

Defining the ‘Sexual’ in Sexual Violence: Towards a Survivor-Centred Understanding of ‘Acts of a Sexual Nature’

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While significant advances have been made in international criminal law (‘ICL’) towards accountability for sexual violence, if we are to do better at addressing this ongoing human rights crisis we must focus our attention on some of the most critical questions about the nature of sexual violence: what makes acts sexual in nature; what makes violence sexual; and when does that violence amount to core international crimes. Understanding what constitutes sexual violence is crucial if we are to recognise and respond to the reality of what survivor’s experience, and ultimately dismantle the underlying systems of discrimination and patriarchal oppression that enable sexual violence to occur.

Notably, neither the [Rome Statute](#) or the [Elements of Crimes](#) (‘EoC’) definition aid our understanding of what amounts to sexual violence. This has led to a line of jurisprudence that has not adequately met the expectations of victims, reflected the reality of their experiences or offered any meaningful justice.

To overcome these definitional problems, Global Rights Compliance (‘GRC’) and Women’s Initiatives for Gender Justice (‘WIGJ’) have conducted extensive research into definitions of sexual violence, both internationally and domestically, with the aim of clarifying the EoC definition. At the forefront of this project has been a recognition that these fundamental questions cannot be answered without paying close attention and truly listening to the voices of survivors. The gap between the ways in which survivors have explained their view of what makes violence sexual and the way in which ICL has prosecuted these acts as international crimes is a salutary reminder of the work that remains to be done.

Circular and Vague: The Definition of Sexual Violence in the Rome Statute

There have been several attempts to define sexual violence under ICL, and yet none of them have successfully answered the critical question: what is sexual violence? While the Rome Statute’s codification of the crime of “any other form of sexual violence” (Article 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(iv)) represents a significant advancement towards recognition of, and accountability for, the broad spectrum of sexual acts that victims experience, the key question of what makes violence sexual remains unanswered.

The Rome Statute fails to define what ‘sexual’ means or to provide a comprehensive definition of sexual violence, making it difficult to determine which acts in practice fall within the scope of this crime. The EoC, which are designed to “assist the Court in the interpretation and application” of Rome Statute crimes (Rome Statute, article 9(1)), provide no further clarification. The EoC define sexual violence in the following terms:

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The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force or by threat of force or coercion, such as that caused by fear or violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

Fundamentally, while the above explains the *violent* nature of the act, it does not explain the *sexual* nature of the violence. Nowhere is it explained what constitutes an 'act of a sexual nature', leaving the definition open to restrictive or expansive definition. What is more, the definition is circular: 'any other form of sexual violence' occurs when the perpetrator 'committed an *act of a sexual nature*'. This is a legal anomaly, with no other crime being defined in relation to itself: torture cannot be defined as an "act of torture" or genocide as an "act of genocide".

Problematic jurisprudence arising from the Rome Statute definition

This is no mere technicality or academic concern. These definitional problems have created concrete and serious difficulties in the investigation and prosecution of sexual violence before the ICC and have left the door open for retrograde judgments that fail to adequately afford victims the justice they deserve.

The *Bemba* case offers a clear illustration. The 2008 [Application for a Warrant of Arrest](#) included charges of 'any other form of sexual violence' against civilian women, men and children, in relation to incidents where members of the MLC ordered men, women and children to undress in public. Pre-Trial Chamber ('PTC') III [refused](#) to include these charges as crimes against humanity or war crimes (paras 40, 63).

On declining to include the charge of crimes against humanity, PTC III did not dispute that the acts were 'sexual' in nature, but rather that they did not meet the comparable gravity test (para. 40). Still, its consideration of this issue showed a clear lack of understanding about the essential nature of sexual violence. It made no reference to the drafting history of the crime (which indicates the crime was intended to capture forced nudity) or the ICTR's *Akayesu* finding that an incident involving the undressing of a student and forcing her to do gymnastics in front of a crowd constituted sexual violence (para. 688). Moreover, PTC III failed to seek the views of the victims or affected community on the gravity of the forced nudity, or the significance and impact of those acts.

The new crime of sexual violence was debated again in the *Kenyatta* case. In *Kenyatta*, the charge of 'sexual violence' was excluded in the [Decision on the Prosecutor's Application for Summonses to Appear](#) by PTC II on the basis that acts of forced circumcision 'cannot be considered acts of a "sexual nature" [...] but are to be more properly qualified as "other inhuman acts"' (para. 27). At the confirmation of charges stage, the Prosecution sought, once again, to include the forced circumcisions and penile amputations as 'sexual violence' ([Counts](#) 5, 6), [arguing](#) that they were 'intended as attacks on men's identities as men within their society and were designed to destroy

their masculinity’ (p.88). Nonetheless, the PTC again [refused](#) the charges stating that ‘not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence’ and that ‘the determination of whether an act is of a sexual nature is inherently a question of fact’ (para. 265). It considered instead that ‘the acts were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other’ and would therefore consider them under other inhumane acts (para. 266). Once again, the judges seemingly failed to consult the drafting history of the crime or seek the views of the victims on whether they considered the violence they had experienced to be sexual.

Tellingly, in subsequent litigation on the reclassification of the crimes, the victims filed [observations](#) maintaining that PTC II had ‘relied on an outdated conceptualization of sexual violence; namely, that such are purely about sex and not about the complex power dynamics at play’ (para. 12). The victims themselves felt that the forced circumcisions were of a sexual nature, stating that these acts of violence had ‘a detrimental affect effect on them physically and psychologically, including on their ability to have sexual intercourse’ and ‘a severe effect on [their] masculinity and sense of manhood’ (para. 14). These submissions further highlight the divergence between the views of survivors on the one hand, and the decisions made by practitioners in international justice on the other.

The issues that have arisen in charging the crime of ‘any other form of sexual violence’ are inherently linked to the lack of a definition within the Rome Statute and EoC, and within ICL texts and jurisprudence, as a whole. These failures highlight the importance of creating a robust definition of sexual violence, as well as consulting, acknowledging, and listening to the victims of these egregious crimes.

Moving Forward: Towards a survivor-centred interpretation and comprehensive understanding of sexual violence

The challenge is to move beyond these far too common errors and arrive at a better understanding of what sexual violence is and how it intersects with a range of other factors, including gender, sexuality, race, class, and ethnicity. Perceptions of sex, sexuality and sexual violence are not universal; they vary across time and place, and what one person considers ‘sexual’ may not accord with another person’s definition. The scope for variation is magnified in the context of ICL, which applies across many different cultural settings.

Yet firm answers to these questions about the nature and gravity of sexual violence are necessary in a legal sense. The [Hague Principles on Sexual Violence](#) (‘Hague Principles’), developed by the WIGJ in 2019, are a critical departure point for these discussions. The Civil Society Declaration on Sexual Violence presents a means by which the concept of sexual violence can be viewed through the eyes of survivors. However, progress can easily be lost if attention is not paid to ensuring the perspective and experiences of survivors are included when addressing sexual violence in international crimes cases.

As a consequence, and spring boarding from the success of the Hague Principles, GRC, together with WIGJ, have conducted a wide investigation into how to best define acts of a sexual nature to

see whether we can better define the crime of sexual violence. This project has involved undertaking an in-depth analysis of ICL jurisprudence, international and regional human rights law, and the laws and jurisprudence of over 40 domestic jurisdictions to identify various acts of a sexual nature which are criminalised and their corresponding definitions.

Better definitions can be both informed by and informative of the responses of domestic jurisdictions to sexual violence as an essential part of the Court's complementarity agenda. The research revealed that, while there is no universally accepted definition of sexual violence, there are some common elements that have been widely used across jurisdictions. It is hoped that from these lessons learnt and best practices, we can develop an amendment to clarify the EoC and overcome some of the critical definitional problems that continue to preclude the advancement of a survivor-centred approach to the investigation and adjudication of sexual violence. Some of these key lessons learnt are described below.

1. Psychological/non-physical acts

To begin with, multiple human rights definitions, internationally and regionally, refer to **psychological (or non-physical) acts** in addition to physical violence. The inclusion of non-physical acts is not controversial. Indeed, non-physical acts of sexual violence have long been recognised by the *ad hoc* tribunals, notably in *Akayesu*, where the Trial Chamber held that 'sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact' (para. 688).

Regionally, the Inter-American system has repeatedly relied on the formulation that 'acts of a sexual nature [...], which besides including the physical invasion of the human body, may include acts that do not imply penetration or even any physical contact whatsoever' (*see e.g., Miguel Castro-Castro Prison v. Peru*, para. 306). State practice also reveals widespread appreciation of both physical and psychological violence, with many States recognising that sexual violence can take place even in the absence of physical contact.

The recognition of non-physical acts is imperative to any definition of sexual violence: it highlights that these acts should be considered on an equal footing with physical acts and can be equally harmful to victims. Arguably, including explicit reference to non-physical acts could go some way to overcome the harmful legacy of the *Bemba* decision by ensuring that such acts are identified as sexual violence and their gravity accurately assessed.

2. Legally protected interests

Defining sexual violence in relation to the legally protected interests underlying the violence also offers an opportunity to better understand what makes violence sexual. Recognition of these interests are included in many definitions across the international, regional and domestic spheres, which variably refer to the victims' sexual autonomy or integrity, personal security, self-determination, dignity or sexual freedom.

Support for the inclusion of the legally protected interests in a definition of sexual violence can be found in both ICL jurisprudence (which has often referred to acts inflicted upon the integrity of

the victim), as well as international and regional human rights. The Committee on the Elimination of Discrimination against Women (‘CEDAW’) has, for example, recognised that sexual assault is a ‘crime against the right to personal security and physical, sexual and psychological integrity’ (*see e.g.*, [CEDAW General Recommendation 35](#), para. 29(e)). Similarly, the Inter-American Commission on Human Rights has stressed that sexual violence “violates the rights to personal integrity, private life, autonomy and non-discrimination” (*see e.g.*, [V.R.P and V.P.C, Nicaragua](#), para. 78). Domestically, definitions in legislation and case law often refer to sexual integrity, dignity and autonomy, or sexual freedom.

3. Carried out through sexual means or by targeting sexuality

Best practice from international human rights has highlighted that sexual violence constitutes an attack carried out through sexual means or by targeting a person’s sexuality. For example, the widely accepted report submitted by the [UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices](#) defines sexual violence as ‘any violence, physical or psychological, carried out through sexual means or by targeting sexuality’ (para. 21).

This definition, it appears, goes some way to delineate the parameters of sexual violence and explain what makes certain conduct sexual in nature. Arguably, with the recognition of such a definition, the *Kenyatta* saga would not have been decided so restrictively. While the circumcisions and amputations may well have been ethnically motivated, this would clearly not stop them being equally and simultaneously targeted towards a persons’ sexuality. Indeed, the [victims noted](#) as much, stating that ‘an indicium of the sexual nature of the crimes of forced circumcision and penile amputation is the effect that the crime has had on the sexual lives of the victims in questions and the purpose behind why they crime was committed’ (para. 15).

This wording, which eludes to how or why the violence was conducted (i.e., through sexual means or targeting sexuality), also encourages a broad view of the diverse acts that can amount to sexual violence. In addition, this formulation looks at both the perpetrator and victim’s view of the violence, suggesting a need to inquire *inter alia* into the effect of the violence on the victim’s sexuality or sexual freedom or autonomy. It is hoped this formulation would encourage recognition of many of the acts which have been identified by victims in the [Hague Principles](#), including causing someone to form a reasonable apprehension, or fear, of acts of sexual violence, depriving someone of their reproductive autonomy, prohibiting someone from engaging in consensual sexual activity, or injuring a person’s sexual body part.

4. Importance of a contextual approach

The fourth lesson learnt relates to the importance of utilising a contextual approach in assessing the sexual nature of acts, taking into consideration the intention of the perpetrator, and the perceptions of the victim and/or affected community. As discussed previously, how sexual violence is understood and experienced varies hugely across different contexts, and it is imperative that legal responses situate their analysis within the contexts in which the violence occurred.

This approach is adopted by [The Hague Principles](#) and has widespread support among survivors. Looking at the circumstances surrounding the act also finds support from domestic jurisprudence:

for example, Canadian law requires a focus on whether the conduct can be considered sexual “viewed in the light of all the circumstances”, with the part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the acts and all other surrounding circumstances being potentially relevant (*R v Chase*, para. 11). Similarly, the England and Wales [Sexual Offences Act of 2003](#) requires an examination of whether a “reasonable person” would consider whether the act was sexual in nature because of its circumstances or purpose of any person in relation to it (s.78).

This approach does not necessitate an overtly subjective approach but encourages an approach that looks at the context in which the sexual violence took place and pays attention to the views of survivors and whether they experienced the violence as sexual.

5. Importance of examples in sexual violence definitions

Finally, desk-based research, and lessons from practical training on the [Hague Principles](#) in diverse jurisdictions including the Gambia, Colombia and Ukraine, has revealed the utility of including a non-exhaustive list of the types of acts which may amount to sexual violence. Illustrative examples can provide guidance to investigators, prosecutors, defence counsel, judges and other justice actors, both domestically and internationally, on what a broad interpretation of sexual violence looks like in practice. Examples can concretise understandings of the types of sexual violence that may be included in the definition, and can contain explicit reference to certain acts, such as forced nudity and circumcision, which have not been recognised before the ICC but which have been repeatedly recognised in other legal frameworks, both internationally and domestically.

Conclusion

Relying on the present definition of sexual violence contained in the Rome Statute and EoC, without further clarification on the meaning of ‘act of a sexual nature’, allows many acts to fall outside of the scope of the definition, leaving certain acts of sexual violence vulnerable to impunity. As experience shows, if definitions of sexual violence are circular or otherwise vague, or not tethered to the reality of survivor’s experiences, violence is mischaracterised or trivialised, accountability efforts fall short and survivors are left without recognition and validation of their experiences.

GRC and WICJ’s study intends to serve as a basis to carry forward further discussion for future actions on these initiatives into 2021. This opens the floor to consider possible options to overcome some of the barriers to the investigation and prosecution of sexual violence and reconsider conceptualisations of what makes violence sexual. Firm answers to these legal questions remain imperative and must be addressed by the international community.