women would also fall within the ambit of sexual slavery, covering conduct such as transportation of women or facilitating the trafficking through procurement of false documents.

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<sup>116</sup> *Katanga and Chui*, Confirmation of charges, *supra* note 80, para. 431; *Special Rapporteur for Slavery Report 1998*, *supra* note 109, para. 8; Boot and Hall, *supra* note 86, p. 211.

<sup>117</sup> *Katanga and Chui*, Confirmation of charges, *supra* note 80, para. 431, citing *Special Rapporteur for Slavery Report 1998*, *supra* note 109, para. 8. The facts in *Katanga and Chui* include keeping women in what amounted to rape camps and as ‘wives’; *Katanga and Chui*, Confirmation of charges, *supra* note 80, paras. 434-5.

<sup>118</sup> *Katanga and Chui*, Confirmation of charges, *supra* note 80, para. 432.

<sup>119</sup> *Katanga and Chui*, Confirmation of charges, *supra* note 80, para. 433.

<sup>120</sup> *Hopes Betrayed*, *supra* note 6, pp. 17; 62-67.

Peacekeeping personnel who engage in sexual relations with women being kept in sexual servitude could be charged with aiding, abetting or otherwise assisting sexual slavery. While they may not be the persons directly responsible for the victims' servitude, by their engagement with the victims are contributing to the ongoing servitude of such women. An aider and abettor does not have to be part of a plan or agreement,<sup>121</sup> or be aware of the precise crime that was intended,<sup>122</sup> but is criminally responsible if he 'carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime ... and this support has a substantial effect upon the perpetration of the crime'.<sup>123</sup> The engagement in sexual relations with women kept in sexual slavery has a substantial effect on the perpetration of the crime by enabling it to be carried out and to continue.

However, they could also be charged as principal perpetrators, as they are purchasing the women. The purchase may only be for a limited time, but for that period of time, they are exercising the powers of ownership by controlling that person's liberty (including sexual liberty) for the duration of the engagement.

### *3.3 Enforced Prostitution*

The elements of enforced prostitution are:

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or

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<sup>121</sup> *Prosecutor v. Tadic*, 15 July 1999, Appeal Judgement, IT-94-1-A, para. 229.

<sup>122</sup> *Furundzija*, Trial Judgement, *supra* note 45, para. 246.

<sup>123</sup> *Tadic*, Appeal Judgement, *supra* note 121, para. 229. See Robert Cryer, 'General Principles of Liability in International Criminal Law', in Dominic McGoldrick, et al., (eds.), *The Permanent International Criminal Court*, (Hart Publishing, Oxford and Portland Oregon, 2004), 233-262, p. 248.

persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.

This offence could be used to prosecute peacekeeping personnel who engage in agreements with owners of brothels containing forced prostitutes, to provide protection against potential raids by the mission, or who have any kind of involvement with those engaged directly in forced prostitution.<sup>124</sup> Many women working in 'night clubs' or brothels are trafficked or forced to work there as prostitutes.<sup>125</sup> Even in situations where women are working by choice, it is not a true 'choice', but rather one emanating from desperate circumstances<sup>126</sup> - which amounts to the night club or brothel owners taking advantage of a coercive environment.

Were a peacekeeper to engage in pandering, they could be charged under this provision. This may be a charged in conjunction with sexual slavery. For example, peacekeeping personnel in the Former Yugoslavia who bought women and kept them for their own sexual services would be charged with sexual slavery, but if they also offered the services of the woman or women to others, this could also amount to forced prostitution.<sup>127</sup> Any forced prostitution taking place under the conditions of purchasing, selling, lending, bartering or deprivation of liberty would also amount to sexual slavery.

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<sup>124</sup> See e.g., 'So does it mean we have the rights?', *supra* note 12, in which UNMIK Police were alleged to have assisted a brothel owner in trafficking women and to alert the brothel owner about a raid, p 42.

<sup>125</sup> *Ibid.* at 7.

<sup>126</sup> Isabelle Talleyrand, 'Military Prostitution: How the Authorities Worldwide Aid and Abet International Trafficking in Women', 27 *Syracuse Journal of International Law & Commerce* (2000) 151-176, p. 158; Kent, *supra* note 2, p. 53.

<sup>127</sup> Amnesty International discovered allegations of Russian troops in Kosovo bringing trafficked women for sex work onto the KFOR base; 'So does it mean we have the rights?', *supra* note 12, pp. 44-45.

As with sexual slavery, it is possible that a peacekeeper who engages in patronising a forced prostitute could be charged with aiding, abetting or otherwise assisting in the commission of forced prostitution, or as the main perpetrators. Without clientele to purchase the service of the forced prostitutes, those who engage in forced prostitution would have no temptation or indeed means to commit the crime, as it is the demand that makes the crime possible.<sup>128</sup> Thus any client is having a substantial effect upon the perpetration of the crime, and is aiding, abetting or otherwise assisting in the commission of the crime.<sup>129</sup> However, it would be more significant to charge a peacekeeper as a main perpetrator. Under the provision, a peacekeeper engaging in acts of a sexual nature with a prostitute is taking advantage of a coercive environment, and another person obtains or expects to obtain pecuniary or other advantage in exchange for or in connection with these acts. That other person in receipt of pecuniary or other advantage (e.g. food) may be the victim herself, or may also be a brothel owner or panderer.<sup>130</sup>

### *3.4 Sexual Violence*

The elements of sexual violence are:

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute/ The conduct was of a gravity comparable to that of a grave breach of the

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<sup>128</sup> 'International presence generates sex trade'; '*So does it mean we have the rights?*', *supra* note 12, pp. 6-7.

<sup>129</sup> *Tadic*, Appeal Judgement, *supra* note 121, para. 229.

<sup>130</sup> La Haye, *supra* note 88, p. 193.

Geneva Conventions/ The conduct was of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions.

With the crime of sexual violence, once again there is the element of taking advantage of a coercive environment. Of all the provisions of the Rome Statute, sexual violence is the offence under which a charge for sexual exploitation would most likely succeed. It is clear that rape, sexual slavery and enforced prostitution are all crimes with very specific elements. However, the crime of sexual violence is a broadly defined one, in order to encompass a wide range of crimes.<sup>131</sup> It has been discussed above how a coercive environment is created and can be presumed within an armed conflict or in post-conflict society. Such an environment would then be the basis for determining that sexual exploitation falls within the ambit of 'sexual violence' under the Rome Statute, as the act of a sexual nature may not have been committed with force, but was certainly committed by taking advantage of a coercive environment.

Depending upon which provision the offence is being charged under, it must also, however, be determined whether the conduct was of gravity comparable to other crimes against humanity, to a grave breach of the Geneva Conventions, or to that of a serious violation of Common Article 3. Thus it must be proven that sexual exploitation is of gravity comparable to one of these definitions. The gravity of sexual exploitation is found in the fact that it violates many human rights of the women involved,<sup>132</sup> as well as abusing a relationship that has a significant power differential. The crux of sexual exploitation is the abuse of 'a position of vulnerability, differential power, or trust, for

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<sup>131</sup> La Haye, *supra* note 88, p. 198.

<sup>132</sup> War crimes are also violations of human rights; Peter Rowe, 'War Crimes', in Dominic McGoldrick, et al., (eds.), *The Permanent International Criminal Court*, (Hart Publishing, Oxford and Portland Oregon, 2004), 203-230, p. 212-213.



sexual purposes’,<sup>133</sup> and this makes it a grave crime. An additional factor of the gravity of the crime would be the age of the victim. Many cases involve girls,<sup>134</sup> and the youth of a victim has been found by the *ad hoc* tribunals to be a factor that increases the pain and humiliation of sexual violence.<sup>135</sup>

#### 4. A New Provision?

While it may be argued that sexual exploitation would fall under the ambit of ‘sexual violence’, it may also be argued that the Rome Statute is lacking in an express provision which would enable peacekeeping personnel to be prosecuted for sexual exploitation, including patronising prostitutes. In the context of armed conflict, sexual exploitation should be acknowledged as a crime as grave as the other listed sexual offences. While the drafters of the sexual offences provision aimed to avoid less grave crimes such as sexual harassment,<sup>136</sup> sexual exploitation is a grave crime itself, as demonstrated by the impact it has on victims by violating their rights and abusing their trust. It can also become something which is endemic;<sup>137</sup> and can be linked to trafficking and forced prostitution. Sexual exploitation should be recognised as a crime in its own right, as it is a serious abuse of a sexual nature inflicted upon the physical and moral integrity of a person<sup>138</sup> by taking advantage of a coercive environment. The elements of the crime of sexual exploitation could be taken from the UN definition: ‘[T]he term ‘sexual exploitation’ means any actual or attempted abuse of a position of vulnerability, differential power, or

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<sup>133</sup> *Secretary-General’s SEA Bulletin*, *supra* note 7.

<sup>134</sup> OIOS Congo Investigation, *supra* note 6.

<sup>135</sup> *Foca*, Trial Judgement, *supra* note 45, para. 773. In addition, the vulnerability and defenceless of the female victims was considered an aggravating factor in sentencing; para 874.

<sup>136</sup> Cottier, *supra* note 77, p. 454.

<sup>137</sup> Which is evidenced by the ongoing and widespread problem of use of prostitutes and sexual exploitation by peacekeepers in mission territories in worldwide locations; *SG’s SEA reports*, *supra* note 6.

<sup>138</sup> *Furundzija*, Trial Judgement, *supra* note 45, para. 186.

trust, for sexual purposes, including but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.’<sup>139</sup> The element of force, threat of force, coercion or taking advantage of a coercive environment, or the person’s incapacity to give genuine consent, could be included; although this should not be necessary given the crucial aspect of sexual exploitation being the abuse of position, rather than an emphasis on force or lack of consent *per se*. Thus, the elements of the crime of sexual exploitation could be defined as follows:

1. Any actual or attempted abuse of a position of vulnerability, differential power, or trust, or taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent, for sexual purposes.

2. Such conduct was engaged in for the purpose of, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.

Element two aims not to restrict the definition of sexual exploitation only to profiting monetarily, socially or politically from the sexual exploitation of another, but rather to include those circumstances as possible situations of sexual exploitation in addition to the basic element of the crime, as defined in the first element.

## **5. Conclusion**

The commission of crimes against women such as sexual exploitation and rape by peacekeepers is particularly reprehensible. Such conduct violates the duty of care to the civilian population that peacekeepers are charged with. It is important that perpetrators are held accountable for such offences. The ICC is one forum in which accountability could be implemented. The Rome Statute covers very effectively some of the relevant

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<sup>139</sup> *Secretary-General’s SEA Bulletin, supra* note 7.

gender-based crimes considered in this article, particularly rape, trafficking-related offences, sexual slavery and enforced prostitution. However it does not contain express provisions to prosecute peacekeeping personnel for sexual exploitation. The crime of ‘sexual violence’ may be used to prosecute for sexual exploitation, but sexual exploitation is a crime of sufficient gravity to be introduced as a stand-alone, express sexual offence.

UN reports demonstrate that transactional sex is still the most common form of SEA misconduct committed by peacekeeping personnel. There is a need for a strong stance on criminalising these forms of SEA and ensuring that they are no longer committed with impunity. The first Review Conference of the Rome Statute took place in 2010.<sup>140</sup> While it will be some time before another Review Conference is held, the Assembly of State Parties may deal with an amendment proposal directly.<sup>141</sup> State parties may do well to consider an amendment of an additional sub-provision under Articles 7 or 8, proscribing sexual exploitation as a war crime and/or crime against humanity under the Rome Statute. In the meantime, the ICC should not be discounted as a court in which peacekeeping personnel can be prosecuted for misconduct amounting to criminal offences, particularly gender-based crimes against women.

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<sup>140</sup> See <<http://www.icc-cpi.int/Menus/ASP/ReviewConference/>>, 7 July 2011.

<sup>141</sup> Article 121, Rome Statute.