

Section 3: Sexual Offenses

General Commentary

Sexual offenses are often committed during wartime, occupation, and in post-conflict states. Sexual offenses are regularly perpetrated against civilians in the context of acts of genocide, crimes against humanity, and war crimes. Reference should be made to Article 86 (“Genocide”), Article 87 (“Crimes against Humanity”), and Article 88 (“War Crimes”), and in particular Articles 87.1(1)(g), 88.1(1)(b)(xxii), and 88.1(1)(d)(vi), which explicitly refer to the sexual offenses of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence. Sexual offenses may also be prosecuted under other provisions, even where not specifically mentioned in the text of the article, for example, under Article 86.1(b) (as has been determined by the ICTR in the case of *Prosecutor v. Akayesu*, case no. ICTR-96-4-T, Decision, September 2, 1998), Article 87.1(1)(f) (as has been determined at the ICTY in the cases of *Prosecutor v. Delalić et al.*, case no. IT-96-21-T, Decision, November 16, 1998, and *Prosecutor v. Furundzija*, case no. IT-95-17/1-T, Decision, December 10, 1998), and Article 87.1(1)(h) (as has been determined at the ICTY in the case of *Prosecutor v. Kvočka*, case no. IT-98-30/1-T, Decision, December 15, 2000). Thus sexualized torture (or torture by means of rape) and gender-based persecution are also prosecutable. Rape and other forms of sexual violence have been successfully prosecuted as instruments of genocide, crimes against humanity, and war crimes before the ICTY and the ICTR.

Section 3 of the Special Part of the MCC deals with sexual offenses outside of the context of the criminal offenses of genocide, crimes against humanity, and war crimes. Often, the legislation in post-conflict states either is outdated, in which case so are the definitions of sexual offenses, or is purposely discriminatory against women in the articulation of sexual offenses. Given that instances of sexual offenses have often risen in the aftermath of a conflict, it is crucial that a post-conflict state examine the adequacy of its existing legislation to combat and punish such criminal offenses.

Coupled with the introduction of new legislation dealing with sexual offenses, a state may need to address other issues to adequately combat this crime problem. One of the primary challenges in post-conflict states in bringing prosecutions for sexual offenses (after new legislation has been introduced) is the stigma attached to the victim of a sexual offense. For example, as is evidenced in post-conflict societies such as Kosovo, East Timor, Liberia, Afghanistan, Rwanda, and Cambodia, victims are reluctant to come forward and report criminal offenses due to social, religious, or

cultural stigmas or other obstacles attached to sexual offenses. Some cases are settled by compensating the victim's family, marrying the victim to the perpetrator, or sending the victim away. In some locales, victims of sexual offenses are even forced to prove the sexual offense themselves or else they may be at risk of trial for criminal offenses such as adultery or fornication outside of marriage. Public awareness and education campaigns are often necessary in a post-conflict state to address the issues just mentioned.

In states in which police or prosecutors are unwilling to investigate and prosecute sexual offenses, education and training may be necessary to ensure that police and prosecutors apply the law, deal with victims in a sensitive and competent manner, and treat sexual offenses as crimes of violence. It is important to ensure that trained female members of the police force or the prosecution service are available to handle these cases. To properly investigate sexual offenses, medical and forensic expertise may also be required. Although post-conflict states have limited resources, every effort should be made to make "rape kits" available to medical professionals to assist them in the examination of a rape victim. (A rape kit consists of boxes, microscope slides, and plastic bags for collecting and storing evidence, such as bodily fluids or skin cells, that may later be used in the prosecution of this offense.) Similarly, despite resource constraints, every effort should be made to provide forensic laboratories. Additionally, a state or a nongovernmental organization or civil society organization with the requisite capabilities, competence, and skills should provide medical assistance, counseling, and rehabilitation to the victims of sexual offenses.

Article 94: Rape

Article 94.1: Definition of Offense

A person commits the criminal offense of rape when:

- (a) he or she invades the body of another person by conduct resulting in penetration, however slight, of any part of the body of that person or of the perpetrator with a sexual organ, or of the anal or genital opening of the other person with any object or any other part of the body; and
- (b) the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such person or another person, or by taking advantage of a coercive environment; or the invasion was committed against a person incapable of giving genuine consent.

Commentary

The wording of Article 94 is taken from the *Elements of Crimes*, accompanying the Rome Statute of the International Criminal Court, Articles 7(1)(g)-1, 8(2)(b)(xxii)-1, and 8(2)(e)(vi)-1). The definition of rape in the *Elements of Crimes* applies only to rape in the context of crimes against humanity and war crimes. Nonetheless, the drafters of the MCC viewed it as suitable for use as a stand-alone definition of rape. The definition of rape in the *Elements of Crimes* was arrived at after extensive negotiations between representatives from states around the world. The fact that the definition is generally accepted by numerous states rather than derived from one particular legal system made it the most obvious choice for the definition of rape in the MCC. The delegates who drafted the *Elements of Crimes* grappled with the many different definitions of rape that existed at the time, both in international law (under the jurisprudence of the ICTY and the ICTR) and in domestic law, before coming up with this novel definition.

This definition, now widely commended, does not have many of the deficiencies contained in outdated definitions of rape found in some legal systems. Significantly, the definition of rape in Article 94 does not include lack of consent as an element that needs to be proven to convict a person accused of rape. In many domestic jurisdictions, the inclusion of the nonconsent of the victim to the sexual act really means there is an effective presumption that a victim consented. Thus the only way to convict a person of rape is for the prosecutor to rebut this presumption by bringing forward evidence that the victim did not consent. In such cases, the court may look to the fact that a person consented verbally or implicitly to the sexual act. However, the court may not always look at whether this consent was genuine. If a person verbally said yes to sexual relations but did so only because the person feared for his or her life, this is not genuine consent and should not be allowed to preclude a conviction. Chapter 11, Part 3, of the MCCP addresses the issue of consent in relation to cases of sexual violence. It sets out “Principles of Evidence in Cases Involving Sexual Violence.” Reference should be made to the relevant article and its accompanying commentary. Also of relevance in Chapter 11, Part 3, is the provision on “Exclusion of Evidence of Sexual Conduct,” which governs the introduction of evidence relating to the prior sexual conduct of the victim. For a full discussion, reference should be made to Chapter 11, Part 3, of the MCCP.

Another merit of the definition of rape taken from the *Elements of Crimes* is that rape is categorized as a violation of the bodily integrity and sexual autonomy of a person, rather than as a crime relating to the honor of a person, which is how it is classified in the criminal laws of some states. Furthermore, the definition of rape in the *Elements of Crimes* and in Article 94 applies the criminal offense of rape to all persons. This means that rape can be perpetrated against a man or a woman, not just a woman. The application of rape to all persons also extends to a perpetrator who is married to the alleged victim. The definition of rape in the legislation of many post-conflict states provides that a man cannot be held criminally responsible for the rape of his wife. This exclusionary clause has been gradually removed from the legislation of post-conflict and non-post-conflict states that have reformed their laws on rape, and it is not found in the MCC definition of rape.

Other strengths of the definition of rape contained in the MCC include the following:

- The recognition that rape can be committed either through penetration of a bodily orifice by a sexual organ or through the invasion of the anus or the genital opening of a person by any object. This aspect moves away from definitions of rape that focus only on the invasion of one sexual organ with another sexual organ.
- Use of the term *invasion* rather than the term *penetration*, which is used in some jurisdictions. The use of *invasion* was welcomed by the delegates at the drafting of the *Elements of Crimes* as it more accurately portrays the criminal offense of rape from the perspective of the victim rather than that of the perpetrator. It is also a more gender-neutral term. Footnote 15 to the *Elements of Crimes* states that “the concept of invasion is intended to be broad enough to be gender-neutral.”
- Broadening the definition of force used in some domestic definitions of rape. Under Article 94, the criminal offense of rape can be committed through force, threat of force, or coercion against a person incapable of giving genuine consent. It is worth noting that in the context of armed conflict (which would relate to the prosecution of rape as a war crime), the ICTR found that coercion may be “inherent” when military personnel are present (*Prosecutor v. Akayesu*, case no. ICTR-96-4-T, Judgment, September 2, 1998, paragraph 688).

Article 94.2: Penalty

The applicable penalty range for the criminal offense of rape is five to twenty years’ imprisonment.

Article 95: Sexual Intercourse and Acts of a Sexual Nature with a Child below the Age of Consent to Sexual Relations

Article 95.1: Definition of Offense

1. A person commits the criminal offense of sexual intercourse or acts of a sexual nature with a child below the age of consent to sexual relations when he or she:
 - (a) has sexual intercourse with a person of the same or opposite sex under the age of [insert age of consent to sexual relations]; or

- (b) performs an act of a sexual nature with a person of the same or opposite sex under the age of [insert age of consent to sexual relations] or forces a person to submit to an act of a sexual nature.
2. A person under the age of eighteen who commits the criminal offense set out in Paragraph 1 will be held criminally responsible only if he or she committed the acts by exploiting the lack of capacity of sexual self-determination of the person under the age of consent to sexual relations.

Commentary

Article 95 contains two elements: sexual intercourse with a person below the age of consent to sexual relations, and acts of a sexual nature with a person below the age of consent to sexual relations. The former offense is often known as statutory rape. The age of consent to sexual relations has been left blank in the above article and should be inserted by a state. The age at which a person can consent to sexual relations varies from state to state. The average age of consent to sexual relations based on a world survey is around fifteen or sixteen years. The age of consent determined by a state should not be set too low.

Paragraph 2: The purpose of Paragraph 2 is to create an exception to Article 95 to cover cases in which a person under the age of eighteen has sexual intercourse with a person below the age of consent and where the sexual intercourse or other act of a sexual nature did not involve any exploitation of the lack of capacity of sexual self-determination of a person under the age of consent to sexual relations. This exemption envisages a situation where, for example, teenagers who are very close in age voluntarily and consensually have sexual intercourse or are involved in acts of a sexual nature with each other. It would not apply where an adult and a young child or teenager engage in sexual intercourse or other acts of a sexual nature.

Article 95.2: Penalty

The applicable penalty range for the criminal offense of sexual intercourse or acts of a sexual nature with a child below the age of consent to sexual relations is three to fifteen years' imprisonment.

Article 96: Violation of the Sexual Autonomy of a Defenseless Person

Article 96.1: Definition of Offense

1. A person commits the criminal offense of violation of the sexual autonomy of a defenseless person when he or she has sexual intercourse with a defenseless person or performs or forces a defenseless person to perform or submit to any act of a sexual nature.
2. A defenseless person is a person who is suffering from a mental disease, temporary or permanent mental disorder or sickness, or any other state owing to which that person is not capable of giving genuine consent.

Commentary

This provision aims to protect vulnerable persons who are incapable of giving genuine consent to sexual intercourse or other sexual acts.

Article 96.2: Penalty

The applicable penalty range for the criminal offense of violation of the sexual autonomy of a defenseless person is three to fifteen years' imprisonment.

Article 97: Violation of Sexual Autonomy by Abuse of Authority

Article 97.1: Definition of Offense

A person commits the criminal offense of violation of sexual autonomy by abuse of authority when he or she induces his or her subordinate, a person who depends on him or her, or a person over whom he or she has authority, to have sexual intercourse with him or her or to perform or submit to any act of a sexual nature. The victim may be of the same or opposite sex.

Commentary

This provision aims to protect persons who are in an unequal position to a person who induces them to have sexual intercourse with him or her or to submit to any sexual act. In this case, the act of sexual intercourse or other sexual act occurred by reason of the perpetrator's power over the victim. The perpetrator may be a person who has authority in a work setting or in an educational institution, a family member on whom the victim depends, or another person on whom the victim depends (e.g., a provider of medical care).

Article 97.2: Penalty

The applicable penalty range for the criminal offense of violation of sexual autonomy by abuse of authority is three to fifteen years' imprisonment.

Article 98: Sexual Slavery

Article 98.1: Definition of Offense

A person commits the criminal offense of sexual slavery when he or she exercising any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending, or bartering such a person or persons, or by imposing on them a similar deprivation of liberty causes such person or persons to engage in one or more acts of a sexual nature.

Commentary

The wording of Article 98 is taken from the *Elements of Crimes*, Articles 7(1)(g)-2, 8(2)(b)(xxii)-2, and 8(2)(e)(vi)-2. The definition in the *Elements of Crimes* applies only to sexual slavery in the context of genocide, crimes against humanity, and war crimes. However, the drafters of the MCC viewed the definition as suitable for use as a stand-alone definition of sexual slavery. The definition of sexual slavery in the Statute of the International Criminal Court, just like that of rape, was arrived at after extensive negotiations between representatives from states around the world. The fact that the definition is generally accepted by numerous states, rather than derived from one particular legal system, made it the most obvious choice for the MCC definition of sexual slavery.

The definition of slavery in Article 98 is the same as the definition of the crime against humanity of enslavement found in Article 7(1)(c) of the *Elements of Crimes*. Footnote 11 to the provision in the *Elements of Crimes* states that “it is understood that such deprivation of liberty may, in some circumstances include exacting forced labor or otherwise reducing a person to a servile status, as defined in the Supplementary Convention to the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.” The ICTY has stated that

indications of enslavement include elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labor or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking ... and control of sexuality.

(See *Prosecutor v. Kunarac et al.*, case nos. IT-96-23 and IT-96-23/1, Judgment, February 22, 2001.)

Article 98.2: Penalty

The applicable penalty range for the criminal offense of sexual slavery is five to twenty years’ imprisonment.

Article 99: Enforced Prostitution

Article 99.1: Definition of Offense

A person commits the criminal offense of enforced prostitution when he or she:

- (a) forces one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such person or persons or another person, or by taking

advantage of a coercive environment or such a person's or persons' incapacity to give genuine consent;

- (b) where the perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.

Commentary

The wording of Article 99 is taken from the *Elements of Crimes*, Articles 7(1)(g)-3, 8(2)(b)(xxii)-3, and 8(2)(e)(vi)-3. The definition in the *Elements of Crimes* applies only to enforced prostitution in the context of genocide, crimes against humanity, and war crimes. However, the drafters of the MCC viewed it as suitable for use as a stand-alone definition of enforced prostitution. The definition of enforced prostitution in the *Elements of Crimes*, just like the definitions of rape and sexual slavery, was arrived at after extensive negotiations between representatives from states around the world. The fact that the definition is generally accepted by numerous states, rather than derived from one particular legal system, made it the most obvious choice for the definition of enforced prostitution in the MCC. There are some overlaps between Article 99 and Article 98, dealing with sexual slavery. In some cases, prosecution may be possible under both articles. Experts in the laws relating to sexual offenses pointed out that victims generally favor the term *sexual slavery* as an accurate depiction of the criminal offense committed against them rather than a term that suggests a linkage to prostitution.

Article 99.2: Penalty

The applicable penalty range for the criminal offense of enforced prostitution is five to twenty years' imprisonment.

Article 100: Sexual Violence

Article 100.1: Definition of Offense

A person commits the criminal offense of sexual violence when he or she:

- (a) commits an act of a sexual nature against one or more persons or causes such person or persons to engage in an act of a sexual nature;

- (b) by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such a person's or persons' incapacity to give genuine consent.

Commentary

The wording of Article 100 is taken from the *Elements of Crimes*, Articles 7(1)(g)-6, 8(2)(b)(xxii)-6, and 8(2)(e)(vi)-6). The definition in the *Elements of Crimes* applies only to sexual violence in the context of genocide, crimes against humanity, and war crimes. However, the drafters of the MCC viewed it as suitable for use as a stand-alone definition of sexual violence. The definition of sexual violence in the *Elements of Crimes*, just like the definitions of rape, enforced prostitution, and sexual slavery, was arrived at after extensive negotiations between representatives from states around the world. The fact that the definition is generally accepted by numerous states, rather than derived from one particular legal system, made it the most obvious choice for the definition of sexual violence in the MCC. Article 100 is a residual provision that catches acts of sexual violence that cannot be classified as rape, sexual slavery, or any of the other offenses contained in Section 3.

Article 100.2: Penalty

The applicable penalty range for the criminal offense of sexual violence is three to fifteen years' imprisonment.