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Article

Defining War Rape; a Comparative Case Study of Natural and Codified International Criminal Law

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1. Introduction

International Criminal Law is a relatively new sphere that, except for some initial endeavours following World War 2, started to develop in the early 1990s. One of the main reasons for this delay was the primacy of the state in International Law. Individuals were not the subject of many laws other than domestic law.[1] Since the 1990s, however, International Criminal Law has flourished, both in its practical use, as well as in academic discourse. As can be expected, however, this development has not gone without disagreement.

This paper focuses on the criticism that tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)[2], by virtue of their reliance on customary law and other methods of determining existing norms, appear to violate the principle of legality. Two main questions will be addressed. First, whether the tribunals fail to conduct a fair trial by neglecting the principle of legality, and secondly, whether this use of a different substantive International Criminal Law compared to the International Criminal Court (ICC), affects the effectiveness of the international criminal justice system.

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[1] Antonio Cassese, *International Law* (2nd edn, OUP 2005).

[2] Together, the ICTY and the ICTR will henceforth be referred to as 'the tribunals'.

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To this end a short case study of the crime of war rape will offer a comparative basis that highlights how substantive law has been developed by the tribunals and in the ICC statute. This will be followed by an analysis of the criticisms regarding rule of law and the principle of legality raised against the tribunals. By comparing the substantive norm of the prohibition of rape as used by the tribunals to that of the ICC, for which the crimes under its jurisdiction have been explicitly defined, this paper will evaluate whether this difference affects the effectiveness of either the tribunals or the ICC.

Finally, a critical analysis of the existing law and of the principles that guide international criminal law will lead to the conclusion that, even though the tribunals do not adhere to a strict interpretation of the principle of legality, this does not mean they abandon it altogether, nor does it mean their trials are unfair. It will also show that effectiveness of the courts is not obstructed. The difference in substantive laws of both the tribunals and the ICC are subject to criticism, but in a comparison of their advantages and disadvantages, a net loss of effectiveness in either system is unlikely to be found.

2. The Development of War Rape Definitions

Before exploring the development of the substance of the law, a qualification must be offered, as the question of what sources of law are available to a court could also be considered procedural. Procedure and substance, however, are not mutually exclusive. Nollkaemper suggests that "the distinction between procedure and substance is not a binary one (…). Some questions that present themselves in international adjudication cannot easily be reduced to questions of procedure (…) or substance".[3] As such, even though some elements discussed below may appear to be of a more procedural nature, it is the resulting substance of the law that forms the basis of this paper. For this reason this section will chronologically set out how war rape was defined under the ICTR, the ICTY, and the ICC's Elements of Crimes.

A. The ICTR and the Akayesu Case

Following the Rwandan Genocide that took place in 1994, the United Nations Security

[3] André Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure' (2012) 23(3) EJIL 769, 773.

Council (UNSC) created the ICTR.[4] The statute that is contained in UNSC Resolution 955 gives the tribunal the jurisdiction to adjudicate war rape as both a crime against humanity, and as an outrage upon personal dignity.[5] The statute does not, however, go beyond mentioning crimes that fall under the authority of the tribunal. The lack of definitions of the crimes meant that the court had to use other sources to determine the exact content of the applicable law.

For war rape, this first happened in the *Akayesu* case.[6] The lack of a commonly accepted definition forced the tribunal to define the crime, for which it took a victim-oriented, conceptual approach.[7] The definition it arrived at was "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".[8] As will be discussed below, this definition has been both praised and criticised for going beyond what was common in most national jurisdictions, which often focus on an *actus reus* that includes a physical description of acts.

B. The ICTY and the Furundžija Case

In similar circumstances as the ICTR, the ICTY was created by the UNSC to adjudicate crimes committed during the Yugoslav Wars of the 1990s.[9] Although it was established prior to the ICTR, its first judgment that included rape came after the *Akayesu* case.[10] Despite this fact, however, the ICTY disregarded the precedent set in *Akayesu*, and formulated its own definition in the *Furundžija* case,[11] following a search for "principles of criminal law common to the major legal systems of the world".[12]

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[4] UNSC Resolution 955 (08 November 1994) UN Doc S/RES/955.
[5] ibid, arts 3(g) and 4(e).
[6] *Prosecutor v Jean-Paul Akayesu* (Trial Judgment) ICTR-96-4-T (02 September 1998).
[7] James McHenry, 'The Prosecution of Rape Under International Law: Justice That Is Long Overdue' (2002) 35 Vanderbilt Journal of Transnational Law 1269, 1274.
[8] *Akayesu* (n 6) para 598.
[9] UNSC Resolution 827 (25 May 1993) UN Doc S/RES/827.
[10] The author is aware that the ICTY delivered an amended definition of rape in the Foča case (*Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (Trial Judgment) ICTY IT-96-23-T and IT-96-23/1-T (22 February 2001)). Its inclusion, however, would have limited the available room for analysis. Moreover, the offered critiques and arguments remain unaffected by its omission.
[11] *Prosecutor v Anto Furundžija* (Trial Judgment) ICTY IT-95-17/1-T (10 December 1998).
[12] ibid, para 177.

The tribunal concluded that several criminal legal systems include penetration of and by sexual organs, and consequently arrived at the following, more mechanical, definition:

> (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.[13]

Understandably, the criticism and praise of the *Akayesu* decision was inverted in this case; the definition was seen as regressive by critical scholars and human rights advocates.[14]

C. The ICC

Unlike the ad hoc tribunals, the ICC does have predefined laws at its disposal. Annexed to the treaty that created it are the Elements of Crimes.[15] For war rape, the definition differs from *Akayesu* and *Furundžija*, but, like the latter, is predominantly mechanical:

> 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[16]

This definition has also been criticised widely, not only for still being somewhat regressive, but also because of its awkward wording. Both appear to be a logical result of the majority voting system of international treaty-making, in which most parties must be, to some degree, satisfied. In the ICC negotiations, the large number of state parties from varying legal backgrounds, as well as the NGO representatives that took part, came to legislate definitions that some see as not even the greatest common denominator, but

[13] ibid, para 185.
[14] Chile Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (Brill 2012).
[15] 'Elements of Crimes', International Criminal Court (2011) ICC-ASP/1/3.
[16] Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 3 art 7(1)(g), art 8(b)(xxii), art 8(e)(vi).

the 'least objectionable denominator', dominated by Western, patriarchal legal thought.[17]

3. Critiques of the Tribunals

As mentioned, both tribunals' definitions have been criticised for their content, which will be addressed in the next section, but one of the most prevalent controversies concerns the sources they used to help define crimes.[18] This critique goes to the heart of the concept of ad hoc tribunals. The ICTY and the ICTR were created by the UNSC and given a mandate to adjudicate a list of crimes. The fact that the UNSC did not include definitions of these crimes was, according to some scholars, a grave infringement of the principle of legality that underpins criminal justice systems. By creating these definitions, it is said that the tribunals engage in legislating, which goes against the separation of powers and disregards the accused's right to a fair trial.

Haveman, although not alone[19], is a vocal proponent of this critique, and his contribution is rigorous and comprehensive. Based on the idea of *nulla crimen nulla poena sine lege* (no crime and no punishment without law)[20], he argues that the principle of legality demands that all criminal law must be defined clearly and unequivocally prior to the offending conduct.[21] In doing so he raises some relevant points that deserve careful attention.

Haveman's main practical contention is that, without prior and clear definitions, the accused is denied the chance to prepare a defence, and hence is denied a fair trial. This conclusion is mainly based upon the general principle of legality, which guarantees

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[17] Hannah Baumeister, *Sexualized Crimes, Armed Conflict and the Law: The International Criminal Court and the Definitions of Rape and Forced Marriage* (Routledge 2018). My great gratitude goes to Dr Baumeister for making available an advanced draft of her monograph prior to publication.

[18] Alexander Zahar and Göran Sluiter, *International Criminal Law* (OUP 2008) 79.

[19] See e.g. also: Machteld Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the ICC*, (Intersentia, 2002); Harry Hobbs, 'Towards a Principled Justification for the Mixed Composition of Hybrid International Criminal Tribunals (2017) 30 LJIL 177; Avitus A. Agbor, *Instigation to Crimes against Humanity; The Flawed Jurisprudence of the Trial and Appeal Chambers of the International Criminal Tribunal for Rwanda* (Brill 2013).

[20] Zahar and Sluiter (n 18), 81.

[21] Roelof Haveman, 'Rape and Fair Trial in Supranational Criminal Law' (2002) 9 Maastricht J. Eur. & Comp. L. 263.

certainty, as this predictably dictates the behaviour of people and prevents abuse of power by the state. The latter, in turn, is rooted in the separation of powers, which *inter alia* stipulates that a separation of the judiciary branch of government from the legislative and executive branches prevents abuse and arbitrary conduct of the judiciary.[22]

Building on this, it is stated that the principle of legality is "perhaps the most important principle", that it prohibits retroactive lawmaking, that it gives certainty about the permitted conduct of states, and that "[p]enalisation only has a preventive effect when the citizen knows exactly which conduct can be penalised."[23] This critique finds fertile soil in the fact that the two tribunals have together produced several different definitions of rape, further contributing to the argument that the principle of *stare decisis* should have led the courts to respect prior judgments and follow that definition. Lastly, in his only mention of customary international law, Haveman notes that some advocate that *sine lege* should be interpreted as *sine iure*, which would open up the principle of legality to the use of unwritten customary law. This is rebutted, however, by mentioning that changing the principle would neglect its origin[24], although Haveman never explains what this origin is.

In light of these evaluations, the clear definitions given to the ICC should ensure that the principle of legality is satisfied. This follows the Civil Law solution that Haveman suggests, namely that all international criminal law should be formulated by a legislator beforehand. The second solution he offers, in an attempt to satisfy Common Law systems, is that where no precedents exist, a court may create a definition in the first case, after which the principle of *stare decisis* dictates that it must be followed in all subsequent cases.[25] It becomes unclear, however, how this differs from the status quo, as the ICTY and the ICTR, being distinct tribunals, would not be bound to follow each other's rulings. Furthermore, since it is mentioned that in the Foča case the ICTY already applied *stare decisis* by explicitly not developing a new definition outside of the

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22 Neil Parpworth, *Constitutional and Administrative Law* (9th edn, OUP 2016) 19.
23 Haveman (n 21) 265.
24 ibid, 267.
25 ibid, 275-276.

parameters set out in *Furundžija*.[26] It follows that the ICTY already feels bound by its own precedent, even when it decided to depart slightly from the previous judgment.

4. In Defence of the Tribunals

Although the points raised in critique of the tribunals seem valid, considering that they reflect the principles that guide criminal justice in most legal systems in the world, rebuttals can also be found in a wide range of sources. This section will offer a few of these rebuttals, beginning with the most substantive ones, which look at the reasons the tribunals had for choosing their definitions over others. It will then offer some theoretical evaluations of the content of these definitions, which show that following one universally applicable interpretation is not necessarily desirable when pursuing legitimacy. Subsequently, other theoretical replies to these arguments will be analysed, addressing the rich history of judicial lawmaking in international law and the sources of which the tribunals can avail themselves to this end. Further theoretical responses will cover the difference between legality and legitimacy, and finally the application of the rule of law.

The first substantive point, which regards the choice of definitions by the tribunals, is one of normative relativism and cultural sensitivities. Only the staunchest positivist would argue that people follow laws because they are laws, regardless of their content. It is well accepted that laws should represent the values of the society they govern[27], which undermines the notion that all international criminal law should be uniform. Extending this thought, it is not unthinkable that an application of what is perceived as foreign law may be seen as more oppressive than a retrospectively, but considerately, derived law. Moreover, on the point of clarity, it would still leave the subject with two definitions, a national one reflecting national values and an international one that does not. This, too, could result in a lack of clarity regarding which law applies at the time of committing the act, and by which norm they will be judged.
Perfectly illustrating this relativism, the ICTR in *Akayesu* made its reasons for choosing their definition very clear. Even Haveman himself notes that the omission of body-part

[26] ibid.
[27] Baumeister (n 17).

mechanics was done to satisfy cultural sensitivities that existed in the culture of the victims. These sensitivities dictated that women cannot speak about sexual acts in such descriptive or mechanical language, whereas vague terms such as 'physical invasion' would be acceptable. By choosing this definition, the ICTR ensured that it could hear cases involving rape at all, for a universal 'greatest common denominator' definition would have resulted in a lack of evidence in each case, as victims and witnesses would not be able to testify to the satisfaction of the substantive legal requirements.[28]

Given the case study of war rape, critical theories such as Feminism strongly inform the discussion of the definitions of the tribunals and the ICC. Baumeister considers universalism "one of the danger zones"[29], since it implies taking on board viewpoints that may be harmful to certain groups. An example she names is the effort made by the Arab Bloc during the ICC negotiations, to explicitly decriminalise marital rape.[30] It is therefore argued by most critical scholars that representative cultural or regional definitions that fit the particular situation are preferable to universally applicable norms.

On a more conceptual level, it can firstly be noted that judicial lawmaking has always been part of international law. Quoting Hersch Lauterpacht, Swart notes that "judicial lawmaking is a permanent feature of administration of justice in every society."[31] She further mentions that he also advocated restraint, stating that it was less appropriate to "experiment or innovate" in cases involving private individuals.

In recognising this prevalence of lawmaking, however, Lauterpacht does appear to be referring largely to a form of lawmaking that is perhaps better described as law-finding. In this, Cassese supports Lauterpacht's point, stating that law that is made by the courts must have a footing in customary international law. He notes to this effect that the statutes of the tribunals explicitly refer to custom as a source of law.[32] He further

[28] *Akayesu* (n 6) para 687. See also Havemans (n 21) 270.
[29] Baumeister (n 17).
[30] ibid.
[31] Mia Swart, 'Judges and Lawmaking at the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (Doctoral Thesis, University of Leiden 2006).
[32] Antonio Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice' (2012) 25 LJIL 491, 494.

supports this by quoting the UN Secretary General's report, stating that it "would not be creating or purporting to 'legislate' that law. [It] would have the task of applying existing international humanitarian law.'[33] Extending this opinion to the crime of war rape, Chinkin affirms this standpoint by adding that "rape has long been prohibited by the laws of war".[34]

Moving beyond the use of customary law, some scholars also note that general principles of law can act as a source of law for the courts.[35] Swart quotes Judge Tanaka: "What is permitted to them is to declare what can be logically inferred from the *raison d'être* of a legal system, institution or norm."[36] In the Tadić case,[37] Cassese, as judge on the tribunal, extended the definitions of crimes to non-international armed conflict, even when prior research had shown that no such customary law existed.[38] It is possible that Cassese was driven by his conviction that the legality principle was better explained as a principle of legitimacy, which would entail the "moral and psychological acceptance of a body (…) by its constituency."[39] This, he argues, also safeguards, among other factors, the answerability to the founding authority, transparency, and accountability to the constituency.

Finally, an analysis of the concept of the rule of law, which contains the elements about which Haveman is concerned. Joseph Raz's notion of the rule of law, for example, dictates that laws should be prospective, open, and clear, as well as relatively stable.[40] It is noteworthy, though unsurprising considering he was writing about the common law system, that this does not specify that laws should be written. This is reinforced by his insistence that the principles of natural justice must be observed, meaning that the rule

[33] Swart (n 31) 181.
[34] Christine Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1994) 5 EJIL 326.
[35] Fabián Raimondo, *General Principles of Law in the Decisions of International Courts and Tribunals* (Nijhoff, 2008).
[36] Swart (n 31) 60-61.
[37] *Prosecutor v. Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY IT-94-1-AR72 (2 October 1995).
[38] Robert Cryer, 'International Criminal Tribunals and the Sources of International Law; Antonio Cassese's Contribution to the Canon' (2012) 10 JICJ 1045, 1051.
[39] Cassese (n 32) 492.
[40] Parpworth (n 22) 36.

of law "enforces minimum standards of fairness, both substantive and procedural"[41], but natural law too, has no requirement of being written.

Furthermore, Teitel's observation that different jurisdictions - national, international, and transnational – can advance "often competing rule of law values"[42] rings true with the previous practical and theoretical observations, which also indicates that it is imprudent to judge international criminal justice by the same measures as the domestic criminal law of a civil law country, as Haveman appears to do. Conversely, Teitel argues that a turn to international law helps restore the national rule of law, rather than erode it.[43]

5. Conclusion

The criticism of the ICTR and the ICTY, in respect to its lawmaking endeavours, compared to the legislation-led approach of the ICC, cannot be disregarded. When observing the principles that guide most criminal justice systems, one would conclude *prima facie* that the tribunals are acting illegitimately. What becomes clear from the above analysis, however, is that it is a discredit to International Criminal Law to conflate it with these domestic principles of criminal justice.

Substantively, it cannot be said that the tribunals created any law that did not already exist in customary or conventional law. Moreover, the disparity between ICTR, ICTY, and ICC definitions are justified by the different systems and constituencies for which they are used. If anything, a universal criminal code is potentially harmful to those very groups it seeks to protect.

It further becomes clear that lawmaking, especially when based on customary international law or general principles of law, is a fundamental task of international courts. This task is furthermore not to be seen as an erosion, but rather as a strengthening of the rule of law. It can therefore be concluded that the substantive law and its sources,

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[41] ibid, 38.
[42] Ruti Teitel, 'The Law and Politics of Contemporary Transnational Justice' (2005) 38 Cornel Int'l L.J. 837, 850.
[43] ibid, 847.

despite the existing criticisms, cannot be considered to affect the effectiveness of international criminal law in combatting international crimes. Despite having different approaches to solving substantive questions, each approach has its benefits and disadvantages, but neither system can be said to be less effective as a result.