Chapter 14
International Criminal Justice and the New Promise of Therapeutic Jurisprudence: Prospects and Challenges in Conflict-Related Sexual Violence Cases

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ABSTRACT

For centuries, rape and other forms of sexual violence have always been an integral aspect of warfare. Even so, it is rather recently that these practices have been recognized as crimes and prosecutions undertaken by international criminal tribunals. Whilst the ad hoc international tribunals for the former Yugoslavia and Rwanda did not take an integrative approach to victims in the criminal justice process, the Rome Statute of the International Criminal Court (ICC) took a victim-centred approach by setting out some provisions allowing victims to actively participate in proceedings beyond their traditional role of witnesses. This chapter sets out to critically examine the effectiveness of the ICC victims’ rights framework in achieving this objective in sexual violence cases. Drawing on the complex nature of experiences of victims of such crimes, this chapter engages with the various aspects of the relatively recent approach of victims’ participation in international criminal justice process to highlight prospects and challenges in facilitating the healing process of victims of such crimes.

INTRODUCTION

In many conflicts across the globe, rape and other brutal acts of sexual violence are used as part of military strategies aimed at civilian population to spread terror, inflict trauma and public humiliation. The fact that widespread and systematic sexual violence often serve as a weapon of war is now widely acknowledged. Despite growing awareness and constant global condemnation of rape and other acts of
sexual violence in conflict situations as well as significant strides made in international criminal justice in this regard, these crimes continue to be used as a weapon in conflict situations around the world.

In its Resolution 1820 (2008) on acts of sexual violence against civilians in armed conflicts, the United Nations (UN) Security Council noted that ‘...women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group’. A growing body of empirical studies and reports of the UN and international nongovernmental organisations reveal how a wide range of cruel sexual violence-based practices have become a viable part of military strategies. In support of this position, the ICC recently found Jean Pierre Bemba, the former Congolese vice-president, guilty in its first case to focus on rape as a war crime. Through the Jean Pierre Bemba emblematic case, the ICC has built on the jurisprudence pioneered by the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) which made significant contribution to the international criminal prosecution of these crimes to throw a spotlight on the prevalent use of sexual violence as a weapon of war.

Despite the fact that victims of crimes have for too long been considered as forgotten parties in the criminal justice process (Doak, 2005; Martsui, 2011), significant strides have been made over the recent years which culminated in the victims’ rights to redress in the context of international criminal justice. In fact, due to a growing recognition of the impact of mass crimes on victims, the victims’ right to justice and redress has become an important consideration in the international criminal justice discourse. As such, in addition to victims’ rights to be treated with respect and dignity, right to information about the proceedings and measures to protect their physical and psychological wellbeing, the ICC’s victim rights framework enshrined an important right for victims to present ‘their views and concerns’ in the course of the criminal proceedings, and the right to reparations. It is important to note that the need and significance of providing victims the right to participate in the criminal justice process is also enshrined in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

Although the relatively recent victim-centred approach in the international criminal prosecution represents a positive advance in adopting a healing approach towards the victims of mass crimes, it also presents the Court with significant challenges. Particularly, given the nature of international criminal justice, the complex realities of victims of sexual violence in conflict situations provide a unique range of challenges in addressing their needs within the context of victim participation at trial proceedings. While Article 68(3) of the Rome Statute and rules 89 to 93 of the Rule of Procedure and Evidence (RPE) set out key principles in relation to victims’ participation in proceedings before the ICC, wide discretion was vested with the Court’s judges to develop appropriate modalities of victims’ participation within the context of international criminal justice.

This chapter sets out to critically analyse the effectiveness of victim participation in international criminal justice process in addressing the needs of victims of conflict-related sexual violence. In so doing, the discussion in this chapter begins by examining the nature of these crimes and their victims as well the context in which such crimes are committed in order to understand the extent of the challenge posed by the systematic use of sexual violence in conflict zones. The chapter further looks at the procedural, legal and practical aspects of victims’ participation in international criminal justice process to highlight its potential for therapeutic jurisprudence and challenges to the effectiveness of this approach in addressing the harm suffered by victims of these crimes. In so doing, the discussion first examines the shortcomings of the previous international criminal tribunals in accommodating the victims of rape and other acts of sexual violence. Secondly, it takes a critical approach to the ICC’s victim participation