Sexual Violence and Gender-Based International Crimes in Swedish Case Law

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1 Introduction

The focus of this article is on international and Swedish regulation of gender-based crimes in international criminal law and the application of such by Swedish courts. Crimes of a gender-based nature concern offences subjected to men or women on the basis of their biological sex and/or social norms and stereotypes linked to such, i.e. gender.[1] Categorisations of international crimes as gender-based are generally not explicit in international treaties, with the exception of "gender-based persecution" as a crime against humanity in the Rome Statute.[2] Theories on gender and violations of international law can rather be derived from other sources, such as recommendations by the Committee on the Elimination of Discrimination against Women (CEDAW Committee).[3] For instance, as a means of specifically addressing such aspects during prosecution, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) has adopted a policy document on sexual violence and gender-based crimes.[4] Accordingly, the OTP commits to conducting gender analyses of international crimes and to consider the manner in which offences relate to gender inequality and gender stereotypes. Reference is in this connection made to Article 21 (3) of the Rome Statute, which instructs the ICC to interpret the Rome Statute in accordance with international human rights law, including the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[5] Similarly, the CEDAW Committee has encouraged the interpretation of gender-based international crimes in light of CEDAW.[6] Theoretical and regulatory frameworks in international human rights law may thus be applicable in this regard.

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1 Policy Paper on Sexual and Gender-Based Crimes, The Office of the Prosecutor, International Criminal Court, June 2014, p. 3; Gender Mainstreaming: Strategy for Promoting Gender Equality, Office of the Special Advisor on Gender Issues and Advancement of Women UN, rev. August 2001; Otto, Dianne, "International Human Rights Law: Towards Rethinking Sex/Gender Dualism" in Margaret Davies & Vanessa Munro (ed.), *The Ashgate Research Companion to Feminist Legal Theory*, Farnham: Ashgate, 2013, p. 206.

2 Article 7(h) of the Rome Statute of the International Criminal Court, 1998.

3 CEDAW General Recommendation No. 19: Violence Against Women, UN Doc. A/47/38 (1992), para. 6; Article 1 & Article 2 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 1994; Article 1(j) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2000; Article 3(d) of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention), 2011; Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, UN Doc. A/HRC/17/26, 2 May 2011.

4 Policy Paper on Sexual and Gender-Based Crimes, The Office of the Prosecutor.

5 ibid, para. 26.

6 General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30, 18 October 2013.

In consideration of this approach, the nature, causes and consequences of crimes may indicate which offences can be categorised as gender-based. Certain international crimes are by their nature essentially gender-based, while other offences may include gender-related aspects, depending on the circumstances of the specific case.[7] Thus, albeit certain international crimes are defined and perceived mainly in a gender-neutral manner, it should be taken into account that gender-based aspects may exist also in relation to, for example, conscription of child soldiers or torture.[8] This has also been made apparent vis-à-vis "deportation" as a crime against humanity. According to the investigation of the OTP into the situation of Myanmar, the crime may include sexual violence as an element since rape in that context was a factor that led to the exodus of the Rohingya people and thus a step in deportation.[9]

Furthermore, certain international crimes *exclusively* affect women – for example, due to women's distinct reproductive ability - such as forced pregnancy and forced abortion, and are linked to both the female sex as well as social norms on reproduction.[10] Other international crimes *mainly* affect women, albeit men are also subjected, evident in relation to sexual violence and sexual slavery. These forms of violations originate from stereotypical social norms on femininity and masculinity, in particular the social role of women, where violence is directed not only at the victim herself but also often the social group of which she is a member, by attacking the woman's sexuality. As a result, gender-based crimes against women often involve transgressions of sexual autonomy.[11] This was evident during the genocide in Rwanda in 1994, where male victims were mainly killed while women were subjected to widespread sexual violence. A particular focus has thus been placed on various forms of sexual violence at international level. However, it should be borne in mind that other types of offences may also originate from gender stereotyped norms, such as forced sterilisation.[12] Thus, while sexual violence is generally considered to be a gender-based crime, the latter category is consequently broader than solely sexual violence.

Nevertheless, gender-based crimes do not solely affect women. Men have in a number of armed conflicts, including those discussed below, been subjected to sexual violence with the aim of violating the victim's masculinity and, by extension, the dignity and status of a particular social group. For example, in the cases of *Kenyatta* and *Bemba*, the Prosecutor of the ICC cited gender as an

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7 CEDAW General Recommendation No. 19: Violence Against Women, UN Doc. A/47/38 (1992), para. 6.

8 Policy Paper on Sexual and Gender-Based Crimes, The Office of the Prosecutor, para. 34.

9 Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1, 9 April 2018, paras. 9-10.

10 It should, however, be considered that pregnancy no longer is exclusive to women as a result of sex reassignment surgery.

11 15 Years of the United Nations Special Rapporteur on Violence against Women (1994–2009)—A Critical Review, UN Doc. A/HRC/11/6/Add.5, 27 May 2009, p. 37; Sjöholm, Maria, *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems*, Leiden: Brill, 2017, p. 30.

12 Policy Paper on Sexual and Gender-Based Crimes, The Office of the Prosecutor, para. 25.

underlying factor in relation to sexual violence against both men and women.[13] It should also be emphasised that not all offences against female victims are related to gender as it may be an irrelevant factor in the context of the specific crime. Gender is rather one of multiple factors in theoretical frameworks analysing power and violence from a structural perspective, which may be relevant in the application of international criminal law provisions.

In practice, there is certain disagreement concerning the categorisation of specific acts as sexual violence or as being gender-based. This has emerged in a number of cases before the *ad hoc*-tribunals and the ICC. In the *Kenyatta* case, the Prosecutor and the Pre-Trial Chamber of the ICC disagreed on whether mutilation of male genitals should be considered a form of sexual violence.[14] There is also an inconsistent approach to whether gender discrimination is an underlying purpose of rape of women as a form of torture.[15] This is further complicated by the definition of gender in the Rome Statute. Although the Rome Statute is a particularly progressive treaty, which includes a number of gender-based crimes, it is clear that the view on gender was controversial among the participating states when negotiating and adopting the Statute. As a compromise, Article 7 (3) states that the concept of gender in the Statute refers to 'two sexes, male and female, within the context of society', whereby gender is thus linked to biological sex, which has been criticised.[16] This provision has yet to be assessed by the ICC and its application is thus unclear. Nevertheless, the OTP of the ICC has argued that the concept should be interpreted in accordance with international human rights law, i.e. as including both biological sex and social constructs of gender.[17] An interpretation limited to biological sex would exclude a number of gender-related offences. How gender is to be interpreted in relation to Swedish law is not clear. Although the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406) (Act of 2014) uses the term "sex" in relation to the crime of "persecution", the preparatory works indicate the possibility of addressing this in the broader sense in practice.[18]

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[13] *Prosecutor v. Kenyatta et al.*, ICC PT. Ch. II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 23 January 2012, para. 264; *Prosecutor v. Bemba*, ICC PT. Ch. II, Public Redacted Version of the Amended Document containing the charges filed on 30 March 2009, ICC-01/05-01/08-395-Anx3, 30 March 2009, para. 41.

[14] *Kenyatta et al.*, ICC PT. Ch. II, ICC-01/09-02/11-382-Red, 23 January 2012, paras. 264-266.

[15] ICTY in the *Delalic* case held that the purpose in relation to rape of a woman was gender discrimination. *Prosecutor v. Delalic et al.* (Case No. IT-96-21-T), ICTY T. Ch., Judgment, 16 November 1998, para. 941. *See* also *Prosecutor v. Kunarac*, (Case No. IT-96-23-T & IT-96-23/1-T), ICTY T. Ch., Judgment, 22 February 2001, para. 867. However, the ICTY did not consider that rape against women automatically involves a discriminatory purpose, para. 557.

[16] Oosterweld Valerie, *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, Harvard Human Rights Journal 2005, vol. 18, p. 55.

[17] Policy Paper on Sexual and Gender-Based Crimes Policy, The Office of the Prosecutor, p. 3 and paras. 15-16.

[18] Prop. 2013/14:146 om straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser, p. 115.

What is then the purpose of categorising certain crimes as gender-based? There are a number of overarching objectives, such as acknowledging the structural causes and effects of violations against a particular social group, which in turn may affect state obligations to prevent these types of crime. Studies indicate that there is a higher risk of gender-related crimes - also in the context of international criminal law - in countries with pronounced gender discrimination and inequality.[19] It also fulfills a strategic function at a policy level, since the categorisation draws particular attention to gender-based offences, which historically have been overlooked and trivialised at both national and international level.[20] The consideration of gender-related aspects also has a concrete effect on the categorisation of the offence as a specific crime in international criminal law, in particular gender-based persecution as a form of crime against humanity. It may also affect the interpretation of certain elements of the offence and the *mens rea* of the perpetrator.

2 International Regulation of Gender-based Crimes

Gender-based crimes are, to varying extent, regulated in a number of areas of public international law, mainly international human rights law, international humanitarian law and international criminal law. Some of the crimes, such as rape, are prohibited in all these fields and can thus be distinguished on the basis of the agents of responsibility and the context in which the violation occurred.[21] However, it is not uncommon for courts and tribunals, when considering issues in international human rights law and international criminal law, to refer to the jurisprudence of the respective body of law.[22] Relevant rules of international humanitarian law, in turn, are mainly replicated in international criminal law, while the latter area of law explicitly includes a broader category of gender-based crimes. Meanwhile, in international humanitarian law, Article 27 of Geneva Convention IV (GC IV) ensures the protection of women's honour, including a prohibition on sexual violence.[23] It should be noted that this provision has been criticised for portraying the crime of rape as harming

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19 Banwell, Stacy, *Rape and Sexual Violence in the Democratic Republic of Congo: A Case Study of Gender-Based Violence*, J. of Gender Studies, vol. 24, issue 1, 2014; Beijing Declaration and Platform for Action, Fourth World Conference on Women, UN Doc. A/CONF.177/20, 15 September 1995, paras. 132-137.

20 "Ending History's Greatest Silence", Speech by Inés Alberdi, Executive Director, UNIFEM, 8 July 2009 & UN Action Against Sexual Violence in Conflict Programme, Security Council, 6196th meeting, UN Doc. S/PV.6196, 5 October 2009, p. 3; SC Res. 1820 on Women, Peace and Security, UN Doc. S/RES/1820, 19 June 2008; Report of the Secretary-General, Women and Peace and Security, UN Doc. S/2009/465, 16 September 2009, para. 42.

21 Case law in the field of international human rights law includes *M.C. v Bulgaria*, (Application no. 39272/98), ECtHR, Judgment of 4 December 2003, para. 163; *Case of the Miguel Castro-Castro Prison v. Peru*, (series C), No. 160, IACtHR, Judgment of 25 November 2006.

22 *M.C. v Bulgaria*, 4 December 2003, para. 163; *Case of the Miguel Castro-Castro Prison v. Peru*, 25 November 2006, para. 310; *Prosecutor v. Furundzjia*, (Case No. IT-95-17/1-T), ICTY T. Ch., Judgment, 10 December 1998, para. 163.

23 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV), 1949.

women's honour rather than constituting a violation of the individual's physical integrity and sexual autonomy.[24] Article 76 of Additional Protocol I (AP I) further provides that women should be ensured special respect and protection primarily against rape, forced prostitution and any other form of indecent assault.[25] Sexual violence has also been included by way of interpretation in general provisions such as Common Article 3, in particular the prohibition on torture and outrages upon personal dignity, for example, by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL).[26]

As far as gender-based crimes in international criminal law are concerned, these are encompassed in the crime of genocide, crimes against humanity and war crimes. The contextual elements of the crime in question must thus be fulfilled – for example, an international armed conflict - in addition to the specific act, such as rape. These types of crime have been prosecuted by a number of *ad hoc*-tribunals and in a few cases by the ICC. Case law has mainly involved rape,[27] other forms of sexual violence[28] and sexual slavery.[29] The Rome Statute is the first international treaty in international criminal law that explicitly codifies a range of gender-related crimes, including various forms of sexual violence, such as rape,[30] sexual slavery,[31] enforced prostitution[32] and other forms of sexual violence.[33] Forced marriage has been categorised by the

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[24] Charlesworth, Hilary, *Feminist Methods in International Law*, AJIL, vol. 93, 1999, p. 386; Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Rhadika Coomaraswamy, submitted in accordance with Commission resolution 1997/44, UN Doc. E/CN.4/1998/54, 26 January 1998, para. 4.

[25] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (AP I), 1977.

[26] *Prosecutor v. Furundzjia*, (Case No. IT-95-17/1-T), ICTY T. Ch., 10 December 1998, para. 166; *Case No. SCSL-04-15-T against Sesay, Kallon, Gbao*, Judgment, 2 March 2009, para. 1347. *See* also the Rome Statute Article 8(2)(b)(xxii) and (e)(vi) and Article 4 of the Statute of the International Tribunal for Rwanda.

[27] The Statutes of the ICTY and the ICTR categorized rape as a form of crime against humanity: Article 5 (ICTY) and Article 3 (ICTR). Article 4 of the Statute of the ICTR included rape and enforced prostitution as "outrages upon personal dignity". Rape has also been considered a form of genocide and torture: *Akayesu*, ICTR, T. Ch. 2 September 1998, paras. 507-508, 597. The ICTY Statute did not explicitly include sexual violence as a war crime but has in the main been considered "outrages upon personal dignity". *See* e.g. *Furundzjia*, (Case No. IT-95-17/1-T), ICTY T. Ch., 10 December 1998, para. 173.

[28] *See* e.g. *Akayesu*, ICTR, T. Ch. 2 September 1998; *Prosecutor v. Stevan Todorović*, (Case No. IT-95-9/1-S), ICTY T. Ch., Sentencing Judgment, 31 July 2001.

[29] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL T. Ch. II, Judgment, Case No. SCSL-2004-16-T, 20 June 2007; *Kunarac*, ICTY T. Ch., Judgment, 22 February 2001.

[30] Article 7(1)(g), Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) of the Rome Statute. Rape has also been included in other offences by way of interpretation in case law, such as genocide and torture.

[31] Article 7 (1)(g), Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) of the Rome Statute.

[32] Article 7 (1)(g), Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) of the Rome Statute.

[33] Article 7 (1)(g), Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) of the Rome Statute.

ad hoc-tribunals and the ICC as either constituting sexual slavery[34] or other inhuman acts.[35] The Rome Statute also includes enforced pregnancy,[36] forced sterilisation[37] and gender-based persecution.[38] Trafficking in persons, in particular of women and children, is a form of crime against humanity.[39] These crimes are further discussed in the next section on Swedish legislation.

3 Gender-Based International Crimes in Swedish Law

In cases involving gender-based aspects of international criminal law, Swedish courts have to date applied the former regulation on crimes against international law in the Swedish Criminal Code, Ch. 22 Sec. 6, applicable prior to 1 July 1995. The cases have all concerned crimes committed during 1993-1994 in the former Yugoslavia and Rwanda and the current Act of 2014 cannot be applied retroactively in relation to these conflicts.[40] According to the former provision, a person could be convicted of violations of treaty and/or customary international humanitarian law. In practice, this has involved the application of select provisions of the Geneva Conventions, such as Common Article 3. The latter requires that persons in non-international armed conflicts are treated humanely and includes a prohibition on violations of personal dignity. The examples of serious violations listed in the Swedish Criminal Code, Ch. 22 Sec. 6 also derived from the Geneva Conventions and included willful killing, inhuman treatment, willfully causing great suffering or serious injury to the body or health and unlawful detention. Swedish law previously included also the Act on Criminal Responsibility for Genocide (1964:169). Although applied in some of the cases discussed below, this was not considered in relation to gender-based offences. These earlier regulations were constructed in a broad manner without specific provisions on gender-related crimes. As will be demonstrated below, Swedish courts have in cases concerning these types of crime mainly referred to Common Article 3 of GC I-IV and Article 4 of Additional Protocol II (AP II), in particular the prohibition on humiliating treatment and violations of personal dignity and, in one case, to women's special protection under Article 76 of AP I.

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34 *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL T. Ch. II, Case No. SCSL-2004-16-T, 20 June 2007, para. 704; *Prosecutor v. Germaine Katanga*, ICC T. Ch. II, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/07, 30 September 2008, para. 431.

35 *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL A. Ch., Judgment, Case No. SCSL-2004-16-A, 22 February 2008, para. 195; *Prosecutor v. Dominic Ongwen*, PT. Ch. II, Decision on the Confirmation of Charges against Dominic Ongwen, Case No. ICC-02/04-01/15-422-Red, 23 March 2016, para. 88.

36 Article 7 (1)(g), Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) of the Rome Statute.

37 Article 7 (1)(g), Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) of the Rome Statute.

38 Article 7(1) (h) of the Rome Statute.

39 Article 7(1) (c) and Article 7(2) (c) of the Rome Statute.

40 BrB 22:6. The district court in the Makitan-case referred to certain provisions in the Rome Statute as evidence of customary international law, but as the Statute entered into force subsequent to the events in the case this is questionable. *See* Åklagaren ./. Makitan, Stockholms tingsrätt, Mål nr B 382-10, judgment 8 April 2011, p. 7.

The Act of 2014 is based on the Rome Statute, which was ratified by Sweden in 2001. It is substantially broader in its scope than the previous regulation through its inclusion of crimes against humanity, which does not require the existence of an armed conflict nor genocide, but rather a widespread or systematic attack on a civilian population. The current law is also less ambiguous, as it in the main constitutes a transposition of the definitions of crimes in the Rome Statute, and includes an explicit criminalisation of a number of gender-based crimes.

Similar to the Rome Statute, gender-based offences in the Act of 2014 are encompassed in the three international crimes. These are explicitly regulated in certain crimes and, in other instances, it is clear from the case law of international courts and tribunals as well as the Swedish preparatory works that such are included by way of interpretation. Sec. 1 on genocide requires the existence of an intent to destroy certain enumerated groups in addition to specific acts. Particularly relevant regulations are para. 2) which involves causing serious pain, harm or severe suffering to members of the group; and para. 4) imposing measures intended to prevent births within the group. The offence in para. 2 is also a form of crime against humanity and war crime, which entails that the *chapeaus* of the crimes distinguish the offences. The infliction of serious bodily or mental harm includes rape and other forms of sexual violence. In relation to para. 4, the preparatory works refer to the *Akayesu* case of the International Criminal Tribunal for Rwanda (ICTR) in which the tribunal held that the provision includes sexual mutilation, enforced sterilisation, forced birth control, separation of the sexes and prohibition of marriages.[41] It also includes rape where a woman is made pregnant against her will by a perpetrator belonging to another group, in a social context where membership of a particular group according to prevailing norms is determined by the identity of the father.[42] Rape *per se*, without causing pregnancy, can also be encompassed, since the abuse can generate such grave physical or mental harm to the victim that she subsequently lacks the physical ability to conceive or, due to the psychological trauma she has been subjected to, refrains from sexual activity.[43] However, the preparatory works indicate that it would 'be closer at hand' to prosecute individuals for genocide on the basis that rape causes serious bodily or mental harm to the woman, i.e. according to para. 2.[44]

Sec. 2 defines crimes against humanity, which must occur in the context of a widespread or systematic attack on a civilian population. This includes sexual slavery, rape, forced prostitution, forced pregnancy and gender-based persecution.[45] Certain of these offences warrant further explanation. The crime

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41 Prop. 2013/14:146, p. 87; *Prosecutor v. Jean Paul Akayesu*, (Case no. ICTR- 96-4-T), 2 September 1998, para. 507.

42 *Akayesu*, ICTR, T. Ch. 2 September 1998, para. 508.

43 Prop. 2013/14:146, pp. 89-90.

44 ibid, pp. 89-90. Author's own translation.

45 It particularly involves para. 2) causing a person belonging to the population serious pain or harm or subjecting this person to severe suffering through torture or other inhumane treatment; para. 3) subjecting a person belonging to the population to serious sexual abuse through rape, enforced prostitution or other comparably serious act; para. 4) with the intention of affecting the ethnic composition of a population or of perpetrating other grave

of rape is regulated in para. 3. However, the crime is not defined in the Rome Statute itself. Rather, the preparatory works refer to the Elements of Crimes, which is a separate and non-binding document of the ICC, in addition to case law of the ICTY and the ICTR.[46]

Para. 3 also includes sexual violence of "comparable gravity". The preparatory works in this regard again refer to the *Akayesu* case.[47] While the ICTR in the case approached the concept of sexual violence broadly, for instance including non-physical acts such as forced nudity, the Rome Statute and the preparatory works are more restrictive in their delineation.[48] The preparatory works indicate that this includes acts of a sexual nature that are equivalent to penetration.[49] Nevertheless, other acts of a sexual nature may also be included, which individually do not reach the sufficient level of gravity but have been perpetrated repeatedly, depending on the circumstances.[50] The Government - while noting that the *ad hoc*-tribunals considered the concept to include acts generally categorised as physical assault, for example, genital mutilation - held that the provision should be reserved for acts of a distinctly sexual nature.[51]

Crimes against humanity also include gender-based persecution, which has yet to be applied and interpreted by the ICC. However, in 2018 charges involving this crime were brought against individuals in Mali[52] and it was included in the Prosecutor's Preliminary Inquiry into Afghanistan.[53] Persecution involves

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violations of customary international law, depriving a forcibly impregnated woman belonging to the population of her liberty; para. 5) causing a person who belongs to the population to enter into sexual slavery or, in contravention of customary international law, forced labour or other such state of coercion para. 8) subjecting persons who belong to the population to persecution by, in contravention of customary international law, depriving them of fundamental rights on the basis of political, racial, national, ethnic, cultural, religious, gender or other reasons that are prohibited under customary international law.

46 Prop. 2013/14:146, p. 105.

47 ibid, p. 105.

48 *Akayesu*, ICTR, T. Ch. 2 September 1998, para. 688; Prop. 2013/14:146, p. 105. According to the OTP of the ICC sexual violence encompasses also non-physical acts of a sexual nature, such as forced nudity. *See* Policy Paper on Sexual and Gender-Based Crimes, The Office of the Prosecutor, p. 3. *See* also *Prosecutor v. Stevan Todorović*, (Case No. IT-95-9/1-S), ICTY T. Ch., Sentencing Judgment, 31 July 2001, paras. 37-38. In this case beatings of genitals and biting another person's penis were considered forms of sexual violence. *See* also *Prosecutor v. Milutinovic et al*., (IT-05-87-T), ICTY T. Ch., Judgment, vol. 1, 26 February 2009, para. 199.

49 Prop. 2013/14, p. 146. According to Article 7(1)(g) in the Rome Statute other forms of sexual violence than rape must be of similar gravity as the acts enumerated in the provision.

50 Prop. 2013/14:146, p. 106.

51 Prop. 2013/14:146, p. 106.

52 *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC PT. Ch. I, Warrant of Arrest, ICC-01/12-01/18, 27 March 2018, para. 12.

53 Situation in the Islamic Republic of Afghanistan, ICC PT. Ch. III, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", ICC-02/17-7-Conf-Exp, 20 November 2017, para. 42. This was, however, rejected by the Court in 2019: Situation in the Islamic Republic of Afghanistan, ICC PT. Ch. II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan", ICC-02/17-33, 12 April 2019. It was also a part of the Prosecutor's plea in *Prosecutor v. Callixte Mbarushimana*, ICC PT. Ch. I, Decision on the

serious restrictions of rights vis-à-vis a particular group on the basis of its identity. According to the preparatory works, international human rights law treaties such as CEDAW may be taken into account in the interpretation of the crime.[54] Nevertheless, a higher threshold than general violations of women's human rights is set, since the deprivation of rights must be "severe". In addition, according to the Rome Statute, persecution must be committed in connection with an act listed in the provision on crimes against humanity or another international crime, and in the context of a widespread or systematic attack. The Swedish provision to an extent diverges from this requirement. Rather, the act must either be committed in connection with another crime against humanity or contrary to customary international law.[55]

The war crimes provision also includes a number of gender-based offences encompassed in the other international crimes, with the requirement that such must have been committed in the context of either an international or non-international armed conflict. Included are various forms of sexual violence and sexual slavery as well as more general rules on degrading treatment and torture.[56] Forced nudity is mentioned in the preparatory works as a form of war crime, in violation of the protection against humiliating or degrading treatment, as it causes harm to an individual's personal dignity. A reference is made to the *Kunarac* case of the ICTY, where women were forced to dance naked in front of soldiers.[57] This was considered a violation of personal dignity and, in the context, a war crime. However, it was not mentioned that it was also considered a form of sexual violence by the ICTR in the *Akayesu* case.[58]

Since Swedish courts, in the cases discussed below, have not particularly acknowledged gender-based aspects and a lack of evidence in most cases has resulted in acquittals in relation to such charges, it is to an extent unclear how they will address, for example, sexual offences in an international law context, in particular when applying domestic law applicable to offences committed before 2014. This, for example, includes whether the application of the law will be affected by corresponding domestic provisions beyond international law. It is of the utmost importance that the interpretation of gender-based crimes in this context is in accordance with internationally established rules and principles, taking into account the jurisprudence of international courts and tribunals. The preparatory works to the Act of 2014 note that internationally established

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Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, ICC-01/04-01/10, 28 September 2010, count 11.

54 Prop. 2013/14:146, p. 116.

55 ibid, p. 118.

56 In Sec. 4, para. 2, it is prohibited to cause a protected person serious pain or harm or subjects this person to severe suffering through torture or other inhumane treatment; para. 5: to subject a protected person to serious sexual abuse through rape, enforced prostitution, sexual slavery or other comparably serious act; para. 6: with the intention of affecting the ethnic composition of a population or of perpetrating other grave violations of customary international law, deprive a forcibly impregnated protected person of the female sex of her liberty; para. 7: to subject a protected person to humiliating or degrading treatment that is calculated to seriously violate their personal dignity.

57 Prop. 2013/14:146, p. 269.

58 *Akayesu*, ICTR, T. Ch. 2 September 1998, para. 688.

elements of crimes, such as in the Rome Statute, are adequately delineated and the application of Swedish definitions for non-international offences must be avoided.[59] In situations where there are corresponding offences in the Rome Statute and Swedish legislation involving non-international crimes – such as the crime of rape - it is emphasised that the international definition of the crime prevails.[60] Domestic provisions must thus be interpreted in accordance with existing principles of international criminal law, taking into account the practice of the *ad hoc*-tribunals and the elements of crimes of the Rome Statute, while leaving certain room for development. This means that although certain offences are similar, it is of the utmost importance to consider the context of international crimes in the assessment, such as the particularly coercive circumstances that exist during armed conflicts. This, for example, affects the assessment of what constitutes "coercion" in sexual relations. It should, however, be borne in mind that the Elements of Crimes and the jurisprudence of the *ad hoc*-tribunals are not entirely consistent in defining rape, as the former is the result of a compromise between different legal traditions and the international case law at the time, which has since evolved. Nevertheless, broadly a focus is on whether violence, threats of violence or coercion were present in connection with the sexual activity, taking into account the context and coercive circumstances of, for example, an armed conflict, although this is not a requirement in the case of crimes against humanity or genocide.[61] This question is primarily relevant in relation to the crime of rape, since there is no specific regulation in Swedish law regarding many of the other offences outside the context of international criminal law. In cases where crimes overlap but are not entirely correlated, such as the Swedish crime of human trafficking and the international crime of enslavement, the definition of the international offence shall also be given preference.[62]

In conclusion, the Act of 2014 constitutes a significant development in the recognition of gender-based crimes by explicitly prohibiting such offences. Nevertheless, in contrast to the *ad hoc*-tribunals the Swedish Government has adopted a relatively conservative approach to the interpretation of certain gender-related crimes, such as sexual violence, forced nudity and mutilation of genitals. This, on the other hand, is largely consistent with the limited case law of the ICC. While certain concepts are not defined in the preparatory works, the Government has noted the possibilities of adhering to developments in this area and it can thus be expected that the interpretation of the crimes will be influenced by the forthcoming practice of the ICC.

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59 Prop. 2013/14:146, p. 76.

60 ibid, p. 76.

61 Article 7(1)(g)-1 Elements of Crimes; *Prosecutor v. Bemba*, ICC T. Ch. II, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08, 21 March 2016, paras. 104-106.

62 Prop. 2013/14:146, p. 111.

4 Swedish Case Law from an International Perspective

4.1 Introduction

A limited number of cases in Swedish courts involve gender-based international crimes. The reasons for this are manifold. It is clear from case law - in Swedish courts, the *ad hoc*-tribunals and the ICC - that stigma regarding certain crimes, in particular sexual violence, can make victims unwilling to testify.[63] For example, the district courts in the cases of *Makitan* and *Tabaro* noted that obstacles of a cultural nature often exist in conveying experiences of sexual violence, both in the context of the Rwandan genocide and the conflict in former Yugoslavia.[64] A number of the domestic cases also resulted in acquittals due to a lack of evidence involving the criminal liability of alleged perpetrators. The evidence primarily consisted of statements by victims and witnesses and these were considered unreliable in terms of identifying perpetrators, given the extended time that had passed. From a general perspective, issues from an evidentiary standpoint often arise in relation to gender-based crimes, such as few eyewitnesses. Furthermore, sexual violence frequently generates difficulties in establishing criminal liability in international criminal law. Few prosecutions involve direct participation in such crimes but rather individuals who have aided, abetted or assisted the crimes.[65] Establishing a link between perpetrators and, particularly, sexual violence has proved challenging.[66] Case law of the *ad hoc*-tribunals indicates that in order to obtain a conviction it has generally been required that the individual either directly participated in the rape or, in relation to command responsibility, evidence existed of direct orders or physical presence at the scene of the crime, in addition to proof of rape.[67] Meanwhile, according to the OTP, there is often a lack of evidence of direct orders to commit gender-based crimes, causing problems in proving intent.[68]

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63 Haffajee, Rebecca L., *Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory*, Harvard J. Law & Gender, vol. 29, 2006, p. 205; *Akayesu*, ICTR, T. Ch. 2 September 1998, para. 687.

64 Makitan, 8 April 2011, p. 71; Åklagaren ./. Theodore Tabaro, Stockholms tingsrätt, Mål nr B 13688-16, judgment 27 June 2018, p. 115.

65 MacKinnon, Catharine, *The Recognition of Rape as an Act of Genocide - Prosecutor v. Akayesu*, New Eng. J. of Intl. & Comp. L. vol. 14, No. 2, 2008, p. 104; Haffajee, 2006, p. 202.

66 Goy Barbara, Jarvis Michelle & Pinzauti Giulia, "Contextualizing Sexual Violence and Linking it to Senior Officials: Modes of Liability" in Brammertz Serge, Jarvis Michelle (ed.), *Prosecuting Conflict-related Sexual Violence at the ICTY*, Oxford: Oxford University Press, 2016, p. 174.

67 *Prosecutor v. Niyitegeka*, (Case No. ICTR-96-14), ICTR T. Ch., Judgment and Sentence, 16 May 2003, para. 467; *Prosecutor v. Musema*, (Case No. ICTR-96-13-A), ICTR T. Ch. I, 27 January 2000, para. 968.

68 Policy Paper on Sexual and Gender-Based Crimes, The Office of the Prosecutor, para. 81. An issue has been to prove criminal culpability concerning sexual violence for high ranked individuals. The OTO of the ICC thus aims, in line with its gender-conscious policy paper, charge also middle- and lower ranked officers and individuals for these types of crime. Furthermore, reference can be made to patterns of prior or latter offences of a similar nature as an indication of awareness of the crime as a foreseeable event, e.g. based on information in international and domestic country reports. The OTP in this regard noted *Prosecutor v.*

It is also plausible that these types of crime have been considered of lesser gravity, which has been the case at the international level, where sexual violence has been excluded in favour of prosecution of crimes considered more serious, such as killings.[69] Also the scope of the former domestic provision on crimes against international law may have contributed to this lack of acknowledgment, since gender-based crimes were not explicitly encompassed.

4.2 Case Law

An account of relevant aspects of Swedish case law is discussed in the following, in addition to the coherence between international regulations and Swedish legislation on the matter. Also the Act of 2014 and its applicability to the offences involved in the cases are considered, albeit not applied by the courts with due regard to the principle of non-retroactivity.

The case of *Jackie Arklöv* involved international crimes committed in Bosnia and Herzegovina in 1993.[70] The indictment concerned crimes against international law, according to the previous provision in the Swedish Criminal Code, Ch. 22 Sec. 6, consisting of several acts. The gender-based crimes were thus dealt with in conjunction with other acts in the case and were not specifically acknowledged. However, the victims' statements indicate the occurrence of gender-based offences. According to one victim, punches were directed at his genitals, which occurred during an incident of physical assault. This resulted in problems urinating during a six month period.[71] Another victim stated that soldiers - including Arklöv - threatened to find his wife and daughters and rape them.[72] A female victim testified that Arklöv forced women to remove their headscarves, threatened to kill her husband, to cut her and her children's throats, and to extract the foetus from her stomach as she was three months pregnant.[73] Arklöv called her a "whore" and subjected her to physical assault, including a kick in the back, which caused vaginal bleeding. She believed that the intent of the kick was to cause her to miscarry. Another individual tore apart

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Taylor where the tribunal for Sierra Leone to a significant extent relied on reports from international organizations and NGOs concerning the situation in the country, in order to prove awareness of the pattern of violence, including rape. *See* Policy Paper on Sexual and Gender-Based Crimes, The Office of the Prosecutor, para. 23; *Prosecutor v. Taylor*, (Case No. SCSL-03-01-T), SCSL T. Ch. II, Judgment, 18 May 2012, paras. 6815-6886.

69 *Prosecutor v. Lukić and Lukić*, (Case No. IT-98-32/1-PT), ICTY Pt. Ch., Prosecution Motion Seeking Leave to Amend the Second Amended Indictment, 16 June 2008, para. 14; MacKinnon, C., 2008, p. 104; Letter from Brigid Inder (Executive Director of Women's Initiatives for Gender Justice) to Luis Moreno Ocampo (Chief Prosecutor International Criminal Court) regarding failure to bring charges for sexual violence in the Lubanga case, August 2006, <http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf>, checked 8 November 2018.

70 *Åklagaren ./. Jackie Arklöv*, Stockholms tingsrätt, Mål B 4084-04, judgment 18 December 2006.

71 ibid, p. 17.

72 ibid, p. 23.

73 ibid, p. 43.

her dress. An additional victim stated that vulgar abuse involving the detainees' mothers was common.[74] Arklöv admitted the assault of the victims and the evidentiary assessment was therefore not particularly complex, in conjunction with other supportive evidence in the enquiry, and he was thus convicted.

In relation to the male victims, the combined acts were considered forms of violence to life and person, cruel treatment, torture as well as humiliating and degrading treatment (Articles 3 of the GC I-IV and Article 4 of AP II).[75] The various acts were thus dealt with summarily. Meanwhile, the district court found that the treatment of the female victim was particularly grave, in consideration of the special protection of women in Article 76 of AP I.[76] It also contravened the same provision as for the male victims. Nevertheless, the district court did not pay particular attention to the gender-based aspects of the offences.

A number of these acts can in theory be categorised as gender-based, in consideration of international law and the Act of 2014. However, it is unclear whether these provisions would have led to a different assessment in this particular case. For example, it is unlikely that the assault of the victim's genitals would be considered gender-based as this occurred during the course of an overall physical assault, which resulted in harm to a large part of his body. There is thus no indication that the violence was specifically directed at his genitals nor that there was an intention to affect his reproductive ability or violate his masculinity. According to the preparatory works to the Act of 2014, battering of genitals is categorised as physical assault, rather than a form of sexual violence.[77] However, such a categorical position can be criticised as such violence, regardless of the gender of the victim may, depending on the context, constitute gender-based reproductive and/or sexual violence. For example, the ICTR has considered that more serious forms of genital mutilation can constitute a means of preventing reproduction in a particular group, as a form of genocide.[78] Before the Pre-Trial Chamber of the ICC in the *Kenyatta et al*. case the Prosecutor argued that the acts of forced circumcision and amputation of male genitals intended to harm the masculinity of the victims and constituted a form of sexual violence under Article 7 (1) (g) of the Rome Statute.[79] The

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74 ibid, p. 24.

75 ibid, p. 59.

76 ibid, p. 63. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.

77 Prop. 2013/14:146, p. 106.

78 In the *Akayesu*-case the ICTR held the following: "For purposes of interpreting Article 2(2)(d) of the Statute, the Chamber holds that the measures intended to prevent births within the group should be construed as sexual mutilation, the practice of sterilisation, forced birth control, separation of the sexes and prohibition of marriages." *Akayesu*, ICTR, T. Ch. 2 September 1998, para. 507. *See* also *Stevan Todorović*, ICTY T. Ch., 31 July 2001, paras. 37-38, where repeated beating of male genitals was considered a form of sexual violence.

79 *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, (Case No. ICC-01/09-02/11), ICC T. Ch., Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 264. *See* also Situation in the Islamic Republic of Afghanistan, ICC PT. Ch. III, ICC-02/17-7-Conf-Exp, No. ICC- 02/17, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, para. 216.

Chamber, however, held that not all forms of violence against a body part that is generally associated with sexuality should be considered sexual violence, and in this case it was motivated by ethnic strife rather than social norms on gender.[80] Thus, the incident was categorised as inhumane treatment, which is in line with the case law of the ICTY.[81] Accordingly, the context is determinative of the categorisation of the act as sexual violence, which must take into account that sexual violence is not exclusive to female victims nor is a sexual motive a necessary component. For example, the ICTY has emphasised that sexual violence may be perpetrated with the intent of humiliating another person, rather than necessarily satisfying a sexual desire.[82]

It should also be mentioned that forced sterilisation constitutes an international crime, albeit it has not been subject to prosecution, with the exception of the Nuremberg trials. However, sterilisation in those cases involved surgical procedures,[83] although there is certain support in doctrine for the inclusion also of severe physical assault of genitals.[84]

Furthermore, physical assault for the purpose of inducing miscarriage can be categorised as a number of different international crimes, depending on the context.[85] The inducement of miscarriage is mentioned in the preparatory works to the Act of 2014 in relation to forced medical experiments as a form of war crime, with reference to the Nuremberg trials, but not in relation to other crimes.[86] On the other hand, the *ad hoc*-tribunals have categorised forced abortion as a form of sexual violence[87] and as killing where a pregnant woman was disembowelled.[88] In this case, the statement about tearing out the foetus of the pregnant woman's stomach could indicate an intent to induce miscarriage.

The fact that a woman's dress was torn could involve the offence of forced nudity, depending on the purpose, which in turn can be considered a form of

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80 *Kenyatta et al*., ICC PT. Ch. II, ICC-01/09-02/11-382-Red, 23 January 2012, para. 265.

81 ibid, para. 266. Genital mutilation, through the perpetrator biting off another man's testicle, was considered inhuman treatment in the *Tadic*-case: *Tadic*, ICTY A. Ch., 15 July 1999, paras. 728-730.

82 In *Prosecutor v Dordević*, (Case No. IT-05-87/1-A), ICTY A. Ch., Judgment, 27 January 2014, para. 852 and *Milutinovic et al*., ICTY T. Ch., 26 February 2009, para. 199 the ICTY held that 'In the context of an armed conflict, the sexual humiliation and degradation of the victim is a more pertinent factor than the gratification of the perpetrator' as it is the sexual humiliation and degradation which 'provides specificity to the offence'.

83 *United States of America v. Karl Brandt et al.* (Case No. 1) (Medical case), IMT, published in Trials of war criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (Volume I), ('The USA vs. Karl Brandt et al. vol. I'), p. 695-696.

84 Powderly Joseph & Hayes Niamh, "Article 7", in Otto Triffterer and Kai Ambos (ed.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed.), München: C.H. Beck/Hart/Nomos, 2016, p. 216.

85 Askin, Kelly D., *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, AJIL 1999, vol. 93, No. 1, pp. 97, 103.

86 Prop. 2013/14:146, p. 267.

87 *Kvocka et al*., ICTY T. Ch., 2 November 2001, para. 180.

88 *Prosecutor v. Muhimana*, (Case No. ICTR- 95-1B-T), ICTR T. Ch. III, Judgment and Sentence, 28 April 2005, para. 570. It was not considered a form of rape, which had been argued by the Prosecutor.

sexual violence, categorized as humiliating treatment.[89] However, it is doubtful that such an intent existed if arising as an indirect result of physical violence. On the other hand, a context of derogatory comments against women may indicate gender-based causes of the violence, albeit in themselves not sufficiently serious to constitute a crime.[90] In some cases, vulgar abuse itself can be considered humiliating and degrading treatment.[91] The fact that a woman was forced to take off her veil can also be considered a transgression of the protection against humiliating or degrading treatment as a harm to personal dignity, and thus a war crime. The preparatory works to the Act of 2014 note that the cultural or religious background of the victim may be taken into account in the legal assessment of this provision, as it can cause particular harm to an individual to e.g. be forced to shave his/her hair or beard in contravention of one's religion.[92] It should also be mentioned that although an expressed threat of rape, combined with other acts, has been considered a form of inhuman or degrading treatment in international human rights law, is it is unclear how this is categorized in international criminal law.[93]

Two cases involve incidents or threats of forced nudity. The case against *M.M.* ultimately led Svea Court of Appeal to reverse the judgment of the district court as there was insufficient evidence of the defendant being present during the alleged crimes.[94] Nevertheless, the district court's assessment of the incidents warrants a mention. The inquest indicated that soldiers had threatened several persons that unless they surrendered their belongings, they would be executed or forced to take off their clothes in front of bystanders. The victim stated that M.M. was one of these guards.[95] Another victim reported a similar incident involving only women in front of male spectators.[96] These aspects were not explicitly mentioned in the charges nor in the reasoning by the court. However, the district court found it proved that the accused had committed robbery/looting and it is plausible that the court considered the threat to be consumed by this crime.

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89 *See* more on this in Svea hovrätts beslut 2012-12-19, mål nr B 1248-12 and, Svea hovrätts beslut 2017-02-1, mål nr B 4951-16.

90 *See* e.g. *Case Egyptian Initiative for Personal Rights and Interights v Egypt*, ACmHPR, Communication No. 323/06, 1 March 2011.

91 *Makitan*, 8 April 2011, p. 68.

92 Prop. 2013/14:146, p. 269. *See* also the argument from the OTP of the ICC concerning Afghanistan: Situation in the Islamic Republic of Afghanistan, ICC PT. Ch. III, ICC-02/17-7-Conf-Exp, No. ICC- 02/17, 20 November 2017, para. 206.

93 *Case of Maria Elena Loayza-Tamayo v Peru*, IACtHR, Ser. C No. 33, merits, 17 September 1997, para. 58. The ECtHR has held that threats of harm involving acts contravening the prohibition on torture, inhuman or degrading treatment may also constitute violations of the same, given the psychological harm caused. *See Campbell Cosans v the United Kingdom*, (Application no. 7511/76; 7743/76), ECtHR, Judgment of 25 February 1982, para. 26; *Gäfgen v Germany*, (Application no. 22978/05), ECtHR, Judgment of 1 June 2010, para. 91.

94 Svea hovrätts beslut 2012-12-19, mål nr B 1248-12.

95 ibid, p. 77.

96 ibid, p. 82.

Claver Berinkindi was convicted by Svea Court of Appeal for his participation in the Rwandan genocide in 1994.[97] While rape was mentioned in the background description of the conflict, this was not subject to prosecution as there was no indication that Berinkindi had participated in such crimes. However, the Court agreed with the district court's assessment that Berinkindi had violated the personal dignity of the victims, as an aspect of crimes against international law in the Swedish Criminal Code, Ch. 22 Sec. 6, through particularly humiliating treatment, including forcing people to undress and hand over their clothes to attackers before they were killed.[98] The victims recounted that older women were forced to take off their clothes while being plundered. Forced nudity was thus particularly acknowledged, although no gender aspect was taken into account *per se*.

While the district court held that there was no indication that Berinkindi himself had subjected the victims to humiliating treatment, individual criminal responsibility vis-à-vis this offence was not particularly addressed by Svea Court of Appeal. It can thus be presumed that the Court agreed with this reasoning. On the basis of testimony considered reliable, the district court found proved that Berinkindi was present and that he, together and in agreement with other leaders, organised and instructed the attackers and that this encompassed such acts as violations of personal dignity.[99] However, albeit it was clear that instructions to kill had been given there was no evidence that Berinkindi directly instructed attackers to conduct the acts constituting humiliating treatment.[100] Co-perpetration thus appeared to be based on Berinkindi's presence and organisation of the overall attack, with the humiliating treatment constituting a natural course of events.

At international level, forced nudity has been approached inconsistently, although it is clearly an aspect of international criminal law. The ICTR in the *Akayesu* case categorised forced nudity as sexual violence and a form of "other inhumane acts" as well as a violation of personal dignity.[101] According to the ICTY in the *Kunarac* case and the ICC Pre-Trial Chamber in the *Katanga*/*Ngudjolo* case, such acts constituted violations of personal dignity and were thus considered war crimes.[102] In contrast, the ICC in the *Bemba* case did not consider forced nudity a form of sexual violence of similar gravity as forced intercourse, which is required for the categorisation of crimes against humanity

97 Svea hovrätts beslut 2017-02-1, mål nr B 4951-16.

98 ibid, p. 22, 88-89 (Common Article 3).

99 ibid, p. 88-89.

100 ibid, p. 87-88.

101 *Akayesu*, ICTR, T. Ch. 2 September 1998, para, 688. The ICTR also held that it could constitute "serious bodily or mental harm". *See* also Policy Paper on Sexual and Gender-Based Crimes, Office of the Prosecutor, p. 1.

102 *Kunarac*, ICTY T. Ch., Judgment, 22 February 2001, para. 773; *Katanga*, ICC-01/04-01/07, 30 September 2008, paras. 370-372.

under Article 7 (1) (g).[103] The Swedish preparatory works to the Act of 2014 expresses the same view.[104]

Two cases concern rape as crimes against international law. The case against *Ahmet Makitan* involved crimes he committed in his role as a camp guard in Bosnia.[105] The detained persons were exposed to inhumane living conditions, such as a lack of food, water and medical care as well as sexual violence. A war reporter who testified in the case on the general situation in the camp in question described extensive sexual abuse of women which, in conjunction with concurrent testimony, led the district court to accept the prosecutor's account of the circumstances in the camp.[106] Both female and male victims were subjected to sexual assault, as evidenced by statements of victims and witnesses. Several acts described in the statements could be categorised as sexual violence, such as forced sexual intercourse, forced oral sex and masturbation of another person, a baton inserted in the anus of a person, forced nudity, assault of genitals and forcibly licking a dog's anus/genitals.[107] However, not all of these acts were included in the indictment since only some of them could be linked to the accused. As mentioned, the definition of rape is not uniform in the practice of the *ad hoc*-tribunals and the ICC, although certain elements of the crime are similar. The *actus reus* is generally broadly defined and includes not only intercourse but also other forms of penetration, such as objects inserted anally and oral sex.[108] However, some form of penetration is generally required and the other mentioned acts could be categorised as other forms of sexual violence.[109] As noted, sexual violence mainly aims to humiliate another person rather than serving the sexual desire of the perpetrator, which is evident in this case.

In the Prosecutor's charges sexual violence was categorised as a form of torture or, in the alternative, a violation of personal dignity. Although not directly applicable in the case, the district court referred to the Rome Statute's definition of torture,[110] but opted for considering these acts in relation to the prohibition on outrages upon personal dignity, in particular humiliating and degrading treatment in Common Article 3 of the Geneva Conventions. Why the district court did not categorise the rapes as torture under Common Article 3, in

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[103] *Prosecutor v. Bemba*, ICC PT. Ch. III, Decision on the Prosecutor's Application for a Warrant of Arrest: ICC, ICC-01/05-01/08 10 June 2008, para. 40.

[104] Prop. 2013/14:146, p. 269.

[105] *Makitan*, 8 April 2011.

[106] ibid, p. 54.

[107] ibid, pp. 70-7, 98-99, 102-103, 105, 109, 112-113, 152, 174, 177, 184.

[108] Article 7(1)(g)-1 Elements of Crimes.

[109] *Furundzjia*, ICTY T. Ch., 10 December 1998, para. 185; *Kunarac*, ICTY T. Ch., Judgment, 22 February 2001, para. 460. However, the ICTR requires the existence of an "invasion" rather than penetration. *See Akayesu*, ICTR, T. Ch. 2 September 1998, para. 598. The OTP of the ICC has pointed to the fact that particularly dogs were used in detention settings to frighten inmates as these are considered unclean in Muslim culture. However, they were not used in a sexually demeaning manner. Situation in the Islamic Republic of Afghanistan, ICC PT. Ch. III, ICC-02/17-7-Conf-Exp, No. ICC- 02/17, 20 November 2017, para. 206.

[110] *Makitan*, 8 April 2011, p. 74.

accordance with international practice, is unclear.[111] Nevertheless, the district court did not find the individual incidents of sexual violence substantiated as the evidence in the main consisted of the victims' statements,[112] and other supportive testimonies were considered unreliable.[113]

Nonetheless, Makitan was convicted of having unlawfully detained a number of people as a camp guard. Although he did not capture and detain them himself, the district court considered that Makitan as a guard shared the overall intent of placing persons in detention[114] and helped to maintain the inhuman conditions where the prisoners were forced to 'live in a situation characterised by violence, threats, violations, brutal living conditions…'.[115] The actions were carried out jointly and in agreement with other soldiers and Makitan must have realised that these had seized and unlawfully detained persons in the camp.[116] The crime against international law for which he was convicted was consequently the taking of hostages as well as other grave violations of international humanitarian law.

Although the district court in its summary judgment included sexual violence as an aspect of the inhuman conditions that Makitan must have been aware of as a guard, the violations were dealt with summarily in the reasoning of the court in relation to his liability as a co-perpetrator. Thus, it does not appear that Makitan was considered a co-perpetrator specifically in relation to sexual violence. Why co-perpetration, or aiding or abetting, was not discussed further in relation to sexual violence is unclear as it appears that Makitan was aware of the inhuman conditions of the camps, including sexual violence, with its

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111 Rape has been considered a form of torture, e.g. in *Furundzjia*, ICTY, T. Ch., 10 December 1998, paras. 162-164; *Kvocka et al*., ICTY T. Ch., 2 November 2001, para. 560; *Delalic et al.,* ICTY, T. Ch., Judgment, 16 November 1998, paras. 495-496; *Kunarac*, ICTY, T. Ch., Judgment, 22 February 2001, paras. 655-656; *Akayesu*, ICTR, T. Ch. 2 September 1998, para. 597.

112 The victim Sasa held that Makitan was present during one incident of sexual violence, where he and another detained man were forced to masturbate each other. As there was no other evidence apart from his testimony, the district court did not find it proven. *Makitan*, 8 April 2011, p. 71.

113 The victim Mile stated that he was forced by Makitan to perform oral sex on another detained man. However, the district court did not find this proved, despite the fact that three other witnesses supported his account, as there was no agreement as to when this would have occurred. Another victim also stated that Makitan forced the victim Mitar to perform oral sex on other prisoners. As Mitar had passed away and thus could not be heard, the district court considered that the testimony did not constitute sufficient evidence. *See Makitan*, April 8, 2011, p. 71. However, three judges in a joint dissenting opinion considered that some of these charges were substantiated by an overall assessment of the evidence, as significant parts of the course of events had been affirmed and linked the accused to the crime. These judges e.g. considered it proved that Makitan had forced Mitar to perform sexual acts. Makitan, 8 April 2011, p. 68. *See* dissenting judge Hjalmar Forsberg concerning this aspect.

114 ibid, p. 76.

115 ibid, p. 76. Author's own translation.

116 ibid, pp. 75, 77. Co-perpetration was thus interpreted in a manner consistent with the equivalent provisions in the Rome Statute.

widespread occurrence accepted as a fact.[117] Additionally, the confinement could be seen as a means of perpetrating, for instance, sexual slavery.

The case against *Theodore Tabaro* in 2018 concerned the genocide in Rwanda.[118] Alternative charges considered Tabaro either as a co-perpetrator, through jointly and in agreement with other local leaders having organised, solicited and instructed other perpetrators to imprison Tutsis/civilians and to rape women and girls, including in so-called *blendehus* or, in the alternative, having aided or abetted such acts. The district court affirmed that Tabaro had an informal local leadership role insofar as he was involved in organising, recruiting or ordering other perpetrators to commit crimes.

More specifically, the prosecutor contended that the rapes were committed as part of the genocide or, in the alternative, as serious violations of international humanitarian law. In the charges, the rapes were described as instances of coerced intercourse committed through violence or threats of violence.[119] No reference was in this regard made to the definition of rape applied, for example, whether it relied on the domestic law on rape applicable in 1994. Considering that the district court applied Swedish concepts in general, such as in relation to kidnapping, the court may similarly have relied on the Swedish definition of rape. This consequently diverges from the position taken by the Government in relation to the Act of 2014, where the preparatory works emphasise the necessity of employing international definitions of crimes, including rape. This is of particular relevance as the Swedish definition of rape in law (2018: 618) differs from the current approach in international criminal law, by focusing on non-consent.

Six victims provided testimony on Tabaro's participation in multiple incidents of rape, which in several cases resulted in victims being infected with HIV. The rapes took place repeatedly, systematically and with cruelty and were carried out by multiple perpetrators. However, in terms of evidence of the rapes, the district court held that the victims were generally reserved when recounting the details

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[117] Comparisons can be made with rules concerning co-perpetration or aiding/abetting under the Rome Statute, and in particular the control theory where criminal liability exists for individuals in the presence of a common purpose. *See* Article 25(3)(d) of the Rome Statute. The intent may involve awareness that the crime may occur as a normal course of events as a result of the common plan (Article 30 of the Rome Statute). The control theory also establishes a requirement that the person contributes significantly to the criminal act and exercises control over the crime at some point. Co-perpetration can thus be affirmed even when the person did not physically commit the crime in question or was present at the crime scene. This applies, for example, in cases where they direct or control other perpetrators or participate in the formulation of the joint plan. *See Prosecutor v Thomas Lubanga Dyilo*, ICC T. Ch. I, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/06, 14 March 2012, para. 1004. It is unclear how the ICC will address the issue, but the verdict in *Katanga* indicates that the context of widespread sexual violence may serve as a basis for demonstrating a common purpose, which, however, was not proven in that case. *See Katanga*, ICC-01/04-01/07, 30 September 2008, paras 567-572. Nevertheless, Makitan's role as a guard can be distinguished from Katanga, who was in command. These considerations can also be made in relation to Swedish rules where arguments could be made that Makitan, in agreement with others, contributed to the occurrence of sexual violence or sexual slavery as a plan or with an awareness that this would occur.

[118] *Tabaro*, 27 June 2018.

[119] ibid, p. 13.

of the violations, which was held to derive from Rwandan culture where rape is considered especially shameful for victims and their families. Often other terms were used to describe the acts, such as victims and perpetrators 'sleeping together'.[120]

Regarding the rapes in the *blendehus*, the district court found it proved that the women were systematically and regularly subjected to rape, often by several perpetrators every night. Commonly, a person read a list of women's names in the evenings, who were then taken outside and raped. The prosecutor contended that Tabaro either acted as 1) a co-perpetrator or 2) aided or abetted the rapes in the *blendehus*.[121] The victims did not claim that Tabaro himself participated in or was present during the rapes and only one, whose statement was not considered reliable, held that Tabaro read the list of names. Therefore, the district court did not consider it proved that Tabaro directly participated in or was present when the victims were raped.

As to whether Tabaro could be held liable as a co-perpetrator on the grounds that he organised, recruited or ordered others to commit rapes, or assisted in the rapes being committed through unlawfully detaining the women in the *blendehus*, the district court held that the lists indicated that the rapes were organised and that Tabaro, as a local leader, participated in the organisation surrounding the rapes. An expert witness reasoned that it was highly unlikely that women were confined without the knowledge of the local leaders.[122] The district court, however, did not find sufficient evidence of such awareness on the part of Tabaro. In order to convict Tabaro for aiding or abetting the rapes, the criminal intent had to encompass both the deprivation of liberty of women in the *blendehus* as well as the sexual violence. Because it could not be proved that Tabaro was aware of the occurrence of sexual violence, albeit considered likely, it could not be established that he had assisted in committing the rapes.[123] As for the district court's assessment of the intent encompassing both the confinement and the sexual violence, such an approach is consistent with the ICC's practice. For example, in the *Katanga* case, the Trial Chamber held that sexual slavery required proof of intent both in relation to ownership of another person and sexual violence, where the intent could be established through the awareness that the latter was a common course of events.[124] However, the assessment could differ in terms of establishing the perpetrator's awareness where, at international level, the context of systematic sexual violence has served to prove both a common plan and such crimes as natural consequences thereof, as well as awareness of such.

Nonetheless, Tabaro was considered responsible for the confinement itself, involving the crime of kidnapping. The elements of this crime require a deprivation of liberty and intent both to kidnap or imprison a victim as well as to cause harm to the victim's life or health.[125] The district court thus took into

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120 ibid, p. 115. My own translation.

121 ibid, p. 115.

122 ibid, p. 117.

123 ibid, p. 118.

124 *Katanga*, ICC T. Ch. II, ICC-01/04-01/07, 7 March 2014, para. 981.

125 *Tabaro*, 27 June 2018, p. 109.

account the domestic law in question and not relevant crimes at international level, such as enslavement. A number of witnesses stated that they could leave the *blendehus* during shorter periods at night in order to avoid being raped, while knowing that they would be killed if this were discovered. The district court held that the fact that they could leave the *blendehus* did not affect the assessment of the crime of kidnapping as the victims risked their lives when sneaking out.[126] Tabaro played a central role in the establishment of the *blendehus* and, jointly and in agreement with other local leaders, organised the women's captivity in addition to arranging guards.[127] He was thus deemed to have intended to cause harm to the women's lives or health, with an awareness of the difficult conditions in which they lived.[128]

The case also involved rape in contexts separate from the *blendehus*. However, although the victims were considered credible there was a lack of supportive evidence.[129] While the district court convicted Tabaro of aiding and abetting genocide and for serious violations of international humanitarian law in the form of murder, attempted murder, kidnapping and looting, the district court did thus not find it proved that Tabaro had aided or abetted the rapes.

It should also be mentioned that in a number of these cases, both in relation to the former Yugoslavia and Rwanda, women and men were in various situations separated, for example, when placed in camps.[130] The purpose of these divisions is not always apparent through the victims' statements. However, in the *M.M.* case it seems that the purpose was to execute the men. As women were systematically raped during captivity in both conflicts, which in some circumstances occasioned the ICTR and the ICTY to categorise such incidents as forms of genocide or sexual slavery, this should also have been considered.[131] Furthermore, the ICTR in the *Akayesu* case held that the genocidal act of preventing births within a particular group includes the systematic separation of men and women.[132] In the Rome Statute, forced pregnancy is also considered a crime against humanity.[133]

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126 ibid, p. 111.

127 ibid, p. 114.

128 ibid, p. 115.

129 A witness stated that at the age of 15, she was taken by Jean d'Amour to Tabaro's residence where she was raped by Tabaro. There was, however, reasonable doubt as to the rape since Jean d'Amour stated that he did not remember that he had brought the alleged victim to Tabaro. As for the other victims, their claims of rape committed by Tabaro were also rejected. For example, one victim at a hearing in the district court held that Tabaro was a perpetrator while she indicated another man during previous interrogations.

130 For example, Svea hovrätts beslut 2012-12-19, mål nr B 1248-12; *Arklöv*, 18 December 2006; *Tabaro*, 27 June 2018.

131 *Kunarac*, ICTY T. Ch., Judgment, 22 February 2001, paras. 542, 742; *Akayesu*, ICTR, T. Ch. 2 September 1998, para. 507. *See* also *Katanga*, ICC T. Ch. II, ICC-01/04-01/07, 7 March 2014, paras. 1000-1001. Concerning sexual slavery, *see*: *P. v. Issa Hassan Sesay et al*., (Case No. SCSL-04-15-T-1234), SCSL T. Ch. I, Judgment, 2 March 2009, paras. 152-161.

132 *Akayesu*, ICTR, T. Ch. 2 September 1998, para. 507.

133 Article 7(1)(g); Article 8(2)(b); Article 8(2)(e) of the Rome Statute.

5 Discussion

Gender-based crimes and violations have until relatively recently been excluded from numerous areas of public international law, such as international human rights law, international humanitarian law and international criminal law, both in terms of explicit codification in international treaties and inclusion by way of interpretation and thus also prosecution at international level. This in part stems from conservative interpretations of the scope of states' responsibility and obligations where violence in the private sphere traditionally has been excluded from regulation, an area in which gender-based offences commonly transpire. Furthermore, international criminal law and international humanitarian law have in many respects approached sexual violence and other gender-based crimes as individual deviations, resulting from the personal motivations, rather than forms of systematic oppression, for example, during armed conflict. An increased awareness of the structural factors that generate gender-based crimes, such as gender inequality, as well as an extension of the obligations of states to include the prevention of such, has led to significant advances within the framework of international human rights law. Similarly, the recognition of sexual violence as a method of warfare has influenced developments in international criminal law and international humanitarian law. This is evident, for example, in the comprehensive codification of gender-based crimes in the Rome Statute. This expansion can primarily be linked to the preventive and educational functions of international criminal law, i.e. aiding the prevention of such crimes through acknowledging the broader causes and consequences of gender-based violations.

In relation to Swedish law, the preparatory works to the Act of 2014 indicate that the inclusion of gender-related crimes primarily stems from Sweden's commitment to observe customary international law, which is considered to be largely reflected in the Rome Statute.[134] This is also evident in other preparatory works in relation to sexual offences where international rules on this issue have been taken into account, involving both international human rights law and international criminal law.[135] Accordingly, the approach has mainly been characterised by the adherence to international commitments as well as respect for the principle of legality. The content of the Act of 2014 thus broadly corresponds with the Rome Statute and the jurisprudence of the ICC. Meanwhile, the general aim of strengthening the protection of sexual autonomy and counteracting women's vulnerability in relation to gender-based violence is mainly derivative from other reforms in Swedish law, decoupled from international criminal law, for example in relation to sexual offences.[136]

Nevertheless, a gender-sensitive approach to international criminal law includes not only an explicit codification of these offences. It also requires a gender-sensitive interpretation of the elements of crimes, individual criminal liability and intent. Practically, it involves recognising and denoting such crimes as gender-based, in relation to both male and female victims, in order to acknowledge the structural causes and consequences of the offences. The

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[134] Prop. 2013/14:146, pp. 68-69.

[135] SOU 2010: 71 om sexualbrottslagstiftningen- utvärdering och reformförslag, p. 156.

[136] Prop. 2017/18:177 om en ny sexualbrottslagstiftning byggd på frivillighet.

individual and social effects of the acts must thus not be trivialised. In relation to this, the categorisation of the crime holds significance. For example, under certain circumstances, genital mutilation and forced nudity should be considered forms of sexual violence and rape a form of torture, rather than inhuman treatment. As international criminal law upholds a certain hierarchy in the categorisation of crimes, this is relevant both in terms of obligations and in relation to the stigma that is often associated with gender-based offences.

In the discussed Swedish case law, such aspects were generally not acknowledged except for a brief mention in the *Arklöv* case of women incurring special protection under AP I of the Geneva Conventions which, in the end, was not further developed. In the *Makitan* and *Tabaro* cases, sexual violence was recognised as separate incidents while, in the other cases, gender-based crimes were summarily dealt with in conjunction with other crimes against international law. To a certain extent this is related to the structure of the previous law, broadly encompassing violations of international humanitarian law. The scope of "crimes against international law" thus allowed for the possibility of prosecution based on, for instance, provisions extending special protection to women as well as general rules, such as Common Article 3, both applied mainly to instances of rape. Albeit the offence of "crimes against international law" allowed for consideration of developments in customary international law, the most notable progress vis-à-vis gender-based violence occurred in the case law of the *ad hoc*-tribunals subsequent to the events in the discussed Swedish cases. No reference to international case law was made in these cases, which may be a result of this. With the incorporation of gender-based crimes in the Act of 2014, the prospects for prosecuting these types of crime have broadened, providing Swedish courts with greater possibilities to interpret and apply the elements of crimes in a progressive manner. This includes a more comprehensive material scope, with the introduction of crimes against humanity. Additionally, the regulation of distinct offences allows for specific recognition of the composite acts, rather than summary treatments of incidents as "crimes against international law".

In terms of the elements of crimes of, for example, rape, the Act of 2014 leaves this undefined. However, it is clear that international definitions should be given preference where equivalent concepts exist in domestic law, as such have been developed in consideration of the context of international law. This approach corresponds to the overarching aim of the Swedish Government in harmonising the content of norms. While the district court in *Tabaro* appeared to apply the Swedish definition of rape, with the Act of 2014 the application will rather consider international case law and the definitions of crimes in the Rome Statute. Certain room is thus also provided in the future for Swedish courts to consider and interpret concepts in light of developments in international criminal law.

Nevertheless, practical problems remain from an evidentiary standpoint in relation to sexual violence. In the Swedish cases - similar to case law at international level - it was, in the main, accepted that the stated incidents of sexual violence had occurred. The domestic courts generally did not question the victims' statements nor the circumstances of the conflicts. However, issues arose in proving the criminal liability of the alleged perpetrators. Although sexual

violence generally is problematic from an evidentiary standpoint,[137] in these instances it was mainly related to the fact that a long time had elapsed since the incidents. For example, in the *Makitan* case the district court concluded that the testimonies clearly demonstrated that the victims' memories had been distorted. It did not affect the credibility of their statements but rather placed particular demands on additional, supportive evidence.[138] In addition, problems arose in proving criminal intent in a number of cases. In the *Makitan* and the *Tabaro* cases the accused were convicted of the crimes of taking hostage (in the former) and kidnapping (in the latter), given that awareness of abuse of detainees could be demonstrated. However, awareness was not deemed proved in relation to sexual violence.

It is clear that issues concerning evidence of criminal liability in relation to gender-based crimes are general rather than specific to the Swedish regulation, such as the link between sexual violence and a common plan. For example, only one defendant has been convicted of gender-based crimes at the ICC.[139] This is mainly the result of a lack of evidence of criminal liability involving sexual violence. In light of this, a gender-sensitive interpretation is required of what is considered to be a common plan and what is a natural course of events, including taking into account the conflict in general. Since sexual violence rarely is seen as part of a common plan but as an unfortunate side-effect of armed conflict or a personally motivated crime, this category is often approached differently than other international crimes.[140] This is evident in a number of cases from the *ad hoc*-tribunals.[141] It is therefore important to analyse gender-based offences in

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[137] The OTP of the ICC note that special challenges arise in the investigation of gender-based crimes, in particular sexual violence. These crimes are characterized by underreporting, e.g. due to social, cultural and religious factors, which can cause particular stigma for victims as well as social exclusion, but also deficiencies in national investigations, such as forensic examinations. *See* Policy Paper on Sexual and Gender-Based Crimes, Office of the Prosecutor, para. 50.

[138] *Makitan*, 8 April 2011, p. 55.

[139] Bosco Ntaganda was convicted in July 2019: *The Prosecutor v. Bosco Ntaganda*, ICC T. Ch. VI, Judgment, ICC-01/04-02/06, 8 July 2019. Bemba was convicted of rape in *Prosecutor v. Bemba*, ICC T. Ch. II, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08, 21 March 2016 but was acquitted on appeal. The provision in 25 (3) (d) was employed in the *Katanga*-case, where a common purpose was not found to extend to sexual violence. *Katanga*, ICC T. Ch. II, ICC-01/04-01/07, 7 March 2014, para. 1664. *See* critique of this part of the judgment: Brigid, Inder "Expert Panel: Prosecuting Sexual Violence in Conflict – Challenges and Lessons Learned: a Critique of the Katanga Judgment", Global Summit to End Sexual Violence in Conflict, 11 June 2014, <http://www.iccwomen.org/documents/Global-Summit-Speech.pdf>, checked 26 September 2019.

[140] Goy, Jarvis & Pinzauti, 2016, p. 224.

[141] For example, *Prlić et al*., (Case No. IT-04-74-T), ICTY T. Ch. Judgment, vol. 4, 29 May 2013. Killings and inhuman treatment was considered a part of the common plan but not sexual violence. There is risk that sexual violence/gender-based violence are not considered foreseeable acts on this basis. *See* Jarvis Michelle & Salgado, Elena M., "Future Challenges to Prosecuting Sexual Violence Under International Law: Insights from ICTY Practice", in de Brouwer, Anne-Marie, Ku Charlotte, Römkens Renée, van den Herik Larissa, (ed.), *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Cambridge: Intersentia, 2013, p. 102.

terms of their function and purpose as international crimes, for instance, as a method of warfare during armed conflict, also within the Swedish legislative framework.

It can thus be concluded that the current Swedish legislation on international crimes increases the opportunities for prosecution of gender-based crimes. Nevertheless, a gender-sensitive perspective is required in the forthcoming interpretation of the elements of crimes and principles of international criminal law, in consideration of developments in case law at international level.

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