

Human rights of women

Section D: Sovereign governments, non-state actors and individual responsibility for human rights violations: linking theory to practice

J. Marshall

This study guide was prepared for the University of London by:

- J. Marshall, LLB (Hons), MA, PhD, solicitor and lecturer, School of Law, Queen Mary, University of London.

This is one of a series of study guides published by the University. We regret that the author is unable to enter into any correspondence relating to, or arising from, the guide.

If you have any comments on this study guide, favourable or unfavourable, please use the form at the back of this guide.

Publications Office
The External Programme
University of London
Senate House
Malet Street
London WC1E 7HU
United Kingdom

www.londonexternal.ac.uk

Published by the University of London Press

© University of London 2005

Printed by Central Printing Service, University of London

All rights reserved. No part of this work may be reproduced in any form, or by any means, without permission in writing from the publisher.

Contents

Chapter 1	Introduction	1
1.1	Human rights of women	1
1.2	Section D: Sovereign governments, non-state actors and individual responsibility for human rights violations: linking theory to practice	2
1.3	Approaching your studies	3
Chapter 2	Human rights and international humanitarian law	7
2.1	UN powers to set up ad hoc international tribunals	8
2.2	Statutes and Geneva Conventions	8
2.3	Linking human rights and humanitarian law	11
Chapter 3	International tribunal case studies	15
3.1	Developing international jurisprudence on human rights and international humanitarian law	16
3.2	Background to the ICTY	16
3.3	Applicable law	17
3.4	Rape as a grave breach: ICTY interpretation	19
3.5	War crimes: ICTY interpretation	21
3.6	Genocide: ICTY interpretation	22
3.7	Crimes against humanity: ICTY interpretation	22
3.8	Analysis	24
Chapter 4	Interconnection, global ethics and the human rights of women	25
4.1	Globalism	26
4.2	Sovereign governments – reduced role of the state?	26
4.3	Non-state actors	27
4.4	Global citizens	27

4.5	Using human rights and the IHL	28
4.6	Reconnecting feminist legal theory to the human rights of women	28
4.7	Applying reconstructions of human rights to include women	30

Chapter 3: International tribunal case studies

Introduction

The main focus of the chapter is to analyse some of the case-law of the ICTY as it relates to the rapes and sexual violence of women that occurred during the conflict in the former Yugoslavia. We will analyse how the Statute of the ICTY has been interpreted by that court and its connection with IHL and the Geneva Conventions. You must remember to focus on how this all relates to women's lives and women's human rights violations.

You are expected to read through each section carefully by reference to the essential reading and complete any self-assessment questions or learning activities as you go through the chapter. Be aware of any questions you raise while doing this work. There is a sample examination question to answer at the end.

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- locate all the materials referred to in the chapter
- digest and summarise these and the contents of this study guide
- explain, analyse and critique the jurisprudence of the International War Crimes Tribunal as it relates to violence against women.

Essential reading

- Charlesworth and Chinkin, ch.10 pp.313–338.
- Marshall, J. *Humanity, freedom and feminism* (Aldershot: Ashgate, 2005) part III.
- Prosecutor v Delalic and Others*, Judgment 16 November 1998 IT-96-21-J.
- Sellers P.V. 'Individual(s) liability for collective sexual violence' in Knop. K. *Gender and human rights* (Oxford: Oxford University Press, 2004).
- web site for the ICTY at: www.un.org/icty/index.html.

3.1 Developing international jurisprudence on human rights and international humanitarian law

Events in the former Yugoslavia and in Rwanda led the UN Security Council to take steps to establish an ad hoc tribunal to prosecute those responsible for genocide and other serious violations of international humanitarian law. Powers and jurisdiction are set out in the founding Statutes for the two tribunals that have been set up to do so.

In 1998 a Statute was adopted for establishing the International Criminal Court (ICC).

Charlesworth and Chinkin note that the interests of women have been accorded comparatively serious attention through the processes of the creation and operation of these two ad hoc tribunals and the drafting of the ICC Statute.

The ways this attention has been shown to women are highlighted by Charlesworth and Chinkin. They examine:

- the involvement of women at the UN preliminary stages before the establishment of the tribunals
- women appointed to be investigators and to the Office of the Prosecutor within the tribunal
- the appointment of a special legal adviser with extensive knowledge of gender-related crimes
- the appointment of female tribunal judges.

Most feminist scholars understand that the presence of women in international tribunals can make a difference.

For example, women investigators and prosecutors facilitate the collection of evidence from women survivors who might be reluctant to talk to men about offences committed against them.

Further, the legal adviser on gender within the Prosecutor's office, Patricia Viseur Sellers, has been instrumental in indicting accused persons for crimes against women. Also, both male and female judges have been sensitive to the need to hear evidence of gender-based crimes.

3.2 Background to the ICTY

The ICTY was established on 25 May 1993 by the UN Security Council to prosecute those responsible for violations of international humanitarian law in the territory of the former Yugoslavia committed after 1 January 1991.

The Yugoslav conflict of the 1990s followed the breakdown of the former Socialist Federal Republic of Yugoslavia. Declarations of independence by republics of that political state in mid-1991 were followed by vicious ethnic conflict between the various ethnic racial groups within that former state.

Media and human rights organisations reported atrocities daily. These included the rape and other abuse of women, often on a

systematic and planned basis. This involved detaining women and girls for the specific purpose of forced impregnation to produce offspring of the perpetrators' ethnicity.

These reports led to a high level of public horror and momentum for the international community to alleviate such horrors.

At the same time as carrying out diplomatic negotiations, the UN Security Council took the following steps leading to the establishment of the ICTY.

At first, the Security Council publicly condemned the atrocities as violations of IHL. It then publicised the reported atrocities.

This led to the investigation of violations through a 'Commission of Experts' in the hope that the first 'War Crimes Commission' since World War II would deter abuses.

Its task was to prepare cases for possible prosecution in national and international courts. This culminated in the Security Council's determination that violations of IHL threatened international peace and security. This therefore permitted them to issue the mandate required pursuant to chapter VII of the UN Charter for the Security Council to take measures necessary to maintain international peace and security.

The Security Council announced the creation of an international tribunal to prosecute those responsible for violations of international humanitarian law in the former Yugoslavia.

The resulting report of the Secretary-General was submitted (including a draft statute for the tribunal) on 6 May 1993 taking into account the views of 31 states and several organisations.

Useful further reading

- O'Brien, J. 'The international tribunal for violations of international humanitarian law in the former Yugoslavia' 87(639) 1993 *American journal of international law*.

3.3 Applicable law

Useful further reading

- Chinkin, C. 'Rape and sexual abuse of women in international law' *EJIL* 5(326) 1994.
 - Meron, T. 'Rape as a crime under international humanitarian law' *American journal of international law* 87(424) 1993.
 - Niarchos C.N. 'Women, war and rape: challenges facing the international tribunal for the former Yugoslavia' *Human rights quarterly* 17(649) 1995.
-

3.3.1 The ICTY statute

The ICTY has its own Statute. Pursuant to **Articles 1–5** of the Statute, it has jurisdiction over:

- grave breaches (**Article 2**)
- other breaches of the laws or customs of war (**Article 3**)
- genocide (**Article 4**)
- crimes against humanity (**Article 5**)
- all committed after 1 January 1991 in the former Yugoslavia.

Articles of the Statute are largely based on provisions in the Geneva Conventions.

3.3.2 International law

The law to be applied has to be relevant and well-established international law. The Statute requires that rules of procedure provide protection for victims and witnesses.

The law stated by the ICTY is formally applicable only in that court. However, its interpretations of laws have been described as likely to quickly become fundamental normative instruments of the general laws of war (Meron, 1993).

3.3.3 Definitions of sexual violence

Rape is only explicitly mentioned in **Article 5** of the ICTY Statute where it is listed as a crime against humanity. When originally analysed by legal scholars prior to the cases of the ICTY being heard, there were mixed reactions to the wording of the Statute.

There was a positive reaction of optimism with the tribunal being described as holding promise and representing progress, its existence *per se* being of symbolic significance in sending out a powerful message (Meron, 1993; Niarchos, 1995). The explicit description of rape as a crime against humanity in **Article 5** was applauded. It was noted that confirmation that rape can constitute a crime against humanity is both morally and legally of groundbreaking importance.

However, there was, at the same time, a certain amount of disquiet in the failure of the drafters of the Statute to include rape explicitly as grave breaches of the Geneva Convention, War Crimes or genocide covered by **Articles 2–4**.

The history of rape and the international crimes dealt with in those Articles has been examined by some scholars who argue that such an interpretation was possible (even prior to the jurisprudence of the ICTY). Thus if rape had been explicitly included within other Articles of the Statute, it would have clarified matters greatly. In the circumstances, it is not surprising that some scholars predicted that the tribunal's trials would:

- test the commitment of the international system to women's human rights
- determine whether women can participate as equals in an international legal system created by men.

3.4 Rape as a grave breach: ICTY interpretation

Essential reading

- *Prosecutor v Delalic and Others*, Judgment 16 Nov 1998, IT-96-21-J.

Prior to the establishment and judgments of the tribunal, it was unclear whether rape constituted a grave breach of the Geneva Conventions.

The resolution of this question is important because grave breaches are subject to universal jurisdiction to be exercised in national courts. They are regarded as the most significant violations of IHL, although non-grave breaches can constitute war crimes.

It has been argued that the legal distinction between grave and other breaches potentially leads to other breaches being perceived as less significant and as not meriting as much enforcement.

However, failure to specify rape explicitly within the definition has been described in critical terms as ‘illuminating’ (Niarchos, 1995).

Article 2(b) of the ICTY’s Statute lists ‘inhuman treatment’ as a grave breach. **Article 5(g)** and **Article 5(i)** of the Statute list rape and ‘other inhumane acts’ as crimes against humanity. By implication, it is argued that the drafters considered rape to be inhuman or inhumane treatment (Askin).

Another way to include rape within the definition of a grave breach is by interpreting rape as torture. Rape often meets the required elements of torture and international humanitarian law arguably recognises custodial rape as torture and inhuman treatment.

Prior to the ICTY cases, the Inter-American Commission of Human Rights in *Mejia Egocheaga v Peru* (1996) and the European Court of Human Rights in *Aydin v Turkey* (1997) confirmed that rape can constitute torture.

The ICTY has positively developed the jurisprudence in this area and rape can clearly now be a grave breach constituting torture, inhuman treatment and wilfully causing great suffering or serious injury to body or health.

3.4.1 *Prosecutor v Delalic and Others*

In *Prosecutor v Delalic and Others*, Judgment, 16 November 1998, IT-96-21-T, the tribunal extensively examined whether rape could constitute a grave breach of the Geneva Convention.

The tribunal confirmed that for rape to be torture, it must meet each of the elements of the offence as set out in the Torture Convention.

Those elements were stated to be broader than, and to include, the definition in the 1975 Declaration of the UN General Assembly and in the 1985 Inter-American Convention. They would thus reflect a consensus representative of customary international law. The tribunal cited the cases of *Mejia* and *Aydin*. The UN Special Rapporteur on Torture was also cited.

In an oral introduction to the 1992 Report to the Commission on Human Rights, the Special Rapporteur stated that:

‘since it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture.’

(*Delalic* para 491)

The tribunal set out the elements of torture required for the purposes of applying **Articles 2 and 3** of its Statute in the following terms:

- there must be an act or omission that causes severe pain or suffering, whether mental or physical
- which is inflicted intentionally
- and for such purposes as obtaining information or a confession from the victim, or a third person
- punishing the victim for an act he or she or a third person has committed or is suspected of having committed
- intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind
- and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.

Rape was described by the tribunal as ‘a despicable act which strikes at the very core of human dignity and physical integrity’ (para 495). Whenever rape and other forms of sexual violence meet these criteria, they are classified as torture (para.496).

This case and test was followed in *Prosecutor v Furundzija* 10 December 1998. In that case, the tribunal expressed the view that international case-law and various UN and European bodies’ declarations, statements and reports ‘evinced a momentum towards addressing, through legal process, the use of rape in the course of detention and interrogation as a means of torture and, therefore, as a violation of international law’ (para.163).

It has been commented that the form of indictments would be critical to the evolution of normative principles on rape and sexual violence (Charlesworth and Chinkin and the articles by the adviser Patricia Sellers in the accompanying readings for this section).

Wording used in the case indictments shows that the fear of only considering rape as a crime against humanity under **Article 5(g)** of the ICTY’s Statute which requires a higher standard has not been realised.

3.5 War crimes: ICTY interpretation

Writing prior to most of the decisions of the ICTY, it was noted that if every instance of sexual assault committed during the course of the war was specifically held as a violation of the laws or customs of war, this would make a tremendous impact in extending international jurisprudence towards the protection of women, both combatants and civilians (Askin).

3.5.1 *Gagovic and others (Foca)*

Indictment wording was again critical in the case against *Gagovic and others (Foca)* Indictment, 26 June 1996, IT-96-23-I.

This case involved gross sexual violence. On facts involving rapes and sexual assaults, the accused were indicted pursuant to:

- Article 2(b)** torture and inhuman treatment
- Article 2(c)** wilfully causing great suffering
- Article 3(1)(c)** outrages upon personal dignity
- Article 3(1)(a)** torture
- Article 5(f)** torture as a crime against humanity
- Article 5(h)** persecution on political, racial and religious grounds
- Article 5(c)** enslavement
- Article 5(g)** rape.

This indictment set out the crime of ‘forced sexual penetration of a person’ by the accused or by a third person under the control of the accused. This formulation has been praised as allowing consideration of the elements of the offence without importing understandings of rape from any particular municipal legal system and for emphasising the elements of violence and force.

The terminology is broad enough to cover any form of penetration and to include male victims by focusing on the conduct of the accused. Arguably, this form of wording removes fixation on rape by replacing it with a recognition of sexually violent conduct. Such a view was taken by the legal adviser on gender at the Prosecutor’s office of the ICTY (see Charlesworth and Chinkin and the articles by that adviser – Patricia Sellers – in the set of readings for this section).

3.5.2 *Prosecutor v Anton Furundzija*

In *Prosecutor v Anton Furundzija*, 10 December 1998, ICTY-95-17/I-T10, the issue of rape as a distinct crime was dealt with in the tribunal’s judgment. The history of rape being specifically prohibited by treaty and in armed conflict in customary international law was recognised by the court in this decision. It further developed the definition of rape for the purposes of **Articles 2–5** (para.165–9).

The tribunal’s trial chamber derived the objective elements of rape from general principles of law of the major legal systems around the world. It emphasised 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' (paras.174–186).

The tribunal affirmed that rape can be a crime distinct from torture. Rape may 'amount to a grave breach of the Geneva Conventions', a violation of the laws or customs of war and is contrary to customary international law.

Through this evolutionary process, it has been commented that an international legal understanding of the meaning and jurisdictional basis for rape and sexual assault is emerging (Charlesworth and Chinkin, 2000).

3.6 Genocide: ICTY interpretation

Sexual violence may not at first appear to fall within the legal notion of genocide as this is predominantly defined by intent which must be wholly or partly to destroy a national, ethnical, racial or religious group. However, rape and sexual assault crimes deliberately inflicted upon an ethnic group in an effort to cause that group's destruction, wholly or partially, physically or non-physically, establish **genocidal rape**.

It has been argued that rape becomes genocidal where it is carried out on a massive and systematic basis with the intent of:

- destroying the victims' family and community life
- cleansing an area of all other ethnicities by causing mass flight and the birth of children with the rapists' blood.

In reviewing the indictments against Radovan Karadzic, the Bosnian Serb political leader and Ratko Mladic, the leader of the Bosnian Serb army, the tribunal itself invited the prosecution to broaden the scope of its characterisation to genocide suggesting that the 'systematic rape of women ... is in some cases intended to transmit a new ethnic identity to the child. In other cases, humiliation and terror serve to dismember the group.' (Trial Chamber I Review of Indictment pursuant to Rule 61 K and M cases 11 July 1996, IT-95-5-R61 and IT-95-18-R61, paras.94 and 95.)

This characterisation is further supported by the phenomenon in the conflict in the former Yugoslavia of the forced detention of women:

- first for impregnation
- subsequently to prevent abortion.

3.7 Crimes against humanity: ICTY interpretation

Rape was specifically listed as a crime against humanity in the ICTY's Statute. However, the problem is that a particularly vicious sexual assault would need to be committed for a particular reason before achieving any form of redress.

An extremely arduous standard is involved in prosecuting this crime, since each and every element of the crime must be established for successful prosecution, and its elements can be prohibitive. They require proof of a specific intent based on discrimination or persecution against classes of people.

Essential reading

- *Prosecutor v Tadic* 2 October 1995, (Jurisdiction) Trial Chamber 10 August 1995 and Appeals Chamber, 2 October 1995 105 ILR 419.
-

3.7.1 Relevant case-law

The leading case is *Prosecutor v Tadic*. In that judgment, the tribunal confirmed that it is a settled rule of customary international law that crimes against humanity:

- do not require a connection to international conflicts
- may not require a connection with any conflict at all (so its Statute was more limiting than it needed to be in that respect).

In *Prosecutor v Mrksic and others (the Vukovar Hospital Decision)* 3 April 1996, IT-95-13-R61, the tribunal explained that a link was required between widespread or systematic attack against a civilian population for an act to constitute a crime against humanity. However, a single act (so linked) could constitute a crime against humanity:

‘crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above.’ (para 30)

This was confirmed in *Tadic* (May 1997) which further held that:

‘a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual responsibility and an individual perpetrator need not commit numerous offences to be held liable...The decision ...in the Vukovar Hospital Decision is a recent recognition of the fact that a single act by a perpetrator can constitute a crime against humanity.’ (para 649)

Thus each perpetrator of rape in the context of a mass attack can be held guilty of a crime against humanity. Further, the requirement that the offences be committed in a ‘systematic and organised’ fashion can be inferred from the nature of the crimes and can be satisfied by either a state policy or that of non-state forces including terrorist groups or organisations.

In a judgment in sentencing appeals of the *Tadic* case of 26 January 2000, the tribunal had to resolve whether a crime against humanity and war crimes were of the same gravity (and consequently whether heavier penalties should apply for one than the other). The tribunal by majority decided that they were of the same gravity, although Judge Cassese dissented, arguing that crimes against humanity are more serious.

3.8 Analysis

It is generally agreed that it was the conflict in the former Yugoslavia that galvanised the international community into action and led to other developments in the law of sexual violence against women in armed conflict. Most of this can be traced to the ICTY and the tribunal set up to deal with atrocities in Rwanda – the ICTR. Not all the case-law has been dealt with in this chapter. You should refer to the readings listed for further details.

The focus on sexual violence in these courts has contributed to the end of the invisibility of women and sexual violence and led to new developments in the interpretation of relevant IHL norms. Collective responsibility is another area which is developing in the context of sexual violence as interpreted by the ICTY (see Sellers, 2004).

The whole existence of international law, IHL, the ICTY and other such tribunals could be said to be part of law's rhetorical and symbolic role providing aspirational hope towards a globally just world (Marshall, 2005).

There needs to be an engagement with existing discourses and political structures to enable this to happen. Such structures include international human rights and IHL.

Summary

This chapter has involved detailed analysis of certain cases from the ICTY. This has shown how that tribunal has contributed to the development of the law as it relates to women in an arguably positive manner.

Reminder of learning outcomes

By this stage you should be able to:

- describe, analyse and critique the case-law of the ICTY.

Sample examination question

'The ICTY has been a positive force in the development of IHL for women.'
Discuss.

Advice on answering the question

See general points in chapter 1 of this study guide.

This question will enable you to describe the work of the ICTY: include the background to it being set up; how it was set up; what it is.

Move on to examine the case-law in depth, refer to the judgments and particular passages.

Analyse these by reference to specific crimes against women. How has the case-law developed? You will need to refer to the law as it existed before the ICTY judgments and how it may have changed as a consequence.