

Israel – Hamas 2023 Symposium – Sexual Violence on October 7

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In the past few weeks, strong evidence has emerged that Hamas committed acts of sexual violence in their October 7 attack. On December 14, UN Special Procedures Experts stated they were “alarmed at increasing reports of sexual violence perpetrated by Hamas and other armed groups against women in Israel on 7 October 2023.” Allegations against Hamas detailing sexual violence on October 7 include forced nudity, rape, gang rape, and sexual mutilation.

Defined broadly, sexual violence is “any act of a sexual nature committed against any person under circumstances which are coercive” (International Criminal Tribunal for Rwanda (ICTR), *Akayesu*, para. 688) and “a form of gender-based violence that involves the commission or attempted commission of sexual acts” (International Criminal Court (ICC), Policy on Gender-Based Crimes, para. 31). Sexual violence often forms part of a pattern of abuse and violence which includes killing, inhumane treatment, destruction of property, etc., committed during an attack. The International Committee of the Red Cross (ICRC) observed that “sexual violence may occur as a succession of prohibited acts, for example rape being accompanied by murder or forced public nudity” (ICRC, 2016 Commentary to Common Article 3, para. 699).

Such acts of violence are undoubtedly prohibited under international humanitarian law (IHL) and may constitute war crimes. This post examines the prohibition of rape and other forms of sexual violence under IHL and then focuses on the lesser-known types of sexual acts mentioned in the reports relating to October 7 such as forced nudity and sexual mutilation.

Prohibition of Rape and Sexual Violence

The *New York Times*, *The Guardian*, AP News, and Physicians for Human Rights Israel all mention instances of rape and gang rape in their reports relating to October 7. Other reported acts of sexual violence from these sources include forced nudity, sexual mutilation, and gunshots in the sexual organs and breasts of women.

According to the ICC Elements of Crimes (art. 8(2)(b)(xxii)-1 for international armed conflicts (IAC) and art. 8(2)(e)(vi)-1 for non-international armed conflicts (NIAC)), rape has two elements. The act must be an invasion of a sexual nature, and it must be committed by force, or by threat of force, or coercion.

Under IHL, rape and other forms of sexual violence are prohibited by both treaties and customary international law. This prohibition applies both in IACs and NIACs, thereby setting aside the difficult question of classifying the Israel-Hamas conflict (see Malik 2023 and Schmitt 2023). As the International Criminal Tribunal for the former Yugoslavia (ICTY) summarised: “[r]ape in time of war is specifically prohibited by treaty law: The Geneva Conventions of 1949, Additional Protocol I of 1977 (AP I) and Additional Protocol II of 1977 (AP II). Other serious sexual assaults are expressly or implicitly prohibited in various provisions of the same treaties” (Furundzija, para. 165).

Article 27 of the Fourth Geneva Convention spells out that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.” Similar wording, though dropping the much-criticized link between sexual violence and women’s honour, is found in AP I, Article 76(1). Moreover, unlike the prohibition contained in Article 27 that only applies to civilians who are on the territory of a party to the conflict and enemy inhabitants of occupied territory, the one included in Article 76(1) of API extends the circle of protection to all women in the territory of parties involved in the conflict (ICRC, 1987 Commentary to AP I, para. 3151). This specific protection is only offered to women and not to men. The latter are covered under the general principle of humane treatment enshrined in Article 27(1) of the Fourth Geneva Convention and Article 75 of AP I. Article 75 explicitly refers to “humiliating and degrading treatment, enforced prostitution and any form of indecent assault” without limiting its scope of protection to a particular gender.

Rape and sexual violence are also prohibited in a NIAC via the principle of humane treatment enshrined in the common Article 3 prohibition on “outrages upon personal dignity, in particular humiliating and degrading treatment.” Article 4(1) of AP II uses similar language,

adding “rape, enforced prostitution and any form of indecent assault” and so confirming the application of common Article 3 to acts of sexual violence.

Furthermore, it is well established that rape and similar forms of sexual violence are prohibited under customary law (*Furundzija*, para. 168). Rule 93 of the ICRC *Study on Customary International Humanitarian Law* (CIHL) confirms that “[r]ape and other forms of sexual violence are prohibited.” The ICRC *Study* references the above-mentioned provisions and Article 44 of the Lieber Code, as well as the inclusion of the prohibition of sexual violence in numerous military manuals, national legislation, and case-law. The commentary to the rule further specifies that this “prohibition of sexual violence is non-discriminatory, i.e., that men and women, as well as adults and children, are equally protected by [it].”

Rape has been criminalized and prosecuted at the national and international levels for a long time (see ICRC *CIHL Study commentary* to rule 93). Other crimes of a sexual nature also feature in the statutes of the ICTR (art. 4(e)) and the Special Court for Sierra Leone (art. 3(e)), which expressly list rape, enforced prostitution, and any form of indecent assault as war crimes. The ICC Statute enounces an even wider list and adds a residual category: “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence” are deemed grave breaches of the Geneva Conventions in an IAC and “serious violation[s] of common Article 3 of the Geneva Conventions” in a NIAC. With regard to the residual category, not every form of sexual violence is deemed a war crime; it must be of comparable gravity.

The ICTY (e.g., *Furundzija*), the ICTR, (e.g., *Akayesu*) and the Special Court for Sierra Leone (e.g., *Taylor*) have all convicted individuals for war crimes of a sexual nature. More recently, the ICC sentenced Ntaganda and Ongwen for rape and acts of a similar gravity as war crimes.

Accordingly, there is no denying that the allegations of rape mentioned in news reports, if proven, amount to IHL violations and war crimes.

Other Acts of Sexual Violence

According to the ICC Elements of Crimes, acts not falling within the purview of the prohibition of rape (or any acts of a similar gravity) can still be considered as acts of sexual violence so long as they are sexual in nature and done by force, or threat of force, or coercion.

Prima facie, the acts of a sexual nature that are reported to have been committed by Hamas (e.g., forced nudity, mutilation of sexual organs) are violations of IHL and can be classed as war crimes. Yet, it is important to correctly classify these crimes. It is crucial first to distinguish between the various forms and levels of harm caused to the victim and the degree of severity of the act as these impact on the sentence. Second, it is important to give the crime a meaning independent from other sexual violence crimes (*Ongwen*, para. 2722).

In 1998, the Special Rapporteur on Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery Like Practices during Armed Conflict stated that “sexual violence covers both physical and psychological attacks directed at a person’s sexual characteristics, such as forcing a person to strip naked in public, mutilating a person’s genitals, or slicing off a women’s breasts” (para. 21). Although the acts may target such body parts, it does not necessarily mean that they are “of a sexual nature.” The ICC has declared that “not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence” (ICC, Kenyatta et al., para. 265).

Forced Nudity

Reports on the aftermath of Hamas’s October 7 attack indicate that women were found (partially) naked (The Guardian), men were naked and tied up (Balf), and a couple were undressed and bound together (Physicians for Human Rights Israel, p. 5). Irrespective of whether these findings were the result of other forms of sexual violence, I examine the act of forced nudity as a standalone potential violation or crime.

Chiefly, such acts can fall within the remit of “outrages upon personal dignity” and/or “any form of indecent assault” under IHL. After all, sexual violence is fundamentally a violation of human dignity. Accordingly, forced nudity can be considered under the narrow angle of sexual violence or the wider angle of human dignity and humane treatment. The ICC Statute disentangles the two notions, distinguishing the residual crime covering similar acts of sexual violence from “outrages upon personal dignity.” The latter offence makes no reference to crimes of a sexual nature and rather illustrates its application by reference to “humiliating and degrading treatment.”

This classification debate has been around for a while. For example, in Akayesu, the ICTR found that “the forced undressing of [a woman] after making her sit in the mud” (para. 693) and “the forced undressing and public marching of [a woman] naked at the bureau communal” (para. 692) constituted acts of sexual violence. In contrast, in the Kunarac case which dealt, *inter alia*, with four young women asked to strip and dance on a table whilst soldiers were watching and pointing weapons at them, the ICTY deemed the forced nudity to be humiliating treatment (paras. 766-774). The relevant paragraphs do not consider the situation through a sexual violence prism.

That being said, the ICTY considered in Kvočka et al. that “[t]he Furundzija and Kunarac Trial Chambers have found that rape and other forms of sexual violence, including forced public nudity, cause severe physical or mental pain and amount to outrages upon personal dignity” (para. 170). Thus, whilst acknowledging that all forms of sexual violence are outrages upon personal dignity, it stressed the sexual element of the crime. This may explain why, in Brdjanin, forcing a woman “to undress herself in front of cheering Bosnian Serb policemen

and soldiers” was considered “sexual assault” (para. 1013). As the ICTY enounced, “it is precisely the sexual humiliation and degradation which ‘provides specificity to the offence’” (para. 852).

The latest ICC jurisprudence concerning forced nudity has moved away from its sexual violence angle. In *Katanga and Chui*, the ICC deemed that the act of forcing a woman to walk through town with a blouse and no underwear was to be charged as “outrages upon personal dignity” (para. 376) and did not refer to sexual violence. In *Bemba*, the Prosecutor charged the order given to civilians to remove their clothes to humiliate them as both outrages upon dignity and “other forms of sexual violence” (para 63). The ICC indicated that the charge of “other forms of sexual violence” should be dropped, namely because the Chamber did not deem such a violation to be of “comparable gravity” to other crimes enumerated in the article (Hague Principles on Sexual Violence, p. 86).

Given that the women victims of Hamas’s October 7 attack were found (partially) naked in a public place, and were highly unlikely to have consented to strip, these acts fall under the category of “outrages upon dignity” that can be prosecuted as war crimes.

Mutilation

The Guardian reported genital mutilations committed by Hamas. The New York Times referred to a woman who had “nails and different objects in her female organs” and another person whose genitals were so mutilated that it was impossible to identify the sex of the person. AP News recounted a witness seeing a woman’s breast cut off, then thrown on the ground, after which Hamas militants played with it.

Mutilation is defined as the act of “permanently disfiguring the person or persons, or . . . permanently disabling or removing an organ or appendage” (ICC Elements of Crimes). The acts described above fall within this definition. Whilst the crime of mutilation is a separate crime under the ICC Statute, the question is whether these crimes could also be viewed as acts of sexual violence.

Similar to the discussion on forced nudity, mutilation of body parts of a sexual connotation can be viewed under the prism of human dignity or sexual violence. In *Kvočka et al.* the ICTY indicated that “sexual violence would also include such crimes as sexual mutilation . . . as war crimes” (para. 180 n. 343). The recently published ICC Policy on Gender-Based Crimes specifies that “[a]cts of sexual nature committed by force, or by threat of force or coercion, may include mutilating . . . or otherwise causing injury to a sexual body part” (para. 62).

Nonetheless, case law indicates that it is rather rarely recognised as an act of a sexual nature. For example, in *Krajišnik*, the sexual mutilation of two male detainees was, along with other acts, considered inhumane treatment (paras. 372 and 803-806). In *Sesay et al* the Special Court for Sierra Leone, when examining the instances of “rebels slitting the private parts of several male and female civilians with a knife” and “insert[ing] a pistol into the vagina

of one of the female captives where it remained overnight” (para. 1208), noted that the Prosecution did “not particularise the conduct that constitutes other forms of sexual violence and did not plead forms of sexual violence committed against male victims” (para. 1308). The court thus concluded that such acts were “outrages upon the personal dignity of . . . civilians” (para. 1309) rather than acts of sexual violence.

The ICC Prosecution, in contrast, has made an effort to characterise such acts as sexual violence, notably in *Kenyatta et al.* However, the ICC stressed that whether it is an act of sexual violence is “inherently a question of fact” and concluded that, in the given case of forcible circumcision and penile amputation, “the acts under consideration do not qualify as other forms of sexual violence” (para. 266), requalifying them as inhumane acts.

This means that the mutilations of sexual organs described in the press are undoubtedly outrages upon personal dignity and inhumane acts qualifying as war crimes.

A fair question is whether the mutilations were carried out at a time when the person was alive or dead. Some reports indicate that mutilation was performed *postmortem* (Physicians for Human Rights Israel p. 5). It should be stressed that the prohibition of outrages upon personal dignity covers acts committed against dead persons (ICRC 2016 *Commentary, common Article 3*, para. 611; ICRC *CIHL Study*, rule 113). Accordingly, such mutilations are IHL violations and war crimes even if carried out after the person was dead.

Conclusion

The reports and testimonies gathered from a variety of sources indicate that many crimes of a sexual nature were committed by Hamas on October 7. The UN Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel has announced that it is now investigating reports of sexual violence. There is no doubt that the (gang) rapes can be prosecuted as “rapes” as war crimes, the forced nudity (as a standalone act) as “outrages upon dignity” and the mutilations as “outrages upon dignity” and “inhumane acts,” with the latter two being possibly charged as “any other form of sexual violence of comparable gravity.”

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