

‘Act of a Sexual Nature’: Elements of Crimes

Final Analysis

Current Elements of Crime Definition for Sexual Violence:

1. **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.

1. Is there a universally accepted definition?

There is no universally accepted definition. There are, however, some common definitions that have been used widely:

International

It seems that the most widely accepted definitions internationally are:

- “any violence, **physical or psychological**, carried out through **sexual means or by targeting sexuality**. 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 woman’s breasts”.¹
- “any sexual act, attempt to obtain a sexual act, or acts to traffic, or otherwise **directed against a person’s sexual autonomy and/or sexual integrity**, by any person regardless of their relationship to the victim, in any setting. Sexual violence takes multiple forms and includes **any violence, physical or psychological, carried out through sexual means or by targeting sexuality**.”²

Regional

The European system does not appear to have a definition.

The African Commission on Human Rights has defined sexual violence as:³

- a. Sexual violence means any **non-consensual sexual act**, a threat or attempt to perform such an act, or compelling someone else to perform such an act on a third person. These acts are considered as non-consensual when they involve violence, the threat of violence, or coercion. Coercion can be the result of psychological pressure, undue influence, detention, abuse of power or someone taking advantage of a coercive environment, or the inability of an individual to freely consent. This definition must be applied irrespective of the sex or gender of the victim and the perpetrator, and of the relationship between the victim and the perpetrator.

¹ [The UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed conflict \(1998 Final Report\)](#), para. 21.

² Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence (not yet published).

³ [ACHPR Guidelines on Combating Sexual Violence and its Consequences](#): 3.1 Sexual Violence.

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- b. Sexual violence is **not limited to physical violence and does not necessarily involve physical contact**. It takes many forms, and includes but is not limited to: [...]

In the Inter-American system, the definition is: “Sexual violence is understood any violence, **physical or psychological**, carried out **by sexual means or for a sexual purpose**. This is intended to cover physical and psychological aggressions **aimed at a person's sexual characteristics** such as forcing the person to strip naked in public or mutilate their genital organs as well as situations in which the victims are intended to inflict serious humiliation, such as forcing two victims to perform sexual acts or others to witness acts of sexual violence for intimidating purposes”.⁴

Domestical

There is no universally accepted definition of sexual violence in domestic law.

Many jurisdictions continue to rely on provisions criminalising indecent assault rather than sexual assault.⁵

In some jurisdictions, sexual assault covers only physical touching⁶ and there are a range of other offences (e.g., voyeurism, exhibitionism, sexual harassment, forced nudity, etc) that cover other non-physical acts.

2. What elements are widely accepted?

Legally Protected Interests: Integrity/Dignity/Autonomy/Self-Determination

International

Internationally, definitions of sexual violence often include reference to sexual violence being a crime against the right to respect for integrity and dignity. For example:

- CEDAW: “Ensure that sexual assault, including rape, is characterised as a crime against the **right to personal security and physical, sexual and psychological integrity**”.⁷
- UN Women, Handbook on Legislation on Violence against Women: “Define sexual assault as a violation of **bodily integrity and sexual autonomy**”.⁸
- Hague Principles: “Such acts are to be characterised as sexually violent if they violate a person’s sexual autonomy or sexual integrity”.

Although ICL does not define sexual violence, several judgments have recognised the rights that are protected by the criminalisation of sexual violence. In particular, there has been a focus on the **integrity** of the victim. For example:

- *Furundzija*: “It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the **physical and moral integrity** of a person [...]”⁹

⁴ IACtHR, *Caso López Soto y Otros v. Venezuela* (2018), para. 257.

⁵ See e.g., India, Netherlands, Namibia, The Gambia, Kenya, Sri Lanka, Ghana, Malta, Peru, Ecuador.

⁶ See e.g., UK Sexual Offences Act 2003, section 3; Guyana Sexual Offences Act 2010, section 2.

⁷ CEDAW General Recommendation 35, para. 29(e), citing to *Vertigo v. Philippines*, para 8.7 (in relation to rape): “violation of a women’s right to personal security and bodily integrity”. See also, R.P.B v. the Phillipines, para. 810.

⁸ UN Women, *Handbook on Legislation on Violence against Women* (2012), para. 24.

⁹ *Furundzija Trial Judgment* (1998), para. 186; *Brdanin Trial Judgment* (2004), para. 1012; *Stakic Trial Judgment* (2003), para. 757.

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- *Brima et al.*: “The prohibition embraces all serious abuses of a sexual nature inflicted on the **physical and moral integrity** of a person”.¹⁰
- *Milutinović*: “a) an act of a sexual nature [...] b) That act infringes the victim’s **physical integrity** or amounts to an outrage to the victim’s **personal dignity**”¹¹
- *Dordević Appeal*: “Trial chambers have held that sexual assault is broader than rape and encompasses “all serious abuses of a sexual nature inflicted upon the **physical and moral integrity** of a person [...] The Appeals Chamber notes that the Milutinović et al. Trial Chamber, after a thorough analysis, identified the elements of sexual assault as follows: (a) The physical perpetrator commits an act of a sexual nature [...] (b) That act **infringes the victim’s physical integrity or amounts to an outrage to the victim’s personal dignity** [...]”¹²

Regional

Regional systems also focus on the rights protected by the criminalisation:

- **Inter-American:**
 - o *VRP and VPC v. Nicaragua* (2016): The Commission and the Inter-American Court have taken up cases of sexual violence against women. Both bodies have analysed the manner in which sexual violence, including rape, **violates the rights to personal integrity, private life, autonomy and non-discrimination**.¹³
 - o *Castro Prison v. Peru* (2006): “said acts of sexual violence directly endangered the dignity of those women”.¹⁴
- **Africa:** ACHPR: “Concerned that crimes of sexual violence are often defined as “crimes against morality or honour”, **rather than against the victim’s bodily integrity** [...]”¹⁵

Domestic

A number of domestic jurisdictions have made explicit mention of the legally protected interests criminalised by sexual assault (or other sexual crimes) in their legislation or case law. These usually focus on sexual integrity, dignity and autonomy. In some Latin American countries, they recognise that the legally protected right is sexual freedom.

Out of the jurisdictions surveyed, the following make some mention of the legally protected interests: Canada, the Netherlands, Turkey, India, South Africa, Colombia, Argentina, Chile, Mexico, Bolivia, Peru, Ecuador, Venezuela, Guatemala, El Salvador, Albania, Austria, Serbia. *Note that some of these definitions are found in legislation pertaining to other crimes or legislative frameworks, such as for domestic violence.*

¹⁰ [Brima Trial Judgment \(2007\)](#), para. 720.

¹¹ [Milutinović Trial Judgment](#) (2009), para. 201.

¹² [Dordević Appeal Judgment](#) (2014), para. 850.

¹³ [IACHR, Report No. 4.15, VRP and VPC v. Nicaragua \(2016\)](#), para. 78, *citing* IACHR, Report 76/11, Case 11.769, Merits, J., Peru, July 20, 2011. Also see: Inter-American Court. Case of Fernández Ortega et al. v. Mexico. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 30, 2010. Series C No. 215.

¹⁴ IACtHR: [Miguel Castro-Castro Prison v. Peru](#) (2006), para. 308.

¹⁵ [ACHPR, Resolution on the Situation of Women and Children in Armed Conflict, ACHPR/Res.283\(LV\)2014](#)

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For example, from legislation:

- **Turkey:** “Any person who violates the physical integrity of another person, by means of sexual conduct...”¹⁶
- **Colombia:** sexual offences are under the title “Crimes against Sexual Freedom, Integrity and Formation”¹⁷
- **Peru:** sexual offences under the title “Violation of Sexual Freedom”.¹⁸
- **Mexico:** Article 6: Sexual violence is any act that degrades or damages the body and/or the **sexuality** of the victim. A victim and therefore **an attack on his freedom, dignity and physical integrity**. It is an expression of abuse of power that implies male supremacy over women, by denigrating them and conceiving them as objects, and any other similar forms which injure or are likely to injure **dignity, integrity or freedom of women**.¹⁹
- **Bolivia:** Sexual violence. Is any behavior that jeopardizes sexual, self-determination, both in the sexual act and in all forms of carnal contact or access, genital or non-genital, that threatens, violates or restricts the right to exercise a right to a **safe, effective and fulfilling free sex life, with autonomy and sexual freedom of woman**.²⁰
- **Ecuador:** “Article 116. Attack on sexual integrity and reproductive of protected person”; “Section Four: Crimes against Sexual and Reproductive Integrity [...] Article 17-Sexual Abuse.”²¹
- **Venezuela:** “Any conduct that threatens or violates a woman's right to **decide voluntary and freely their sexuality**, including not only the sexual act, but all forms of contact or sexual access, genital or non-genital, such as lewd acts, violent lewd acts, carnal access violent or rape itself.”²²
- **Morocco:** Sexual Violence: “Any statement, act or exploitation that may affect the **inviolability of the woman’s body [...]**”²³

For example, from the case law:

- **Canada:** “such that the sexual integrity of the victim is violated”,²⁴ “sexual privacy or integrity”,²⁵ “protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one’s body, and how, lies at the core of human dignity and autonomy”.²⁶

¹⁶ Penal Code of Turkey, Article 102.

¹⁷ Colombia Penal Code 2000.

¹⁸ [LAW N° 28251. Modifies and incorporates articles referring to Rape, sexual exploitation commercial and child pornography.](#)

¹⁹ New Law DOF 01-02-2007: General Law on Women’s Access to a Life Free of Violence, article 6.

²⁰ [Law 348 09-03-2013: Comprehensive Law to Guarantee Women a Life Free from Violence.](#), Article 7.

²¹ [Reform of the Comprehensive Organic Criminal Code. 2014.](#)

²² [Law to Reform the Organic Law on the Right of Women to a Life Free of Violence.2014.](#), Article 15(6).

²³ [Law 103-13 On elimination of violence against women 2018](#), article 1.

²⁴ [The Queen v. Chase \[1987\] 2 S.C.R.293.](#) (leading case), para. 11; [R. v S \(PL\) 1991, CanLII 103 \(SCC\) \[1991\] 1 SCR 909](#); [R. v. Alc  s 2000 CanLII 29878 \(QC.CA\)](#); [Canadian Judicial Council: Model Jury Instructions: Offence 271: Sexual Assault.](#)

²⁵ [R. v. V. \(K.B.\), 1992 CanLII 7503 \(ON C.A\).](#)

²⁶ [The Queen v. Ewanbuk \(1999\) 22 C.R. \(5th\) 1, 17 \(S.C.C.\)](#), para. 28.

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- **Netherlands:** “The ratio of criminality to sexual offences in general is the protection of sexual integrity of persons. Article 246 Criminal Code refers in particular to those violations of the right to sexual self-determination [...]”²⁷
- **South Africa:** “No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of **their right to dignity and bodily integrity** [..] **The rights to dignity and bodily integrity** are fundamental to our humanity”²⁸
- **Colombia:** “the protected legal right is sexual freedom [...] it is the duty of the State to punish conduct that impedes the free exercise of sexuality”;²⁹ “this form of violence does not attack the physical integrity of the individual but rather his or her moral and psychological integrity, autonomy and personal development”³⁰
- **Peru:** “That the Chapter IX of Title IV of the Criminal Code, on offences against freedom, regulates the criminal offences relating to the violation of **sexual freedom**, which are reflected in these criminal offences as legal assets subject to the criminal protection of **sexual freedom and sexual indemnity**, the former being understood as the **legally recognized capacity of a person to determine his or her own sexuality**, and the latter being defined as the preservation of a person's sexuality when he or she is not in a position to decide on his or her sexual activity: minors or incapable persons”³¹

What is the plain meaning of each of the words?

Physical/bodily integrity

- Integrity (noun): **the quality of being whole and complete.** ([Cambridge Dictionary](#))
- Integrity (noun): **the state of being whole and not divided.** ([Oxford Dictionary](#))
- Article 5 [American Convention on Human Rights](#) on the right to humane treatment: ‘Every person has the right to have his physical, mental, and moral integrity respected’. (**Link between right to humane treatment and personal integrity**).
- Article 4 [ACHPR](#) on right to life: ‘Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.’ (**Link between right to life and integrity**)
- Article 3 [CFREU](#) on right to integrity of the person: ‘1. Everyone has the right to respect for his or her **physical** and mental integrity’.
- “The principle of bodily integrity sums up the right of each human being, including children, to autonomy and self-determination over their own body. It considers an unconsented physical intrusion as a human rights violation.” ([Child Rights International Network](#))

Autonomy

- **The ability to make your own decisions without being controlled by anyone else.** ([Cambridge Dictionary](#))
- **The ability to act and make decisions without being controlled by anyone else.** ([Oxford Dictionary](#))

²⁷ ECLI: NL: RBHAA: 2008: BD8449, para. 4.1.1.

²⁸ [Director of Public Prosecutions, Western Cape v Prins and Others](#)

²⁹ [Constitutional Court C-285 de 1997](#), para. 35. *See also*, Constitutional Court T 843 11 (2011).

³⁰ Constitutional Court T-271/16 (2016), para. 29.

³¹ [Supreme Court Perú. Permanent Criminal Chamber. No.148 2010. Monquegua.](#)

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- (n) Recognizing the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices (Preamble [Convention on the Rights of Persons with Disabilities](#)). **Link between freedom of choice and autonomy.**

Dignity

- **The importance and value that a person has, that makes other people respect them or makes them respect themselves.** ([Cambridge Dictionary](#))
- **The fact of being given honour and respect by people.** ([Oxford Dictionary](#))
- Respect for human dignity is the one explicit underlying principle of the International Bill of Human Rights.³² Recognised repeatedly as inherent to human beings. Invoked in preambular paragraphs:
 - o “Whereas recognition of the **inherent dignity** and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...” ([Preamble, UDHR](#)). Human beings are equal in ‘dignity and rights’ (Art 1 UDHR).
 - o “Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, recognising that these rights derive from the inherent dignity of the human person...” ([Preamble, ICCPR](#))
- Article 10 (1) ICCPR: 1. All persons deprived of their liberty shall be treated with humanity and with respect for **the inherent dignity of the human person.**

Thoughts/Options/Meeting Notes:

Grey suggests that a “definition that focuses on the meaning of the act, rather than the body part involved, would ensure that the social and psychological aspects of ‘sexual violence’ are recognised”³³ - *can this be done by focusing on the legally protected rights.*

The inclusion of words such as ‘integrity’ or ‘autonomy;’ within the definition of sexual violence has the benefit of making it explicitly clear which rights are protected by the criminalisation of sexual violence. Thus, the legally protected interest in criminalising sexual violence is the right to bodily integrity, personal security, sexual autonomy, etc.

Inclusion of “autonomy” is important – i.e., it is protecting the right of the individual to choose and have agency over their sexuality. It is noteworthy that in some Latin American countries the protected legal right is sexual freedom.³⁴

This is a vital aspect to include in the definition, and is generally accepted across international, regional and domestic law in different formulations.

³² Nigel S Rodley, ‘Integrity of the Person’ in *International Human Rights Law* (eds) Moeckli, Shah, Sivakumar (2nd edn, OUP, 2014) 174.

³³ R Grey, Conflicting Interpretations of ‘Sexual Violence’ in the ICC, (2014) 29 *Australian Feminist Studies* 273, p.284.

³⁴ See e.g., Peru, Ecuador, Guatemala, Colombia, Bolivia.

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- How to phrase:

- “sexual autonomy and bodily integrity”
- “sexual autonomy and/or integrity”
- “personal security, and physical, sexual and psychological integrity”
- “physical and moral integrity and personal dignity”
- “Sexual freedom”

Choice to use “sexual autonomy and/or integrity” – clear that sexual is also attached to integrity from the wording.

Bodily had a physical connotation which could be interpreted to restrict the crime we want to avoid. Sexual autonomy and integrity can convey the broad nature of the offence, and is ambiguous enough to encourage a broad interpretation and keeps expansive. The word sexual focuses the mind into the precondition and autonomy and integrity broaden it appropriately.

Physical/Non-Physical

Some definitions explicitly mention that the acts of sexual violence can be both physical and non-physical. The jurisprudence of the ad hoc tribunals has also recognised acts of sexual can be non-physical. The ICC Prosecutions Policy on Sexual Violence also recognises this.

International

Various definition in international human rights law recognise that sexual violence may be physical or psychological. For example, definitions include the phrase “any violence, physical or psychological”.³⁵

Other international definitions focus on the fact that the violence does not need to involve physical contact. For example: “Conduct of a sexual nature’ is not limited to physical violence and may not involve any physical contact”.³⁶

The ad hoc tribunals have recognised that sexual violence is not limited to physical violence. In *Akayesu*, 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**”.³⁷ This has been followed in various other judgments.³⁸

In addition, various examples of acts that have been prosecuted have not involved physical contact. For example: causing someone to form a reasonable apprehension or fear of acts of sexual violence;³⁹ or forced nudity.⁴⁰

³⁵ See e.g., The UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed conflict (1998 Final Report), para. 21; Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence (not yet published), p.13.

³⁶ Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence (not yet published), p.13.

³⁷ [Akayesu Trial Judgement \(1998\)](#), para. 688.

³⁸ [Kvočka Trial Judgement \(2001\)](#), para. 180; [Milutinović et al. Trial Judgment \(2009\)](#), para. 199; [Dordević Appeal Judgment \(2014\)](#), para. 852.

³⁹ *Kvočka et al* Trial Judgement, paras 98, 108, 229, 234, 319-321, 408, 415, 419-420, 470, 504, 578-579, 691, 752-753; *Prosecutor v Kvočka et al*, IT-98-30/1-A, [Judgement](#), 28 February 2005 (“*Kvočka et al* Appeal Judgement”), paras 329-34, 339, 594-599 and pp. 242-243; *Brđanin* Trial Judgement, paras 516-517, 524, 538, 998, 1013, 1050, 1061, 1088.

⁴⁰ *Akayesu* Trial Judgement, paras 688, 685, 692-695, 697, 731-732, 734; *Prosecutor v Kunarac et al*, IT-96-23-T & IT-96-23/1-T, [Judgement](#), 22 February 2001 (“*Kunarac et al* Trial Judgement”), paras 772, 766-771, 773, 782, 886; *Brđanin* Trial Judgement, paras 1013, 524, 538, 998, 1050, 1061;

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The OTP Policy Paper on Sexual and Gender Based Crimes: An act of a sexual nature is not limited to physical violence and may not involve any physical contact – for example, forced nudity. Sexual crimes, therefore, cover both **physical and non-physical acts with a sexual element**.⁴¹

Nonetheless, in *Bemba* the PTC declined to charges of forced nudity because they did not pass the ‘comparable gravity test’.⁴² The TC did not seek the opinion of the affected community.

- *This decision has been widely criticised.*

Regional

The Inter-American system has continuously recognised that sexual violence can be physical or non-physical. The formulation is: “acts of a sexual nature [...] that in addition to involving physical invasion of the human body, may include acts which do not involve penetration or even physical contact”.⁴³ One case states “sexual violence is understood as any violence, physical or psychological”.⁴⁴

The African Commission on Human and People’s Rights states that: “Sexual violence is not limited to physical violence and does not necessarily involve physical contact”.⁴⁵

Domestic

Some domestic jurisdictions explicitly recognise that sexual violence/sexual assault may occur without physical contact. This formulation is apparent particularly in Latin America.

However, as many laws on sexual assault are based around the definition of assault (requiring touching) in sexual circumstances, it is often a requirement of these laws that some touching occurred. However, where this is the case, it is common that other legislative provisions are included to cover non-physical sexual violence (for example, sexual harassment, voyeurism, exhibitionism, etc).⁴⁶

Legislation:

- **Chile:** “sexual action shall be understood to be any act of sexual significance performed through bodily contact with the victim, or that has affected the victim’s genitals, anus or both, or even when there is no bodily contact”⁴⁷
- **Peru:** “Sexual violence These **are actions of a sexual nature** committed against a person without their consent or under coercion. They include acts **that do not involve penetration or physical contact**.”⁴⁸
- **Guatemala:** “Actions of physical or psychological violence”⁴⁹

⁴¹ [OTP Policy Paper on Sexual and Gender Based Crimes](#), p.3.

⁴² *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, para. 39-40.

⁴³ [IACtHR: Miguel Castro-Castro Prison v. Peru](#) (2006), para. 306; [IACtHR, Fernandez Ortega et al., v. Mexico \(2010\)](#), para. 119; [IACtHR, J. v. Peru \(2013\)](#), para. 358; [IACtHR, Espinoz Gonzales v. Peru](#), para. 191; [IACtHR, Rosendo Cantú et al., v. Mexico \(2014\)](#), para. 109; [IACHR, Report No. 4.15, VRP and VPC v. Nicaragua \(2016\)](#), para. 79; [IACHR, Report No. 150/18, Jineth Bdeoya Lima and Other v. Colombia \(2018\)](#), para. 86.

⁴⁴ [IACtHR, Caso López Soto y Otros v. Venezuela \(2018\)](#), para. 257.

⁴⁵ [ACHPR Guidelines on Combating Sexual Violence and its Consequences](#): 3.1 Sexual Violence.

⁴⁶ See e.g., UK, Guyana,

⁴⁷ [Chile Penal Code](#) (as modified), Article 366ter

⁴⁸ [LAW 30364, LAW TO PREVENT, PUNISH AND ERADICATE VIOLENCE AGAINST WOMEN AND FAMILY MEMBERS](#), article 8.

⁴⁹ [Decree 22-2008. Law against femicide and other forms of violence against women](#), article 3(n); [Decree 09-2009. Law against sexual violence, exploitation and human trafficking](#); article 173bis.

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- **Costa Rica:** “Action that compels a person to engage in sexualised physical or verbal contact or other sexual interactions”⁵⁰

Other jurisdictions have recognised acts other than sexual assault (which requires touching) in their legislation. For example:

- Sexual harassment⁵¹
- Exposure/Exhibitionism⁵²
- Forced Nudity⁵³
- Distributing sexual materials⁵⁴
- Voyeurism⁵⁵

Other jurisdictions have recognised non-physical acts in their case law. For example:

- **Netherlands:** forced nudity and performance of sexual acts in front of webcam.⁵⁶

Thoughts/Options/Meeting Notes

It is very important to explicitly include reference to non-physical acts. Whilst the Bemba decision was about the ‘comparable gravity test’ and not what was sexual, having explicit reference to non-physical acts will focus in the mind of judges that sexual violence can include psychological violence which can be just as grave and physical acts of violence.

Options on language:

- “physical and non-physical acts”
- **“physical and psychological acts”.**
- “Conduct of a sexual nature is not limited to physical violence and may not involve any physical contact”.

Consensus on the importance of including this explicitly. Preferred “psychological” over non-physical because it was felt this captured a broader range of conduct. In addition, non-physical is always defined only in relation to the “physical” – it was therefore seen as closing down the definition instead of expanding. Finally, psychological has the potential to focus the minds of the judges on the impact of the victim.

Carried out through Sexual Means or Targeting Sexuality

The above focused on the rights protected by the criminalisation of sexual violence (e.g., integrity, autonomy, etc). In addition, some definition focus on *how* the violence was conducted, e.g., **through sexual means or by targeting sexuality.**

⁵⁰ [Family Court, Resolution No. 137 - 2005.](#)

⁵¹ See e.g., India, UK, Norway, Germany, Namibia, Turkey, Kenya, Tanzania, Austria, Ireland, Serbia, Colombia, Argentina, Mexico, Peru, Ecuador, Venezuela, Costa Rica, El Salvador.

⁵² See e.g., UK, Norway, India, Germany, South Africa, Guyana, Malaysia, Bangladesh, Albania, Peru, Guatemala, El Salvador.

⁵³ See e.g., India, Colombia.

⁵⁴ See e.g., Canada, Chile, Bolivia, Guatemala, Peru.

⁵⁵ See e.g., UK, Canada, India, Guyana.

⁵⁶ ECLI: NL: RBHAA: 2008: BD8449.

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International

The widely accepted 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**”.⁵⁷ This has been followed by the Model Legislative Provisions.⁵⁸

Other international organisations have used the formulation: “otherwise directed against a person’s sexuality”.⁵⁹

In international criminal law, the focus has traditionally not been on the sexual purpose of the act (i.e., for sexual gratification of the perpetrator) but the degradation and humiliation of the victim.

For example, in *Furundzija* the Trial Chamber held that: “the prohibition embraces all serious abuse of a sexual nature inflicted upon the physical and moral integrity of a person [...] in a way that is degrading and humiliating for the victims dignity”.⁶⁰ This has been followed by another of other Trial Chambers.⁶¹

In the *Milutinović* Trial Judgment, the Chamber explicitly acknowledged that “it would be inappropriate to place emphasis on the sexual gratification of the perpetrator in defining the elements of ‘sexual assault’. 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, and it is this element that provides specificity to the offence”.⁶²

Regional

The Inter-American system has combined a focused on: 1) “carried out by sexual means or for a sexual purpose”; and 2) aimed at a person’s sexual characteristics”.⁶³

Domestic

Domestically, there has been more of a focus on the sexual purpose of the act. Although many jurisdictions have made it clear that the intention of the perpetrator is not an element of the crime.

For example, the following have made it clear that the sexual gratification is not an element of the offence:

- Canada: “the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances”.⁶⁴

⁵⁷ The UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed conflict (1998 Final Report) , para. 21.

⁵⁸ Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence (not yet published), p.13.

⁵⁹ OHCHR, Sexual and gender-based violence in the context of transitional justice, p.1; UNHRC, Analytical Study Focusing on Gender-Based and Sexual Violence in relation to Transitional Justice: Report of the Office of the UN High Commissioner for Human Rights, para. 3; WHO, [World Review on Violence and Health 2002](#), p. 149; Interagency Working Group, [Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse](#) (Luxembourg Guidelines), p.13.

⁶⁰ *Furundzija* Trial Judgement (1998), para. 186.

⁶¹ *Stakić* Trial Judgment (2003); para. 757; *Brdanin* Trial Judgment (2004); para. 1012;

⁶² *Milutinović et al.* Trial Judgment (2009), para. 199. See also, *Dordević* Appeal Judgment (2014), para. 852

⁶³ IACtHR, *Caso López Soto y Otros v. Venezuela* (2018), para. 257.

⁶⁴ *The Queen v. Chase* [1987] 2 S.C.R.293, para. 11; *R v CJ*, 1990 CanLII 6484 (NL CA), para. 15; *R. v S* (PL) 1991, CanLII 103 (SCC) [1991] 1 SCR 909; *R. v. V. (K.B.)*, 1992 CanLII 7503 (ON CA).

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- The Netherlands: “touching the buttocks – in the present circumstances – does have the character of an obscene act [...]. The fact that the suspect may have lacked sexual intention does not alter this”.⁶⁵
- South Africa: in relation to Section 8: Compelling or causing a person 18 years or old to witness sexual offences, sexual acts or self-masturbation: “whether for the sexual gratification of A or of a third party or not”.⁶⁶
- UK: “whatever its circumstances or any person’s purpose in relation to it, it is because of its nature sexual”.⁶⁷
- Tanzania: “sexual abuse means illegal sexual orientated acts or words done or said in relation to any person for gratification or any other illegal purposes”.⁶⁸

However, some jurisdictions do require sexual purpose, for e.g.:

- Guatemala: “performs acts for sexual or erotic purposes on another person”.⁶⁹
- Bangladesh: “to satisfy his sexual urge illegally”.⁷⁰
- Sri Lanka: “for sexual gratification”.⁷¹
- Tanzania: “for gratification or any other illegal purposes”.⁷²

Thoughts/Options

Sexual Gratification

Internationally there has been a shift away from a focus on the sexual gratification or purpose of the perpetrator. However, domestically, in some jurisdictions, it is still a common criterion for establishing the sexual nature of the conduct.

Including an element relevant to the sexual purpose of the conduct would, in effect, make this a specific intent crime which would add additional burdens to its prosecution.

We definitely do not want to make it an element of the crime because *inter alia*: 1) it would focus only on the perpetrator and not give any space for the views of the victim; 2) does not take into account cases where sexual violence is perpetrated for other reasons (e.g., punishment); 3) would add a specific intent requirement that would add an additional burden.

However, *is looking at the purpose of the sexual violence useful in some cases? Are acts of sexual violence in conflict ever perpetrated for sexual pleasure?* It would appear from the academic literature that yes, sometime perpetrators do inflict sexual violence as a means for sexual gratification. However, it’s important that this is not the only, or most acknowledged criterion of what makes something sexual. In particular, it is important not to create this as a specific intent crime.

⁶⁵ [ECLI: NL: HR: 2012: BX4288](#), para. 2.2.3.

⁶⁶ [Criminal Law \(Sexual Offences and Related Matters\) Amendment Act, 2007](#)

⁶⁷ Explanatory Notes, section 78; [R v H \(Karl Anthony\) \[2005\] 2 Cr. App. R. 9](#).

⁶⁸ [Penal Code as amended by the Sexual Offences Special Provisions Act](#)

⁶⁹ [Decree 09-2009. Law against sexual violence, exploitation and human trafficking](#). Article 29: Modifying Article 173 of the Penal Code.

⁷⁰ [The Prevention of Oppression Against Women and Children Act 2000](#), section 10.

⁷¹ Penal Code, Section 365B.

⁷² Penal Code, as amended by the Sexual Offences Special Provisions Act, section 3.

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- Erikson Baaz and Stern argue that the ‘sexual’ in sexual violence has been theorised away as irrelevant.⁷³ However, they suggest that “[i]f we ignore the sexual (however we imbue that with meaning), then we surely lack an understanding of sexual violence that resonates with the ways in which perpetrators say they harm, and survivors feel harm”.

Carried out through sexual means or targeting sexuality

The formulation “carried out through sexual means or by targeting sexuality” focuses on both the perpetrator and the victim – i.e., whether it was carried out in a sexual manner by the perpetrator and whether it affected the victims sexuality.

Could this be a way through which a subjective test could be included – i.e., how perpetrators intended the harm and how the victims felt they were harmed? ‘Through sexual means’ might be the avenue to look at: what body parts we touched; objectively whether it was considered as sexual; how the perpetrator intended it. Where has “targeting sexuality” focuses more on the victim – this could cover situations such as Katanga (forced circumcision), as well as Bemba (forced nudity). I.e., it is not looking just at whether the perpetrator considered it was sexual or whether it was for the purpose of sexuality, but whether it affects the victim’s sexuality and sexual freedom.

However, this problem again is whether this definition is circular – how do you define ‘sexual means’ or ‘targeting sexuality’?

Options for wording:

- “directed against a person’s sexuality”
- “through sexual means or targeting sexuality”

“Carried out through sexual means or by targeting sexuality” was considered to cover the full range of conduct and creates an all-encompassing definition – necessary ambiguity and creation of an overarching definition suitable for broad interpretation.

3. Act of a sexual nature/sexual act

Does “act” include by omission and, if not, do we need to include omission within the definition? General consensus that it is a general principles in ICL that conduct can be committed by act or omission and has never been strongly contested. Therefore, word “act is sufficient”.

Inclusion of “act of a sexual nature” remains circular. Is it necessary with the rest of the definition in place, or is it repetitive? General consensus that with the rest of the definition, the wording “sexual nature” becomes obsolete and is better explained by the definition.

- To include “act [...] that was [definition of its sexual nature].”

4. Should there be an explicit subjective or objective test?

Hague Principles: Subjective view:

- “Sexual violence involves singular, multiple, continuous, or intermittent acts which, in context, are perceived by the victim, the perpetrator, and/or their respective communities as sexual in nature”.⁷⁴
- The sexual nature and the gravity of an act are determined in part by identity ability, age, race, sex, culture, religion, historical precedents, indigeneity, and other intersecting factors.

⁷³ Maria Eriksson Baaz and Maria Stern, ‘Curious erasures: the sexual in wartime sexual violence’, p.295.

⁷⁴ Hague Principles, Part 1.1.

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Therefore, if decision makers take steps to understand the context in which the act occurred, they will be better equipped to determine whether an act is sexual, and to assess the gravity of such acts.⁷⁵

Rosemary Grey considers whether **acts objectively ‘sexual,’ or is this a subjective question? If it is subjective, whose view matters most: the victim’s, the perpetrator’s, the prosecutor’s or the court’s?**⁷⁶

Grey: **The sexual nature of an act may be determined by how the perpetrator intended it, how the victim and their community perceived it, or how the crime affected the victim.**⁷⁷

International

There is no evidence of the use of subjective tests internationally.

While the ad hoc tribunals did not explicitly discuss whether a subjective or objective test should be used, the *Kenyatta* PTC stated: “In this respect, the Chamber considers that the determination of whether an act is of a sexual nature is inherently a question of fact”,⁷⁸ indicating the use of a purely objective test. Indeed, the *Kenyatta* PTC did not consider the views of the victims, who had made submissions regarding the sexual nature of the crimes.

Grey argues that: “protracted debate in the *Kenyatta* case as to whether the acts against the Luo men were sexual in nature suggests that this is cannot be regarded as a ‘question of fact’ as the chamber stated but is a subjective question, a matter of opinion”.⁷⁹

The Elements of Crimes only contains one specific objective test – for the definition of ‘manifest’ in relation to the crime of genocide and the crime of aggression.

- Article 6 Genocide: (b) the term ‘manifest’ is an objective qualification (in relation to the element “the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction).
- Article 8bis: 3. The term ‘manifest’ is an objective qualification. (in relation to “the act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations).
- Also interesting, in regard to value judgments: “With respect to mental elements associated with elements involving value judgement, such as those using the terms “inhumane” or “severe”, it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated.”⁸⁰

ICL jurisprudence has often utilised different objective and subjective tests. It appears that, where the Court is required to make a particular value judgment they will utilise both objective and subjective criteria.

⁷⁵ Hague Principles, part 1.7.

⁷⁶ R Grey, *Conflicting Interpretations of ‘Sexual Violence’ in the ICC*, (2014) 29 *Australian Feminist Studies* 273, p.276

⁷⁷ R Grey, *Prosecuting Sexual and Gender Based Crimes at the International Criminal Court* (Cambridge University Press 2019), p. 319; *Prosecutor v. Dordević*, IT-05-87/1-A, Judgment, 27 January 2014, para. 852: “[I]t would be inappropriate to place emphasis on the sexual gratification of the perpetrator [...]. 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”.

⁷⁸ *Prosecutor v. Kenyatta et al*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), ICC-01/09-01/11, 23 January 2012, para. 266, 270.

⁷⁹ R Grey, *Conflicting Interpretations of ‘Sexual Violence’ in the ICC*, (2014) 29 *Australian Feminist Studies* 273, p.282.

⁸⁰ Elements of Crimes, General Introduction, para. 4.

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- **Genocide:** In determining whether the victimised individuals belong to a national, ethnic, racial or religious group, both subjective and objective criteria are applied.⁸¹ For e.g., in *Rutaganda*, it was held that the concepts of national, ethnic, racial or religious groups need to be assessed in the light of a particular **political, social and cultural context**.⁸²
- **Torture:** in relation to the infliction of ‘severe’: In *Kvočka*: the Trial Chamber must first consider the **objective severity of the harm inflicted. Subjective criteria, such as the physical or mental effect of the treatment upon the particular victim and, in some cases, factors such as the victim's age, sex, or state of health will also be relevant in assessing the gravity of the harm.**⁸³ In *Krnojelac*, the TC stated that they “must take into account all the circumstances of the case, including the **nature and context** of the infliction of pain [...]”.⁸⁴

For more information see the memo on this topic.

Regional

None.

Domestic

Domestic law tends to focus on a purely objective approach, although some jurisdictions focus on the subjective intention of the perpetrator (see above). The tests usually include a number of factors indicative of the sexual nature.

For example:

United Kingdom

Section 78 of the Sexual Offences Act: “[...] penetration, touching or any other activity is sexual if a **reasonable person** would consider that—

- (a) **whatever its circumstances or any person’s purpose in relation to it, it is because of its nature sexual, or**
- (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

In addition, the case law further explains the ‘reasonable person’ test: First, there is the requirement that the **touching because of its nature may be sexual**; and secondly, **there is the requirement that the touching because of its circumstances or the purpose of any person in relation to it (or both) is sexual.**⁸⁵

Canada

Focuses on an objective test viewed in light of the circumstances of the case. The leading case of *The Queen v. Chase* lays out the test:

- “[...]]Sexual assault is an assault within any one of the definitions of that concept in [s. 244\(1\)](#) of the *Criminal Code* which is committed in circumstances of a **sexual nature, such that the sexual integrity of the victim is violated**. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: **"Viewed**

⁸¹ Semanza [Trial Judgment](#), para. 317; Jelisić [Trial Judgment](#), paras. 69-72; Kayishema & Ruzindana Trial Judgment, para. 98.

⁸² ICTR, *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment (6 December 1999), para. 55.

⁸³ ICTY, *Prosecutor v. Kvočka et al.*, "Judgement", IT-98-30/1-T, 2 November 2001, para. 143.

⁸⁴ ICTY, *Prosecutor v. Krnojelac*, "Judgement", IT-97-25-T, 15 March 2002, paras. 182.

⁸⁵ See e.g., [R v H \(Karl Anthony\) \[2005\] 2 Cr. App. R. 9](#); [R v Grout \[2011\] EWCA Crim 299](#); [\[2011\] 1 Cr. App. R. 38](#).

in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer”.

- The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant. The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the **existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.**” (para.11).

Guyana

Section 2 Interpretation: "sexual" includes penetration, touching and any other activity if a **reasonable person** would consider that –

- (i) whatever its circumstances or any person's purpose in relation to it, **it is because of its nature sexual;** or
- (ii) **because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual;**⁸⁶

Ireland

“A sexual assault is an assault accompanied by circumstances which are objectively indecent, and the requisite elements of the offence are; firstly, that the individual intentionally assault the complainant. Secondly, that the assault itself or the assault and the accompanying circumstances are objectively indecent and thirdly, that the accused intended to commit an indecent assault.”⁸⁷

Netherlands: looks at the circumstances

- Certain acts, **viewed objectively according to their outward appearance, are sexual in nature**, and therefore contrary to a socio-ethical norm, and can therefore in principle be regarded as lewd. If it is not immediately apparent from the outward appearance that the act has a sexual character, it must be **assessed on the basis of the circumstances of the case whether or not the act can be classified as a lewd act**. Various factors are important here, such as the context and the relationships between those involved. The body part that was touched, the nature of the touch and the manner in which it was touched - in addition to touching the buttocks, think of squeezing a bare knee **4** or stroking, caressing or touching a bare leg - are factors involved. can be in the assessment. In borderline cases, the intention of the person who performed the act can also play a not insignificant role in the question whether the act, which in itself does not necessarily have a sexual meaning, has acquired this or not.⁸⁸

Other jurisdictions focus on the perpetrator’s intention (see above).⁸⁹

⁸⁶ Sexual Offences Act 2010, as amended in 2013.

⁸⁷ [DPP v Babayev \[2019\] IECA 198](#), para 13

⁸⁸ [ECLI: NL: PHR: 2018: 1255](#).

⁸⁹ Sri Lanka, Bangladesh, Tanzania.

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Thoughts/Options

The primary question here is whether it is appropriate to explicitly incorporate an objective or subjective test into the Elements of Crimes or whether it should be left to the judge’s discretion?

There are clear negatives to having a purely objective test:

- Judges are limited to assessing the evidence through their own cultural and personal lens – or the lens of a ‘reasonable person’. But who is the reasonable person?
- Does not take account of cultural differences – e.g., in certain cultures touching hair may be regarded as sexual but not in others.
- This approach directly led to the problems in Kenya.

What are the benefits of a subjective approach?

- Importance of taking a survivor-centered approach and paying attention to how survivors comprehend perpetrators motives or experiences.
- Important in survivors’ attempts to find ways to rebuild their everyday lives and selves in the aftermath of violence through collective and individual meaning-making.⁹⁰
- Can take account of the nature of the act and the social and cultural context in which it was perpetrated.
- Can look at criteria such as the purpose of the perpetrator, the views of the victim, and the views of the affected communities.
- Will enable a better understanding of the crime – why it takes place, how it is perceived, and what it affects are.

What are the negatives of a subjective approach?

- There is no international or state practice using a purely subjective approach – although some do focus on the sexual intention of the perpetrator.
- Is there some case where the sexual violence will just be sexual in nature – even if the perpetrators and/or victims did not perceive it as such. For example, an instance of a male victim being forced to masturbate another male – the perpetrator may argue it was not for sexual gratification, while the victim may (for a variety of cultural reasons) refer to the violence as torture and not focus on the sexual nature of the crime.
- Would adding this test explicitly have the effect of creating an additional evidential hurdle to prosecutors investigating and prosecuting this crime that is not present in other crimes?

Options:

- Put into the definition either a subjective or objective test.
- Put into a footnote something hinting towards a subjective test: “An act may be sexual in nature if it was intended to be sexual by the perpetrator, or if it was considered as such by the victim or affected community.”
- Include something about “in context”

⁹⁰ C Dolan, M Eriksson Baaz and M Stern, What is sexual about conflict-related sexual violence? Stories from men and women survivors, p.3.

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- Leave out and include within an advocacy campaign.
- Is the terminology: “through sexual means and targeting sexuality” sufficient to imply the need for objective and subjective criteria.

Wording:

- “An act may be sexual in nature if it was intended to be sexual by the perpetrator, or if it was considered as such by the victim or affected community”
- “Whether an act is sexual in nature can be assessed taking into account objective and subjective criteria”
- “Assess on the basis of the circumstances of the case and the context in which the sexual violence took place”
- “Assessed in light of the particular social and cultural context”.
- “Whether an act is sexual can be assessed taking into account objective or subjective criteria, assessed on the basis of the circumstances of the case and the context in which the sexual act took place. Appropriate weight should be given to the intent of the perpetrator and the views of the victim and affected community”.

Meeting notes

Does including “objective/subjective” test add anything, as these are not clearly defined terms in ICL. However, it is deemed necessary to include some wording to ensure that judges are considering the views of the victims.

- Would give the view of adding additional elements.
- Makes you categorise in a very rigid way, and potential for judges to get bogged down with definitions of objective/subjective.

Consensus that explicit reference to objective/subjective test is not the most appropriate in the definition.

“An act may be sexual in nature if it was intended to be sexual by the perpetrator, or if it was considered as such by the victim or affected community”

- This wording is preferred over explicit objective/subjective test.
- But need to be extremely careful not to highlight the intent as the perpetrator and ensure it does not become a defining feature of the crime. We don’t want to inadvertently make the intention of the perpetrator an element.
- Do not want to create an obligation – but this is just to guide judges in some factors to consider, and focus their minds on the need to look at the opinions of the victims and affected communities opinion.
- This is the main problem, that judges have not considered what was sexual for the victims – means this is necessary to overcome the problem. So we need to direct them to take these views into account.
- What about affected communities which might be imposing their views of what is sexual on to female victims? What about where the victim does not consider it sexual, for example male victims who might not describe the assault as sexual but focus on ‘torture’.

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- Does the intention of the perpetrator need to be included? Maybe this needs to be taken out. But then many victims won't take into consideration that this violence was sexual? Decision that all three are necessary.
- Need to consider whether this would create a hierarchy in victims – i.e., victims of sexual violence get their views heard but victims of other crimes don't. Another reason to ensure it is not worded an obligation. Unlike other crimes, the sexual nature requires views of victims because it can be subjective.
- No need to include objective/subjective explicitly as it makes it quite rigid. The footnote seems the best way. The word “may” makes it an explanation rather than a legal obligation -> “An act may be sexual in nature depending on the overall circumstances, including if it was intended to be sexual by the perpetrator or if was considered as such by the victim or affected community”

5. Should the definition have examples?

- Considering the above, is it possible to define tightly enough without examples?
- What are the positive/negatives of examples?
- Would by necessity have to be explicitly a non-exhaustive list.
- How would we implement the examples – in the text of the element or in a footnote?
- Is there example of this having been done in domestic legislation or previously in the EoC?
 - Domestic: the sexual assault laws we have reviewed do not contain examples. However, it is common for a wider variety of provisions covering certain types of sexual violence to be included in domestic legislation (e.g., exhibitionism, voyeurism, sexual harassment, FGM, etc).
 - In the EoC no crimes list examples of conduct that could fall into the crime. With the exception of the crime against humanity of enslavement (footnote 11) and sexual slavery (footnote 18) which state in relation to “similar deprivation of liberty” that: “It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.”
- What examples would we use? All examples we have come across, those with the most state practice, those previously recognised in ICL?
 - *I think using those from ICL would be the most appropriate course of action. Firstly, this covers the most prevalent and the remainder (e.g., voyeurism, exhibitionism) are more relevant in a domestic setting; secondly, I think it would be easier to persuade State to include them if we can show they have already been previously recognised as sexual violence under ICL (nullum crimen sine lege).*

Benefits of including examples:

- Provides guidance to ICC prosecutors, defence and judges, as well as domestic prosecutors, defence and judges.
- Enables a broad view of sexual violence to be concretised into examples.

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- Could make explicit reference to certain acts, such as forced nudity and circumcision, which have not been recognised before the ICC.

Negatives of including examples:

- It would be impossible to list every possible example of sexual violence.
- Would limiting the examples to the most common/most widely accepted have the effect of: 1) creating a hierarchy between acts of sexual violence, with the examples seen as the most serious; 2) unintentionally limit the scope of sexual violence as these will be the main focus.
- Will it make the process of getting the amendment through more difficult – gives states more to disagree with.
- Is it more appropriately left to the judges discretion?

Thought/Opinions/Meeting Notes

Do we need to include? Other definitions in the Elements of Crimes do not include examples. However, is it necessary to include to ensure that judges are pointed in the right direction.

Would adding examples be adding an additional element that no other crime has – an extra burden for the prosecution? Outweighed by the benefits to explicitly pointing judges towards a progressive and broad interpretation of the crime. The need for this has clearly been seen by the fact that certain examples (nudity/castration) which have been considered in ICL jurisprudence but not by ICC.

Is the point of the examples to deal with the gravity requirement? I.e., to show that conduct such as forced nudity is explicitly accepted as the same gravity.

Would need to be obvious that these examples are not part of the element itself but a non-exhaustive list of examples. To put in footnote.

Examples important to cover explicitly the conduct that is *clearly* sexual in nature, and yet, the ICC judges have failed to recognise. Important to show the breadth and range of the crime – physical acts, non-physical acts, gravity. Examples could be a tool to educate judges both internationally and domestically.

Forced nudity could be in public or private – for example, stripping someone naked in a prison cell even if only in front of the perpetrator.

General consensus that reproductive rights and forced marriage will likely be met with opposition from states. For e.g., forced abortion and forced marriage have been recognised in ICL – but not in state practice (with the exception of Latin America). We need to find wording that would include these crimes without it being explicit – suggestion of “causing injury/violent acts to sexual or reproductive body parts”. This would be broad enough to cover forced abortion.

The examples should be those that deal with

1. gravity issue,
2. unwillingness of judges to see non-physical acts,
3. try to make inroads into forced marriage, abortion (subtly),
4. causing injury/touching a sexual body part.

In order to make the list realistic we will stick to acts that have previously been accepted by ICL jurisprudence, and have at least some state practice.

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What examples?

From international criminal law (note I've removed footnotes, but see fully cited list in ICL table and Hague Principles):

- **Beating, biting mutilating or otherwise causing injury to a sexual body part;**
- Causing someone to form a reasonable apprehension of fear of acts of sexual violence, including through sexual threats;
- **Causing the victim to masturbate himself or herself or another person;**
- **Causing the victim to witness acts of a sexual nature;**
- **Forced abortion;**
- Forced marriage;
- **Having someone undress partially or fully in public while performing physical activities such as dancing, exercising or marching whilst nude;**
- Inspecting someone's sexual body parts;
- Inspecting the occurrence of menstruation;
- **Kissing or licking the victim's body, especially a sexual body part;**
- **Touching the victim in a sexual way, such as touching a sexual body part, including with a sexual body part, weapon or other object.**

Additional from domestic and human rights

- Voyeurism
- Sexual harassment
- Forced pornography/distribution of pornography

6. How should the definition be formulated?

Discussion of the importance of not inadvertently making the crime more difficult to prosecute – i.e., the need to not add additional elements that need not exist.

This question relates to how the definition and its components should be formulated. Remembering that the Elements of each crime are composed of elements of crimes that describe the “conduct, consequences and circumstances associated with each crime, they are generally listed in that order”.⁹¹

Proposal to include the definition of ‘acts of a sexual nature’ in the first Element – conduct. Put the coercive behaviours and circumstances into the second element (circumstances) as is done for the definition of rape.

Aspects of the definition that reflect *how to interpret* the crime (e.g., looking at the circumstances surrounding the crime) should be in a footnote, as not specifically an element of the crime. The same applied for examples.

⁹¹ Elements of Crimes, General Introduction, para. 7.