

Anne-Marie de Brouwer / Charlotte Ku / Renée Römkens / Larissa van den Herik (eds.), Sexual Violence as an International Crime: Interdisciplinary Approaches, Intersentia 2013, 400 pages, 80 Euro, ISBN 978-1-78068-002-6.

Sexual violence and gender-based crimes are not a new phenomenon with regard to mass atrocities. Enforcement of their prohibition through means of international criminal justice is, however, a new development and considerably one of the rather positive “legacies” of the *ad hoc* tribunals. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have carried out investigations and prosecutions and represent “landmark developments”.¹

After a historical perspective on the treatment of sexual violence in armed conflicts by *Askin* (chapter 2), going back to World War I and II, *Oosterveld* focuses on the prosecution of gender-based crimes more generally (chapter 3). The persecution based on gender was for the first time regulated as crimes against humanity in the Article 7 (1) (h) of the Rome Statute (at 57). Moreover, the International Criminal Court’s Office of the Prosecutor (ICC-OTP) made investigating and prosecuting such crimes one of their top priorities. *Moreno-Ocampo*, the former Chief Prosecutor, touches upon this strategy of the ICC-OTP briefly in chapter 7. Under the new Prosecutor, Fatou Bensouda, the policy has been shaped more clearly as she stated in June 2014:

*“Each of us has a role to play. It is hoped that the Policy will also serve as a guide to national authorities in the exercise of their primary jurisdiction to hold perpetrators accountable for these crimes. United in our efforts, we can end the silence that has surrounded sexual and gender-based crimes for far too long and give victims the ultimate tool in combatting such crimes: a voice backed by the force of the law.”*²

A new policy document is now available for the ICC since June 2014,³ a Special Gender Advisor works closely with the OTP, and a Gender and Children Unit (GCU) leads to more effective investigations and prosecutions.⁴ The implementation will be seen in the future and will reflect in cases yet to come to the ICC level.

Sivakumaran then focuses more on the implementation side. He states with regard to male sexual violence, meaning the prosecution for sexual violence against men and boys

- 1 Chapter 1, at 4. See also the ICTY’s own assesement available at <http://www.icty.org/sid/10314> (last accessed on 5 September 2015) and the ICTR’s Best Practice Manual available at <http://www.unict.org/tabid/155/Default.aspx?id=1374> (last accessed on 5 September 2014).
- 2 The Prosecutor of the International Criminal Court, Fatou Bensouda, publishes comprehensive Policy Paper on Sexual and Gender-Based Crimes, Press Release, 5. June 2014 (ICC-OTP-20140605-PR1011).
- 3 Policy Paper on Sexual Violence and Gender-Based Crimes, June 2014, ICC-OTP, available at <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> (last accessed on 5 September 2014).
- 4 Policy Paper on Sexual Violence and Gender-Based Crimes, *supra* note 3, paras. 112-3.

(chapter 4), that the actual prosecutions appear rather disappointing (at 87). While the ICTY has charged several accused, the ICTR and Special Court for Sierra Leone (SCSL) were more reluctant and had very few cases on sexual violence against men (at 88). He concludes later that prosecutions tend to prefer the general form (torture or cruel treatment) rather than the specific sexual crime, despite a substantive law codification (at 97). The ICTY has developed a solid body of jurisprudence on sexual violence as a war crime as *Jarvis* and *Salgado* rightly emphasize (chapter 5, at 103). In complex cases the prosecution remains difficult. It is much easier to hold lower-level perpetrators accountable than going to the level of senior political and military figures (at 106). In this regard, it will be interesting to see further developments in pending cases, such as *Karadžić* and *Mladić*, where the charges include genocide partly based on sexual violence (at 122). *Bianchi* (chapter 6) continues with the “Rwandan experience” and practical challenges (at 127 *et seq.*). She holds the opinion that the ICTR achieved successes and contributed to the legal framework for prosecuting sexual violence, naming quite a number of successful prosecutions (at 140). The *Akayesu* judgment that she mentions is significant in that respect as it provided for the legal basis in case law that rapes and other sexual violence can constitute genocide (at 141):

*“With regard, particularly, to the acts described [...], that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.”*⁵

Ending impunity for such crimes and the “historical record” of the sexual violence that occurred in Rwanda leaves, in her view, a testament and legacy of the ICTR (at 148-9).

Coming to other tribunals, the SCSL is evaluated in the following chapter 8. *Doherty* describes the landmark decisions and cases on sexual violence. It is worthy to note that article 15 (4) of the SCSL’s Statute providing for the Responsibilities of the Prosecutor envisaged a special provision from the very outset:

“Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice” (at 159).

The provision is a unique feature, and other tribunals did not include such a provision. Moreover, the SCSL was the first international court to issue decisions dealing with forced marriage and sexual slavery as a crime against humanity (at 165).

In contrast, the Extraordinary Chamber in the Courts of Cambodia (ECCC) seemed to be far behind the SCSL and the *ad hoc* tribunals with regard to investigating sexual crimes at the outset (at 179, 185). In chapter 9 *Studzinsky* explains how challenging it is to deal

5 Prosecutor v. Akayesu, Judgment, Trial Chamber (ICTR 96-4-T), 2. September 1998, para.731.

with sexual crimes in the context of Cambodia. Forced marriages were finally included in the indictment of case 002 after a long struggle, but the exclusion of rapes outside the context of forced marriage tainted this success (at 183). Be that as it may, the author holds the opinion that civil party participation paved the way from ignoring cases of sexual violence to giving victims a voice and the inclusion of forced marriages. Prior to this, forced marriages were not considered a “crime” in Cambodian society and a debate arose on parallel tracks with the inclusion in the indictment (at 186).

Chapters 10-13 look at social, legal and medical data collection and their usage for the criminal process. *Reis* stresses the public health and human rights issue of sexual violence (at 189), continues with the background and definition of gender-based violence (at 191-2), before she addresses the increased demand for information on the nature and extent of sexual violence during conflict (at 193). Data is collected by different activities, often overlapping and non-coordinated, and it is limited by under-reporting (at 193 *et seq.*). Many survivors may never disclose what has happened to them. The sensitive nature of sexual violence poses ethical and safety-related challenges to anyone gathering such data (at 201). Guidance and recommendations thus need to be taken into account when dealing with sexual violence data (at 202 *et seq.*). *Marcus* then gives some insights how crimes of sexual and gender based violence are investigated. Concrete methods for accessing evidence are presented, in particular the three main groups of the elements of international crimes broken down:

- (i) Specific elements;
- (ii) Common elements of the category of international crime;
- (iii) Linkage elements, which link the commission of each crime to a particular accused person or persons (at 229).

The checklist for investigations into crimes of sexual violence (at 233 *et seq.*) adds a hands-on element to the article that is very illustrative. In the next chapter, *Lawry, Johnson and Asher* describe methods of data collection that can be used by the ICC to gather evidence. They describe the essential role of quantitative data in elucidating patterns of sexual violence (at 259 *et seq.*), give an overview of field methods and share their best practices (at 261 *et seq.*). Last but not least, *Hagan, Brooks and Haugh* discuss the role of social science evidence for the ICC and in particular the Darfur situation. The authors hold the opinion that sufficient evidence to meet the “reasonable grounds” standard under the Rome Statute can be demonstrated with regard to Darfur. They make reference to the U.S. State Department Atrocities Documentation Survey (ADS) and a “new approach” involving the use of Hierarchical Linear Modeling methodology (at 285-6), which they then outline in detail.

The last block of chapters 14-16 examines how awareness about sexual violence can be raised. *Inder* gives a great summary of women’s advocacy for gender justice (at 317-8). She turns to the example of Ituri and speaks of a “missed opportunity” by the OTP (at 325). Despite evidence for sexual violence in the Lubanga case, the scope of the legal proceedings did not cover these crimes adequately (at 328). In general, she criticizes the narrow interpretation of existing jurisprudence at the ICC, but also mentions that the reliance on

secondary sources (UN reports, NGO reports, media reports, etc.) does not provide for a solid prosecutorial basis (at 336-7). *Irwin* interviews the filmmakers *van Velzen* in chapter 15 and demonstrates how movies can be used for awareness raising. The films “Fighting the Silence” and “Weapons of War” deal with sexual violence in DRC. The later one is a documentary from the view of the perpetrators, and the filmmakers give insights why they have chosen this unusual approach (at 340 *et seq.*). *Sharratt* takes a phenomenological approach as a clinical psychologist to the prosecution of sexual violence in international courts. She conducted interviews with many court members and experts and arrives at a critical conclusion:

“There is very little recognition of structural gender arrangements, the subjectivity of law, the context in which the prosecution of rape takes place, and the barriers that most women have to face and overcome” (at 368).

Gender competence and psychosocial capacity are still lacking in many institutions.

In their concluding remarks, *de Brouwer*, *Ku*, *Römkens* and *van den Herik* discuss future prospects and highlight the interdisciplinary approaches necessary to address sexual and gender based violence from different angles.

The combination of diverse authors with different backgrounds and expertise makes the book at hand a very interesting reading experience. It broadens the perspective one might have had before, and demonstrates once more that international criminal law is not solely a juridical exercise. While mentioned tribunals have contributed significantly through case law to fight impunity for sexual and gender based violence, this would never have been possible without the support and dedication of many people outside the courtroom. We thereby ought not to forget that successful prosecutions for sexual and gender based violence cumulate to a drop in the ocean given the widespread occurrence, and a lot still remains to be done.

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