

Q & A – The nexus between conflict-related sexual violence and human trafficking for sexual exploitation in times of conflict during court proceedings: An insider’s view

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Abstract

One of key areas related to sexual violence in conflict, including human trafficking for sexual exploitation, includes the legal avenues to address these crimes. National and international lawyers are confronted with substantive and procedural legal issues to best investigate, prosecute and adjudicate such crimes. Patricia Viseur Sellers discusses from extensive and first-hand legal experience how she perceives both crimes and how she thinks they can best be addressed, e.g. by including the crime of the slave trade and removing the crime of sexual slavery.

Q & A

1. Can you elaborate on what you consider to be the similarities and differences between human trafficking and sexual violence in conflict, if any?

There are significant differences between sexual violence and human trafficking, whether or not it is related to armed conflict. A very basic difference is that trafficking is a transnational crime, not an international crime. It criminalizes how someone is reduced to a form of exploitation. The crime actually centres on the means through which someone is reduced to exploitation, such as when someone is kidnapped, treated violently, or induced, fooled or defrauded, with no physical violence. The form of exploitation could be slavery, forced labour, forced prostitution et cetera. The crime of trafficking does not aim to criminalize the underlying substantive criminal conduct that is the basis of the exploitative situation. Trafficking focuses on, for very good reasons, *how* a person has been reduced to exploitation.

The crime of sexual violence in conflict is a type of residual crime that incorporates various sexual acts considered criminal. It potentially incorporates everything from forms of rape to forms of forced sterilisation. However, within the context of the Rome Statute, those forms of criminal conducts are enumer-

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ated as specific crimes. Sexual violence is a residual provision for criminal sexual conduct of a similar gravity to the enumerated crimes. It is different from trafficking in that sexual violence might address the underlying act that happens after someone is reduced to a form of exploitation. However, sexual violence as a crime does not have to be preceded by trafficking. A person does not have to be trafficked in order for sexual violence to be inflicted upon them. Sexual violence and trafficking are two very different crimes that might happen sequentially or independently of each other.

2. The Secretary General's report says that conflict-related sexual violence actually includes trafficking. How do you look at conflict-related sexual violence as the umbrella term and then trafficking falling under it? Is it a good way forward?

The Secretary General, with very good intentions, is using descriptive terminology. He is not employing strict legal language. By using the terminology, he draws attention to the egregious acts of sexual violence and the systems that enable wartime sexual violence. He strove to emphasize that during periods of armed conflict, trafficking may occur. Trafficking is more aptly understood as slave trading: when the exploitation is enslavement, especially sexualized enslavement, it could encompass sexual violence, forced sterilisation, et cetera. By putting sexual violence in a nice compact phrase, the Secretary-General could seek to recognize that there exist a myriad of forms of sexual violence and trafficking is a related conduit to sexual violence. The Secretary General is urging the international community to increase its awareness of the various forms of sexual violence that could occur during armed conflict. Within a more precise legal discussion, one would understand specifically which crimes – sexual violence, slavery, trafficking or rape – are being committed. Such crimes could be charged in one manner on the national level and in a different manner at the international level.

3. Can you give some examples of situations or cases where people were victims/survivors of both human trafficking and sexual violence in conflict?

Recently, two guilty pleas for war crimes were handed down by the Colombian criminal trial courts. The crimes – rape, torture and trafficking – occurred in the province of Sucre, in a small town named Libertad that was mostly inhabited by Afro-Colombians. Paramilitary forces had occupied the town. The head of the paramilitary force, “El Oso” or “the Bear” had previously pleaded guilty to crimes of sexual violence. A subordinate of El Oso and a town official of Libertad entered into these two guilty pleas. Both men acted in concert with El Oso. The guilty pleas specifically cover rape, trafficking, and torture as enumerated under Colombian criminal law. High school girls were raped. These teenagers were frequently taken from their homes and driven to the military

headquarter and raped by the commander. At times, the rapes were perpetrated for punishment and at other times for intimidation. The context of the sexual violence was a means to effectuate the occupation and exercise control over the inhabitants of Libertad. So yes, here are two national cases that entail both trafficking and forms of sexual violence – rape and torture – in the context of armed conflict.

4. How have international and national legal mechanisms dealt with the prosecution of human trafficking and/or sexual violence in conflict?

In the cases just cited in Colombia, the crime of trafficking in persons resulted in a guilty plea. However, there could remain some confusion. Trafficking requires that one be reduced to a form of exploitation. Rape and torture might not be considered “forms” of exploitation. Slavery is a form of exploitation. Interestingly, the court found that the teenage girls were reduced to sexual slavery by the act of trafficking, even though the sexual slavery was not the basis of the guilty plea.

In national settings, recourse must be to national criminal codes that might penalize trafficking as well as sexual violence and other sexual crimes. The national settings also might recognize international crimes, such as war crimes or crimes against humanity, possibly through legislation that enabled provisions of the Rome Statute to become domesticated. For example, in the Colombian cases, one of the defendants pleaded guilty to war crimes and the transnational crime of trafficking as incorporated into the national penal code.

At the international level there are various forms of sexual violence that are criminalized. At the International Criminal Tribunal for the former Yugoslavia (ICTY), there was a very interesting discussion in the *Kvočka* case concerning sexual violence and its definition. It was not an enumerated provision within the ICTY Statute. Now, it is an enumerated provision within the Rome Statute. However, the International Criminal Court has not upheld convictions based upon the sexual violence provisions under crimes against humanity nor under war crimes. Deliberation upon the conduct that could comprise sexual violence under the Rome Statute remains to be articulated in the jurisprudence. Certainly, it is a specific crime that also lends itself to being an umbrella term for multiple forms of sexual conduct. A layperson’s connotation of sexual violence, thus, could be that the provision entails several different sets of conduct.

The Special Court for Sierra Leone (SCSL) used provisions of the Rome Statute, but did not charge trafficking. Trafficking is not an enumerated crime under the SCSL Statute. Convictions for sexually violent acts related to war crimes and crimes against humanity, including rape and sexual slavery, however, were rendered. The Statute for the International Criminal Tribunal for Rwanda (ICTR), which predates the Rome Statute, pronounced convictions relating to sexually violent conduct as part of genocide and as rape under crimes against

humanity, including in Akayesu and in Karemera. However, neither sexual violence nor trafficking was an express crime under the ICTR Statute.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) sanctioned sexually violent conduct including rapes within the context of genocide and as crimes against humanity. Genocide was perpetrated against the minority of Vietnamese and the Muslim populations. Female members of these populations were raped prior to execution. Cambodian males and females as victims of forced marriages were constrained to consummate the illicit “marriages” or in other words, forced to sexually assault each other. Such conduct was characterized as crimes against humanity. The ECCC did not enumerate trafficking as a crime. Hence, there are several national and international courts that examine sexually violent conduct. I am unaware of any international process that is adjudicating the express crime of trafficking. The International Criminal Court, in its definition of enslavement, seems to characterize trafficking as an expression of enslavement whenever there is the exercise of powers of ownership over someone while they are being trafficked.

5. Do you see any investigatory and prosecutorial challenges in establishing the nexus between human trafficking and sexual violence in conflict?

Trafficking is a transnational crime; I am less familiar with its applicable liability modes in national courts. Nevertheless, the nexus between sexual violence and trafficking can occur depending upon what was the exploitation into which the survivor or the victim was reduced. There is no difficulty in relating trafficking result to a form of exploitation that comprises sexual violence. However, here is a small warning: one can prove trafficking by showing that the destined exploitation displayed forms other than sexual violence. On the other hand, the crime of sexual violence could be proved without necessarily criminalizing how a person came to be in the situation where they were subjected to sexual violence by a perpetrator. The preceding conduct might have entailed trafficking, or, other criminal conduct such as imprisonment, or possibly it did not entail criminal conduct.

The two crimes of trafficking and sexual violence are not legally dependent upon each other. In trafficking cases you must prove the means and method a person was reduced to exploitation and then prove that there existed an exploitative situation. However, proving trafficking is not a synonymous charge to proving the substantive underlying criminal exploitation. The underlying exploitation is usually due to the acts of another perpetrator.

6. In your experience, does it make a difference for victims/survivors of both human trafficking and sexual violence in conflict under which definition the crimes are prosecuted?

From the victim or survivor's point of view, and certainly from the prosecutor's viewpoint, it is rather unseemly to select the criminal charge based upon whether its name is appealing. Firstly, interviews with witnesses concern the description of criminal conduct – facts that have happened and must be proved beyond a reasonable doubt. Secondly, interviews with witnesses try to ascertain the mental state or the intent, the *mens rea* of the accused. These factors put together result in the characterization of the criminal conduct.

Whether in a national or international system, victims usually do not select the crime under which the criminal acts will be prosecuted. For example, survivors might understand that a death could result in a charge of murder. Nonetheless they would not decide on whether manslaughter, negligent homicide or murder in the first degree ultimately will be charged. Survivors of international crimes usually do not request that an act be charged as persecution rather than as torture.

I imagine the reason why you ask this question is to determine whether there is value in giving victims a preference in characterizing the crime to which they have been subjected. That leads to the question whether there are crimes that are more significant than other or that carry more stigma than other crimes. What does it mean for crimes to bring a stigma to survivors when the criminalisation of conduct should mean that the accused bears the stigma.

7. You just mentioned that trafficking is a transnational crime, and that its inclusion in the Rome Statute is unfortunate because it is different than an international crime. Do you think that, even though it is in the Rome Statute, trafficking is not suitable for international prosecution?

The enslavement provision under the Rome Statute uses the basic elements from the definition in the 1926 Slavery Convention, 'the exercise of power of ownership over someone'. At the Rome Statute drafting conference, many States were alert to the trafficking in persons that accompanies armed conflict or periods when crimes against humanity are committed. Possibly, in order to address this phenomenon, the term trafficking, was inserted into the enslavement explanation without any requisite, in-depth legal consideration. The placement of the word trafficking in the Rome Statute was misguided for several reasons.

Firstly, the explanatory paragraph to the enslavement provision under crimes against humanity states that 'Enslavement' means 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'. However, in the Elements of the Crimes document of

the Rome Statute, no elements are given in regard to (the transnational crime of) trafficking. Therefore, trafficking is not a crime under the Rome Statute, or else, the elements of trafficking, meaning its *actus reus* and the *mens rea* would be delineated in the Elements of the Crime Document. As such, the crime of trafficking must be a description of conduct, not a crime that need be proven in order to find an accused guilty of enslavement.

Secondly, from my point of view, enslavement entails exercising powers of ownership over a person, irrespective of how that exercises of power of ownership manifests. When considering trafficking as set forth under the Palermo Protocol the trafficker is not legally required to exercise powers of ownership over the victim. The exercise of such powers is not an element of the crime of trafficking. The trafficker is condemned whenever he or she reduces the victim to a form of exploitation, such as enslavement. Therefore, a person might have the status of a slave because the person was reduced to slavery as a result of being trafficked. The enslavement provision in the Rome Statute, essentially, confounds trafficking. Whenever anyone, including the trafficker exercises powers of ownership over a person that is an act of enslavement and no longer should be termed trafficking.

Thirdly, I say that the crime of the slave trade is what is missing from the Rome Statute. Because of its absence, conduct described as trafficking is more misunderstood. Under the 1926 Slavery Convention slavery and the slave trade are condemned. The 1926 Slavery Convention defines the slave trade as including ‘all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.’

The slave trade, as a crime, resembles the transnational crime of trafficking to the extent that a person who is not enslaved, subsequently, is reduced to the status of a slave. However, the slave trade is a distinctive crime. The slave trader, like the trafficker is not legally required to exercise powers of ownership over a person prior to their being reduced into slavery. However different from trafficking, slave trading is never dependent upon the absence or presence of coercive circumstances. Slave trading, unlike trafficking, does not legally recognize the consent of an adult victim as a defence to the crime. In slave trading, the age of the victim is irrelevant. The crime can continue beyond the initial reduction of someone into slavery. Slave trading can be perpetrated upon someone who is already enslaved, by facilitating the transfer of ownership to another person, by trade, exchange or transport. Slavery and the slave trade work in tandem. This probably explains their sequential placement in the 1926 Slavery Convention and why they are reiterated, almost verbatim, in the 1956 Supplemental Slavery Convention.

Fourthly, the Rome Statute leaves an almost imperceptible impunity gap by omitting the slave trade as a crime. According to the explanatory paragraph of

enslavement, only persons who exercise the powers of ownership are sanctioned. Thus, slave traders who transport or engage in any of the acts described in the definition of the slave trade, but who do not exercise powers of ownership over the persons are not proscribed under the enslavement provision of the Rome Statute.

The Rome Statute should have explained that the provision of enslavement entails slavery and the slave trade. As such, the statute would have had jurisdiction over all conduct wherein powers of ownership over a person had been exercised and all conduct that reduces a person to slavery or that further enslaves a person by transfer to a subsequent owner. As currently drafted, the Rome Statute provision of enslavement conflates, confounds and muddles the crimes of trafficking and slavery and omits the crime of slave trade. The omissions are, in my opinion, even more glaring under Article 8 of the Rome Statute. Astoundingly, none of the extensive war crimes provisions incorporate slavery or the slave trade, even though both are recognized customary prohibitions under international humanitarian law.

To advance one step further, sexual slavery, as enumerated, should be reconsidered and removed from the Rome Statute. Why? The definition of enslavement countenances the exercises of powers over sexual integrity, sexual autonomy or sexual access. In essence the crime of enslavement prohibits sexualized enslavement. As currently constructed, to prove sexual slavery requires the same elements as enslavement, *plus* proof of being held out for an act of a sexual nature, according to the Elements of the Crime Document. What most likely comes to the forefront when thinking about acts of a sexual nature is holding females out for rapes or forced marriages. However, acts of a sexual nature as actually practiced in historic episodes of slavery are more nuanced. For example, during the 19th century Arab slave trade, males were frequently gelded or castrated. Enslaved males were intentionally mutilated so that they could work within the harems of their masters, yet, not pose a sexual threat to the females in the harem. Castration, as an act defies “just” being held for an act of a sexual nature. It is a multi-layered attack on the sexual integrity of a person, physically, psychologically, in terms of reproductive capacity, et cetera. In North and South America, after trans-Atlantic slave trade was banned during the 19th century, slave owners increased their breeding of slaves to sell internally. Male and female slaves were made to copulate. Male slaves did not own their semen nor did female slaves own their wombs. Neither could claim parental rights over any child born of their relations. Such breaches of sexual integrity or autonomy evince the exercise of powers of ownership, yet are inappropriate characterized as being held out for an act of a sexual nature. Likewise, when enslaved females are examined to check their menstrual cycles or are forced to breastfeed children of the master’s choosing, such evidence of ownership is unbecoming to be deemed an act of a sexual nature.

As currently enumerated, sexual slavery doesn’t seem posed to account for how enslavement is sexualized through the exercise of powers of ownership.

It's not a distinct enslavement but often an integral component of the existing slavery. Anyone who is sexually enslaved is also otherwise enslaved. The jurisprudence of the Special Court of Sierra Leone, and specifically the Charles Taylor case, divided the sexual acts that comprised sexual slavery, and from all other acts, such as performing house work, that comprised under enslavement. The division is quite artificial. Preferably any and all acts wherein powers of ownership are exercised should be expressed as enslavement. It all should be enslavement, understanding that the evidence of exercising powers of ownership can be presented in multiple sexualized ways.

8. At the national level, victims/survivors of human trafficking often have more access to support based on their legal status than victims/survivors of sexual violence in conflict. What do you think is needed to address this legal protection gap?

That is a difficult question. The situation would have to be examined state by state and at each tribunal or court. I am not familiar with all the domestic prosecutions in terms of protective measures at domestic level. In the international judicial mechanisms there are best practice guidelines. However, effective execution of practices depends on human and monetary resources. That is probably true at the state level as well. At the International Criminal Court, a lot of the attention concerning protection is integrated into the investigation procedure by the Office of the Prosecutor and undertaken by the Registry during the court proceedings.

As of now, there is provision of services *via* the Trust Fund even though there have been no successful adjudications of sexual violence. As a result, there is an inability to know how reparations would be allocated and whom they would serve in terms of a sexual violence adjudication. The international community's approach to protection, redress, recognition, and servicing, should be further along than it is after 25 years. Still, this area of international criminal law needs more concerted attention. One task that could be done is to more fully engage the experiences of survivor communities, starting with Yugoslavia and Rwanda. It is important to understanding from their perspective which support measures were positive or negative and which were most valuable, in hindsight. In essence, what could have been done better, differently and what worked? How should it be done? What means and methods are necessary to assist current cases – whether be it the Rohingya or child soldiers? There is a body of knowledge to be obtained from actual long-term survivors of international crimes.

9. What should be the way forward in addressing human trafficking and sexual violence in conflict in concert, if at all?

Fortunately, serious attention is now given to the intersection of trafficking and sexual violence, and the intersection of slavery, war crimes, and crimes

against humanity. This enables us to consider – and this is a long-term goal – who is susceptible to such crimes and how should potential victims be adequately protected, at both the national and international level. It need not be a trade-off to use all available crimes to ensure that persons who reduce others to enslavement – by slave trading or trafficking – can be prosecuted. Together, national, transnational, and international crimes should provide a complete security blanket for everyone from multiple such harms.

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From 1994-2007, Patricia was the Legal Advisor for Gender Related Crimes and Senior Acting Trial Attorney in the Office of the Prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda. In that capacity, she advised teams of investigators and trial attorneys on the prosecution of sex-based crimes under the tribunals' statutes and in accordance with pertinent doctrines of humanitarian law. She has litigated and advised on the leading international criminal law cases regarding wartime sexual violence, sexual violence and genocide and sexual violence and enslavement as a crime against humanity, including the Prosecutor v. Furundzija, the Prosecutor v. Akayesu and the Prosecutor v. Kunarac. In 2000, she was the Co-Prosecutor at the International Women's Tribunal that conducted a symbolic trial to redress the sexual slavery committed against the Comfort Women during II World War.

She has lectured widely, testified as an expert witness at international courts and authored numerous articles on international criminal law.

She is the recipient of the American Society of International Law's Prominent Women in International Law Award. She was named an Honorary Fellow by the University of Pennsylvania Law School in 2006 and received an Honorary Doctorate of Law from the Law School of City University of New York in 2001. She has been awarded the Martin Luther King Award bestowed by the Black Law Student Association of Rutgers University Law School, the Ron Brown International Lawyer award presented by the National Bar Association.