PART OF EXISTING CRIME CATEGORIES OR A DISCRETE CRIME?

The ICC Statute has partly lifted the traditional immunity historically granted by international law to sex criminals. However, much remains to be done. The problems under the Rome Statute stem from the artificial means by which international law has tried to adapt all sex crimes to the existing crime categories.

As Charlesworth and Chinkin describe this problem:

They do not move beyond the “add women and stir” approach … and would not lead to a restructuring of the international legal system that would address the continued subordination of women.\textsuperscript{462}

The struggle for inclusion of sexual offenses in the framework of the traditional crime categories that have existed for so long in international law conceals the unique characteristics of sex crimes. This struggle describes sexual offenses solely as crimes of violence, or to be more precise, as crimes of violence which in the past had been excluded from coverage of the general norms, as expressed by Agamben,\textsuperscript{463} and which have now come to be recognized as one example among many violent crimes. The problem is that the crime categories that have been developed by men, intended for the male point of view, are too narrow to address the complexities of sex offenses.

The drafters of the Rome Statute were aware of some of these complexities, as I discuss above,\textsuperscript{464} but only marginally. As noted, the Rome Statute requires that the prosecution appoint advisers who have expertise in sexual

\textsuperscript{462} Hilary Charlesworth & Christine Chinkin, The Boundaries of International Law, supra note 44, p. 335.

\textsuperscript{463} Giorgio Agamben, supra note 6. Agamben discusses the abandoned person, the one who is excluded from the norm, such that in effect a violation of the excluded person is immune. My claim is that excluding sexual offenses from the criminal law – taking them outside of the general norms – leaves the victim’s body permissible. The exclusion of sexual offenses in the past, and the current inadequate legal arrangement, places the victims of sexual offenses outside the shelter of the law.

\textsuperscript{464} Part Three, subchapter 6.3: “The ICC – A New Status Quo”.
and gender violence.\textsuperscript{465, 466} In other words, the Rome Statute recognized that sexual offenses are composed of two strata – general and gendered. The Rome Statute further instructs the prosecutor to consider at the time of investigating witnesses the interests and personal circumstances of the victims of sexual violence and gender violence – another recognition of the two strata of the offense.

In a nutshell, my claim is as follows: rape is both a violent crime and a sexual crime.\textsuperscript{467} Violent, in the physical sense; and sexual in the sense that it is a part of the social subordination of women that already exists. During conflict, national law has never been relevant, and international law did not address sexual offenses. As it developed, international law regarded sexual offenses as crimes against honor, while ignoring the two components of its physical aspect and its sexual aspect. Finally, in its current stage of development, the \textit{New Status Quo} of the \textit{Third Era}, international law has placed sex crimes within the framework of the existing categories for violent crimes – and it thereby ignores the second stratum, the sexual/gender stratum. Thus, the recognition of sex crimes in the Rome Statute solely in the framework of the existing violent crime categories does not furnish a comprehensive solution to this problem, because it continues to ignore the gender stratum of these crimes.

Using the existing crime categories to cover sexual crimes of violence equates rape with other international crimes. Yes, rape is a violent international crime, but it also contains within it an additional stratum – by being a tool for feminine subordination, sexual satisfaction, masculine empowerment, and perpetuation of male domination over the female gender.

As discussed above,\textsuperscript{468} reform as to how sexual offenses are handled at the national level is well underway. These reforms have taken place in both the legislative and enforcement arenas, and they have begun to have an impact.

Nevertheless, during conflict, when the lights are out, the seeds of gender violence sprout and grow into that old patriarchal monster. During times of conflict, rape is again in many cases excluded from the general norms. The battlefield becomes the battle site for subordination on the basis of

\textsuperscript{465} I discuss this distinction between the two types of offenses above in Part Two, subchapter 6.3: “The ICG - A New Status Quo”. As noted, this provision can be understood as recognition that sexual offenses embody an additional offense that requires expertise and treatment – that they are not only sexual offenses as part of inter-ethnic violence but also offenses that are part of the inter-gender violence. See also supra note 373.
\textsuperscript{466} Rome Statute, supra note 4, art. 42(8)(b).
\textsuperscript{467} See Janet Halley, Rape at Rome, supra note 3, p. 58–59.
\textsuperscript{468} Part One, chapter 3: “Rape as a Unique Crime under Domestic Law”.