Chapter IV

The ICC as an Avenue for the Prosecution of UMC Personnel

There is clearly a need for criminal accountability of UMC personnel for serious incidents of SEA. Alternative mechanisms for ensuring some level of accountability, where TCCs prove unwilling or unable to effectively exercise their jurisdiction, must be considered. Recently the question of whether UN peacekeepers could be subject to the jurisdiction of the ICC has been a matter of academic debate. This Chapter will consider whether the prosecution of UMC personnel committing SEA by the ICC is a plausible and justifiable alternative.

Arguably serious incidents of SEA could fall within the *actus reus* not only of specific gender-based crimes enumerated in the Rome Statute, but also other acts constituting war crimes and crimes against humanity. That stated, in Sections I it will be argued that the high thresholds set by the *chapeau* elements of war crimes and crimes against humanity would be difficult to overcome and serve as barriers to prosecuting UMC personnel before the ICC for sexual offences. When serious sexual crimes are perpetrated as part of an overall ‘systematic’ plan or policy to destroy the overall fabric of a societal group, it may amount to genocide under the Rome Statute. A *dolus specialis* requirement is embedded within Article 6, namely the intent to destroy a national, ethnic, racial or religious group in whole or in part. It seems implausible that SEA by

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2 *Prosecutor v Akayesu (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [732]; Kelly Askin, ‘Prosecuting Wartime Rape and Other Gender Related Crimes under International Law; Extraordinary Advances, Enduring Obstacles’ (2003) 21 *Berkeley Journal of International Law* 313, 316.

3 *Convention on the Prevention and Punishment of the Crime of Genocide*, opened
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UN peacekeepers, are ever likely to be committed with genocidal intent or pursuant to any policy or plan. Therefore genocide will not be considered.

Section II will examine the difficulties posed by other provisions of the Rome Statute for any possible prosecution of UMC personnel by the ICC, including the mechanisms for triggering the ICC’s jurisdiction, and Articles 16 and 98. Article 16 of the Rome Statute enables the SC to request a deferral of prosecution by the ICC for a perpetually renewable period of 12 months in the interests of maintaining international peace and security.4 Article 98 provides that the ICC cannot request the surrender of those suspected of egregious crimes under the Rome Statute, where a bi-lateral agreement exists that would be violated on surrender. The nature of crimes dealt with by the ICC is limited to the ‘most serious crimes of concern to the international community.’5 It is unlikely, save in the gravisest cases, that crimes of SEA by UN peacekeepers would attract the attention of the Court. Sections III and IV will address gravity and prosecutorial discretion and the possible implications these factors may have for the ICC exercising jurisdiction over UMC personnel.

The foundational principle of the Rome Statute, complementarity, provides that national courts have primary jurisdiction, even if an act constitutes a crime under the Rome Statute, and that the ICC may only assume jurisdiction when states are unwilling or unable to prosecute.6 Section V will examine complementarity in light of any potential prosecution of peacekeepers by the Court. Complementarity will be considered again in Section VI, albeit from a different stance, through the lens of positive complementarity, namely the ability of the ICC to assist and encourage national prosecutions.

A SEA by UMC Personnel – Chapeau Elements under the Rome Statute

International law in recent years has seen massive developments in the recognition of sexual violence and rape as prosecutable offences.7 The *ad hoc* tribunals

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6 Ibid, Article 17.

7 See, eg, *Prosecutor v Tadić (Sentencing Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-94-1-T, 14 July 1997); *Prosecutor v Delalić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-21, 16 November 1998); *Prosecutor v Furundžija (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No. IT-95-17/1, 10 December 1998); *Prosecutor v Akayesu*