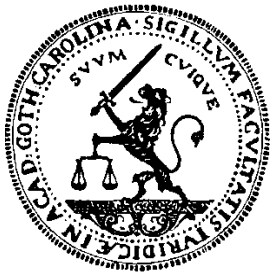

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Adjudication of Gender Based Crimes against Women in International Criminal Courts and Tribunals

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Summary

Sexual crimes against women have always been a part of war and have occurred in virtually every armed conflict throughout human history. For a very long time, and still today in some cultures, women were not seen as equal to men. Thus, gender based crimes against women were almost invisible to international criminal law. While these crimes were largely ignored after World War I and II, things have recently started changing for the better. This change started in the 1990's with the establishment of the ICTY and ICTR, as the first international criminal tribunals which had a mission to also punish crimes against women. These tribunals were the first ones that explicitly included rape as a crime against humanity in their statutes and their jurisprudence is of crucial importance for the prosecution of gender based crimes against women. The ICTR in *Akayesu* provided the first definition of rape in international criminal law and set the precedent that rape could constitute genocide. The ICTY in *Kunarac* expanded the definition of rape and also became the first international criminal tribunal to convict a perpetrator for enslavement for sexual reasons (sexual slavery). The ICC further continued the work of the *ad hoc* tribunals and expanded the list of gender based crimes against women by including in its statute several crimes that had never before been explicitly criminalized. Similarly, the SCSL became the first international criminal tribunal to explicitly recognize forced marriage as a crime against humanity. This thesis aims to widen the knowledge of this issue and provide an overview and analysis of the treatment of gender based crimes against women in international criminal law.

Preface

As someone whose childhood was tarnished by the horrors of war in besieged Sarajevo, I never thought that I would be able to read or write about war. But as someone personally affected by such events, I felt it necessary to read numerous reports, testimonies and judgments to understand the factors motivating human beings to commit some of the worst crimes possible. While it was, at times, disturbing and heartbreaking, I am happy that I chose this topic as it has provided me with the inspiration and drive to assist efforts to increase protections for women during armed conflict.

This thesis is the final product of the Master's programme in International Human Rights Law at Lund University. Those two years were the best of my life with many wonderful people from all over the world. I not only have my diploma as a reminder of my time there, but something even more important and valuable: experiences and friendships that will last forever.

Several persons contributed to this thesis, in many different ways. First of all, my supervisor Ms. Iryna Marchuk, an extremely supportive and very knowledgeable professor who guided me from the beginning of the thesis-writing process. Her input and comments were invaluable and I am extremely grateful for all her guidance and help throughout the process.

Secondly, I would like to say a huge thank you to the Raoul Wallenberg Institute (RWI) and all its personnel, led by Ms Marie Tuma, who have given us a wonderful environment and resources to work with. A special thank you also goes out to Lena Olsson and everyone from RWI library that gave us access to the wonderful books that we used during the whole master programme.

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Of course, I could never forget my wonderful family: my incredible parents, my fantastic sister and my amazing best friend Lea for their love, help and endless support. Even though they were miles away I always felt as if they were by my side. And the person without whose support this thesis would never have happened and who has stood by my side for many years. Words cannot express the gratitude I owe you, my love! You have always being there for me, always believed in me and encouraged me. Thank you. 529

Finally, it is important to mention that I started an internship at the ICTY immediately after my Master's programme ended, before I had fully finished my thesis and before I had successfully defended it. In my work at the ICTY I continued dealing with sexual violence in international criminal law and learned even more about this topic.

At the ICTY I have worked with many brilliant lawyers, analysts and other (non-legal) experts who have jointly contributed to broadening my knowledge in this field and this invaluable experience will, no doubt, play important part in my future professional life.

Thank you all!

Irma

Abbreviations

AFRC	Armed Forces Revolutionary Council of Sierra Leone
CDF	Civil Defence Forces of Sierra Leone
DRC	Democratic Republic of Congo
FNI	Nationalist and Integrationist Front of Congo
FPLC	Patriotic Forces for the Liberation of Congo
FRPI	Front for Patriotic Resistance of Ituri
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
NGO	Non-Governmental Organization
RUF	Revolutionary United Front of Sierra Leone
SCSL	Special Court for Sierra Leone
UN	United Nations
UPC	Union of Congolese Patriots
US	United States of America

1. Introduction

War has existed as long as mankind and has been an integral part of human history. War and conflict are perhaps even a part of human nature itself. Every war inevitably leads to death, suffering and destruction. It has no winners: when war is waged, everyone loses.

The suffering endured by the civilian population in armed conflicts is not always the same and may vary from one victimized group to another. Gender can be an important factor when considering the effects of armed conflicts on persons: although everyone suffers, men and women generally suffer in different ways. While men are more likely to be killed or captured, women are much more likely to be subjected to rape and to suffer other sexual violence or to be displaced or deported as refugees.[1]

This master thesis will focus on the suffering of women during an armed conflict, more precisely on gender-based crimes that are committed against women, such as rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and other forms of sexual violence. These types of violence towards women have occurred in every armed conflict throughout world history, and many women are subject to violence even during peacetime. For a long time women were not seen as equal to men and not much attention was given to sexual violence and crimes against women in international criminal tribunals, such as the ones after World War II, even though rape and forced prostitution were widespread during the war.[2]

However, in recent years more attention has been paid to gender based crimes against women due to the developments in international criminal law by specific *ad hoc* tribunals (that is the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda), the International Criminal Court and the Special Court for Sierra Leone. These developments are very welcome and very important. However, even more attention and effort needs to be paid to these issues, for several reasons. Firstly, it is necessary to make it absolutely clear that crimes of sexual violence are no longer ignored and will not go without punishment. Hopefully, this will eventually lead to the reduction of

[1] Brammertz, Serge and Jarvis, Michelle: "*Lessons Learned in Prosecuting Gender Crimes under International Law: Experiences from the ICTY*" in ed Eboe-Osuji, Chile: "Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay" (Martinus Nijhoff Publishers: 2010), page 93, at page 99

[2] Phelps, Andrea: "*Gender-based war crimes: Incidence and effectiveness of international criminal prosecution*", William and Mary Journal of Women and the Law Volume 12, Issue 2 (2006), page 499, at page 512

occurrences of crimes of sexual violence during armed conflict, as perpetrators become aware that sexual violence is not simply a part of war and that they will be held accountable for their acts. Secondly, when sexual violence crimes do occur it is necessary to establish mechanisms on how to most efficiently help the victims with their trauma and assist them in finding justice. While great advances have been made in this regard, even more can and should be done. Therefore, my thesis will focus on the jurisprudence of international criminal tribunals regarding gender based crimes against women.

1.1 Purpose

The purpose of this master thesis is to provide a legal analysis of the jurisprudence and developments in the area of gender-based crimes against women and, if possible, find lacunae in the law and provide recommendations on how it can be further improved. I will also attempt to reveal the intricacies which surround this complex area of international criminal law by scrutinizing the practice and jurisprudence of the *ad hoc* tribunals (ICTY and ICTR), the ICC as well as the SCSL.

While much has been written about gender based violence against women, the position of women (in general and during armed conflict) has not improved: the fact is that gender based violence against women is still very widespread and is a part of virtually all armed conflicts in the world. Therefore, I believe more academic discussion, legal analysis and research is necessary about these issues, especially considering the discussion about potentially introducing new crimes to this area of law (such as forced marriage). While gender based crimes against women will likely never be completely eradicated from armed conflicts, putting greater focus on these issues is crucial for preventing and reducing these horrible crimes.

1.2 Methodology and materials

In the research and writing of this master thesis I shall rely mostly on the traditional legal method. This will be used in order to explore and interpret the case law of the relevant international criminal courts and tribunals regarding the topic of the thesis. This method will be used together with a gender-oriented perspective, as the thesis deals with issues which require the focus to be put on gender related issues specific to women. I will also compare the similarities and differences between the jurisprudence of the different international criminal law tribunals, as well as their statutes, and try to establish their approaches to gender based crimes against women and

thereby establish the current position of international criminal law regarding these crimes.

In my thesis I will rely on academic writing and on the case law of international criminal tribunals, mostly of the ICTY and the ICTR. However, case law of other tribunals will be used as well, such as the relevant jurisprudence of the ICC and SCSL. Case law preceding the *ad hoc* tribunals, such as case law of the Tokyo and Nuremburg tribunals, might be briefly mentioned in order to offer a historical perspective as to the development of gender based crimes.

I will also rely upon various international legal instruments, such as Statutes of the international criminal courts and tribunals and their rules of procedure and evidence, international conventions, UN Security Council Resolutions, relevant UN reports, etc.

1.3 Delimitations

This study is limited to the analysis of gender based crimes against women in the context of genocide, crimes against humanity and war crimes.

In international criminal law attention has also been devoted to gender based violence against male victims, which has become acknowledged on the same par as violence directed against women. However, this is a very complex issue which should be addressed separately and comprehensively. Therefore, it falls outside the scope of this thesis.

Many modern international criminal courts and tribunals, as well as some national courts, deal with the prosecution of gender based violence against women. However, the focus of this thesis will only be on jurisprudence of the ICTY, ICTR, ICC and SCSL. Due to space limitations the thesis will not deal comprehensively with each individual crime. Instead, the thesis will provide a wider overview and reveal challenges which appear when dealing with gender based crimes against women.

1.4 Structure

This thesis is divided into several parts. The introductory part describes the historical development of gender based crimes in international criminal courts and tribunals and introduces definitions of legal terms relevant to

understand gender based crimes against women. It also outlines the applicable legal instruments.

The main part of the thesis explores specific gender based crimes that occur in the context of genocide, crimes against humanity and war crimes. The specific crimes that are subject to the research inquiry are rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, any other form of sexual violence and forced marriage.

Following the main part of the thesis is a section on procedural guarantees when prosecuting gender based crimes against women, including the protection of vulnerable victims and witnesses. These measures are generally applicable to all of the individual crimes listed in the thesis.

2. Historical development

2.1 Introduction

Sexual crimes against women have always been a part of war and armed conflict and they have occurred in probably every armed conflict in the world.[3] For a very long time in history, and still today in some cultures, women were not seen as equal to men. They have been raped and sexually abused during wars, and often regarded as trophies of war and property of men given to soldiers to boost their morale.[4] The approach of international criminal law towards gender based crimes against women can generally be divided into four historical periods.

2.2 Prior to World War II

Although many armed conflicts occurred in modern history prior to World War II and although crimes against women were committed in all of them, gender based crimes were not recognised in international law and largely went ignored.

The 1907 Hague Convention,[5] one of the major international humanitarian law instruments, does not include any explicit references to gender based crimes. However, the Hague Convention contained certain provisions which could be interpreted as applying to gender crimes, such as provisions on crimes against "family honour and rights."[6] This interpretation was not invoked in practice,[7] and these provisions were not used for punishing crimes against women. Therefore, gender based crimes committed against women often went ignored and unpunished.

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[3] Copleon, Rhonda: "*Gender crimes as war crimes: integrating crimes against women into international criminal law*", McGill Law Journal Volume 46, Issue 1 (2000), page 217, at page 220

[4] Palmer, Amy: "*An evolutionary Analysis of gender-based war crimes and the continued tolerance of 'forced marriage'*", Northwestern University Journal of International Human Rights Volume 7 (2009), page 128, at page 129

[5] Hague Convention Respecting the Laws and Customs of War on Land of 18 October 1907, available at www.icrc.org/ihl.nsf/full/195 (20.09.2012)

[6] Article 46 states "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected"

[7] Erb, Nicole Eva: "*Gender-based crimes under the draft statute for the permanent International Criminal Court*", Columbia Human Rights Law Review Volume 29, Issue 2(1997-1998), page 401, at page 407

2.3 World War II Tribunals

After World War II, international criminal law witnessed many developments. In light of the widespread atrocities committed by the Nazi regime of Adolf Hitler, the Allied forces discussed the possibility of setting up a tribunal tasked with the adjudication of those crimes. In 1945, the representatives of the United States, the United Kingdom, the Soviet Union and France signed the London Agreement,[8] which was later supported by 19 other countries.[9] By this Agreement the Nuremberg International Military Tribunal was created in order to bring to justice Nazi leaders who were guilty of core international crimes committed during World War II. In the course of the trial 22 persons were tried.[10]

At the same time (1946), US Army General Douglas MacArthur, under the powers given to him by the Allied States, issued a special proclamation by which the International Military Tribunal for the Far East (IMTFE or Tokyo IMT) was established. In its work the Tokyo IMT convicted 25 Japanese defendants for their role in World War II. Both Tribunals had the same mandate – to prosecute crimes against peace, war crimes and crimes against humanity.[11] Even though the tribunals had ample evidence that acts of sexual violence against women had been committed on a large scale and had the possibility to prosecute them as crimes against humanity or as war crimes, they failed to do so.

However, the Tokyo Tribunal did prosecute the crime of rape and several Japanese officials were convicted for violations of laws and customs of war which included rape and sexual slavery. Even so, these crimes were only prosecuted alongside other war crimes or crimes against humanity, which meant that gender based crimes were not considered to be severe enough to stand alone.

Hence, gender based crimes against women remained very under-represented. Most notably, the systematic rape and sexual slavery by the Japanese imperial army of as many as 200 000 women was completely

[8] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal of 8 August 1945, available at http://www1.umn.edu/humanrts/instree/1945a.htm (20.09.2012)

[9] Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxemburg, The Netherlands, New Zealand, Norway, Panama, Paraguay, Uruguay, Venezuela and Yugoslavia

[10] Schabas, William A.; Bernaz, Nadia: "*Routledge Handbook of International Criminal Law*" (Taylor & Francis: 2011), page 295

[11] Ibid

ignored in the Tokyo trials.[12] These women were referred to as "comfort women" and were forced to be prostitutes for Japanese soldiers as part of official government policy, for which the Japanese government accepted responsibility and apologized, but only in 1992.[13]

Both tribunals mostly focused their attention on crimes against peace, not war crimes or crimes against humanity and especially not crimes against women. The reasons for not prosecuting gender-based crimes after World War II have been pondered over by many scholars. Some argue that women rarely had power or influence in those tribunals.[14] Others argue that, after armed conflicts, it is generally considered more important to prosecute crimes which have death as their outcome.[15] In any case, gender based crimes committed in World War II were not adequately prosecuted.

Finally, as a result of the atrocities committed during World War II, in 1948 one of the fundamental instruments of international criminal law was adopted, the Genocide Convention.[16] It also remains largely silent regarding gender based crimes, as do its *travaux preparatoires*.[17] It does not expressly list gender based crimes as amounting to genocide, although certain gender based crimes (such as forced abortion or forced sterilization) could be covered by the Genocide Convention, under Article 2(d) - imposing measures intended to prevent births within the group, and although in the jurisprudence of the *ad hoc* tribunals rape has been recognized as amounting to genocide when the requisite intent is fulfilled.

These issues will be further explored below.

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[12] Askin, Kelly Dawn: "*A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*", Human Rights Brief Volume 11, Issue 3 (2004), page 16

[13] Brouwer de, Anne Marie: "*Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*" (Intersentia: 2005), page 8

[14] Ibid

[15] Haddad, Heidi Nichols: "*Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals*", Human Rights Review Volume 12, Issue 1 (2011), page 109, at page 112

[16] Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, available at http://untreaty.un.org/cod/avl/ha/cppcg/cppcg.html (20.09.2012)

[17] See, for example: Abtahi, Hirad and Webb, Philippa: "*The genocide convention: the travaux préparatoires*" (Martinus Nijhoff Publishers: 2008)

2.4 ICTY and ICTR

After the Nuremberg and Tokyo IMTs, there was no progress in international criminal law for a long time with regards to gender based crimes. Further developments of the jurisprudence took place again in the 1990's following the bloodshed in Yugoslavia and Rwanda and the establishment of *ad* hoc international criminal tribunals for these countries (ICTY and ICTR).

2.4.1 ICTY

The dissolution of the former Yugoslavia prompted a series of armed conflicts in the beginning of the 1990's. Mass atrocities took place and thousands of civilians were killed, wounded, expelled from their homes, tortured, sexually abused and held in detention camps. Therefore, the UN Security Council, acting within its mandate under Chapter VII of the UN Charter, adopted Resolution 827 and established the ICTY in 1993.[18] Although questions were raised about the legality of the UN Security Council resolution,[19] the ICTY has been one of the key institutions shaping contemporary international criminal law.

The tribunal's mandate is to prosecute persons accused of: grave breaches of the Geneva Conventions of 1949; violations of the laws or customs of war; genocide; and crimes against humanity in the conflict in former Yugoslavia. The ICTY has indicted 161 persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia.[20]

Before the establishment of the ICTY, various women's groups exerted significant pressure in order to ensure prosecution of gender based crimes against women. They did not want these crimes to go unpunished, as was

[18] United Nations Security Council Resolution 827 of 25 May 1993; The main aim of the Security Council for establishing the ICTY was to "*put an end to such crimes and take effective measures to bring to justice the persons who are responsible for them*." – Preamble of the Statute of the ICTY; The ICTY's mandate is limited in time and it should conclude its work by 31st December 2014.

[19] ICTY, case IT-94-1 *Prosecutor v Tadić (Prijedor)*, Trial Chamber Judgment of 7 May 1997

[20] There are 35 ongoing proceedings for 35 accused (including appeal procedures), and the proceedings for 126 accused have been concluded. 78 individuals have been indicted for sexual violence crimes, and sexual violence was contained in 24 Judgments. – United Nations, Department of Peacekeeping Operations, "*Review of the sexual violence elements of the Judgments of the International Criminal Tribunal for the former Yugoslavia, the International Criminal tribunal for Rwanda, and the Special Court for Sierra Leone in the light of Security Council Resolution 1820*", page 29, available at www.unrol.org/article.aspx?article_id=123 (20.09.2012)

the case in previous conflicts.[21] This pressure paid off and the ICTY, in its Statute, explicitly mentions rape as a crime against humanity for the first time in international criminal law.[22] Furthermore, a number of developments occurred in the ICTY's case law as well. In the *Čelebići camp case*[23] the judges held that rape could constitute torture, which it reiterated in the *Furundžija case*.[24] In the *Kunarac case*[25] the ICTY issued the first indictment based solely on crimes of sexual violence against women. One of the accused, Kunarac, was also convicted of the enslavement of women, representing the first time that enslavement was charged as a crime of sexual violence (sexual slavery).[26]

2.4.2 ICTR

In 1994, around 800 000 people were killed in the armed conflict in Rwanda that waged for 100 days. Similarly to the situation in the former Yugoslavia, the conflict was a result of long-lasting tensions between ethnic groups, the Hutu and the Tutsi, where the Hutu turned against the Tutsi. The UN Security Council followed the same path as with the conflict in the former Yugoslavia. In November 1994 it acted under Chapter VII of the United Nations Charter and adopted Resolution 955, which established the ICTR.[27] According to its Statute, the ICTR is to prosecute persons who committed genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.[28]

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[21] Green, Jennifer; Copelon, Rhoda; Cotter, Patrick and Stephens, Beth: "*Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*", Hastings Women's Law Journal, Volume 5, Issue 2 (1994), page 171, at page 176

[22] ICTY Statute, Article 5(g)

[23] ICTY, case IT-96-21 *Prosecutor v Mucić et al. (Čelebići Camp)*, Trial Chamber Judgment of 16 November 1998

[24] ICTY, case IT-95-17/1 *Prosecutor v Furundžija (Lašva Valley)*, Trial Chamber Judgment of 10 December 1998

[25] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Trial Chamber Judgment of 22 February 2001

[26] Campanaro, Jocelyn: "*Women, war and international law: the historical treatment of gender-based war crimes*", Georgetown Law Journal Volume 89, Issue 8 (2001), page 2557, at page 2568

[27] United Nations Security Council Resolution 955 of 8 November 1994; Similarly as with the ICTY, the aim of the ICTR was to prosecute those responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens in the territory of neighbouring States. The court's jurisdiction *ratione temporis* is limited to acts which occurred in the period between 1 January 1994 and 31 December 1994; The ICTR has 72 completed cases, which includes 46 convictions, 10 acquittals and 16 cases pending appeal. 1 case is still in progress. Source: www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx (20.09.2012)

[28] United Nations Security Council Resolution 955 of 8 November 1994

During the armed conflict, women in Rwanda were subjected to horrific crimes. They were raped, gang-raped, sexually tortured, held in slavery or sexually mutilated.[29] Similarly to the ICTY, rape is also listed as a crime against humanity in the ICTR Statute.[30] Since gender based crimes against women were so widespread in Rwanda, the ICTR even established the Sexual Assault Committee in 1996 in order to help it investigate all the reported cases. [31]

Regarding its case law, perhaps the most important sexual violence case in the ICTR is the *Akayesu case*;[32] in which the accused Akayesu was convicted of crimes against humanity for acts of sexual assault and where it was established that sexual violence was an essential part of the genocide in Rwanda.[33]

As with the ICTY, much was expected from the ICTR with regard to proper prosecution and punishment for gender based crimes. And indeed, these tribunals' work had a very good beginning with some groundbreaking cases, such as *Kunarac,*[34] *Furundžija*[35] *and Akayesu*.[36] However, the ICTY and ICTR have later been criticized for the subsequent stagnation in the investigation and prosecution of sexual and gender based violence and for their failure to fulfil the high expectations placed on them.[37]

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[29] Human Rights Watch Report: "*Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*", 1 September 1996, page 23, available at: www.unhcr.org/ refworld/docid/3ae6a8510.html (20 September 2012)

[30] Statute of the ICTR, Article 3(g)

[31] Human Rights Watch Report: "*Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*", 1 September 1996, page 54, available at: www.unhcr.org/ refworld/docid/3ae6a8510.html (23 September 2012)

[32] ICTR, case ICTR-96-4 *Prosecutor v Akayesu*, Trial Chamber Judgment of 2 September 1998

[33] Campanaro, Jocelyn: "*Women, war and international law: the historical treatment of gender-based war crimes*", Georgetown Law Journal Volume 89, Issue 8 (2001), page 2557, at page 2569

[34] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Trial Chamber Judgment of 22 February 2001 ICTY and Appeal Chamber Judgment of 12 June 2002

[35] ICTY, case IT-95-17/1 *Prosecutor v Furundžija (Lašva Valley)*, Trial Chamber Judgment of 10 December 1998

[36] ICTR, case ICTR-96-4 *Prosecutor v Akayesu*, Trial Chamber Judgment of 02 September 1998

[37] Human Rights Watch Report: *Human Rights Watch World Report 2004 - In War as in Peace: Sexual Violence and Women's Status*, 1 January 2004, available at www.unhcr.org/refworld/docid/402bac094.html (20 September 2012)

2.5 SCSL

In 1991 a civil war broke out in Sierra Leone when an armed group known as the Revolutionary United Front (RUF) crossed over the border from Liberia in an attempt to overthrow the government of Sierra Leone. The civil war lasted 10 years during which many atrocities were committed against civilians, such as mass murders, rapes and sexual slavery.

After the end of the civil war, the Special Court for Sierra Leone (SCSL) was established by treaty between the government of Sierra Leone and the United Nations,[38] upon request by the President of Sierra Leone. This led to the passing of a Security Council resolution requesting the Secretary-General to enter into negotiations with Sierra Leone regarding such a court.[39] In July 2002, the SCSL started its work.

The SCSL is somewhat different from the other *ad hoc* international criminal tribunals: it is a treaty based *sui generis* court of mixed jurisdiction and composition.[40] The majority of judges and the Prosecutor are appointed by the Secretary-General, while the minority of judges and the Deputy Prosecutor are appointed by the government of Sierra Leone.[41] The SCSL is not a subsidiary organ of the United Nations, but it is also not part of the domestic legal system of Sierra Leone. It is a separate international institution with its own Statute and Rules of Procedure and Evidence.[42]

The SCSL has jurisdiction to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone since 1996.[43] It has so far held three joint trials of nine accused (AFRC case,[44] RUF case[45] and CDF case[46]) and the trial of Charles Taylor, the former President of Liberia.[47]

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[38] Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone, signed on 16 January 2002

[39] United Nations Security Council Resolution 1315 of 14 August 2000

[40] Secretary-General report on the establishment of a Special Court for Sierra Leone, UN Doc.S/2000/915 of 4 October 2000, para. 9

[41] Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone, signed on 16 January 2002, Article 2.

[42] Cryer, Friman and Robinson, Wilmshurst: "*An Introduction to International Criminal Law and Procedure*", (Cambridge University Press, New York: 2010), page 182

[43] Statute of the Special Court for Sierra Leone, Article 1; The Court has jurisdiction to prosecute just crimes against humanity and war crimes, but not genocide; The provisions on crimes against humanity and war crimes are similar, but not identical, to the definitions in the ICTR.

[44] SCSL, Case 16 *Prosecutor v Brima, Kamara and Kanu (AFRC case)*

[45] SCSL, Case SCSL-04-15 *Prosecutor v Sessay, Kallon and Gbao (RUF case)*

[46] SCSL, Case SCSL-04-14 *Prosecutor v Fofana and Kondewa (CDF case)*

Once appeal proceedings in the *Taylor* case are completed, the work of the SCSL will be concluded.

2.6 ICC

The Rome Statute established the International Criminal Court,[48] the first permanent international criminal court in history, with a broader jurisdiction than that of the *ad hoc* tribunals (which were limited to a certain conflict on a certain territory for a certain period). 121 states have so far ratified the Rome Statute.[49] The ICC has jurisdiction over the same crimes as the *ad hoc* tribunals, in particular war crimes, crimes against humanity and genocide.[50] However, an addition to the jurisdiction of the ICC is the crime of aggression over which jurisdiction can be exercised only after 01 July 2017.[51] With respect to other crimes, the ICC has jurisdiction if the offences were committed after the entry into force of the Rome Statute.[52]

The jurisdiction of the ICC is not intended to replace that of national courts but to complement them,[53] meaning that the ICC can only exercise jurisdiction if States are unable or unwilling to prosecute crimes themselves.[54] Moreover, the ICC may only exercise its jurisdiction after the Prosecutor (pending authorisation by the Pre-Trial Chamber) opens an investigation or after a state party refers the case to the Prosecutor.[55] A case can also be referred to the Prosecutor by the UN Security Council.[56]

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[47] SCSL, Case SCSL 03-01 *Prosecutor v Charles Taylor*; On 26 April 2012, after a very high profile trial, Charles Taylor was found guilty on all counts of the Indictment, and on 30 May 2012 he was sentenced to 50 years in prison. The Judgment has been appealed by both the Prosecutor and Defence.

[48] The Rome Statute is an international treaty that which was adopted in 1998 but only came into force on 01 July 2002.

[49] Source: www.icc-cpi.int/Menus/ASP/states+parties/ (20 September 2012)

[50] Rome Statute, Article 5

[51] This is subject to approval at the next ICC Review Conference. Review Conference of the Rome Statute, Resolution RC/Res.6 – The Crime of Aggression, available at www.icc-cpi.int/iccdocs/asp_docs/resolutions/rc-res.6-eng.pdf (20.09.2012)

[52] Rome Statute, Article 11; Up to 20 September 2012 the court had started 16 cases in 7 situations (Uganda, Democratic Republic of the Congo, Darfur - Sudan, Central African Republic, Republic of Kenya, Libya and Cote d'Ivoire).

[53] Brouwer de, Anne Marie: "*Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*" (Intersentia: 2005), page 20

[54] Rome Statute, Article 17

[55] In such situations either the state where the act occurred or the state of nationality of the accused must be party to the Rome Statute (or accept jurisdiction by a Declaration) for the Court to have jurisdiction.

[56] In which case it is not necessary for the state where the act occurred or the state of nationality of the accused to be party to the Rome Statute – Rome Statute, Articles 12 to 16

Another important characteristic of the ICC legal framework is the existence of the Elements of Crimes, a non-binding document containing legal elements of each crime which are designed to assist the Court in the interpretation and application of legal provisions on war crimes, crimes against humanity and genocide.[57]

As to the developments in the prosecution of gender based crimes, it must be noted that the ICC made significant steps forward and was the first international criminal court to define rape, sexual assault, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization as separate and distinct war crimes and crimes against humanity.[58] This focus on gender issues was a result of strong lobbying by over 200 women's organizations when the Rome Statute was drafted.[59]

[57] Rome Statute, Article 9

[58] Brouwer de, Anne Marie: "*Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*" (Intersentia: 2005), page 21

[59] Ibid, page 20

3. Definition of gender and contextual elements

3.1 Introduction

As stated in previous chapters, gender based crimes are recognized in the Rome Statute of the International Criminal Court and in the jurisprudence of the *ad hoc* intentional courts and tribunals. This jurisprudence deals with gender based crimes as crimes against humanity (particularly rape and sexual slavery),[60] war crimes and genocide. Before discussing specific crimes, it is necessary to first define what is meant by gender based crimes against women and to then describe the contextual elements of crimes against humanity, war crimes and genocide, in order to avoid repetition when assessing the specific crimes dealt with by this thesis.

3.2 Definition of gender based crimes against women

Gender based crimes are result of gender based violence. Though there are many connotations of gender based violence in national criminal laws and human rights law, there is a disagreement and lack of precision over the definitions of gender based crimes in international criminal law.

The term "violence" is normally understood as "*the intentional use of physical force or power, threatened or actual, against oneself, another person or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, mal-development or deprivation*."[61] The term "gender" is in the United Nations often used as a synonym to the word "women".[62]

[60] See eg. Oosterveld, Valerie: "*Gender-Based Crimes Against Humanity*" in ed Sadat, Leila Nadya: "Forging a Convention for Crimes Against Humanity" (Cambridge University Press: 2011), page 78

[61] World Health Organization, *World Report on Violence and Health*, page 5, available at www.who.int/violence_injury_prevention/violence/world_report/en/ (20.09.2012)

[62] Oosterveld, Valerie: "*Gender-Based Crimes Against Humanity*" in ed Sadat, Leila Nadya: "Forging a Convention for Crimes Against Humanity" (Cambridge University Press: 2011), page 78, at page 78

However, gender can also be seen as a wider concept than just "women", as gender is not the same as sex.[63] The UN Office of the Special Adviser on Gender Issues outlines gender as "*the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/time-specific and changeable. Gender determines what is expected, allowed and valued in a women or a man in a given context.*"[64]

In international criminal law, specifically in the Rome Statute, the term gender "*refers to the two sexes, male and female, within the context of the society*."[65] When gender based crimes occur in the context of genocide, an armed conflict or a widespread or systematic attack against the civilian population, the first crime that comes to mind is rape. Having said that, there is a greater diversity of sexual and non-sexual gender based crimes directed against women *i.e.* sexual slavery, forced prostitution and forced marriage.

The recent report of the UN Security Council provides a definition of sexual violence related to armed conflict as "*incidents or patterns [...] of sexual violence, that is rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity against women, men or children. Such incidents or patterns occur in conflict or post-conflict settings or other situations of concern (e.g. political strife). They also have a direct or indirect nexus with the conflict or political strife itself, that is, a temporal, geographical and/or causal link.'*"[66]

Therefore, it can be said that gender based violence is violence that targets women or men because of their sex and/or their socially constructed gender roles. Sexual violence is often systematic and is carried out with the purpose of destabilising populations and destroying bonds within communities and families, advancing ethnic-cleansing, expressing hatred for the enemy, or supplying combatants with sexual services.

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[63] Oosterveld, Valerie: "*Gender-Based Crimes Against Humanity*" in ed Sadat, Leila Nadya: "Forging a Convention for Crimes Against Humanity" (Cambridge University Press: 2011), page 78, at page 79

[64] www.un.org/womenwatch/osagi/conceptsandefinitions.htm (20.09.2012)

[65] ICC Rome Statute, Article 7(3)

[66] UN Secretary-General, *Conflict-related sexual violence: report of the Secretary-General*, 13 January 2012, A/66/657*–S/2012/33*, para 3, available at: http://www.unhcr.org/refworld/docid/4f27a19c2.html (20 September 2012)

3.3 Contextual elements of crimes against humanity, genocide and war crimes

Crimes under international criminal law exist only when the criminal acts are committed in a certain context. This means that certain contextual elements must exist in order for an act to be considered as a crime against humanity, war crime or an act of genocide and not, for example, an "ordinary" act of murder or rape which would not come within the scope of international criminal law. Contextual elements are those elements (or circumstances) that are common to all underlying crimes against humanity, war crimes or acts of genocide that characterize them as international crimes. Only when these common contextual elements exist will the specific elements concerning each of the specific crimes be assessed and analyzed.

3.3.1 Crimes against humanity

Given that the contextual elements for crimes against humanity are well established in the jurisprudence of international criminal courts and tribunals, there is no need to examine them in detail in this thesis. It is sufficient to remind the reader what contextual elements have to be established for acts to constitute crimes against humanity. These elements separate international crimes from ordinary criminal acts, such as murder due to jealousy or ordinary theft, which are not of concern to the international community and are outside the scope of international criminal law.

These elements are listed in the ICC Elements of Crimes, in Article 7:

3. *The conduct was committed as part of a widespread or systematic attack directed against a civilian population.*
4. *The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.*

Regarding the first element, an attack usually involves the use of armed force. However the element can also encompass any mistreatment of civilian population even where there is no use of armed force.[67] The

[67] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Appeal Chamber Judgment of 12 June 2002, para 86; ICTR, case ICTR-96-4 *Prosecutor v Akayesu*, Trial Chamber Judgment of 02 September 1998, para 581; ICC Elements of Crimes, Crimes against humanity – Introduction, para 3

widespread or systematic test is not cumulative; it is sufficient to establish that an attack existed and that it was either widespread or systematic. The "widespread" element generally denotes a large scale of the attack and number of victims,[68] which is assessed on a case-by-case basis. The term "systematic" reflects a high degree of organization that features, among others, patterns, continuous commission, use of resources, as well as planning and political objectives.[69]

Furthermore, the attack must be directed against "any civilian population" regardless of nationality. The term "civilian" denotes that the attack is directed towards non-combatants, while the term "population" denotes that a larger number of persons are subject to the attack, rather than isolated acts against individuals. The civilian population must be the primary object of the attack which means that attacks directed against legitimate military objectives would not qualify as crimes against humanity.[70]

In order to find a person guilty of crimes against humanity, a link must exist between the accused person and the attack. In brief, not only must the act of the accused objectively fall within context of the broader attack, but also he/she must be aware of the broader context. As the ICTY stated: "*Thus to convict an accused of crimes against humanity, it must be proved that the crimes were related to the attack on a civilian population (occurring during an armed conflict) and that the accused knew that his crimes were so related*."[71]

The ICTY held that awareness, wilful blindness or knowingly taking a risk that the act is a part of an attack would be sufficient to establish the connection between the perpetrator and the attack.[72] While it is not clear whether the ICC will completely follow the ICTY's lead, it is likely that the standard for establishing awareness will not be high, as it is not necessary that the perpetrator had detailed knowledge of the act or its characteristics. The perpetrator's awareness can be inferred from relevant facts and

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[68] ICTY, case IT-94-1 *Prosecutor v Tadić (Prijedor)*, Trial Chamber Judgment of 07 May 1997, para 206; ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Trial Chamber Judgment of 22 February 2001, para 428; ICTR, case ICTR-96-11 *Prosecutor v Nahimana*, Appeal Chamber Judgment of 28 November 2007, para 920; ICC, case ICC-02/05-01/09, *Prosecutor v al Bashir*, First Arrest Warrant of 04 March 2009, para 81

[69] Cryer, Friman and Robinson, Wilmshurst: "*An Introduction to International Criminal Law and Procedure*", (Cambridge University Press, New York: 2010), page 237

[70] Ibid, pages 241-242

[71] ICTY, case IT-94-1 *Prosecutor v Tadić (Prijedor),* Appeal Chamber Judgment of 15 July 1999, para 271; ICTR, case ICTR-97-20 *Prosecutor v Semanza*, Trial Chamber Judgment of 15 May 2003, para 326

[72] Cryer, Friman and Robinson, Wilmshurst: "*An Introduction to International Criminal Law and Procedure*", (Cambridge University Press, New York: 2010), page 244

circumstances, and in the vast majority of cases the existence of a widespread and systematic attack would be notoriously known and could not be reasonably denied by the perpetrator.[73]

Finally, it should be noted that for crimes against humanity to exist, there is no need to prove a nexus to armed conflict, although the practice of the international criminal tribunals is not fully consistent regarding this issue. The Nuremberg and Tokyo International Military Tribunals required a nexus to war crimes or aggression (that is to an armed conflict), as did the Statute of the ICTY.[74] However, this element was subsequently omitted in the ICTR and ICC Statutes. Nowadays it is well settled that a nexus to armed conflict is not required for crimes against humanity and the Statute of the ICTY is only an exception or anomaly in that regard.[75] This was also confirmed by the jurisprudence of the ICTY, which admits that the requirement of a nexus to armed conflict is no longer necessary in customary international law, but that it was, nonetheless, included in the Statute and must exist in cases before the ICTY.[76]

Similarly, there is no requirement of a discriminatory intent, that is that the crimes against humanity are committed on national, ethnic, racial or religious grounds. Such provisions were included only in the Statute of the ICTR,[77] but not in the Statutes of the ICTY or ICC, or other hybrid tribunals (SCSL for example). Therefore, these provisions in the ICTR Statute are also an exception to the rule.

3.3.2 War Crimes

The provisions of the Rome Statute on war crimes which are relevant for this thesis (as they contain sexual crimes) are Articles 8(2)(b) and 8(2)(e), which deal with *"other serious violations of the laws and customs applicable in international armed conflict"* in international and non-international armed conflicts respectively.

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[73] Cryer, Friman and Robinson, Wilmshurst: "*An Introduction to International Criminal Law and Procedure*", (Cambridge University Press, New York: 2010), page 244

[74] Article 5 of the Statute states that the ICTY has the power to prosecute persons for crimes against humanity "committed in armed conflict"

[75] Cryer, Friman and Robinson, Wilmshurst: "*An Introduction to International Criminal Law and Procedure*", (Cambridge University Press, New York: 2010), page 235

[76] See, for example, ICTY, case IT-94-1 *Prosecutor v Tadić (Prijedor)*, Trial Chamber Judgment of 7 May 1997, para 627 and Appeal Chamber Judgment of 15 July 1999, paras 282-288

[77] ICTR Statute, Article 3

In the ICC Elements of Crimes, all crimes under these provisions have two common elements (with the only difference being in the first of the two elements below regarding international or non-international armed conflict):

1. *The conduct took place in the context of and was associated with an international armed conflict.*[78]

[1. The conduct took place in the context of and was associated with an armed conflict not of an international character.] [79]

2. *The perpetrator was aware of factual circumstances that established the existence of an armed conflict.*[80]

It must be noted that not every crime committed during an armed conflict amounts to a war crime. A murder committed on the ground of jealousy or between neighbours over land, for example, will not constitute a war crime even if it is committed during an international or internal armed conflict. The formulation "in the context of and was associated with" is meant to distinguish war crimes from ordinary criminal behaviour.[81]

Regarding the first element, the term "in the context of" an armed conflict refers to the temporal and geographic scope: the conduct occurred during an armed conflict and on a territory in which there is armed conflict. The term "associated with" refers to the nexus between the conduct and the conflict, meaning that the conduct must be closely related to the armed conflict.[82]

International armed conflicts are defined under common Article 2 of the Geneva Conventions.[83] They are defined as "*all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them*" and as "*all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance*." The ICTY stated that an international armed conflict "*exists whenever there is a resort to armed force between States*."[84] It also clarified that "*[a]ny difference arising between two States and leading to the*

[78] For Article 8(2)(b) of the Rome Statute

[79] For Article 8(2)(e) of the Rome Statute

[80] Identical for Article 8(2)(b) and (8)(2)(e) of the Rome Statute

[81] Dörmann, Knut: "*Elements of War Crimes under the Rome Statute of the International Criminal Court Sources and Commentary*" (Cambridge University Press: 2004), page 19

[82] Cryer, Friman and Robinson, Wilmshurst: "*An Introduction to International Criminal Law and Procedure*", (Cambridge University Press, New York: 2010), page 285

[83] Common Article 2 of the Geneva Conventions of 1949, available at www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp (20.09.2012)

[84] ICTY, case IT-94-1 *Prosecutor v Tadić (Prijedor)*, Decision on the defence motion for interlocutory appeal on jurisdiction of 2 October 1995, para 70

intervention of members of the armed forces is an international armed conflict and [i]t makes no difference how long the conflict lasts, or how much slaughter takes place."[85]

"Non-international armed conflicts" are armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups. Article 8(2)(f) of the Rome statute defines non-international armed conflicts as "*armed conflicts not of an international character and [...] [not] situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature*." These examples are used to distinguish non-international armed conflicts from other forms of violence which are not covered by international humanitarian law.[86] Whether a situation will be characterized as a non-international armed conflict, as internal disturbances or merely as tensions will generally depend on the intensity (or protracted duration[87]) of the conflict and organization of the parties.[88]

As for the temporal and geographic scope of the conflict and protection offered by international humanitarian law, international humanitarian law will apply from the initiation of the conflict until a general conclusion of peace is reached. It applies to the whole territory of the Parties of the conflict or the territory under their control (in the case of non-international conflicts). However there are exceptions, as set out by certain provisions that are bound to hostilities and a limited territorial scope.[89]

Regarding the second element, there is no need for the perpetrator to conduct a legal evaluation on whether an armed conflict exists and what its type is, nor must he be aware of the facts that established the conflict. All that is required is his awareness of factual circumstances that establish the existence of an armed conflict.[90] While the language is less than clear, this suggests that the perpetrator only needs to know the nexus between his/her acts and the armed conflict to a lower standard than that of Article 30 of the

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[85] ICTY, case IT-96-21 *Prosecutor v Mucić et al (Čelebići camp)*, Trial Chamber Judgment of 16 November 1998, para 208

[86] Dörmann, Knut: "*Elements of War Crimes under the Rome Statute of the International Criminal Court Sources and Commentary*" (Cambridge University Press: 2004), page 385

[87] ICTY, case IT-96-21 *Prosecutor v Mucić et al (Čelebići camp)*, Trial Chamber Judgment of 16 November 1998, para 184

[88] ICTY, case IT-94-1 *Prosecutor v Tadić (Prijedor)*, Trial Chamber Judgment of 07 May 1997, para 562

[89] Dörmann, Knut: "*Elements of War Crimes under the Rome Statute of the International Criminal Court Sources and Commentary*" (Cambridge University Press: 2004), pages 24-25

[90] ICC Elements of Crimes, Article 8 – Introduction

Rome Statute, and in most cases proving the nexus objectively will be sufficient.[91] This issue is mostly theoretical, since it is difficult to imagine situations where the conduct of the perpetrator would have a nexus to the conflict, but the perpetrator wouldn't have awareness of the surrounding armed conflict.[92]

3.3.3 Genocide

Contrary to crimes against humanity, the definition of contextual elements for genocide is still a controversial and problematic issue. Genocide is defined in Article 2 of the Genocide Convention,[93] which states that "*[...] genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) *Forcibly transferring children of the group to another group*."

This same definition was transposed, *verbatim*, to the Statutes of the ICTY, ICTR and ICC. Unlike crimes against humanity, the definition of genocide does not contain an additional contextual element which relates to circumstances in which the prohibited act constitutes genocide. The contextual element was implicitly introduced in the ICC Elements of Crimes, which specify that "*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*."[94]

This contextual element encompasses two different situations: the first is where the individual accused of genocide commits the acts as part of a wider context in which other perpetrators are also committing acts of genocide (or crimes against humanity). This would be the most likely method of carrying out genocide. The second, less common, situation is

[91] Dörmann, Knut: "*Elements of War Crimes under the Rome Statute of the International Criminal Court Sources and Commentary*" (Cambridge University Press: 2004), pages 21-22

[92] Cryer, Friman and Robinson, Wilmshurst: "*An Introduction to International Criminal Law and Procedure*", (Cambridge University Press, New York: 2010), page 287

[93] Convention on the Prevention and Punishment of the Crime of Genocide, available at http://untreaty.un.org/cod/avl/ha/cppcg/cppcg.html (20.09.2012)

[94] ICC Elements of Crimes, Article 6 – Genocide

where the individual committing genocide can himself/herself effect the destruction of the targeted group, without the need for a wider pattern of similar genocidal conduct.[95] This would be, for example, if an individual had access to nuclear or chemical weapons using which they could commit genocide. Therefore, under these contextual elements, acts which do not cause a real or concrete threat to the existence of the targeted group or part thereof would not constitute genocide,[96] for example when isolated crimes are committed against a protected group but do not objectively have the possibility of destroying the group or part of it.

Contextual elements of the crime of genocide are not explicitly laid down in the Statutes of the ICTY or the ICTR. However, they could be inferred from the ICTR judgement in *Akeyasu*[97] and the ICTY Trial Judgement in *Krštić*.[98] However, the *Krštić* Appeals Chamber dismissed the necessity to prove contextual elements of genocide, arguing that they do not appear in the Genocide Convention and are not part of customary international law.[99] Therefore, the ICTY judges ruled out the contextual element as a constitutive element of genocide in its jurisprudence.

On the contrary, however, the ICC has relied upon the definition of genocide as set out in the Elements of Crimes and applied the contextual elements of genocide in the *Al Bashir Arrest Warrant case*. The Pre-Trial Chamber stated that these contextual elements were not contrary to the Statute of the ICC and its definition of genocide (and, hence, that they were not contrary to the Genocide Convention).[100] Therefore, it seems that in future proceedings contextual elements will be applied by the ICC to the crime of genocide, contrary to previous jurisprudence of the *ad hoc* tribunals. This seems quite justified if genocide is to be distinguished from "lesser" crimes and to be considered as the most serious crime that can be committed.

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[95] Cryer, Friman and Robinson, Wilmshurst: "*An Introduction to International Criminal Law and Procedure*", (Cambridge University Press, New York: 2010), page 218

[96] ICC, case ICC-02/05-01/09 *Prosecutor v Al Bashir*, Pre-Trial Chamber I Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir of 04 March 2009, para 124

[97] ICTR, case ICTR-96-4 *Prosecutor v Akayesu*, Trial Chamber Judgment of 02 September 1998, paras 520-523

[98] ICTY, case IT-98-33 *Prosecutor v Krstić (Srebrenica-Drina Corps)*, Trial Chamber Judgment of 02 August 2001, para 682

[99] ICTY, case IT-98-33 *Prosecutor v Krstić (Srebrenica-Drina Corps)*, Appeal Chamber Judgment of 19 April 2004, para 224

[100] ICC, case ICC-02/05-01/09 *Prosecutor v Al Bashir*, Pre-Trial Chamber I Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir of 04 March 2009, para 113 and paras 130-133

3.4 State or organizational policy

3.4.1 Crimes against Humanity

A controversial aspect, which has been at the heart of debate, is whether state or organizational policy is a requirement for crimes against humanity, that is whether there must be an underlying governmental or organizational policy that directs, instigates or encourages the crimes.[101] Some authorities have supported such a requirement, while others have rejected it.

This element cannot be found in the Statute of the ICTY. The Appeals Chamber of the ICTY held in the *Kunarac* case, in no uncertain terms, that a state or organizational plan or policy is not an independent element of the crime against humanity, although it can be relevant to establish the other (required) elements of crimes against humanity: "*[N]either the attack nor the acts of the accused needs to be supported by any form of 'policy' or 'plan'. There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes [...]. [P]roof that the attack was directed against a civilian population and that it was widespread or systematic are legal elements of the crime. To prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.*"[102]

On the other hand, the need for a state or organizational policy to exist is expressly recognized in the Statute of the ICC. Article 7(2)(a) states: "*'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population,* ***pursuant to or in furtherance of a State or organizational policy to commit such attack***." (emphasis added). Furthermore, the Elements of Crimes expand the above statement: "*'[P]olicy to commit such attack' requires that the State or organization*

[101] Cryer, Friman and Robinson, Wilmshurst: "*An Introduction to International Criminal Law and Procedure*", (Cambridge University Press, New York: 2010), page 237

[102] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča),* Appeal Chamber Judgment of 12 June 2002, para 98; The Appeal Chamber in case IT-98-33 *Prosecutor v Krstić (Srebrenica-Drina Corps),* Appeal Chamber Judgment of 19 April 2004, para 225

actively promote or encourage such an attack against civilian population."[103]

The ICC, while taking note of the jurisprudence of the ICTY,[104] confirmed the requirement of a state or organizational policy in several decisions. In *Katanga and Chui* the Pre-Trial Chamber of the ICC stated that this element "*ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources. Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised - as opposed to spontaneous or isolated acts of violence - will satisfy this criterion*."[105]

Moreover, in the *Authorization of an Investigation into the Situation in the Republic of Kenya* Decision, the ICC Pre-Trial Chamber expressly listed all the elements of crimes against humanity, including the state or organizational policy element. Having relied upon the case law of the ICTY, it further clarified that "*policy does not necessarily need to have been conceived at the highest level of the State machinery. Hence, a policy adopted by regional or even local organs of the State could satisfy the requirement of a State policy. [...] With regard to the term 'organizational' the Chamber notes that the Statute is unclear as to the criteria pursuant to which a group may qualify as 'organization' [...]. Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values. [...] The Chamber thus determines that organizations not linked to a State may, for the purposes of*

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[103] ICC Elements of Crimes, page 5. This was footnoted by the explanation that "*A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action*."

[104] ICC, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, of 31 March 2010, para 86.

[105] ICC, case ICC-01/04-01/07 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges of 26 September 2008, para. 396; Pre-Trial Chamber II stated largely the same in case ICC-01/05-01/08 *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Confirmation of charges of 15 June 2009, para 81

the Statute, elaborate and carry out a policy to commit an attack against a civilian population."[106]

Although the ICC jurisprudence explicitly recognizes a state or organizational policy as a requisite element of crimes against humanity, the situation is not entirely clear and disagreement exists. The issue of a state or organizational policy to commit an attack on civilian population is at the core of the Kenyan cases. The judges agreed that even non-state actors can satisfy the state or organizational policy requirement. However, disagreement evolved around the criteria that should be applied to non-state actors as well as the question whether state actors may adopt an organizational policy. The majority of judges took an expansive view of the term "organization" in Article 7(1)(b). In the *Tadić* case, the ICTY Trial Chamber found that both state and non-state actors can be behind the attacks in crimes against humanity: "*[T]he law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory*."[107]

The above Decision of the Pre-Trial Chamber of the ICC was endorsed by the Majority, with Judge Hans-Peter Kaul dissenting. In his opinion, the post-election violence in Kenya could not fall under crimes against humanity, as the contextual element of the state or organizational policy requirement had not been met. In his Dissenting opinion Judge Kaul rejected the position that any non-state actor may qualify as an "organization" and considered that only state-like organizations fell within the term "organizational policy" in Article 7(2)(a) of the Rome Statute: "*I read the provision such that the juxtaposition of the notions 'State' and 'organization' in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics of a State. Those characteristics eventually turn the private 'organization' into an entity which may act like a State or has quasi-State abilities*."[108]

According to Judge Kaul, in such situations (of an organization conducting a policy of violence) it is precisely this state-like character of the organization which elevates the crimes to an international level, instead of

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[106] ICC, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, of 31 March 2010, paras 89-92

[107] ICTY, case IT-94-1 *Prosecutor v Tadić (Prijedor)*, Trial Chamber Judgment of 07 May 1997, para 654

[108] ICC, Pre-Trial Chamber II, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC Doc. ICC-01/09 of 31 March 2010, Dissenting opinion of Judge Kral, para 51

being purely national crimes.[109] His approach to crimes against humanity was based on the understanding that only the state or state-like entities are capable of implementing policies to carry out such violence. However, in many countries individuals with access to resources may organize and implement atrocities similar to the state organised crimes against humanity. There were many examples how different rebel groups, clan leaders or other non-state actors and sometimes even state agencies on behalf of specific leaders may organise serious abuses against civilians, as was the case with the Democratic Republic of Congo, Uganda, Somalia, the Central African Republic and other places where there was an absence of efficient and legitimate state structure.[110] According to the majority in the *Kenyan* Decision, such groups would be considered as organizations under Article 7(2)(a) without the need to be state-like. However, even according to Judge Kaul's approach, such organizations could perhaps be considered as state-like, although the threshold is set higher.

Therefore, we can see that there is disagreement among international criminal tribunals about the requirement for a state or organizational policy as a contextual element of crimes against humanity. In spite of the fact that the ICTY did not recognise such policy as a contextual element of crimes against humanity, one may argue that the ICC has, through the codification of customary international law and documentation of states' *opinio juris*, established state or organizational policy as a necessary element of the crime. Additional support for this view may be taken from critical commentary of the ICTY approach, some of which claimed that the ICTY analysis of the state or organizational policy element in international customary law was rather superficial and that it was more the result of a political decision than a legal analysis.[111]

Regarding the state or organizational policy requirement, it should be noted that the jurisprudence has established that a policy does not need to be formally adopted, nor does it have to be expressly declared, nor stated clearly and precisely.[112] Furthermore, the state or organizational policy element may be satisfied by inference from the manner in which the acts

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[109] ICC, Pre-Trial Chamber II, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC Doc. ICC-01/09 of 31 March 2010, Dissenting opinion of Judge Kral, paras 51 & 52

[110] Hansen, Thomas Obel: "*The Policy Requirement in Crimes Against Humanity: Lessons from and for the Case of Kenya*" in George Washington International Law Review, Volume 43, Issue 1, page 1, at page 37

[111] Schabas, William A.: "*State Policy as an Element of International Crimes*" in The Journal Of Criminal Law and Criminology, Volume 98, Issue 3, page 953, at pages 959-965

[112] See, for example, ICTY, case IT-94-1 *Prosecutor v Tadić (Prijedor)*, Trial Chamber Judgment of 07 May 1997, para 653; ICTY, case IT-95-14 *Prosecutor v Blaškić*, Trial Chamber Judgment of 03 March 2000, paras 204-205

occur, for example by showing the improbability of the incidences being random occurrences. Moreover, it is not required to show any actual action by a state or organization, as this requirement can be satisfied by explicit or implicit approval or endorsement or by conduct that is clearly encouraged or fits within a general policy, which would include inaction designed to encourage the crimes, for example.[113] Finally, it should be noted that even the authorities that do not consider state or organizational policy as an element of crimes against humanity still regard it as evidentially relevant for establishing the other necessary elements, as mentioned above regarding the *Kunarac* case.

3.4.2 War Crimes

Article 8(1) of the Rome Statute states that "*[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes*." Although this might seem like a requirement for a state or organizational policy, as is needed for crime against humanity, this is not an element of war crimes. Therefore, unlike crimes against humanity, even a single act can qualify as a war crime. This provision is actually an indicator to assist the ICC in determining where to focus its attention and resources, that is to not focus on isolated crimes but on the most serious situations which require action. Therefore, since this formulation is only guidance, the ICC can prosecute even isolated war crimes that have a sufficient gravity and/or impact.[114]

3.4.3 Genocide

As shown in section 3.3.3 above, the definition of genocide in the Genocide Convention does not include the requirement for a contextual element of a state or organizational policy, despite the fact that it is practically impossible for the crime of genocide to occur without a plan or organization by a state or state-like entity, or by some clique associated with it.[115] Indeed, it is difficult to imagine "imposing measures" or "inflicting conditions of life" as isolated acts of an individual. Even though typically these acts would need a large number of individuals and a large scale to be carried out, the requirement of a state or organizational policy is excluded from the

[113] Cryer, Friman and Robinson, Wilmshurst: "*An Introduction to International Criminal Law and Procedure*", (Cambridge University Press, New York: 2010), page 240

[114] Ibid, page 289

[115] Schabas, William A.: "*State Policy as an Element of International Crimes*" in The Journal of Criminal Law and Criminology, Volume 98, Issue 3, page 953, at page 966

definition.[116] However, lately more attention has been directed to the role of state policy in international crimes.

The first judgements of genocide and crimes against humanity in the *ad hoc* tribunals did not hold that a state plan or policy was an element of the crime of genocide and the subsequent practice of the *ad hoc* tribunals also confirmed that a state or organizational policy was not a requirement for finding that genocide occurred. In the *Kayishema* case, the ICTR explicitly stated that "*[A]though a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without a plan or organization"*,[117] but that "*the existence of such plan would be strong evidence of the specific intent requirement for the crime of genocide*."[118]

The above statement was also confirmed by the ICTY, which stated in the *Jelisić* case that "*the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime*."[119] Therefore, similarly to crimes against humanity, the approach is that the policy element is not required, but that it is certainly useful and relevant for evidentiary reasons and for proving the *dolus specialis* of genocide.

However, some scholars nonetheless advocate such a requirement. In fact, the approach and the analysis of customary international law of the *ad hoc* tribunals regarding this issue have been criticized as at best superficial and at worst simply incorrect.[120] In fact, it is instead suggested that customary international law does, arguably, see state or organizational policy as a required element. It is argued that the contextual element of genocide found

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[116] Jessberger, Florian: "*The definition and the elements of the crime and genocide*" in ed. Gaeta, Paola "The UN Genocide Convention - a commentary" (Oxford University Press: 2009), page 87, at page 95

[117] ICTR, case ICTR-95-1 *Prosecutor v Kayishema*, Trial Chamber Judgment of 21 May 1999, para 94

[118] Ibid, para 276

[119] ICTY, case IT-95-10 *Prosecutor v Jelisić (Brčko)*, Appeal Chamber Judgment of 05 July 2001, para 48; Similarly, in ICTY case IT-98-33 *Prosecutor v Krstić (Drina Corps)*, Appeal Chamber Judgment of 19 April 2004, para 225, the ICTY stated that "*While the existence of such a plan may help to establish that the accused possessed the requisite genocidal intent, it remains only evidence supporting the inference of intent, and does not become a legal ingredient of the offence*."

[120] Schabas, William A.: "*State Policy as an Element of International Crimes*" in The Journal Of Criminal Law and Criminology, Volume 98, Issue 3, page 953, pages 959 and 964

in the Elements of Crimes of the ICC[121] is nothing else than the state or organizational policy requirement and that the omission of the word "policy" is not crucial, as the differences in expressions are purely semantic.[122]

Moreover, support for this position is found in the Report of the Commission of Inquiry on Darfur in 2005, mandated by the Security Council to investigate whether genocide occurred or not. The Commission concluded that the "*government of Sudan has not pursued a* ***policy*** *of genocide*."[123] (emphasis added). This conclusion gives rise to the argument that the Commission equalled specific intent for genocide with the existence of a state or organizational policy.

A similar approach was taken by the International Court of Justice in the *Bosnian Genocide* case,[124] which dealt with the state responsibility of Serbia for genocide in Bosnia and Herzegovina. The ICJ examined the specific intent of genocide through a state or organizational policy endorsed by Serbia and Montenegro. As William Schabas puts it, "*[n]either the Darfur Commission nor the ICJ was looking for the specific intent of individual offenders. Rather, they were looking for the specific intent of a State, like Sudan, or a State-like entity, like the Bosnian Serbs. States, however, do not have specific intent. Individuals have specific intent. States have policy. [...] Obviously, when asked whether 'acts of genocide have been committed,' bodies like the Darfur Commission and the ICJ do not pursue their search for [...] marginal individuals. Rather, they look to the policy*."[125]

Therefore, according to this approach, state or organizational policy would be a necessary requirement for finding that genocide was committed, and this approach stems from the assumption that "*this massive crime is collective in nature and cannot occur unless the action of sole individuals is*

[121] ICC Elements of Crimes, Article 6: "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"

[122] Schabas, William A.: "*State Policy as an Element of International Crimes*" in The Journal Of Criminal Law and Criminology, Volume 98, Issue 3, page 953, page 967

[123] International Commission on the Inquiry on Darfur, Report of the International Commission of the Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc. S/2005/60 of January 25, 2005, para 518

[124] ICJ, Case concerning application of the Convention on the prevention and punishment of the crime of genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007

[125] Schabas, William A.: "*State Policy as an Element of International Crimes*" in The Journal Of Criminal Law and Criminology, Volume 98, Issue 3, page 953, page 970

masterminded, guided, directed, or supported by governmental authority or at any rate by a collective body or a multitude of organized persons."[126]

However, although these two approaches are perhaps the most common, *Antonio Cassese* has proposed a third approach to this issue, which involves approaching the individual acts of genocide differently. He claims that a contextual element is not required by customary international law for some acts of genocide, while it is for others: "*[W]ith regard to two categories of genocide, namely:*

(i) killing members of a protected group; and

(ii) causing serious bodily or mental harm to members of a protected group, one or more individuals may engage in the crime of genocide without any general policy or collective action being required for their being prosecuted and punished for that crime. [...]

I therefore submit that for these two categories of genocide international rules do not require the existence of either a widespread or systematic practice or a plan as a legal ingredient of the crime of genocide."[127]

Therefore, according to this approach, a state or organizational policy would not be necessary for defining the abovementioned categories as incidences of genocide.

On the other hand, establishing other acts[128] as incidences of genocide would require the existence of a state or organizational policy, as they presuppose or demand some kind of collective or organized action: "*[A]ctions such as deliberate deprivation of resources indispensable for the survival of members of a protected group [...], or [...] bringing about conditions of life leading to the destruction of the group, are necessarily carried out on a large scale and by a multitude of individuals in pursuance of a common plan [...]. Similarly, such measures to prevent births [...] are all activities that only state organs or other official authorities may undertake, or authorize to undertake, or at least approve or condone*."[129]

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[126] Cassese, Antonio: "*Is genocidal policy a requirement for the crime of genocide?*" in ed Gaeta, Paola: "The UN Genocide Convention – a commentary", in ed. Gaeta, Paola "The UN Genocide Convention - a commentary" (Oxford University Press: 2009), page 128, at page 131

[127] Ibid, at pages 134-135

[128] *(iii)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; *(iv)* Imposing measures intended to prevent births within the group; *(v)* Forcibly transferring children of the group to another group.

[129] Cassese, Antonio: "*Is genocidal policy a requirement for the crime of genocide?*" in ed Gaeta, Paola: "The UN Genocide Convention – a commentary", in ed. Gaeta, Paola "The

As we can see, there is still currently a debate regarding the role that state or organizational policy should play in crimes of genocide (as well as crimes against humanity). Furthermore, the debate demonstrates that the issue is far from settled.

In the chapters below I will discuss individual gender based crimes against women.

UN Genocide Convention - a commentary" (Oxford University Press: 2009), page 128, at page 135

4. Rape

4.1 Introduction

In times of war, women have always been in danger of rape and sexual violence. This is evidenced by the many examples of sexual violence towards women during war even in recent history, from World Wars I and II, to the armed conflicts in Bosnia and Herzegovina and Rwanda, to the latest conflicts in the Democratic Republic of Congo, Uganda, Sudan, etc.[130] However, even with vast examples of atrocities towards women, sexual crimes have long been overlooked and ignored as being not particularly serious. Although both men and women can be the victims of rape, data on rape indicates that it is essentially a crime committed against women.[131]

For centuries, rape was seen as something to be expected in war and a right that belonged to the conqueror: an incentive for men to enlist into the military and a way to celebrate victory – a prize of war.[132] Later, it was seen as a property crime (as a woman was often considered the property of her father or husband) or a crime against a family's or husband's honour, rather than against the victim of rape herself.[133]

Generally, there are two theories as for the motives of rape: opportunity and policy. The theory of policy suggests that rape is perpetrated as a weapon of war, systematically terrorising and harming not only women but also whole communities. The theory of opportunity suggests that rape is committed by armed men who use the chaotic circumstances of armed conflict to indulge their libidos and desires. Support for this is found in the fact that UN peacekeeping troops and NGO personnel also commit rape.[134]

International humanitarian law at the beginning of the 20th century largely ignored rape and crimes of sexual violence and left them unpunished,

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[130] For more examples see Chinkin, Christine: "*Rape and sexual abuse of women in international law*" in European Journal of International Law Volume 5, Issue 3 (1994), page 326, at page 327

[131] Ibid, at page 326

[132] Beltz, Amanda: "*Prosecuting rape in international criminal tribunals: the need to balance victim's rights with the due process rights of the accused*" in Saint John's Journal of Legal Commentary, Volume 23, Issue 1 (2008), page 167, at page 171

[133] Palmer, Amy*:* "*An evolutionary analysis of gender-based war crimes and the continued tolerance of 'forced marriage'* ", Northwestern University Journal of International Human Rights Volume 7, Issue 1 (2009), page 128, at para 13

[134] Eboe-Osuji, Chile: "*Rape and superior responsibility: international criminal law in need of adjustment*" in ed Eboe-Osuji, Chile: "Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay", page 141, at page 143

although certain documents have prohibited acts of wartime rape for hundreds of years.[135] Rape as an individual crime was not included in the Charters of either the Nuremburg or Tokyo Tribunals after World War II. Although it could have been tried as "other inhumane acts" it was not prosecuted, despite the overwhelming evidence of rape and other crimes of sexual violence, such as in Japanese comfort camps. Rape was prosecuted in the Tokyo IMT as a war crime, however there were no convictions for crimes of rape only.[136] Concerning World War II, the first instrument to expressly list rape as a crime against humanity was Control Council Law No. 10, however no crimes of rape were prosecuted under it.[137]

After World War II, rape was mentioned in Article 27 of the Fourth Geneva Convention,[138] which states, *inter alia*, 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*." However, a breach of this provision is not considered a grave breach of the Geneva Conventions and rape is not listed in Common Article 3 of the Geneva Conventions.[139] Moreover, Article 27 characterized sexual violence as an attack upon women's honour rather than an attack upon her bodily and mental integrity and thus denies the great emotional and physical harm that victims of rape suffer.[140] The two Additional Protocols to the Geneva

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[135] Meron, Theodor: "*Editorial Comment: Rape as a crime under international criminal law*" in American Journal of International Law Volume 87, Issue 3 (1993), page 424, at page 425: Rape committed by soldiers was prohibited by national military codes, such as those by Richard II and Henry V.

Boot, Machteld: revised by Hall, Christopher: "*Crimes against Humanity - Article 7(1)(g)*" in ed Triffterer, Otto: "Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article" 2nd ed (Hart Publishing: 2008), page 206, at page 206: for example, rape was prohibited in the Articles of War issued by Swedish king Gustav Adolf in 1621, as well as in the instructions by United States' president Abraham Lincoln on how soldiers should conduct themselves during war, known as the Lieber Code of 1863.

It was also prohibited as a violation of the "laws of humanity" by the 1919 Paris Peace Conference Commission Report, a report by a commission of experts established to deal with war crimes committed during World War I.

[136] Meron, Theodor: "*Editorial Comment: Rape as a crime under international criminal law*" in American Journal of International Law Volume 87, Issue 3 (1993), page 424, at page 426

[137] Boot, Machteld: revised by Hall, Christopher: "*Crimes against Humanity - Article 7(1)(g)*" in ed Triffterer, Otto: "Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article" 2nd ed (Hart Publishing: 2008), page 206, at page 207

[138] Convention (IV) relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) of 12 August 1949, available at www.icrc.org/ihl.nsf/full/380 (20.09.2012)

[139] Although Common Article 3 contains a prohibition on "outrages upon personal dignity"

[140] Boot, Machteld: revised by Hall, Christopher: "*Crimes against Humanity - Article 7(1)(g)*" in ed Triffterer, Otto: "Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article" 2nd ed (Hart Publishing: 2008), page 206, at page 207

Conventions[141] also expressly prohibited rape, but kept the same approach towards rape as the Geneva Conventions.

However, while these instruments formally prohibited rape, in practice it was usually dismissed as an inevitable by-product of war and was rarely prosecuted.[142] This continued until the 1990's and the establishment of the ICTY, ICTR and afterwards the ICC. The atrocities towards women reported in Bosnia and Herzegovina and Rwanda, such as mass rapes, existence of "rape camps", forcible pregnancies, use of rape and sexual violence as weapons of war based on policy, prompted the international community to take more account of sexual crimes.

For example, in Bosnia and Herzegovina it was reported that "*[..] rape was being used as an instrument of ethnic cleansing. Many documents were received by the Special Rapporteur in this connection. [...] Rape of women, including minors, has occurred on a large scale. [...] There is clear evidence that Croat, Muslim and Serb women have been detained for extended periods of time and repeatedly raped. [...] In Bosnia and Herzegovina and in Croatia, rape has been used as an instrument of ethnic cleansing.' [...] [R]ape has been used not only as an attack on the individual victim, but is intended to humiliate, shame, degrade and terrify the entire ethnic group. There are reliable reports of public rapes, for example, in front of a whole village, designed to terrorize the population and force ethnic groups to flee.*"[143]

Regarding the conflict in Rwanda, it was reported that "*[...] rape was extremely widespread and that thousands of women were individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery […] or sexually mutilated. [...] Rapes were sometimes followed by sexual mutilation, including mutilation of the vagina and pelvic area with machetes, knives, sticks, boiling water, and in one case, acid. [...] Young girls or those considered beautiful were particularly*

[141] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, Articles 75(2)(b) and Article 76; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, Article 4(2)(e). Both available at www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp (20.09.2012)

[142] Boon, Kristen: "*Rape and forced pregnancy under the ICC Statute: Human dignity, autonomy and consent*" in Columbia Human Rights Law Review Volume 32, Issue 3 (2001), page 625, at page 628

[143] Report on the Situation of Human Rights in the Territory of the Former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Pursuant to Commission Resolution 1992/S-1/1 of 14 August 1992, U.N. Doc. E/CN.4/1993/50 of 10 February 1993, paras 82-85

at the mercy of the militia groups, who were a law unto themselves and often raped indiscriminately."[144]

Following such horrifying reports of sexual violence against women, it was clear that international criminal law needed to give more attention to prosecuting such crimes. Hence, as previously mentioned, the ICTY and ICTR became the first international criminal tribunals to expressly list rape as a crime against humanity and war crime[145] and to prosecute those crimes. Based on the experiences of the ICTY and ICTR, the Rome Statute of the ICC included even more crimes of sexual violence.

4.2 Definition of rape in international law

National legislations generally do not have problems with clearly defining various punishable crimes, including rape. The national legislation of Bosnia and Herzegovina, for example, defines rape as compelling another person to sexual intercourse by force or threat of immediate attack upon life or body, or life or body of someone close to that person.[146] The definitions are similar in other national legislations as well. In Sweden, rape is forcing another person to have sexual intercourse or to engage in a comparable sexual act that, having regard to the nature of the violation and the circumstances in general, is comparable to enforced sexual intercourse, by violence or threat which involves or appears to the threatened person to involve an imminent danger.[147] In Germany, rape is defined as coercing another person by force, threat of imminent danger or exploiting a situation in which the victim is unprotected and at the mercy of the offender to suffer sexual acts by the offender or a third person or engage in sexual acts with the offender or a third person.[148] In France, rape is defined as any act of sexual penetration, whatever its nature, committed against another person by violence, constraint, threat or surprise.[149]

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[144] Human Rights Watch, Report: *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* of 1 September 1996, Introduction, available at www.unhcr.org/refworld/docid/3ae6a8510.html (20.09.2012)

[145] Only the ICTR Statute; The Statute of the ICTY lists rape only as a crime against humanity.

[146] Criminal Code of the Federation of Bosnia and Herzegovina, Article 203. – English version can be found at www.ohr.int/ohr-dept/legal/oth-legist/doc/fbih-criminal-code-new.doc (20.09.2012)

[147] Swedish Criminal Code, Chapter 6, Section 1. Available at http://legislationline.org/documents/section/criminal-codes (20.09.2012)

[148] German Criminal Code, Section 177. Available at http://legislationline.org/documents/section/criminal-codes (20.09.2012)

[149] French Criminal Code, Article 222-23. Available at http://legislationline.org/documents/section/criminal-codes (20.09.2012)

However, contrary to national law, defining rape in international criminal law is not nearly as clear and is, indeed, very problematic. In fact, one single definition does not exist, as no international legal instrument provides a statutory definition of rape. While the Statutes of the ICTY (Article 5(g)), of the ICTR (Article 3(g)) and of the ICC (7(1)(g)) all list rape as a crime against humanity; none of the statutes give a clear definition of rape. The closest provision of a definition can probably be found in the Elements of Crimes of the ICC.

As there was no previous definition of rape in international treaty or customary law, the ICTY and ICTR judges were in a very delicate position of formulating a definition of rape by themselves, while taking into account both the interests of victims and the right of the accused to a fair trial. Their position was made even more difficult due to the fact that there were no previous prosecutions of rape before international criminal tribunals that they could use as precedent and draw inspiration from.[150] This led to different definitions being adopted by the different tribunals.

The first international criminal tribunal to define rape was the ICTR in the *Akeyasu* case.[151] In its definition the Trial Chamber considered that rape is a form of aggression and focused on the conceptual framework of rape. It underlined that focusing on a mechanical description of the constituent acts of rape would be inadequate.[152] Therefore, the Trial Chamber stated that "*[...] rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. [...] The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.*"[153]

[150] Schomburg, Wolfgang and Peterson, Ines: "*Genuine Consent to Sexual Violence under International Criminal Law*" in American Journal of International Law Volume 101, Issue 1 (2007), page 121, at page 123

[151] ICTR, case ICTR-96-4 *Prosecutor v Akayesu*, Trial Chamber Judgment of 02 September 1998

[152] Karagiannakis, Magdalini: "*The Definition of rape and its Characterization as an Act of Genocide – A Review of the Jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia*" in Leiden Journal of International Law Volume 12, Issue 2 (1999), page 479, at page 481

[153] ICTR, case ICTR-96-4 *Prosecutor v Akayesu*, Trial Chamber Judgment of 02 September 1998, paras 597-598

It also stated that "*[s]exual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."* [154]

Therefore, in *Akayesu* the Trial Chamber attempted to emphasize that the violence was the main element of rape, rather than the acts of rape itself, like for example penetration. The Court held that sexual violence was not limited to physical invasion and could include acts which did not involve penetration. The definition given by the ICTR in the *Akeyasu* case was later followed by the ICTY in the *Čelebići camp* case,[155] where the Trial Chamber stated that "*[t]his Trial Chamber [...] sees no reason to depart from the conclusion of the ICTR in the Akayesu Judgement on this issue. Thus, the Trial Chamber considers rape to constitute a physical invasion of a sexual nature, committed on a person under circumstances that are coercive."*

The definition of rape established by *Akayesu* was considered to be groundbreaking. Firstly, because it was the first time the term "invasion" was used, which recognized that rape was a wider sexual assault on the bodily integrity of the victim, and more than just penile/vaginal penetration. Secondly, because it characterized rape as a sexual act occurring in coercive circumstances, which pleased feminist and rape victims advocates, who were concerned about the pressure placed on victims in order to establish consent in rape trials, which traditionally required the showing of force and resistance for successful prosecution.[156] The issue of consent will be further discussed below.

However, in spite of initially following the definition established in *Akeyasu*, the ICTY subsequently adopted a different view to the definition of rape. The next important case before the ICTY, which departed from the previous definition, was the *Furundžija* case.[157] In *Furundžija* the Trial Chamber mentioned the previous definition accepted by the ICTR in *Akeyasu* and the ICTY itself in the *Čelebići camp*[158] case. However, it then proceeded to disregard it, presumably as it believed that the definition

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[154] ICTR, case ICTR-96-4 *Prosecutor v Akayesu*, Trial Chamber Judgment of 02 September 1998, para 688

[155] ICTY, case IT-96-21 *Prosecutor v Mucić et al. (Čelebići Camp)*, Trial Chamber Judgment of 16 November 1998, para 479

[156] Grewal, Kiran: "*The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape*" in Journal of International Criminal Justice, Volume 10, Issue 2 (2012), page 373, at page 378

[157] ICTY, case IT-95-17/1 *Prosecutor v Furundžija (Lašva Valley)*, Trial Chamber Judgment of 10 December 1998

[158] ICTY, case IT-96-21 *Prosecutor v Mucić et al. (Čelebići Camp)*, Trial Chamber Judgment of 16 November 1998

lacked the specificity necessary in criminal law.[159] The Trial Chamber stated that there was no definition of rape in international law and instead provided their own definition, which was very much focused on the physical acts and physical elements of rape. [160]

It conducted an extensive overview of rape laws in the major legal systems of the world, trying to find common elements upon which it could base its definition. After finishing such an analysis, it stated that "*[...] the Trial Chamber finds that the following may be accepted as the objective elements of rape:*

(i) the sexual penetration, however slight:

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

(b) of the mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person.

As pointed out above, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration."[161]

From the above comparison of the two definitions, it is clear that the difference between the *Akeyasu* and *Furundžija* definitions is significant. While the first does not consider the physical acts of rape as crucial, the second focuses almost exclusively on them.

A third approach was later again articulated by the ICTY in the *Kunarac case*, [162] which further developed the *Furundžija* definition. The *Kunarac* definition kept the description of sexual acts and reference to body parts from *Furundžija*. However, it altered the second element, changing it from force or coercion to no consent to the act. In *Kunarac*, The Trial Chamber focused on sexual acts involving sexual penetration to which the victim did not consent or could not resist[163] and stated that: "*[T]he Trial Chamber understands that the actus reus of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or*

[159] ICTY, case IT-95-17/1 *Prosecutor v Furundžija (Lašva Valley)*, Trial Chamber Judgment of 10 December 1998, para 177

[160] Eboe-Osuji, Chile: "*Rape as genocide: Some questions*" in Journal of Genocide Research Volume 9, Issue 2 (2007), page 251, at page 253

[161] ICTY, case IT-95-17/1 *Prosecutor v Furundžija (Lašva Valley)*, Trial Chamber Judgment of 10 December 1998, para 185

[162] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)***,** Trial Chamber Judgment of 22 February 2001

[163] Eboe-Osuji, Chile: "*Rape as genocide: Some questions*" in Journal of Genocide Research Volume 9, Issue 2 (2007), page 251, at page 254

anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."[164]

Within the ICTY and the ICTR it would seem that the *Kunarac* definition has been used more often than the previous two approaches. A similar approach, based on non-consent, was also accepted by the SCSL.[165] However, the jurisprudence of these courts, from *Akayesu* and *Čelebići camp*[166] to *Muhimana*[167] through *Furundžija* and *Kunarac* reveals a great lack of unanimity among judges regarding the definition and analysis of rape in international criminal law.[168] This was evident even in the ICTR itself, where the Trial Chamber in *Musema*[169] and *Niyitegeka*[170] followed the *Akayesu* definition of rape, while, on the other hand, the Trial Chambers in *Semanza*,[171] *Kajelijeli*[172] and *Kamuhanda*[173] preferred the ICTY definition of rape from *Furundžija* and then *Kunarac*.

The *Gacumbitsi*[174] Trial Chamber in the ICTR was the first one that attempted to reconcile these different definitions. The Trial Chamber in *Muhimana* also suggested that the *Furundžija* and *Kunarac* definitions do not necessarily depart from the *Akayesu* one. It stated that "*[t]his Chamber*

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[164] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Trial Chamber Judgment of 22 February 2001, para 460; This definition was also confirmed by the Appeal Chamber as well, Appeal Chamber Judgment of 12 June 2002, para 128

[165] SCSL, Case SCSL-04-16 *The Prosecutor vs. Brima, Kamara and Kanu (AFRC Case)*, Trial Chamber Judgment of 20 June 2007, paras 693-694

[166] ICTY, case IT-96-21 *Mucić et al. (Čelebići Camp)*

[167] ICTR, case ICTR-95-1B *Prosecutor v Muhimana*, Trial Chamber Judgment of 28 April 2005

[168] Eboe-Osuji, Chile: "*Rape as genocide: Some questions*" in Journal of Genocide Research Volume 9, Issue 2 (2007), page 251, at page 252

[169] ICTR, case ICTR-96-13 *Prosecutor v Musema*, Trial Chamber Judgment of 27 January 2000, para 226

[170] ICTR, case ICTR-96-14 *Prosecutor v Niyitegeka*, Trial Chamber Judgment of 16 May 2003, para 456

[171] ICTR, case ICTR-97-20 *Prosecutor v Semanza*, Trial Chamber Judgment of 15 May 2003, para 345

[172] ICTR, case ICTR-98-44 *Prosecutor v Kajelijeli*, Trial Chamber Judgment of 01 December 2003, para 915

[173] ICTR, case ICTR-99-54 *Prosecutor v Kamuhanda*, Trial Chamber Judgment of 22 January 2004, para 709

[174] ICTR, case ICTR-01-64 *Prosecutor v Gacumbitsi*, Trial Chamber Judgment of 17 June 2004, para 321

considers that Furundžija and Kunarac, which sometimes have been construed as departing from the Akayesu definition of rape – as was done in Semanza - actually are substantially aligned to this definition and provide additional details on the constituent elements of acts considered to be rape. [...] The Chamber takes the view that the Akayesu definition and the Kunarac elements are not incompatible or substantially different in their application. Whereas Akayesu referred broadly to a 'physical invasion of a sexual nature', Kunarac went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape. [...] On the basis of the foregoing analysis, the Chamber endorses the conceptual definition of rape established in Akayesu, which encompasses the elements set out in Kunarac."[175] Therefore, the *Muhimana* Trial Chamber submitted that *Furundžija* and *Kunarac* tacitly accepted the *Akayesu* definition of rape.

This suggestion is debatable, but it is true that, as the *Akayesu* definition is broader, the ICTY *Furundžija* and *Kunarac* definitions fit within the *Akayesu* definition and every act of rape under the *Furundžija*/*Kunarac* definitions would also constitute rape under the *Akayesu* definition. However, the same does not apply *vice versa*, that is not every rape under the *Akayesu* definition would be considered as rape under the *Furundžija*/*Kunarac* definitions.[176]

4.2.1 Elements of rape before the ICC

The fourth approach and definition was adopted in the Rome Statute of the ICC and combines elements from the *Akayesu* and *Furundžija* definitions. The ICC approach is also broader than the *Furundžija* definition and avoids the non-consent element present in the *Kunarac* definition of rape.[177] The Rome Statute lists rape as both a crime against humanity, in Article 7(1)(g) and as a war crime, in Articles 8(2)(b)(xxii) and 8(2)(e)(vi). The ICC Elements of Crimes further elaborate and list the following common elements of rape as a crime against humanity and a war crime:

1. *The perpetrator invaded* the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.*

[175] ICTR, case ICTR-95-1B *Prosecutor v Muhimana*, Trial Chamber Judgment of 28 April 2005, paras 549-551

[176] Eboe-Osuji, Chile: "*Rape as genocide: Some questions*" in Journal of Genocide Research Volume 9, Issue 2 (2007), page 251, at page 255

[177] Oosterveld, Valerie: "*Gender-Based Crimes Against Humanity*" in ed Sadat, Leila Nadya: "Forging a Convention for Crimes Against Humanity" (Cambridge University Press: 2011), page 78, page 85

2. *The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.***

(contextual elements omitted)

The above elements also contain two footnotes, which read:

"** The concept of 'invasion' is intended to be broad enough to be gender-neutral.*

*** It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. [...]*"

The ICC Elements of Crimes adopt a part of the *Akeyasu* definition by emphasizing coercive circumstances, but also a part of the more mechanical and narrower *Furundžija* definition, which describes and focuses on the physical acts of rape.[178] The Elements of Crimes do not, however, completely focus on the issue of non-consent but rather on force, threat of force, coercion or a coercive environment. This is a mixture of the *Akayesu* and *Furundžija* definitions, (as the *Kunarac* definition was not available when the Rome Statute was adopted),[179] but it is closer to *Furundžija* than *Akayesu*.[180]

4.3 Rape and (non)consent

The above-mentioned judgments in *Akayesu* and *Kunarac* have greatly contributed to the proper recognition of rape in international criminal law, especially the Judgment in *Akayesu* which could be considered as revolutionary at the time. However, these two cases also illustrated a division in international law between a consent-based definition of rape (*Kunarac*) and a broader coercive circumstances approach to rape (*Akayesu*).[181] Whereas *Akayesu* does not require non-consent by the victim

[178] MacKinnon, Catharine A.: "*Defining rape internationally: A comment on Akayesu*" in Columbia Journal of Transnational Law Volume 44, Issue 3 (2006), page 940, at page 958

[179] Brouwer de, Anne Marie: "*Supranational criminal prosecution of sexual violence*" in eds Jones, Jackie; Grear, Anna; Fenton, Rachel Anne; and Stevenson, Kim: "*Gender, Sexualities and Law*" (Routledge: 2011), page 201, at page 202

[180] Boon, Kristen: "*Rape and forced pregnancy under the ICC Statute: Human dignity, autonomy and consent*" in Columbia Human Rights Law Review Volume 32, Issue 3 (2001), page 625, at page 648

[181] Grewal, Kiran: "*The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape*" in Journal of International Criminal Justice, Volume 10, Issue 2 (2012), page 373, at page 374

to be shown, *Kunarac* does. It establishes non-consent as an integral element of the crime of rape, which must be proven beyond a reasonable doubt by the prosecutor.

The traditional definition of rape presumes that the victim consented to the sexual act if there was no clear evidence to the contrary, such as physical resistance by the victim. Such a definition of rape worked to the advantage of the perpetrator, as it focused on the conduct of the victim (that is, whether she physically opposed the act or not).[182] Rape laws were generally based on a demonstration of force from the accused and of resistance from the victim.[183] Traditionally, it was considered that "*in effect, the law permits men to assume that a woman is always willing to have sex, even with a stranger, even with substantial physical force, unless the evidence shows unambiguously she was unwilling*."[184]

The concept of consent is based on the notion that the individual is the ultimate decision maker of his/her fate: "*[It] acts as a moral basis for results, procedures and transactions and is the ultimate expression of self determination*."[185] It is supposed to protect a person's ability to make choices about his/her body and sexual activities and to "*[have] control over who touches one's body, and how, [which] lies at the core of human dignity and autonomy*."[186] The concept of consent also serves to protect the accused from rape charges when the other party had actually consented.

However, although the consent-based concept of rape was at first seen as a means to adequately recognize individuals' right to bodily integrity, it has also been criticized for placing too much attention on the behaviour and conduct of the victim. This can be very traumatizing for the victims, where they sometimes repeatedly have to assert they did not consent and the different circumstances (such as threat, duress of the victim or power relations) are often not taken into account. This can, and often does, dissuade victims from reporting rape, and it has been argued that the focus

[182] Boon, Kristen: "*Rape and forced pregnancy under the ICC Statute: Human dignity, autonomy and consent*" in Columbia Human Rights Law Review Volume 32, Issue 3 (2001), page 625, at page 655

[183] Grewal, Kiran: "*The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape*" in Journal of International Criminal Justice, Volume 10, Issue 2 (2012), page 373, page 385

[184] Ibid, at page 386

[185] Boon, Kristen: "*Rape and forced pregnancy under the ICC Statute: Human dignity, autonomy and consent*" in Columbia Human Rights Law Review Volume 32, Issue 3 (2001), page 625, at page 667

[186] Ibid, at page 668

should shift from a consent approach to a coercive circumstances-based approach, which is seen as a distinct model of understanding rape.[187]

It has also been argued that the difference between these approaches is how rape is seen conceptually: as a crime of power and aggression or a sexual crime. "*Where coercion definitions of rape see power-domination and violence - non-consent definitions envision love or passion gone wrong. Consent definitions accordingly have proof of rape turn on victim and perpetrator mental state: who wanted what, who knew what when. This crime basically occurs in individual psychic space. Coercion definitions by distinction turn on proof of physical acts, surrounding context, or exploitation of relative position: who did what to whom and sometimes why.*"[188]

As stated above, the approach taken by the ICTR in *Akayesu* was praised by feminist groups and victims' advocates for taking the focus away from the issue of consent and focusing on the coercive circumstances prevailing at the time of the rape. *Kunarac*, on the other hand, was then heavily criticized for re-focusing on consent and making it an integral element of rape. The concept and legal doctrine of consent is founded on the presumption that individuals can make rational and informed choices regarding their best interests and that they must be able to do so in a neutral environment. External factors, such as coercion, violence, or threats can place the victim in a state of fear or submission, thereby limiting their autonomy and negating their ability to freely and genuinely give consent. Therefore, in such situations it is often not relevant to establish consent when coercive circumstances exist.[189]

While this is also applicable to national rape legislation, the issue of coercive circumstances, which negates the ability to give real consent, is even more important when prosecuting rape under international criminal law. It is argued that in international law, in contrast to national legislation, non-consent should not be considered as an element of sexual violence crimes, but only as an affirmative defence of the accused. As argued by the prosecutors of the ICTY and ICTR, as well as legal scholars, crimes which are under the jurisdiction of the international criminal tribunals (either the ICC or the *ad hoc* ones), such as genocide, crimes against humanity or war

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[187] Grewal, Kiran: "*The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape*" in Journal of International Criminal Justice, Volume 10, Issue 2 (2012), page 373, at page 385

[188] MacKinnon, Catharine A: "*Defining rape internationally: A comment on Akayesu*" in Columbia Journal of Transnational Law Volume 44, Issue 3 (2006), page 940, at page 941

[189] Boon, Kristen: "*Rape and forced pregnancy under the ICC Statute: Human dignity, autonomy and consent*" in Columbia Human Rights Law Review Volume 32, Issue 3 (2001), page 625, at page 654

crimes, are the most serious crimes that are of importance to the whole international community and prohibition of these crimes protects supranational values. Therefore, any act falling within these categories is difficult to interpret as being dependent on the person's consent or lack thereof.[190]

When sexual crimes, especially rape, occur in the context of genocide, crimes against humanity or war crimes, it is argued that genuine consent is impossible under such circumstances. For example, regarding genocide, "*the very nature of the circumstances in which rape occurs in the context of genocide is predicated in the special intent to destroy a group in whole or in part, the victim of the rape being part of the group targeted for such destruction. This is a major flaw of Kunarac, given its heavy reliance on domestic law*." [191] Therefore, it is argued there can be no genuine consent by the victim to the act of rape under international criminal law: "*A widespread or systematic attack against a civilian population generates highly coercive circumstances. The perpetrator's conduct itself need be neither widespread or systematic, nor intended to inflict injury upon the civilian population. He is guilty of a crime against humanity only if his act is-both objectively and subjectively-sufficiently linked to the collective attack. Any sexual act that is so related to the overall context will therefore occur under coercive circumstances that rule out the possibility of genuine consent.*"[192]

Therefore, it is argued that "*any sexual contact that fulfils the requirements of the international element will therefore occur under circumstances that make genuine consent by the victim impossible. For these reasons, consent cannot be considered the nub of crimes of sexual violence within the framework of international criminal law*."[193] Moreover, the Prosecutors of the ICTY and ICTR claimed that rape should be viewed in the same way as other violations of international law, where the Prosecution does not have to prove non-consent.[194]

Therefore, many scholars are of the opinion that consent should not be an element of the crime of rape and that when the common contextual elements of genocide, crimes against humanity or war crimes are established, the

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[190] Schomburg, Wolfgang and Peterson, Ines: "*Genuine Consent to Sexual Violence under International Criminal Law*" in American Journal of International Law Volume 101, Issue 1 (2007), page 121, page 125

[191] Eboe-Osuji, Chile: "*Rape as genocide: some questions arising*", Journal of Genocide Research Volume 9, Issue 2 (2007), page 251, at page 258

[192] Schomburg, Wolfgang and Peterson, Ines: "*Genuine Consent to Sexual Violence under International Criminal Law*" in American Journal of International Law Volume 101, Issue 1 (2007), page 121, at page 130

[193] Ibid, at page 138

[194] Ibid, at page 123

issue of consent quickly becomes irrelevant and inappropriate. Moreover, such questions can be very traumatizing and insulting for rape victims, no matter how they are formulated ("did you agree", "did you consent", "did you fight back", "was it against your will"), and especially if the victim had established the existence of coercive circumstances. An example is a witness in *Kunarac*, who, after explaining that she had been raped 150 times in 40 days, answered the question of whether the sexual acts had been against her will by saying: "*Please, madam, if over a period of 40 days you have sex with someone, with several individuals, do you really think that is with your own will*."[195]

Therefore, according to these arguments, once it is established that a crime was committed in the context of an international crime (genocide, crime against humanity or war crime), the question of consent should become irrelevant and should not have to be further established by the prosecutor. In the rare cases where consent might have actually existed, it should be raised as a defence by the accused, to be first tested *in camera*, but not as an element for the prosecutor to prove.[196] On the other hand, others argue that presuming coercion would make consensual sexual relations legally impossible in certain circumstances,[197] and that assumptions regarding consent could lead to convictions of persons who could prove that the other party had consented.[198]

However, despite such arguments, in the practice of the *ad* hoc tribunals consent has firmly remained an element of the crime of rape and the *Kunarac* definition has been favoured. Moreover, after the *Kunarac* Judgment, the question of consent was revisited by the ICTR in the *Gacumbitsi* appeal. Although the issue was not directly necessary for the appeal, the Prosecution requested the Appeal Chamber to decide the issue as a matter of general importance for international criminal law. In its Judgment, the *Gacumbitsi* Appeal Chamber stated that "*[…] Kunarac establishes that non-consent and knowledge thereof are elements of rape as a crime against humanity. The import of this is that the prosecution bears the burden of proving these elements beyond reasonable doubt. If the*

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[195] Brouwer de, Anne Marie: "*Supranational criminal prosecution of sexual violence*" in eds Jones, Jackie; Grear, Anna; Fenton, Rachel Anne; and Stevenson, Kim: "*Gender, Sexualities and Law*" (Routledge: 2011), page 201, at page 202-203

[196] Ibid, at page 203

[197] Engle, Karen: "*Feminism and its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*" in American Journal of International Law, Volume 99, Issue 4 (2005), page 778, at page 815

[198] Halley, Janet; Kotiswaran, Prabha; Shamir, Hila; Thomas, Chantal: "*From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*" in Harvard Journal of Law & Gender, Volume 29 (2006), page 335, at page 381

affirmative defence approach were taken, the accused would bear, at least, the burden of production, that is, the burden to introduce evidence providing prima facie support for the defence. […] As the Prosecution points out, Rule 96 of the Rules does refer to consent as a 'defence'. The Rules of Procedure and Evidence do not, however, redefine the elements of the crimes over which the Tribunal has jurisdiction, which are defined by the Statute and by international law. […] The Appeals Chamber agrees, moreover, with the analysis of the Trial Chamber in the Kunarac case. […] Rather than changing the definition of the crime by turning an element into a defence, Rule 96 of the Rules must be read simply to define the circumstances under which evidence of consent will be admissible."[199]

Therefore, the *Gacumbitsi* Appeals Chamber again confirmed that non-consent is an integral element of the crime of rape that must be established by the Prosecutor and not just a defence to be put forward and established by the accused. However, in both *Kunarac* and in *Gacumbitsi*, the Chambers also stated that not every case requires that consent be established through the victims' words or acts or lack thereof. In the *Kunarac* case, for example, regarding the analysis of national legislation when an act will constitute rape, the Trial Chamber stated that "*[t]hese factors for the most part can be considered as falling within three broad categories:*

(i) the sexual activity is accompanied by force or threat of force to the victim or a third party;

(ii) the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or

(iii) the sexual activity occurs without the consent of the victim."[200]

The Trial Chamber also stated that "*[t]he basic principle which is truly common to these legal systems is that serious violations of sexual autonomy are to be penalised. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant*."[201]

This was the first time in international criminal law that a Court used the term "sexual autonomy". Furthermore, although it used a consent-based definition of rape the *Kunarac* Trial Chamber adopted a much wider concept of consent than in *Furundžija*, which was criticized as being unduly

[199] ICTR, case ICTR-01-64 *Prosecutor v Gacumbitsi*, Appeal Chamber Judgment of 07 July 2006, paras 153-154

[200] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Trial Chamber Judgment of 22 February 2001, para 442

[201] Ibid, para 457

narrow.[202] It stated that "*[c]onsent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances*."[203] This definition has been praised by some for "*avoiding the traditional limitations of consent-based rape definitions, which have focused too heavily on the victim's conduct and the extent of her or his active resistance. Instead, by using the language of 'voluntariness', to be assessed in relation to the surrounding circumstances, and 'sexual autonomy', the Trial Chamber seemed to be explicitly recognizing the importance of taking into account coercive circumstances that may impact on an individual's ability to make free and informed decisions.*"[204]

The Appeals Chamber in *Kunarac* agreed with the Trial Chamber, and further stated that "*[…] the Appellants in this case were convicted of raping women held in de facto military headquarters, detention centres and apartments maintained as soldiers' residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors. Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. […] Such detentions amount to circumstances that were so coercive as to negate any possibility of consent. […] In conclusion, the Appeals Chamber agrees with the Trial Chamber's determination that the coercive circumstances present in this case made consent to the instant sexual acts by the Appellants impossible*."[205] Therefore, the Appeals Chamber stated that the circumstances the victims were under were such that any kind of genuine consent was impossible, thus meaning that the prosecutor did not have to establish non-consent by referring to the words or acts (or lack thereof) of the victims.

Therefore, even though the *Kunarac* definition of rape requires non-consent of the victim as an element, the fact that it is based on sexual autonomy implies that only genuine, voluntary and free consent will be accepted. This means that a narrow understanding of consent will generally be insufficient, and that surrounding circumstances will also have to be assessed and taken into account. Examples of such circumstances include the victim's mental capacity, awareness of available options, whether she was provided with

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[202] Grewal, Kiran: "*The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape*" in Journal of International Criminal Justice, Volume 10, Issue 2 (2012), page 373, at page 380

[203] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Trial Chamber Judgment of 22 February 2001, para 460

[204] Grewal, Kiran: "*The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape*" in Journal of International Criminal Justice, Volume 10, Issue 2 (2012), page 373, at page 380

[205] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Appeal Chamber Judgment of 12 June 2002, paras 132-133

adequate information or whether she could exercise freedom of choice free from external interference.[206] Therefore, consent should be affirmative, rather than negative (that is, the victims should freely and voluntarily say yes instead of just not saying no). The *Kunarac* Appeal Chamber stated that "*[f]orce or threat of force provides clear evidence of non-consent, but force is not an element per se of rape. In particular, the Trial Chamber wished to explain that there are 'factors [other than force] which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim'. A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force. [...] [I]t is worth observing that the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible."*[207] Moreover, even the Rules of Procedure of the ICTY preclude the use of consent as a defence of the accused in certain cases, such as when the victim was, *inter alia*, in detention or captivity.[208]

Furthermore, in *Muhimana*, the Trial Chamber of the ICTR, following the *Kunarac* Appeals Chamber, also confirmed that consent does not always have to be proven, but that coercion can be used as evidence of non-consent and that in most situations which give rise to prosecution under international criminal law genuine consent will be impossible: "*In analyzing the relationship between consent and coercion, the Appeals Chamber acknowledged that coercion provides clear evidence of non-consent. [...] Similarly, the Chamber also recalls that the Furundžija Trial Chamber acknowledged that 'any form of captivity vitiates consent'. [...] Accordingly, the Chamber is persuaded by the Appellate Chamber's analysis that coercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape. Further, this Chamber concurs with the opinion that circumstances prevailing in most cases charged under international criminal law, as either genocide, crimes against humanity, or war crimes, will be almost universally coercive, thus vitiating true consent*."[209]

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[206] Grewal, Kiran: "*The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape*" in Journal of International Criminal Justice, Volume 10, Issue 2 (2012), page 373, at page 386

[207] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Appeal Chamber Judgment of 12 June 2002, paras 129-130

[208] ICTY, Rules of Procedure and Evidence, Rule 96, which states:

[209] ICTR, case ICTR-95-1B *Prosecutor v Muhimana*, Trial Chamber Judgment of 28 April 2005, paras 544-546

Finally, the Appeals Chamber in *Gacumbitsi* perhaps most clearly explained how consent may be established. It stated that "*[t]he Prosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. […] [T]he Trial Chamber will consider all of the relevant and admissible evidence in determining whether […] it is appropriate to conclude that non-consent is proven beyond reasonable doubt. But it is not necessary, as a legal matter, for the Prosecution to introduce evidence concerning the words or conduct of the victim or the victim's relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim. Indeed, the Trial Chamber did so in this case*."[210]

Therefore, it is clear that it is not necessary to induce specific evidence from the victim that she did not consent. Although non-consent has been retained as an element of the crime of rape, the Tribunals have adopted a common sense approach to proving non-consent. This minimizes focus on the victim's conduct and the requirement of proving non-consent will generally not be difficult to discharge.[211]

Having in mind the width of the concept of coercion in the *Kunarac* definition of rape (and that consent of each individual victim does not have to be established), it has been argued that "*it becomes clear that the apparent division between consent-based definitions of rape, on the one hand, and coercive circumstances approaches, on the other hand, is a largely artificial distinction. Whether an individual's sexual autonomy was violated requires attention to be paid to the wishes of the individual in question (something which will frequently be ascertained from whether she or he consented or not). This is important as 'viewing women as autonomous human beings would mean treating them as persons who know what they want and mean what they say*'."[212]

Regarding the ICC, it must be stated that it is not completely clear how it will treat the issue of consent, as the Court has not had to consider the issue yet. Furthermore, as stated above, the Elements of Crimes of the ICC

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[210] ICTR, case ICTR-01-64 *Prosecutor v Gacumbitsi*, Appeal Chamber Judgment of 07 July 2006, para 155

[211] Brammertz, Serge and Jarvis, Michelle: "*Lessons Learned in Prosecuting Gender Crimes under International Law: Experiences from the ICTY*" in ed Eboe-Osuji, Chile: "Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay" (Martinus Nijhoff Publishers: 2010), page 93, at page 108

[212] Grewal, Kiran: "*The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape*" in Journal of International Criminal Justice, Volume 10, Issue 2 (2012), page 373, at page 386

doesn't explicitly list non-consent as an element of the rape. Moreover, although the ICC is not bound by the jurisprudence of the *ad hoc* tribunals, it is unlikely to completely ignore them either, as they reflect wider trends in international law and international human rights law.[213] It has been argued that the ICC should not follow the *Kunarac* definition of rape and that the *Akayesu* and ICC Elements of Crimes definitions best fit the reality of rape and that these definitions should be taken as the leading ones in international criminal law.[214]

The second element of rape in the ICC Elements of Crimes as well as Rule 70 of the ICC Rules of Procedure and Evidence are structured to require a two-part analysis in determining whether evidence of the victim's consent will be admissible as an affirmative defence to rape. Firstly, it must be established whether the victim actually had legal capacity to give consent (regarding which Rule 70 precludes inferring of consent when the victim is unable to give genuine consent, for example for induced, natural or old age reasons).[215] Secondly, if the first part of the analysis is met and the victim was legally capable of giving her consent, the next issue that will be considered is whether there were any coercive circumstances which undermined the victim's ability to exercise her free choice. If force, threats of force or coercion existed and affected the victim's ability to give consent, Rule 70 establishes that the victim's acts or words cannot be used to infer she gave consent and there will be a presumption against consent. Rule 70 also creates a standard of affirmative consent, as consent cannot be inferred from the victim's lack of resistance or silence.[216] The second element of rape creates a presumption of non-consent in coercive situations, but it does not completely exclude consent, as consent will still be relevant if the defendant argues that the circumstances were not coercive or if the Prosecutor cannot establish force or other types of coercion.

Finally, it should be noted that it is also argued that the ICC provisions on rape are disjointed, lack clarity and that they are not consistent with the dominant approaches taken in international criminal law jurisprudence,

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[213] Grewal, Kiran: "*The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape*" in Journal of International Criminal Justice, Volume 10, Issue 2 (2012), page 373, at page 382

[214] Brouwer de, Anne Marie: "*Supranational criminal prosecution of sexual violence*" in eds Jones, Jackie; Grear, Anna; Fenton, Rachel Anne; and Stevenson, Kim: "*Gender, Sexualities and Law*" (Routledge: 2011), page 201, page 203

[215] Boon, Kristen: "*Rape and forced pregnancy under the ICC Statute: Human dignity, autonomy and consent*" in Columbia Human Rights Law Review Volume 32, Issue 3 (2001), page 625, at page 652

[216] Ibid

international human rights law and many national legal systems.[217] Therefore, the ICC should use its first cases to expressly articulate and endorse the concept of sexual autonomy as being central to the prohibition of rape and sexual violence in international criminal law, and as a concept which already underlies ICC instruments. Moreover, the issue of consent should be clarified as being a defence to rape, rather than an element of rape and as requiring genuine and meaningful affirmative consent.[218]

4.4 Rape as other crimes

As stated above, the statutes of international criminal courts and tribunals have recognized rape as an offence of crimes against humanity and war crimes. However, the jurisprudence of the *ad hoc* tribunals has recognized that rape can also amount to other crimes if the requisite elements of those crimes are fulfilled. Therefore, rape can arise in connection with genocide, torture, persecution, inhumane treatment, wilful causation of great suffering, serious injury to body or health, or be a component of murder or wilful killing.[219] The recognition of this is "*a commendable approach that involves a re-interpretation of general international criminal law norms to more accurately reflect the experiences of women*."[220] However, due to space constraints, only rape as genocide and torture will be discussed below.

4.4.1 Rape as genocide

The list of acts which constitute genocide in the Genocide Convention, mentioned above, are exhaustive. This signifies that acts which are not included in the list do not constitute genocide, even if the perpetrator acted with the intent to destroy a protected group.[221] At first sight, it might seem that rape does not fit within this definition,[222] but in fact it has been

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[217] Grewal, Kiran: "*The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape*" in Journal of International Criminal Justice, Volume 10, Issue 2 (2012), page 373, at page 396

[218] Ibid, at page 391

[219] Boon, Kristen: "*Rape and forced pregnancy under the ICC Statute: Human dignity, autonomy and consent*" in Columbia Human Rights Law Review Volume 32, Issue 3 (2001), page 625, at page 636

[220] Jarvis, Michelle: "*An Emerging Gender Perspective on International Crimes*" in eds Boas, Gideon; Schabas, William A.: "International criminal law developments in the case law of the ICTY" (Martinus Nijhoff: 2003), page 157, atpage 162

[221] Jessberger, Florian: "*The definition and the elements of the crime and genocide*" in ed. Gaeta, Paola "The UN Genocide Convention - a commentary" (Oxford University Press: 2009), page 87, at page 94

[222] Chinkin, Christine: "*Rape and sexual abuse of women in international law*" in European Journal of International Law Volume 5, Issue 3 (1994), page 326, at page 333

recognized in jurisprudence that rape can constitute genocide under the act of "causing serious bodily or mental harm to members of the group". To fall under this category, the mental or bodily harm must be serious. "Serious" mental harm means that it must be more than a minor or temporary impairment of mental faculties.[223]

For example, the Trial Chamber in *Krstić* stated that "*serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life. In subscribing to the above case-law, the Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury*."[224] Therefore, the definition of genocide through causing serious bodily or mental harm specifically includes sexual violence which causes such harm.[225]

Men and women can be targeted in different ways during genocide and acts directed at women, such as sexual violence, can be used as an integral component of genocidal strategy. Understanding how crimes of sexual violence can constitute genocide has been a great challenge in reconceptualising international crimes from a gender perspective. However, if the requisite genocidal intent can be established, there is no reason why sexual violence should not be considered as part of the *actus reus* of genocide.[226]

In spite of the fact that its initial indictment did not include a charge of rape, the *Akayesu* case before the ICTR was the first case considered by international criminal courts that expressly listed rape as genocide. It was only after hearing testimonies of multiple rapes, that the Tribunal allowed

[223] ICTY, case IT-98-33 *Prosecutor v Krstić (Srebrenica-Drina Corps)*, Trial Chamber Judgment of 2 August 2001, para 510; Report of the Preparatory Committee on the Establishment of an International Criminal Court. Part 2. Jurisdiction, Admissibility and Applicable Law, UN Doc. A/CONF. 183/2/Add.1, 14 April 1998, page 11.

[224] ICTY, case IT-98-33 *Prosecutor v Krstić (Srebrenica-Drina Corps)*, Trial Chamber Judgment of 02 August 2001, para 513

[225] Jessberger, Florian: "*The definition and the elements of the crime and genocide*" in ed. Gaeta, Paola "The UN Genocide Convention - a commentary" (Oxford University Press: 2009), page 87, at pages 98-99

[226] Brammertz, Serge and Jarvis, Michelle: "*Lessons Learned in Prosecuting Gender Crimes under International Law: Experiences from the ICTY*" in ed Eboe-Osuji, Chile: "Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay" (Martinus Nijhoff Publishers: 2010), page 93, at page 102

the Prosecutor to amend the indictment and include in it rape as genocide.[227] In *Akayesu*, the Trial Chamber first interpreted the Genocide Convention as including a prohibition against torture and then found that rape can be a form of torture, thus linking rape to genocide.[228]

In Akayesu, the Trial Chamber stated: "*With regard, particularly, to [...] rape and sexual violence, […] they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute […] one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm. [...] These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole. [...] Sexual violence was a step in the process of destruction of the Tutsi group - destruction of the spirit, of the will to live, and of life itself. [...][T]he Chamber finds firstly that the acts described [...] constitute the factual elements of the crime of genocide, namely the killings of Tutsi or the serious bodily and mental harm inflicted on the Tutsi*."[229]

The position that rape can constitute genocide stated by the ICTR in *Akeyasu* has been confirmed in several subsequent cases before the ICTR, such as *Muhimana*,[230] *Musema*[231] and *Gacumbitsi.*[232] As for the ICTY, there have, so far, been no convictions for rape as genocide. However, the ICTY jurisprudence recognizes the possibility that sexual violence crimes can constitute genocide.[233] In *Furundžija*, although the issue of rape as genocide was not directly relevant to the case, the Trial Chamber stated in passing that "*[r]ape may also amount to a grave breach of the Geneva Conventions,*

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[227] Miller, Alexandra A.: "*From the international criminal tribunal for Rwanda to the international criminal court: expanding the definition of genocide to include rape*" in Penn State Law Review Volume 108, Issue 1 (2003), page 349, at page 363

[228] Ibid, at page 364

[229] ICTR, case ICTR-96-4 *Prosecutor v Akayesu*, Trial Chamber Judgment of 02 September 1998, paras 731-734

[230] ICTR, case ICTR-95-1B *Prosecutor v Muhimana*, Trial Chamber Judgment of 28 April 2005, paras 512-519

[231] ICTR, case ICTR-96-13 *Prosecutor v Musema*, Trial Chamber Judgment of 27 January 2000, para 908

[232] ICTR, case ICTR-01-64 *Prosecutor v Gacumbitsi*, Trial Chamber Judgment of 17 June 2004, paras 291-293

[233] Brammertz, Serge and Jarvis, Michelle: "*Lessons Learned in Prosecuting Gender Crimes under International Law: Experiences from the ICTY*" in ed Eboe-Osuji, Chile: "Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay" (Martinus Nijhoff Publishers: 2010), page 93, at page 103

a violation of the laws or customs of war or an act of genocide, if the requisite elements are met, and may be prosecuted accordingly."[234] The reason why rape can constitute genocide and why it is an "effective" method of genocide is because in patriarchal societies it renders female victims of rape socially infertile, unmarriageable or untouchable, as they are often isolated from society and seen as "damaged goods." [235]

Regarding the ICC, there have, so far, been no convictions of rape or genocide (or rape as genocide) before the Court. However, in the *Al Bashir* case it is evident that the ICC accepted the jurisprudence of the *ad hoc* Tribunals regarding rape as genocide. In the Second Decision on the Prosecution's Application for a Warrant of Arrest, the ICC Pre Trial Chamber stated that *"According to the Elements of Crimes the specific material element of this count of genocide [causing serious bodily and mental harm] is that the perpetrator caused serious bodily or mental harm to one or more persons, which may include acts of torture, rape, sexual violence or inhuman or degrading treatment. The Prosecution listed the following acts within the present count of genocide:*

(i) acts of rape and other forms of sexual violence;

(ii) torture; and

(iii) forcible displacement of members of the targeted groups.

[…] The Chamber is […] satisfied that there are reasonable grounds to believe that acts of rape, torture and forcible displacement were committed against members of the targeted ethnic groups. Accordingly, the Chamber finds that there are reasonable grounds to believe that the material element of the crime of genocide by causing serious bodily or mental harm, as provided for in article 6(b) of the Statute, is fulfilled."[236] Therefore, it is clear that the ICC also accepted the *ad hoc* Tribunals' findings that rape can constitute genocide if the requisite intent exists.

It has been argued that it is extremely important to acknowledge and recognize that rape can constitute genocide, as the legal qualification of rape as genocide is essential to actuate state intervention in situations of massive and systematic rapes. It has been argued that, although states are not required to intervene in cases of crimes against humanity, customary international law imposes a duty of states to intervene when genocide occurs

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[234] ICTY, case IT-95-17/1 *Prosecutor v Furundžija (Lašva Valley)*, Trial Chamber Judgment of 10 December 1998, para 172

[235] Dixon, Rosalind: "*Rape as a Crime in International Humanitarian Law: Where to from Here?*" in European Journal of International Law Volume 13, Issue 3 (2002), page 697, at page 703

[236] ICC, case ICC-02/05-01/09 *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Second warrant of arrest of 12 July 2010, paras 26 and 30

and that classifying rape as genocide could function as a deterrent in times of armed conflict.[237]

An explicit inclusion of sexual violence crimes as acts that can constitute genocide would also make these provisions consistent with provisions in international criminal law on war crimes and crimes against humanity. Therefore, it has been argued that certain sexual violence crimes should explicitly be incorporated into the genocide definition.[238] Moreover, it has also been argued that the Genocide Convention itself, and its list of protected groups, should be amended so that gender becomes one of the Convention's protected groups. Such a provision would cover the genocide of women through their gender classification (that is because they are women) and should not be confused with genocide against women which is aimed at destroying one of the already protected groups, such as national or ethnic groups.[239] However, while this might influence the further advancement of gender-based crimes in international criminal law, it also perhaps risks expanding and diluting the definition of genocide beyond what was intended. Furthermore, perhaps it does not seem likely that genocide could realistically be attempted against women as a gender. A delicate balance would need to be struck if gender were introduced as a protected group in regards to genocide.

4.4.2 Torture

Throughout history, sexual violence has often been used as a means of torturing women, as the act of rape inflicts severe physical and mental pain and is often aggravated by additional factors, such as social and cultural implications, risk of sexually transmitted diseases, risk of pregnancy, damage of the reproductive system, etc.[240] As stated above, rape can also constitute torture and the crime of torture was used as a link between rape and genocide. In *Akayesu*, the Trial Chamber stated that "*[l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture,*

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[237] Miller, Alexandra A.: "*From the international criminal tribunal for Rwanda to the international criminal court: expanding the definition of genocide to include rape*" in Penn State Law Review Volume 108, Issue 1 (2003), page 349, at page 362

[238] Brouwer de, Anne Marie: "*Supranational criminal prosecution of sexual violence*" in eds Jones, Jackie; Grear, Anna; Fenton, Rachel Anne; and Stevenson, Kim: "*Gender, Sexualities and Law*" (Routledge: 2011), page 201, at page 204

[239] Grady, Kate: "*The Genocide Convention's protected groups: A place for gender?*" in ed Eboe-Osuji, Chile: "Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay" (Martinus Nijhoff Publishers: 2010), page 165

[240] Jarvis, Michelle: "*An Emerging Gender Perspective on International Crimes*" in eds Boas, Gideon; Schabas, William A.: "International criminal law developments in the case law of the ICTY" (Martinus Nijhoff: 2003), page 157, at page 163

rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[241]

Afterwards, in *Kunarac,* the Trial Chamber altered this definition of torture and stated that torture in international humanitarian law does not necessarily require presence of a state or official or other person of authority. The Chamber stated that "*[...] the definition of torture under international humanitarian law does not comprise the same elements […] under human rights law. [...] [T]he presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law. [...] [I]n the field of international humanitarian law, the elements of the offence of torture […] are as follows:*

(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.

(ii) The act or omission must be intentional.

(iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person."[242]

This position was also supported by the Appeals Chamber[243] and by the Trial Chamber in *Kvočka*.[244] That rape can constitute torture has been recognized in a number of cases before the ICTY. For example, in *Furundžija* the Trial Chamber stated that "*[i]nternational case law [...] evince[s] a momentum towards addressing […] the use of rape in the course of detention and interrogation as a means of torture and, therefore, as a violation of international law. Rape is resorted to either by the interrogator himself or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person*."[245]

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[241] ICTR, case ICTR-96-4 *Prosecutor v Akayesu*, Trial Chamber Judgment of 02 September 1998, para 597

[242] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Trial Chamber Judgment of 22 February 2001, paras 496-497

[243] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Appeal Chamber Judgment of 12 June 2002, para 148

[244] ICTY, case IT-98-30/1 *Prosecutor v Kvočka et al. (Omarska, Keraterm & Trnopolje Camps)*, Trial Chamber Judgment of 02 November 2001, para 139

[245] ICTY, case IT-95-17/1 *Prosecutor v Furundžija (Lašva Valley)*, Trial Chamber Judgment of 10 December 1998, para 163

The *Kunarac* Appeal Chamber also stated that "*[g]enerally speaking, some acts establish per se the suffering of those upon whom they were inflicted. Rape is obviously such an act. [...] Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture. [...] Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.*"[246] The ICTY has clearly stated, in a number of other cases, that rape and sexual violence can reach the level of torture.[247]

The issue of rape as torture was perhaps most explored in the *Mucić et al* case. The Trial Chamber examined the definition of rape, accepting the one given previously by *Akayesu*, and analysed the jurisprudence of other international bodies that dealt with the crime of rape as torture, such as the Inter-American Commission of Human Rights and the European Court of Human Rights, and then made its findings. The Trial Chamber stated that "*[r]ape causes severe pain and suffering, both physical and psychological. The psychological suffering […] may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. [...] Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet this criteria.*"[248]

The above statements mostly focus on the element of physical or mental suffering, and it has been established undoubtedly that rape can produce the level of suffering necessary for torture. Moreover, as stated by the Trial Chambers in the cases mentioned above, in order for an act to be considered as torture it must have a purpose. For example, in most instances the purpose is to obtain information from the victim or a third person. However, the purpose of torture can also be to obtain a confession from the victim or a third person, to punish the victim for an act he/she or a third person has committed or is suspected of having committed, to intimidate or coerce the victim or a third person, or for any reason based on discrimination of any

[246] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Appeal Chamber Judgment of 12 June 2002, para 151

[247] ICTY, case IT-98-30/1 *Prosecutor v Kvočka et al. (Omarska, Keraterm & Trnopolje Camps)*, Trial Chamber Judgment of 02 November 2001, paras 144-145

[248] For example ICTY, case IT-96-21 *Prosecutor v Mucić et al. (Čelebići Camp)*, Trial Chamber Judgment of 16 November 1998, paras 495-496

kind.[249] Therefore, only a rape with such a purpose will constitute the crime of torture, instead of the crime of rape.

The approach taken by the ICTY was also confirmed by the ICTR, in the *Semanza* case. The accused, Laurent Semanza, the former *bourgmestre* of The Bicumbi commune, was convicted for instigating a crowd to rape Tutsi women before killing them. The Trial Chamber stated that "*[t]he Chamber has found [...] that the Accused, in the presence of commune and military authorities, encouraged a crowd to rape Tutsi women before killing them. [...] Noting, in particular, the extreme level of fear occasioned by the circumstances surrounding the event and the nature of the rape of Victim A, the Chamber finds that the perpetrator inflicted severe mental suffering sufficient to form the material element of torture. It is therefore unnecessary to determine whether this rape also inflicted severe physical pain or suffering [...]. [...] The Chamber finds that the rape was committed on the basis of discrimination, targeting Victim A because she was a Tutsi woman. The Chamber recalls that severe suffering inflicted for the purposes of discrimination constitutes torture and, therefore, finds that the principal perpetrator tortured Victim A by raping her for a discriminatory purpose. [...] The Chamber finds that by encouraging a crowd to rape women because of their ethnicity, the Accused was encouraging the crowd to inflict severe physical or mental pain or suffering for discriminatory purposes. Therefore, he was instigating not only rape, but rape for a discriminatory purpose, which legally constitutes torture. [...] Therefore, the Chamber finds that the Accused is criminally responsible for instigating torture as a crime against humanity*."[250]

As for the ICC, it should be noted that the Elements of Crimes adopt two different definitions of torture, as either a crime against humanity or a war crime. As for torture as a crime against humanity, the Elements of Crimes list the following elements:

(1) The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

(2) Such person or persons were in the custody or under the control of the perpetrator.

[249] Jarvis, Michelle: "*An Emerging Gender Perspective on International Crimes*" in eds Boas, Gideon; Schabas, William A.: "International criminal law developments in the case law of the ICTY" (Martinus Nijhoff: 2003), page 157, at page 166; ICTY, case IT-96-21 *Prosecutor v Mucić et al. (Čelebići Camp)*, Trial Chamber Judgment of 16 November 1998, para 494

[250] ICTR, case ICTR-97-20 *Prosecutor v Semanza*, Trial Chamber Judgment of 15 May 2003, paras 481-485

(3) Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.[251]

(contextual elements omitted).

Regarding torture as a war crime, the elements are:

(1) The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

(2) The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.[252]

(contextual elements omitted).

This second definition is quite similar to the definition in *Kunarac*.

So far there have been no convictions of rape as torture before the ICC. However, regardless of the difference in definition of rape, it seems that the ICC will undoubtedly recognize rape as torture. In the case against *Mbarushimana*, the Prosecutor charged the accused with torture as a crime against humanity and a war crime, inflicted through acts of rape.[253] However the Pre Trial Chamber declined to confirm the charges, as it found that were no substantial grounds to believe the accused was individually responsible for the crimes committed.[254] The ICC prosecutor has also charged rape as torture in *Mudacumura*.[255] There are a number of other cases where torture was charged by the Prosecutor, but from the available documents it is unclear whether the charges were based on acts of rape.

4.5 Prosecution of rape

The *ad hoc* tribunals have made a great contribution towards ending the impunity of sexual violence crimes in international law. They were the first international criminal tribunals to have dealt extensively with crimes of

[251] ICC Elements of Crimes, Article 7(1)(f)

[252] ICC Elements of Crimes, Articles 8(2)(a)(ii)-1 and 8(2)(c)(i)-4

[253] ICC, case ICC-01/04-01/10 *The Prosecutor v Callixte Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest of 28 September 2010, pages 8-9

[254] ICC, case ICC-01/04-01/10 *The Prosecutor v Callixte Mbarushimana*, Decision declining to confirm the charges of 16 December 2011, para 340

[255] ICC, case ICC-01/04-01/12 *The Prosecutor v Sylvestre Mudacumura*, Decision on the Prosecutor's Application under Article 58 of 13 July 2012, para 50

sexual violence in times of armed conflict.[256] Among the cases that have dealt with rape and other sexual violence crimes, *Akayesu* and *Kunarac* are probably the most important and groundbreaking.

Akayesu represents the first time in international criminal law that an international tribunal defined the crime of rape and the first time that rape was classified as genocide. However, despite its importance for the prosecution of rape, the original indictment in *Akeyasu* contained no charges of sexual violence. As mentioned above, it was only when several witnesses spontaneously testified about the massive instances of rape that the Trial Chamber invited the Prosecutor to investigate the claims and file an amended indictment if necessary. A year later the Prosecutor filed an amended indictment which included rape and other inhumane acts, and thereby amended the count of genocide to also refer to sexual violence.[257]

The *Kunarac* judgment was extremely important for the prosecution of sexual violence because it was the first time a commanding officer and the other accused were convicted as primary perpetrators of rape, rather than just responsible under command responsibility. Furthermore, "*it was the first time that sexual violence crimes were rendered visible from the obscurity of 'lesser' concurrent sentences.*"[258] *Kunarac* was also the first case where sexual slavery was charged as enslavement and the first time the objectification of women as live pornography was prosecuted as a war crime before the ICTY.[259]

However, despite their groundbreaking nature, *Akayesu* and *Kunarac* were also somewhat controversial, due to them criminalizing behaviour after it had already occurred (*ex post facto*). Before the judgments in *Akayesu* and *Kunarac*, rape was not explicitly recognized in international law as a crime against humanity.[260] Rape was undoubtedly a violation of the Geneva Conventions and generally recognized as a war crime under international law, however, it was generally seen as an inevitable product of war, and was

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[256] Schomburg, Wolfgang and Peterson, Ines: "*Genuine Consent to Sexual Violence under International Criminal Law*" in American Journal of International Law Volume 101, Issue 1 (2007), page 121, at page 122

[257] Roca de, Inés Weinberg: "*Prosecuting Gender Based and Sexual Crimes against Women: the Role of the International Courts and Criminal Tribunals*" in ed Eboe-Osuji, Chile: "Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay", page 229, at page 230

[258] Dixon, Rosalind: "*Rape as a Crime in International Humanitarian Law: Where to from Here?*" in European Journal of International Law Volume 13, Issue 3 (2002), page 697, at page 699

[259] Ibid, at page 699

[260] McHenry, James R. III: "*The prosecution of rape under international law: justice that is long overdue*" in Vanderbilt Journal of Transnational Law, Volume 35, Issue 4 (2002), page 1269, at page 1299

rarely prosecuted. Moreover, even though it was illegal as a war crime or a violation of the Geneva Conventions, rape had also not been defined under international law. For the ICTY, this meant that the tribunals had to develop a new definition of rape, although their mandate prohibited applying anything other than accepted definitions of international humanitarian law. As rape was not expressly defined as a crime against humanity when the events in *Akayesu* and *Kunarac* occurred, their prosecution was necessarily *ex post facto*.[261]

However, although rape was not explicitly recognized as a crime against humanity, it was still considered as a crime. Firstly, previous international conventions and provisions of international law explicitly prohibited torture and enslavement and both of these crimes may also include rape. Rape may have, at least implicitly, been considered a crime against humanity under these other categories as well, even if it was not recognized as a specific crime. Therefore, the accused in *Akayesu* and *Kunarac* both committed acts which were clearly recognized as being criminal at the time when they were committed, although rape itself was not clearly and explicitly a crime against humanity and was not well-defined at the time it when occurred.[262]

Along with Akayesu and *Kunarac,* the ICTR and ICTY dealt with rape and crimes of sexual violence in a number of other cases, some of which have already been mentioned above. As for the ICTR, rape was dealt in, for example,[263] *Bagosora*,[264] *Gacumbitsi*,[265] *Hategekimana*,[266] *Kajelijeli*, [267] *Kamuhanda*,[268] *Mugenzi*,[269] *Casimir Bizimungu*,[270] *Bicamumpaka*,[271]

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[261] McHenry, James R. III: "*The prosecution of rape under international law: justice that is long overdue*" in Vanderbilt Journal of Transnational Law, Volume 35, Issue 4 (2002), page 1269, at page 1300

[262] Ibid

[263] NOTE: the cases are listed per accused as on the ICTR website, with every accused having his own case number. However, often the proceedings were joined and several accused tried together in a single trial, changing the case number in the trial.

[264] ICTR, case ICTR-96-7 *Prosecutor v Bagosora*, Trial Chamber Judgment of 18, December 2008, Appeal Chamber Judgment of 14 December 2011: convicted for, *inter alia*, rape, verdict confirmed on appeal; the other 3 accused were acquitted of rape charges.

[265] ICTR, case ICTR-01-64 *Prosecutor v Gacumbitsi,* Trial Chamber Judgment of 17 June 2004, Appeal Chamber Judgment of 07 July 2006: convicted for, *inter* alia, rape, verdict confirmed on appeal.

[266] ICTR, case ICTR-00-55 *Prosecutor v Hategekimana*, Trial Chamber Judgment of 06 December 2010, Appeal Chamber Judgment of 02 March 2012: convicted for, *inter alia*, rape, verdict confirmed on appeal.

[267] ICTR, case ICTR-98-44 *Prosecutor v Kajelijeli*, Trial Chamber Judgment of 01 December 2003, Appeal Chamber Judgment of 23 May 2005: acquitted of rape charges, acquittal confirmed on appeal.

[268] ICTR, case ICTR-99-54 *Prosecutor v Kamuhanda*, Trial Chamber Judgment of 22 January 2004, Appeal Chamber Judgment of 19 September 2005: acquitted of rape charges, acquittal confirmed on appeal.

Mugiraneza,[272] *Muhimana*,[273] *Musema*,[274] *Niyitegeka*,[275] *Nsengiyumva*,[276] *Kabiligi*,[277] *Ntabakuze*,[278] *Renzaho*,[279] *Semanza*,[280] *Ngirabatware*,[281] *Augustin Bizimungu*,[282] *Gatete*,[283] *Karemera*,[284] *Ngirumpatse*,[285] *Pauline Nyiramasuhuko*,[286] *Ntahobali*,[287] *Nzuwonemeye*,[288] *Sagahutu*,[289] and *Nizeyimana*.[290]

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[269] ICTR, case ICTR-99-47 *Prosecutor v Mugenzi*, Trial Chamber Judgment of 30 September 2011, appeal pending: acquitted of rape charges

[270] ICTR, case ICTR-99-45 *Prosecutor v Casimir Bizimungu*, Trial Chamber Judgment of 30 September 2011, appeal pending: acquitted of rape charges.

[271] ICTR, case ICTR-99-49 *Prosecutor v Bicamumpaka*, Trial Chamber Judgment of 30 September 2011, appeal pending: acquitted of rape charges.

[272] ICTR, case ICTR-99-48 *Prosecutor v Mugiraneza*, Trial Chamber Judgment of 30 September 2011, appeal pending: acquitted of rape charges.

[273] ICTR, case ICTR-95-1B *Prosecutor v Muhimana*, Trial Chamber Judgment of 28 April 2005, Appeal Chamber Judgment of 21 May 2007: convicted for, *inter alia*, rape, two of the rape convictions overturned on appeal, while others were confirmed.

[274] ICTR, case ICTR-96-13 *Prosecutor v Musema*, Trial Chamber Judgment of 27 January 2000, Appeal Chamber Judgment of 16 November 2001: convicted for, *inter alia*, rape, rape conviction overturned on appeal.

[275] ICTR, case ICTR-96-14 *Prosecutor v Niyitegeka*, Trial Chamber Judgment of 16 May 2003, Appeal Chamber Judgment of 09 July 2004: acquitted of rape charges, acquittal confirmed on appeal.

[276] ICTR, case ICTR-96-12 *Prosecutor v Nsengiyumva*, Trial Chamber Judgment of 18 December 2008, Appeal Chamber Judgment of 14 December 2011: acquitted of rape charges, acquittal confirmed on appeal.

[277] ICTR, case ICTR-97-34 *Prosecutor v Kabiligi*, Trial Chamber Judgment of 18 December 2008: acquitted of rape charges.

[278] ICTR, case ICTR-97-30 Prosecutor v *Ntabakuze*, Trial Chamber Judgment of 18 December 2008, Appeal Chamber Judgment of 08 May 2012: acquitted of rape charges, acquittal confirmed on appeal.

[279] ICTR, case ICTR-97-31-DP, *Prosecutor v Renzaho*, Trial Chamber Judgment of 14 July 2009, Appeal Chamber Judgment of 01 April 2009: convicted for, *inter alia*, rape, rape conviction overturned on appeal.

[280] ICTR, case ICTR-97-20 *Prosecutor v Semanza*, Trial Chamber Judgment of 15 May 2003, Appeal Chamber Judgment of 20 May 2005: Acquitted of one charge of rape, convicted of the other charge of rape, rape conviction upheld on appeal.

[281] ICTR, case ICTR-99-54 *Prosecutor v Ngirabatware*, case in progress, indicted for rape as a crime against humanity.

[282] ICTR, case ICTR-00-56 *Prosecutor v Augustin Bizimungu*, Trial Chamber Judgment of 17 May 2011, appeal pending: convicted of rape.

[283] ICTR, case ICTR-00-61 *Prosecutor v Gatete*, Trial Chamber Judgment of 31 May 2011, appeal pending: acquitted of rape charges.

[284] ICTR, case ICTR-97-24 *Prosecutor v Karemera*, Trial Chamber Judgment of 02 February 2012, appeal pending: convicted for, *inter alia*, rape.

[285] ICTR, case ICTR-97-28 *Prosecutor v Ngirumpatse*, Trial Chamber Judgment of 02 February 2012, appeal pending: convicted for, *inter alia*, rape.

[286] ICTR, case ICTR-97-21 *Prosecutor v Nyiramasuhuko*, Trial Chamber Judgment of 24 June 2011, appeal pending: convicted for, *inter alia*, rape, including rape as genocide (however, she did not commit any of the rapes herself).

Of the above cases, an especially interesting one to note, perhaps, is the case of Pauline Nyiramasuhuko, who was the first woman to be charged and convicted of genocide in international criminal law, and the first woman to be charged with inciting rape as a form of genocide. At the time of the conflict in Rwanda, she held the position of Minister of Family and Women's Development in the Interim government of Rwanda. She was found to have been superior to the *Interahamwe* forces in her hometown and to have directly ordered killings, torture and rape of Tutsi women, especially ordering that they be raped before they are killed.

As with the ICTR, the ICTY also dealt with rape in a significant number of cases, along with *Kunarac*. Therefore, rape and/or crimes of sexual violence were considered in cases against *Bralo*,[291] *Brđanin*,[292] *Češić*,[293] *Rasim Delić*,[294] *Furundžija*,[295] *Kvočka et al*, [296] *Mucić et al,*[297] *Nikolić*,[298] *Rajić*,[299]

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[287] ICTR, case ICTR-97-21, *Prosecutor v Ntahobali*, Trial Chamber Judgment of 24 June 2011, appeal pending: convicted for, *inter alia*, rape.

[288] ICTR, case ICTR-00-56 *Prosecutor v Nzuwonemeye*, Trial Chamber Judgment of 17 May 2011, appeal pending: acquitted of rape charges.

[289] Ibid

[290] ICTR, case ICTR-2000-55 *Prosecutor v Nizeyimana*, Trial Chamber Judgment of 19 June 2012, appeal pending: acquitted of rape charges.

[291] ICTY, case IT-95-17 *Prosecutor v Bralo (Lašva Valley)*, Trial Chamber Judgment of 07 December 2005, Appeal Chamber Judgment of 02 April 2007: convicted of torture and outrages upon human dignity, including rape, conviction upheld on appeal.

[292] ICTY, case IT-99-36 *Prosecutor v Brđanin (Krajina)*, Trial Chamber Judgment of 01 September 2004, Appeal Chamber Judgment of 03 April 2007: convicted of persecution and torture based on rape, torture charges reversed on appeal.

[293] ICTY, case IT-95-10/1 *Prosecutor v Češić (Brčko)*, Trial Chamber Judgment of 11 March 2004: pleaded guilty of rape for forcing two brothers to perform oral sex on each other.

[294] ICTY, case IT-04-83 *Prosecutor v Rasim Delić*, Trial Chamber Judgment of 15 September 2008, died during appeal process: acquitted of rape charges.

[295] ICTY, case IT-95-17/1 *Prosecutor v Furundžija (Lašva Valley)*, Trial Chamber Judgment of 10 December 1998, Appeal Chamber Judgment of 21 July 2000: convicted of torture and outrages upon personal dignity including rape, conviction upheld on appeal.

[296] ICTY, case IT-98-30/1 *Prosecutor v Kvočka et al*. *(Omarska, Keraterm & Trnopolje Camps)*, Trial Chamber Judgment of 02 November 2001, Appeal Chamber Judgment of 28 February 2005: The accused (Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlađo Radić & Zoran Žigić were indicted with rape, however the Court rejected rape charges and found that they were subsumed under the crime of persecution, which included rape. Affirmed on appeal.

[297] ICTY, case IT-96-21 *Prosecutor v Mucić et al*. *(Čelebići Camp)*, Trial Chamber Judgment of 16 November 1998, Appeal Chamber Judgment of 20 February 2001: Zdravko Mucić, Hazim Delić and Esad Landžo were convicted of torture through, *inter alia*, rape. Zejnil Delalić was acquitted of such charges. Convictions confirmed on appeal.

[298] ICTY, case IT-94-2 *Prosecutor v Nikolić (Sušica Camp)*, Trial Chamber Judgment of 18 December 2003: pleaded guilty of persecution, torture and sexual violence, including rape.

[299] ICTY, case IT-95-12 *Prosecutor v Rajić (Stupni Do)*, Trial Chamber Judgment of 08 May 2006: pleaded guilty of, *inter alia,* inhumane treatment including sexual assault.

Sikirica et al,[300] *Stakić*,[301] *Tadić*,[302] *Todorović*,[303] *Zelenović*,[304] *Haradinaj et al*,[305] *Karadžić*,[306] *Mladić*,[307] *Prlić*,[308] *Šešelj*[309] and *Hadžić*.[310]

Sexual violence crimes were widespread during the conflict in Sierra Leone as well. Charles Taylor[311] was convicted as an aide/abettor to, *inter alia*, rape and sexual slavery. Moreover, the accused in the *AFRC* case[312] were all convicted of rape, while no convictions were entered on sexual slavery and forced marriage. However, in the *RUF* case,[313] all the accused were convicted of rape, sexual slavery and forced marriage (to be discussed further below).

Concerning the ICC, as has been stated before, currently the ICC has not convicted any accused of sexual violence crimes. However, rape has been present in all the situations the ICC has investigated and has been charged in

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[300] ICTY, case IT-95-8 *Prosecutor v Sikirica et al. (Keraterm Camp)*, Trial Chamber Judgment of 13 November 2001: pleaded guilty of persecution, which for the accused Damir Došen included persecution through rape.

[301] ICTY, case IT-97-24 *Prosecutor v Stakić (Prijedor)*, Trial Chamber Judgment of 31 July 2003, Appeal Chamber Judgment of 22 March 2006: convicted of, *inter alia*, persecution through rape, conviction confirmed on appeal.

[302] ICTY, case IT-94-1 *Prosecutor v Tadić (Prijedor)*, Trial Chamber Judgment of 07 May 1997, Appeal Chamber Judgment of 15 July 1999: convicted of, *inter alia*, persecution through rape, conviction confirmed on appeal.

[303] ICTY, case IT-95-9/1 *Prosecutor v Todorović (Bosanski Šamac)*, Trial Chamber Judgment of 31 July 2001: pleaded guilty for forcing six men to perform oral sex on each other.

[304] ICTY, case IT-96-23/2 *Prosecutor v Zelenović (Foča)*, Trial Chamber Judgment of 04 April 2007: pleaded guilty for, *inter alia*, rape.

[305] ICTY, case IT-04-84 *Prosecutor v Haradinaj et al*, Trial Chamber Judgment of 03 April 2008, Appeal Chamber Judgment of 21 July 2010: the accused were indicted with, *inter alia,* rape and persecution which included rape. They were acquitted, but the Appeal Chamber ordered a re-trial, which is currently ongoing.

[306] ICTY, case IT-95-5/18-I *Prosecutor v Karadžić,* Indictment of 27 February 2009 and Marked-up Indictment of 19 October 2009: case currently in trial. Rape is prominent in the indictment as persecution and genocide.

[307] ICTY, case IT-09-92 *Prosecutor v Mladić*, Indictment of 16 December 2011: case currently in trial. Rape is present in the indictment, primarily as persecution.

[308] ICTY, case IT-04-74 *Prosecutor v Prlić et al*, Indictment of 11 June 2008: case currently in trial. The accused are indicted with rape.

[309] ICTY, case IT-03-67 *Prosecutor v Šešelj***,** Indictment of 07 December 2007: case currently in trial. The accused is indicted with, *inter alia*, persecution through sexual assault.

[310] ICTY, case IT-04-75 *Prosecutor v Hadžić,* Indictment of 22 July 2011: case in pre-trial stage. Indictment includes persecution through, *inter alia*, sexual assault.

[311] SCSL, *The Prosecutor v Charles Taylor*, Trial Chamber Judgment of 18 May 2012, appeal pending.

[312] SCSL, case SCSL-04-16 *The Prosecutor vs. Brima, Kamara and Kanu (AFRC Case)*, Trial Chamber Judgment of 20 June 2007, Appeal Chamber Judgment of 22 February 2008.

[313] SCSL, case SCSL-04-15 *The Prosecutor vs. Sesay, Kallon and Gbao (RUF Case)*, Trial Chamber Judgment of 02 March 2009, Appeal Chamber Judgment of 26 October 2009

11 of the 16 cases so far: in *Katanga and Chui*,[314] *Bemba Gombo*,[315] *Muthaura and Kenyatta*,[316] *Mbarushimana*,[317] *Ntaganda*,[318] *Mudacumura*,[319] *Kony et al*,[320] *Ahmad Harun and Ali Kushayb*,[321] *Al Bashir*,[322] *Muhammad Hussein*[323] and *Gbago*.[324]

[314] ICC, case ICC-01/04-01/07 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges of 26 September 2008: charges confirmed, charged with rape and sexual slavery.

[315] ICC, case ICC-01/05-01/08 *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Confirmation of charges of 15 June 2009: charges confirmed, charged with rape.

[316] ICC, case ICC-01/09-02/11 *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on the confirmation of charges of 23 January 2012: charges confirmed, charged with rape. Confirmation of charges against Mohammed Hussein Ali declined.

[317] ICC, case ICC-01/04-01/10 *The Prosecutor v Callixte Mbarushimana*, Decision declining to confirm the charges of 16 December 2011: Pre Trial Chamber declined to confirm charges, charged with rape.

[318] ICC, case ICC-01/04-02/*06 The Prosecutor v Bosco Ntaganda*, Second warrant of arrest of 13 July 2012: at large, charged with rape and sexual slavery.

[319] ICC, case ICC-01/04-01/12 *The Prosecutor v Sylvestre Mudacumura*, Warrant of arrest of 13 July 2012: at large, charged with rape.

[320] ICC, case ICC-02/04-01/05 *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Warrant of arrest of 08 July 2005: at large, Kony and Otti charged with rape and sexual salvery.

[321] ICC, case ICC-02/05-01/07 *The Prosecutor v Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Warrant of arrest of 27 April 2007: at large, charged with rape.

[322] ICC, case ICC-02/05-01/09 *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Second warrant of arrest of 12 July 2010: at large, charged with rape.

[323] ICC, case ICC-02/05-01/12 *The Prosecutor v Abdel Raheem Muhammad Hussein*, Warrant of arrest of 01 March 2012: at large, charged with rape.

[324] ICC, case ICC-02/11-01/11 *The Prosecutor v Laurent Gbagbo*, Warrant of arrest of 23 November 2011: confirmation of charges in progress, charged with rape and other sexual violence.

5. Sexual slavery

5.1 Introduction

Despite its prevalence in armed conflicts, for a long time sexual slavery was not recognized as a distinct crime in international law. It was listed as a separate crime for the first time in the Rome Statute of the ICC: Article 7(1)(g) of the Rome Statute expressly lists sexual slavery as a crime against humanity, while Articles 8(2)(b)(xxii) and 8(2)(e)(vi) expressly list it as a war crime. However, it must be noted that prior to sexual slavery being expressly recognized as a crime in international law it was prohibited as a form of enslavement, the prohibition of which is a *jus cogens* norm of customary international law.[325]

Sexual slavery is closely linked to two other international crimes, enslavement and forced prostitution. In fact, while it was accepted that sexual slavery should be considered as a separate crime, questions arose about what the differences between sexual slavery and enforced prostitution and enslavement are.

5.2 Sexual slavery, enforced prostitution and enslavement - differences

Enforced prostitution has a much longer history in international law and has been listed in legal documents since the 1900's.[326] However, during the drafting of the Rome Statute the question arose whether references to both enforced prostitution and sexual slavery were necessary. Some considered that enforced prostitution was an outdated term, which was subsumed by the wider term "sexual slavery." They argued that the term "enforced prostitution" reflected a male view, that it was discriminatory towards women, that it implied a level of voluntarism, that it does not convey the serious nature of the crime, etc. Hence, the term sexual slavery is more appropriate.[327]

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[325] Lupig, Diane: „*Investigation and prosecution of sexual and gender-based crimes before the international criminal court*" in Journal of Gender, Social Policy & the Law Volume 17, Issue 2 (2009), page 431, at page 461

[326] Oosterveld, Valerie: "*Sexual Slavery and the International Criminal Court*" in Michigan Journal of International Law, Volume 25, Issue 3 (2004), page 605, at page 616

[327] Ibid, at page 619

Others claimed that sexual slavery and enforced prostitution are different crimes, which have different elements. They argue that enforced prostitution should not be subsumed by sexual slavery because the term slavery is not the same during peace and wartime. That is, that there might be cases where women are coerced to act as prostitutes, but not in a slave-like position. In such situations, although most cases of enforced prostitution would be covered by the crime of sexual slavery, it could be beneficial to keep the category of enforced prostitution to cover such, rare, situations.[328] Since no clear answer could be found for the above questions (whether or not acts of enforced prostitution can always be considered as sexual slavery), it was decided to expressly list both crimes in the Rome Statute.

Regarding the crime of enslavement, it was claimed that sexual slavery was basically a form of enslavement and that, in order to reduce overlaps and repetition, it was not necessary to list sexual slavery separately but that a subsection could be added to the crime of enslavement.

While sexual slavery is, in essence, a form of enslavement, many disagreed with this proposal. Some of the arguments for express recognition of sexual slavery are as follows:

- that the term sexual slavery more accurately described and characterized the essence and nature of the crime;
- that sexual slavery was a contemporary form of enslavement that occurred often and should be expressly named;
- that such explicit reference to sexual slavery would advance international criminal law and its recognition of crimes of sexual violence;
- that the prohibition of slavery can have an exception in international humanitarian law while prohibition of sexual slavery cannot.[329]

Therefore, both the crimes of enslavement and of sexual slavery were expressly listed in the Rome Statute, although, as noted, overlaps exist between them. Another crime that can be considered similar to sexual slavery, which has not been explicitly recognized by the Rome Statute, is the crime of forced marriage, first charged before the SCSL. However, these similarities will be mentioned when discussing forced marriage in section 10 below.

[328] Ibid, at page 622

[329] Ibid, at pages 623-624

5.3 Elements of the crime of sexual slavery before the ICC

Prior to the definition of sexual slavery, the definition of "slavery" itself was given for the first time in the Slavery Convention,[330] as "*the status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised*." This was considered as also including sexual access through rape of other forms of sexual violence.[331]

Sexual slavery is expressly listed in Article 7(1)(g) of the Rome Statute, however no details are listed. Instead, what constitutes the crime of sexual slavery is described in detail in the ICC Elements of Crimes, in Article 7(1)(2)(g)-2 for crimes against humanity, Article 8(2)(b)(xxii)-2 for war crimes in international armed conflicts and Article 8(2)(e)(vi)-2 for war crimes in non-international armed conflicts. The first two elements of sexual slavery both as crimes against humanity and war crimes are identical, with the only difference being the different contextual and mental elements needed for crimes against humanity and war crimes.

The elements of the crime of sexual slavery are that:

1. *The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty*.[332]
2. *The perpetrator caused such person or persons to engage in one or more acts of a sexual nature*.

(contextual and mental elements omitted)

As has been stated above, sexual slavery is essentially a particularly serious form of enslavement. Therefore, the first element of sexual slavery is identical to the first element of the crime of enslavement.[333] Enslavement can take various forms, such as chattel slavery[334] and other practices which

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[330] Signed at Geneva on 25 September 1926

[331] UN Commission on Human Rights, Contemporary form of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: Final Report Submitted by Gay J. McDougall, Special Rapporteur, -E/CN.4/Sub.2/1998/13,22 June 1998, para 27

[332] Footnoted by: "*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.* "

[333] In Article 7(1)(c) of the Elements of Crimes of the Rome Statute

[334] Treating persons as chattels - movable property

involve exercising powers attaching to the right of ownership over a person.[335] Examples of practices that are included under enslavement are capturing, acquiring, selling or exchanging persons with the intent of reducing them to slavery, selling, lending or bartering persons, trafficking in persons (especially women and children), forced labour, debt bondage and other practices by which the perpetrator exercises the right of ownership over other persons.

While the first element is identical the second, additional, element sets sexual slavery apart from enslavement: that the perpetrator caused the victim(s) to engage in one or more acts of a sexual nature. This means that, in addition to limitations on the victim's autonomy, the ability to decide matters relating to his or her sexual activity is the identifying element of sexual slavery.[336] The clearest examples of cases of sexual slavery would be Japanese comfort camps or rape camps established during the conflict in Former Yugoslavia.

Certain commentators and women's groups have criticized the above elements on the basis that the language of the elements and the illustrative list could be interpreted narrowly and that it overly emphasizes commercial transaction or similar deprivations of liberty. However, it has also been argued that such criticisms and concerns are somewhat unfounded.[337]

5.4 Prosecution of sexual slavery

As of yet, no persons have been convicted of sexual slavery before the ICC under Article 7(1)(g) (crimes against humanity) or Article 8(2)(b)(xxii) or 8(2)(e)(vi) (war crimes) of the Rome Statute. However, the crime of sexual slavery is present in several cases from the Democratic Republic of Congo and Uganda that have not yet come to trial or which are currently in trial proceedings.

Firstly, in a case that is currently under trial,[338] Germain Katanga and Mathieu Ngudjolo Chui have been charged with committing, through other persons, sexual slavery as a crime against humanity and as a war crime

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[335] Cryer, Friman and Robinson, Wilmshurst: "*An Introduction to International Criminal Law and Procedure*", (Cambridge University Press, New York: 2010), page 248

[336] ICC, case ICC-01/04-01/07 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges of 26 September 2008, para 432

[337] Oosterveld, Valerie: "*Sexual Slavery and the International Criminal Court*" in Michigan Journal of International Law, Volume 25, Issue 3 (2004), page 605, at pages 641-644

[338] ICC, case ICC-01/04-01/07, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*

during the armed conflict in the Democratic Republic of Congo. Katanga and Chui were the commanders of ethnic armed groups in the Congo and the charges against them are a result of their military attacks on the Bogoro village in the North-East of Congo, where atrocities were committed against the local population.

According to the majority of the Pre Trial Chamber in the Decision on Confirmation of Charges, there were substantial grounds for the belief that the forces led by Katanga and Chui had committed crimes against humanity, as they "*(i) abducted women and/or girls from villages or areas surrounding the camps for the purpose of using them as their 'wives'; (ii) forced and threatened women and/or girls to engage in sexual intercourse with combatants and to serve as sexual slaves for combatants and commanders alike; and (iii) captured and imprisoned women and/or girls to work in a military camp servicing the soldiers. [...] The women were taken to camps where they were kept as prisoners in order to provide domestic services, including cooking and cleaning, and to engage in forced sexual acts with combatants and commanders*."[339]

Moreover, the majority of the Pre Trial Chamber also found that there were substantial grounds for the belief that the forces led by Katanga and Chui committed the war crime of sexual slavery. The Prosecutor alleges that women in Bogorowere were raped and forcibly taken to military camps where they were sometimes given as "wives" to their captors or kept in the camp's prison, which was a hole dug in the ground, where they were repeatedly raped by soldiers, commanders and soldiers who were punished and sent to the "prison".[340]

The majority of the Pre Trial Chamber concluded that "*there is sufficient evidence to establish substantial grounds to believe that civilian women were abducted from the village of Bogoro after the attack, imprisoned, and forced into becoming the 'wives' of FNI/FRPI combatants, required to cook for and obey the orders of FNI or FPRI combatants. [...] The Chamber also finds that there is sufficient evidence to establish substantial grounds to believe that these civilian women were forced to engage in acts of a sexual nature*."[341]

It must be noted that the Decision by the Pre Trial Chamber was made by a majority of judges. Judge Anita Ušacka partly dissented, especially with

[339] ICC, case ICC-01/04-01/07 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges of 26 September 2008, para 434

[340] Ibid, para 345

[341] ICC, case ICC-01/04-01/07 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges of 26 September 2008, paras 348-349

regards to the charges of sexual slavery. She considered that the evidence offered was not sufficient to establish substantial grounds that Katanga and Chui were responsible for rape and sexual slavery, as "*the Prosecution did not provide any direct evidence that Germain Katanga and Mathieu Ngudjolo Chui intended the common plan to attack Bogoro village to include rape or sexual slavery. For example, the Prosecution did not present evidence that either Germain Katanga or Mathieu Ngudjolo Chui directly ordered, suggested or induced members of the FNI/FRPI to commit rape or sexual slavery. Neither did the Prosecution present evidence that the suspects expressly agreed that rape and sexual slavery would be committed during the attack on Bogoro village, or even that in the aftermath of the Bogoro attack, the suspects were present when the crimes of rape and/or sexual slavery were committed*."[342]

Staying with the situation in the Democratic Republic of Congo, in the case against Bosco Ntaganda (who is still at large), the Prosecutor submitted that Ntaganda was responsible for, *inter alia*, sexual slavery as a crime against humanity and as a war crime. In the Second Warrant for Arrest, the Pre Trial Chamber II stated that "[t]*he Prosecutor submits that, from September 2002 to September 2003, Lendu and other non-Hema 'female civilians' were abducted, systematically raped, and subjected to other forms of sexual violence as part of the UPC/FPLC policy to gain control over Ituri. [...] On the basis of the facts presented in the material, the Chamber finds that there are reasonable grounds to believe, that crimes of rape and sexual slavery were committed as part of the attacks in different locations in Ituri [...]."*[343]

And finally, the crime of sexual slavery is also present in the case against Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen (all at large) regarding the situation in Uganda.[344] However, it must be noted that the Warrants for Arrest only submit that Kony and Otti are responsible for sexual slavery as a crime against humanity, while they do not state the same for the other accused *("NOTING that the evidence submitted, including REDACTED, suggests that some of the abducted REDACTED were REDACTED 'threatened, beaten and raped'; that REDACTED; that REDACTED indicated that the abduction REDACTED and REDACTED sexual enslavement occurred 'in fulfilment of orders given by Otti and*

[342] ICC, case ICC-01/04-01/07 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges of 26 September 2008, Partly Dissenting opinion of Judge Ušacka, para 19

[343] ICC, case ICC-01/04-02/*06 The Prosecutor v Bosco Ntaganda*, Second warrant of arrest of 13 July 2012, para 38

[344] ICC, case ICC-02/04-01/05 *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Warrant of arrest of 8 July 2005

Kony')."[345] However, the Warrants for Arrest are so heavily redacted that not much can be seen from them regarding the crime of sexual slavery.

As regards the ICTY, firstly it should be noted that sexual slavery as a separate crime is not listed under the Statute of the ICTY. The Statute, in Article 5 on crimes against humanity, mentions enslavement as a separate crime, as well as rape, which is the only gender based crime expressly listed in the Statute of the ICTY. Even so, the practice of the ICTY was important for the development and recognition of sexual slavery in international criminal law, because it was the first international court to rule on a case of sexual enslavement in the *Kunarac* case.[346]

In the *Kunarac* case the perpetrators were found to have detained Muslim women and girls and continuously raped them, sometimes for months, lent them out and sold them to soldiers for the purpose of being raped. Since the Statute of the ICTY does not list sexual slavery as a crime against humanity, these acts were prosecuted as the crime against humanity of enslavement. However, the Prosecutor specified that the enslavement was done for sexual purposes (such as rape) and even though the Trial and Appeals Chambers analyzed the crime of enslavement, *Kunarac* is an important case when it comes to the crime of sexual slavery.[347]

The Trial Chamber in *Kunarac* found that the objective element of the crime of enslavement was "*the exercise of any or all of the powers attaching to the right of ownership over a person*."[348] The relevant factors to establish this element of enslavement is whether one of the following elements exists: control of someone's movement; control of physical environment; psychological control; measures taken to prevent or deter escape; force; threat of force or coercion; duration; assertion of exclusivity; subjection to cruel treatment and abuse; control of sexuality; forced labour; and the buying, selling or inheriting of a person or his or her labours or services.[349] Of course, in the context of sexual slavery the most important element is the

[345] ICC, case ICC-02/04-01/05 *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Warrant of Arrest for Vincent Otti of 08 July 2005, para 17

[346] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Trial Chamber Judgment of 22 February 2001

[347] Oosterveld, Valerie: "*Sexual Slavery and the International Criminal Court*" in Michigan Journal of International Law, Volume 25, Issue 3 (2004), page 605, at page 647

[348] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Trial Chamber Judgment of 22 February 2001, para 540

[349] Ibid, para 543

control of another person's sexuality, which is a specific indicator of sexual slavery.[350]

The Trial Chamber also established that there is no need for a commercial or monetary element and that acquisition or disposal of someone for monetary or other compensation is not a requirement for enslavement.[351] The Appeals Chamber then clarified that the definition of contemporary forms of slavery is different from the traditional definition of chattel slavery and therefore, the victim does not need to be subjected to the more extreme rights of ownership associated with "chattel slavery" in order for the act to qualify as sexual slavery.[352]

And lastly, the Trial Chamber also clearly stated that the lack of consent is not a necessary element of the crime of sexual slavery (or enslavement for sexual reasons), which the Appeal Chamber confirmed: "*[T]he Appeals Chamber does not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from claimed rights of ownership; accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime. However, consent may be relevant from the evidential point of view [...]*." [353]

Similarly to the ICTY, the Statute of the ICTR does not list sexual slavery as a separate crime. The only gender-based crimes listed in the Statute are rape as a crime against humanity[354] and rape, enforced prostitution and indecent assault as outrages upon personal dignity under Common Article 3 of the Geneva Conventions.[355] Rape was an integral and planned part of attacks during the conflict in Rwanda and many judgements have found perpetrators guilty of rape as crimes against humanity but also as genocide, as seen above in section 4.4.1. However, to the best of my knowledge, there have been no judgements finding perpetrators guilty of enslavement for sexual reasons (sexual slavery), as there has been before the ICTY.

The SCSL also recognizes sexual slavery as a distinct crime against humanity under Article 2(g) of the Statute. This is due to the fact that it was

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[350] Oosterveld, Valerie: "*Sexual Slavery and the International Criminal Court*" in Michigan Journal of International Law, Volume 25, Issue 3 (2004), page 605, at page 648

[351] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Trial Chamber Judgment of 22 February 2001, para 542

[352] Oosterveld, Valerie: "*Sexual Slavery and the International Criminal Court*" in Michigan Journal of International Law, Volume 25, Issue 3 (2004), page 605, at page 648

[353] ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Appeal Chamber Judgment of 12 June 2002, para 120

[354] ICTR Statute, Article 3(g)

[355] Ibid, Article 4(e)

established after the ICC and that its statute was largely modelled after the Rome Statute. It lists sexual slavery as one of the five enumerated crimes against humanity of a sexual nature (along with rape, enforced prostitution, forced pregnancy and other forms of sexual violence).[356]

Moreover, the SCSL was the first international criminal tribunal to charge and convict perpetrators of sexual slavery as a separate crime. The first charge of the crime of sexual slavery was in the *AFRC* case. However, due to procedural mistakes of the Prosecutor who charged the crime of "sexual slavery and any other form of sexual violence, a crime against humanity punishable under Article 2(g) of the Statute" under the same count of the Indictment, this charge was dismissed.[357] The Trial Chamber found that it violated the rule against duplicity, as the accused were charged with two crimes under the same count which meant that the accused were unsure of which of the two crimes they should prepare a defence for.[358] On appeal, the Appeal Chamber agreed with the Trial Chamber that the Indictment in the count for sexual slavery violated the rule against duplicity, but it did not agree with the form of remedy the Trial Chamber chose. However, no miscarriage of justice occurred so it was no necessary for the Appeal Chamber to correct the Judgement of the Trial Chamber in that respect.[359]

However, after the *AFRC* case, a conviction for crimes against humanity of sexual slavery was achieved in the *RUF* case, a consequence being that the SCSL became the first international criminal court to convict for crimes against humanity of sexual slavery (as well as for the crime against humanity of forced marriage, which will be discussed later). The SCSL recognized that the crime of sexual slavery is not entirely new and that other perpetrators have been convicted for those types of acts, although under different names (for example, under the crime against humanity of enslavement in the *Kunarac* case).[360] However, even though the particular crime of sexual slavery criminalized actions that were already criminal, the new name and the establishment of sexual slavery as a separate crime against humanity was designed to draw attention to serious crimes that have, as the Court stated, often been overlooked in history and that have been

[356] Statute of the Special Court for Sierra Leone, Article 2(g)

[357] SCSL, Case SCSL-04-16 *The Prosecutor vs. Brima, Kamara and Kanu (AFRC Case)*, Trial Chamber Judgment of 20 June 2007, para 95

[358] Ibid, para 93

[359] SCSL, Case SCSL-04-16 *The Prosecutor vs. Brima, Kamara and Kanu (AFRC Case)*, Appeal Chamber Judgment of 22 February 2008, para 110

[360] SCSL, Case SCSL-04-15 *The Prosecutor vs. Sesay, Kallon and Gbao (RUF Case)*, Trial Chamber Judgment of 02 March 2009, para 155

used to humiliate and instil fear into the victims, their families and communities.[361]

In the Judgement, the Trial Chamber described the necessary elements that constitute sexual slavery. They are that:

1. *the accused exercised any or all the powers attaching to the right of ownership over one or more persons, such as purchasing, selling, lending or bartering such a person, or by imposing on them a similar deprivation of liberty;*
2. *the accused caused such a person or persons to engage in one or more acts of a sexual nature;*
3. *the accused intended to exercise the act of sexual slavery or acted in the reasonable knowledge that this was likely to occur.*[362]

While the first two elements are the same, the third element is an addition to the elements of sexual slavery found in the Elements of Crimes of the ICC.

The Court stated that the first two elements are the *actus reus* of the crime, and the SCSL refers to them as the *slavery element* and the *sexual element*. Regarding the *slavery element*, the SCSL relies on the ICTY's Judgement in the *Kunarac* case, so that the *slavery element* can be indicated through "*control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, to cruel treatment and abuse, control of sexuality and forced labour.*"[363]

For the *sexual element*, the Prosecutor must establish that the accused caused the enslaved person to engage in sexual acts, which, together with the *slavery element*, constitute the crime of sexual slavery. The consent of the victim is not a necessary element, because the *slavery element* presupposes that the penetrator has ownership and control over the victim. In any case, the SCSL agrees with the ICTY Appeal Chamber that in certain circumstances it is impossible to express consent and that the existence of

[361] SCSL, Case SCSL-04-15 *The Prosecutor vs. Sesay, Kallon and Gbao (RUF Case)*, Trial Chamber Judgment of 02 March 2009, para 156

[362] Ibid, para 158

[363] SCSL, Case SCSL-04-15 *The Prosecutor vs. Sesay, Kallon and Gbao (RUF Case)*, Trial Chamber Judgment of 02 March 2009, para 160; ICTY, case IT-96-23 & 23/1 *Prosecutor v Kunarac et al (Foča)*, Trial Chamber Judgment of 22 February 2001, para 543, Appeal Chamber Judgment of 12 June 2002, para 119

those circumstances is sufficient to assume that consent does not exist,[364] such as in the *Kunarac* case before the ICTY.

The RUF Trial Chamber also noted a few circumstances that can establish the *slavery element*, such as, for example, giving drugs to the victim in order to further control her.[365] It also confirmed that slavery existed even if the victims were not physically confined, but were unable to leave as they feared for their lives and had nowhere else to go.[366] As for the necessary *mens rea element* the Trial Chamber stated that it is satisfied if the accused intended to exercise the act of sexual slavery or acted in the reasonable knowledge that this was likely to occur.

On appeal the accused attempted to challenge the Trial Chamber's decision that there was no consent by the victims. However, the Appeal Chamber did not agree, and repeated that the Trial Chamber correctly found that there was no consent and that, in any case, consent is not an element of the crime of sexual slavery. It is a form of enslavement to which consent is not possible.[367] Therefore, the Appeal Chamber confirmed the findings of the Trial Chamber regarding sexual slavery.

It is likely that the ICC will closely examine the Judgements of the SCSL regarding sexual slavery, as the ICC Prosecutor has charged Germain Katanga and Mathieu Ngudjolo Chui, for their acts in the Democratic Republic of the Congo, with sexual slavery as a crime against humanity.[368]

[364] SCSL, Case SCSL-04-15 *The Prosecutor vs. Sesay, Kallon and Gbao (RUF Case)*, Trial Chamber Judgment of 02 March 2009, para 163

[365] Ibid, para 1463

[366] Ibid, para 161

[367] Ibid, para 734

[368] ICC, case ICC-01/04-01/07 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges of 26 September 2008

6. Enforced prostitution

6.1 Introduction

Like sexual slavery, the crime of enforced prostitution was also listed as a separate crime for the first time in the Rome Statute of the ICC. Enforced prostitution is listed as a crime against humanity[369] and, as with the other gender based crimes, a war crime.[370] However, even before enforced prostitution was expressly listed as a distinct international crime, it existed in international humanitarian law as an "*attack to women's honour*" in the Fourth Geneva Convention,[371] as well as in Additional Protocol I[372] and Additional Protocol II,[373] where it is listed under "*outrages upon personal dignity*." Enforced prostitution is a crime which can be committed against both sexes. However, in practice in armed conflicts it is almost always committed against women.

6.2 Elements of forced prostitution before the ICC

Under the Elements of Crimes of the ICC, forced prostitution as a crime against humanity and as a war crime has two common elements:[374]

1. *The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of 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*.

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369 Article 7(1)(g)

370 Rome Statute, Article 8 (2)(b)(xxii) and Article 8(2)(e)(vi)

371 Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Article 27 – available at http://www.icrc.org/ihl.nsf/full/380 (20.09.2012)

372 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 08 June 1977, Articles 75(1)(2)(b) and 76 (1) – available at http://www.icrc.org/ihl.nsf/full/470?opendocument (20.09.2012)

373 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 08 June 1977, Article 4 (2)(e) – available at http://www.icrc.org/ihl.nsf/full/475?opendocument (20.09.2012)

374 ICC Elements of Crimes, Article 7(1)(g)-3, Article 8(2)(b)(xxii)-3 and Article 8(2)(e)(vi)-3

2. *The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature*.

As we can see from the above, the first element requires that the perpetrator causes another person to engage in sexual acts without that person's consent, while the second element requires that the perpetrator or another person obtained an advantage from or for these sexual acts. This second element characterizes the crime of enforced prostitution and distinguishes it from other crimes, such as sexual slavery: enforced prostitution requires a person obtaining or expecting to obtain pecuniary or other advantages in exchange for the sexual acts, while sexual slavery does not.[375] As has been stated above regarding sexual slavery, these elements were heavily criticized from certain commentators.[376]

The crime of sexual slavery does not require a commercial exchange or superiority, because the main focus of the crime is on the exercise of powers or ownership rights. The commercial exchange can exist in sexual slavery as well, through the purchase, sale or bartering of a victim. However enforced prostitution also requires that the person expects to gain a pecuniary or other advantage from the sexual acts, which is not a requirement for sexual slavery. Hence, it might be possible that sexual services with pecuniary or other advantages could constitute both the crime of sexual slavery and enforced prostitution.[377]

In fact, according to the UN Special Rapporteur on the situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, "*sexual slavery also encompasses most, if not all forms of forced prostitution*. *The terms 'forced prostitution' or 'enforced prostitution' [...] have been insufficiently understood and inconsistently applied*. *'Forced prostitution' generally refers to conditions of control over a person who is coerced by another to engage in sexual activity*."[378] Therefore, it has been

[375] Oosterveld, Valerie: "*Gender-Based Crimes Against Humanity*" in ed Sadat, Leila Nadya: "Forging a Convention for Crimes Against Humanity" (Cambridge University Press: 2011), page 78, at page 90

[376] See section 5.3

[377] Oosterveld, Valerie: "*Sexual Slavery and the International Criminal Court*" in Michigan Journal of International Law, Volume 25, Issue 3 (2004), page 605, at page 646

[378] UN Commission on Human Rights, Contemporary form of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: Final Report Submitted by Gay J. McDougall, Special Rapporteur, - E/CN.4/Sub.2/1998/13,22 June 1998, para. 31

argued that enforced prostitution is a crime of sexual slavery and that such acts in an armed conflict could be easily prosecuted as sexual slavery.[379]

6.3 Difference before enforced prostitution and sexual slavery

As stated above with regard to sexual slavery, there was great debate when the Rome Statute was drafted about whether sexual slavery and enforced prostitution should constitute separate crimes or not. The debate centred around two issues: firstly, how a person might be forced to engage in sexual acts if he/she was not enslaved (sexual slavery), and secondly whether a benefit from the sexual acts was necessary, what might that benefit be and to whom should it accrue.

Regarding the first issue, the drafters followed the lead given by the ICTY in the *Furundžija* case[380] and the ICTR in the *Akeyasu* case[381] regarding rape. Therefore, the ICC elements make it clear that physical force is not required in order to prove enforced prostitution and that the victim could be forced into prostitution through threats of violence, detention, duress or psychological oppression, express or implied, intimidation, extortion and other forms of duress which prey on fear or desperation.[382]

Regarding the second issue, it was decided that some form of monetary or other benefit in exchange for the sexual acts was necessary. If no benefit existed (for example, if a person kept women confined and offered them freely for sexual services), it would be an act of sexual slavery. Therefore, the material benefit element was adopted as it differentiates enforced prostitution from sexual slavery and other sexual crimes,[383] and as it fits the ordinary meaning of the term "*prostitution*."[384]

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[379] UN Commission on Human Rights, Contemporary form of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: Final Report Submitted by Gay J. McDougall, Special Rapporteur, -E/CN.4/Sub.2/1998/13,22 June 1998, para. 31

[380] ICTY, case IT-95-17/1 *Prosecutor v Furundžija (Lašva Valley)*, Trial Chamber Judgment of 10 December 1998

[381] ICTR, case ICTR-96-4 *Prosecutor v Akayesu*, Trial Chamber Judgment of 02 September 1998

[382] Oosterveld, Valerie: "*Sexual Slavery and the International Criminal Court*" in Michigan Journal of International Law, Volume 25, Issue 3 (2004), page 605, at page 644

[383] Ibid, at page 645

[384] Cryer, Friman and Robinson, Wilmshurst: "*An Introduction to International Criminal Law and Procedure*", (Cambridge University Press, New York: 2010), page 257

Therefore, although they are very similar, the distinction between sexual slavery and enforced prostitution should be understood. The elements of forced prostitution emphasise coerced engagement in acts of a sexual nature, while the elements of sexual slavery, on the other hand, emphasize the limitation of the victim's autonomy. The term "prostitution" suggests that sexual service is a part of exchange. Even though the element of coercive circumstances is present, the women perhaps have no other option to survive, as, for example, in the case of DRC peacekeepers who offered cake or bananas in exchange for sexual services.[385] Therefore, it can be argued that it is very important that the Rome Statute included enforced prostitution as a separate crime, because it covers situations where a person is forced to be a prostitute in order to get something necessary for their survival or to avoid further harm.

6.4 Prosecution of enforced prostitution

Finally, it must be noted that enforced prostitution, like sexual slavery, is not listed in the Statute of the ICTY. However, it is listed in the Statute of the ICTR, as a violation of the Common Article 3 of the Geneva Conventions and of Additional Protocol II.[386] Moreover, enforced prostitution is also expressly listed in the Statute of the SCSL, both as a crime against humanity[387] and a war crime.[388] However, to the best of my knowledge, there have been no cases before any of these courts or tribunals where enforced prostitution has been charged as a distinct crime.

[385] Brouwer de, Anne Marie: "*Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*" (Intersentia: 2005), page 143

[386] ICTR Statute, Article 4(e)

[387] SCSL Statute, Article 2(g)

[388] Ibid, Article 3(e)

7. Forced pregnancy

7.1 Introduction

Like sexual slavery, forced pregnancy was also criminalized for the first time by the ICC's Rome Statute.[389] Prior to this, forced pregnancy could not be found in any international criminal law or international humanitarian law documents. Following the lead of the ICC, the SCSL also included forced pregnancy in its Statute.[390]

Like most of the other gender based crimes against women, although the crime of forced pregnancy is relatively new the acts themselves are not and have occurred throughout history, with evidence of this practice going back as far as 2500 years.[391] However, it wasn't until the armed conflicts in Bosnia and Herzegovina and Rwanda in the 1990's that forced pregnancy came into the international community's focus.

It was reported that Serb forces raped and intentionally impregnated Croat and Muslim women and denied them access to medical facilities where they could terminate the pregnancies, thereby forcing them to bear "Serb children." It was also reported that women were repeatedly raped until they became pregnant and that this was a part of a systematic plan.[392] Similarly, after the genocide in Rwanda it was reported that raped women gave birth to between 2000 and 5000 children, sometimes called "children of hate."[393] The point of these acts was for women to give birth to children which would be considered as being of another ethnicity or "ethnically impure." These crimes also had a terrible impact on its victims: along with the traumas of the rape itself, their suffering was even greater and more complex as they had a child that was their own, but that reminded them every day of the horrors they suffered. Moreover, in addition to the stigma of rape, the pregnancy and birth of a child of the "enemy" might make the women even more isolated and ostracized by their family and society.

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389 Enforced prostitution was already recognized under the Geneva Convention IV as an attack on women's honour, as stated above in section 4.1

390 As a crime against humanity in Article 2(g)

391 Milanović, Milan: "*Vessels of reproduction: forced pregnancy and the ICC*" in Michigan State Journal of International Law, Volume 16, Issue 2 (2008), page 439, at page 439

392 U.N. Secretary-General, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674 of May 27 1994, para 248

393 Carpenter, Robyn Charli: "*Forced Maternity, Children's Rights and the Genocide Convention: A Theoretical Analysis*" in Journal of Genocide Research Volume 2, Issue 2 (2000) page 213, at page 223

Following these reports from Bosnia and Herzegovina and Rwanda, the international community chose to place greater focus on the crime of forced pregnancy. Therefore, the United Nations Vienna Declaration[394] in 1993, the United Nations Beijing Declaration[395] in 1995 and the United Nations Commission on Human Rights in 1998[396] all expressly named forced pregnancy, among other acts of sexual violence, as violations of human rights that must be eliminated. And finally, in 1998 the Rome Statute of the ICC became the first international criminal law or humanitarian law instrument to expressly criminalize forced pregnancy.

7.2 Elements of the crime of forced pregnancy in the Rome Statute

Like the previous crimes, the Rome Statute lists forced pregnancy as a crime against humanity[397] and as a war crime.[398] However, unlike the previous crimes of sexual violence, forced pregnancy is the only gender-specific crime that can be committed only against women. It is also the only sexual crime that has been explicitly defined in the Rome Statute itself: "*'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy*".[399]

The ICC Elements of Crimes simply reformulate the definition given in the Rome Statute without really clarifying it any further. They list the common element for the crime of forced pregnancy[400] as:

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394 World Conference on Human Rights, June 14-25 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 of 12 July 1993, para 38

395 Fourth World Conference on Women, Beijing, China, September 4-15 1995, *Report of the Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20 of 17 October 1995, para 114

396 United Nations Commission on Human Rights Resolution 1998/52, The Elimination of Violence Against Women, 52d Session, Supp. No. 3, E/CN.4/1998/52 of 17 April 1998, at 171

397 Rome Statute, Article 7(1)(g)

398 Ibid, Article 8(2)(b)(xxii) and Article 8(2)(e)(vi)

399 Ibid, Article 7(2)(f)

400 Common element of forced pregnancy as a crime against humanity and as war crimes, in Article 7(1)(g)-4, Article 8(2)(b)(xxii)-4 and Article 8(2)(e)(vi)-4 of the ICC Elements of Crimes; the provisions on forced pregnancy as war crimes refer to the definition of forced pregnancy in Article 7(2)(f)

1. *The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law*.

(contextual elements omitted)

However, by analysing the above text, it is possible to break it down into several smaller elements: (i) that the victim is physically pregnant; (ii) that she is confined during the time she is pregnant; (iii) that the perpetrator has an additional intent that the pregnancy affects the ethnic composition of a population or an intent to commit other grave violations of international law.

7.2.1 Pregnant

Firstly, according to the definition of the crime, the woman must be "forcibly made pregnant", meaning that the women must be physically pregnant, and that unsuccessful attempts to make her pregnant will not constitute forced pregnancy (for example, if a woman is unable to bear children). Instead, such cases would fall under other sexual crimes (unsuccessful attempts to make a woman pregnant could constitute rape, while confinement of a woman who is not pregnant could constitute enslavement or sexual slavery).

The pregnancy must also be caused by "force", and the standards of "force" in rape[401] will be used by analogy for forced pregnancy. However, it is argued that not only acts which make a woman pregnant will be relevant for the concept of "force", but also acts which prevent her from controlling her reproductive cycles. Therefore, if a woman is forcibly prevented from using contraceptives, it is argued that such acts could constitute evidence of forced pregnancy.[402]

It should be noted that the act of "forcibly making a woman pregnant" does not necessarily have to be the same as rape. Rape, according to the ICC Elements of Crimes, requires penetration by a sexual organ or by an object. However, penetration by an object cannot impregnate a woman (unless, perhaps, the object is a medical instrument used for impregnation) and cannot, hence, be a part of the crime of forced pregnancy. While rape is the "common" method used to forcibly impregnate women, forced pregnancy does not necessarily have to involve penetration and covers any situation or technology by which a woman is made pregnant against her will (such as

[401] Such as violence, duress, detention, psychological oppression or abuse of power

[402] Milanović, Milan: "*Vessels of reproduction: forced pregnancy and the ICC*" in Michigan State Journal of International Law, Volume 16, Issue 2 (2008), page 439, at page 442

medical experiments for example). Therefore, the phrase "forcibly made pregnant" only requires the finding that a woman is pregnant and that she was made pregnant forcibly, against her will.[403]

7.2.2 Confined

Secondly, it is necessary that the woman is confined so that she remains pregnant, although it is not necessary that she actually give birth to the child. The confinement itself is not clearly defined, however by analogy it can be equated with the war crime of unlawful confinement in the Rome Statute,[404] which is defined as confinement to a certain location. Therefore, this element should be fulfilled if the woman was detained in any location where she was not at liberty to leave.[405]

Since the crime of forced pregnancy is not exactly the same as the crime of unlawful confinement, or enslavement for example, the confinement of a pregnant woman must have a temporal element which is connected to her pregnancy. This means that, for forced pregnancy to exist, the woman must be confined from the time she is believed to be pregnant, to the time of the pregnancy's termination, either by birth, miscarriage, abortion or by passing the limit when abortion can be performed.[406] This would mean that the woman was forced to be pregnant and had no possibility of willingly ending the pregnancy.

It must be noted that this element of forced pregnancy is the defining one. It separates forced pregnancy from other crimes and it is the *actus reus* of the crime. The essence of forced pregnancy is not in the forcible impregnation through rape or other means, but in confining a pregnant woman and forcing her to remain pregnant. Thus, the perpetrator of this crime is not the person that forcibly impregnates a woman, but the person that confines a pregnant woman in order for her to give birth to a child and thus affect the ethnic composition of a population. [407]

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[403] Boon, Kristen: "*Rape and forced pregnancy under the ICC Statute: Human dignity, autonomy and consent*" in Columbia Human Rights Law Review Volume 32, Issue 3 (2001), page 625, at page 661

[404] Rome Statute, Article 8(2)(a)(vii)

[405] Boon, Kristen: "*Rape and forced pregnancy under the ICC Statute: Human dignity, autonomy and consent*" in Columbia Human Rights Law Review Volume 32, Issue 3 (2001), page 625, at page 662

[406] Ibid, at page 663

[407] Milanović, Milan: "*Vessels of reproduction: forced pregnancy and the ICC*" in Michigan State Journal of International Law, Volume 16, Issue 2 (2008), page 439, at page 442

7.2.3 Intent

Finally, the third element necessary for forced pregnancy to exist is that the perpetrator has the intent of "*affecting the ethnic composition of any population or carrying out other grave violations of international law*." This additional intent element does not exist with any of the other sexual violence crimes and sounds similar to the *dolus specialis* required for the crime of genocide. This means that unless the perpetrator had the above intent of affecting the ethnic composition of a population or of committing other grave violations of international law the crime of forced pregnancy cannot be found. An example would be if the perpetrator forcibly impregnated a woman and kept her pregnant not to affect the ethnic composition of a population, but because he wanted to have his own offspring. While such an act could fit under several other crimes, it would not be considered as forced pregnancy.

Reading the definition of forced pregnancy, we see that there are actually two different and alternative requisite intents. The first one is that the perpetrator had the intent of affecting the ethnic composition of a population to which the victim belongs. Such were the reported cases from the armed conflict in Bosnia and Herzegovina, where Muslim and Croat women were subjected to forced pregnancy in order to give birth to "Serb babies". This first intent requires that the perpetrator and the victim are members (or thought to be members) of different ethnic groups.[408] Otherwise, while the child would be a product of rape, it would not affect the ethnic composition of a population.

However, it is argued that there is a certain vagueness regarding the definition of forced pregnancy: does a woman have to be made forcibly pregnant with the intent of affecting the ethnic composition of a population, or is it sufficient that she is only confined with such intent? A textual analysis of the definition suggests that only the confinement requires such intent.[409]

The second type of intent, that is to carry out other grave violations of international law, is wider and applies regardless of ethnic identity, race, religion or other circumstances. In brief, it will be left to judges to determine how to interpret this intent. It was included to cover situations such as

[408] Boon, Kristen: "*Rape and forced pregnancy under the ICC Statute: Human dignity, autonomy and consent*" in Columbia Human Rights Law Review Volume 32, Issue 3 (2001), page 625, at page 663

[409] Milanović, Milan: "*Vessels of reproduction: forced pregnancy and the ICC*" in Michigan State Journal of International Law, Volume 16, Issue 2 (2008), page 439, at page 44

abuses by the military of their own civilians or biological experiments that might be conducted on women.[410]

7.3 Forced pregnancy as genocide?

As stated above, the Rome Statute criminalizes forced pregnancy as a crime against humanity and as a war crime. However, due to its characteristics, certain commentators have argued that forced pregnancy can constitute genocide as well and that, together with rape, it is implicitly incorporated in the crime of genocide, although it is not listed anywhere in the Genocide Convention or in the provisions on genocide in the statutes of any international criminal court or tribunal.

For an act to be defined as genocide, it must fall under one of the five listed forms of genocide, as previously mentioned above. As for forced pregnancy, it is argued that it could fall under either causing serious bodily or mental harm to members of the group, or imposing measures indented to prevent births within the group. Commentators find support for this claim in the *Akayesu*[411] and *Musema*[412] judgments before the ICTR, where the Court found the accused guilty of genocide based on, *inter alia*, charges of rape.

In Akeyasu, the Trial Chamber found that "*[t]he rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. Sexual violence was a step in the process of destruction of the Tutsi group - destruction of the spirit, of the will to live, and of life itself*." and in *Musema* the Trial Chamber stated that "*acts of serious bodily and mental harm, including rape and other forms of sexual violence were often accompanied by humiliating utterances, which clearly indicated that the intention underlying each specific act was to destroy the Tutsi group as a whole*."[413] Therefore, the ICTR created a clear link between crimes of sexual violence and genocide by causing serious bodily and mental harm.

Moreover, the ICC's Elements of Crimes when discussing the crime of genocide by causing serious bodily or mental harm state that "*[t]his conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual*

[410] Cryer, Friman and Robinson, Wilmshurst: "*An Introduction to International Criminal Law and Procedure*", (Cambridge University Press, New York: 2010), page 257

[411] ICTR, case ICTR-96-4 *Prosecutor v Akayesu*, Trial Chamber Judgment of 02 September 1998, paras 731-732

[412] ICTR, case ICTR-96-13 *Prosecutor v Musema*, Trial Chamber Judgment of 27 January 2000, para 965

[413] Ibid, para 933

violence or inhuman or degrading treatment."[414] Therefore, due to the above, it is argued by certain commentators that forced pregnancy conducted with the intent of destroying a national, ethnic, racial or religious group can constitute genocide through causing serious bodily or mental harm: "*[S]ystematic sexual assaults to produce children of a different ethnic group and to destroy another group meet the definition of genocide and could thus be prosecuted as genocide*."[415] As one commentator puts it, "*[w]hen reproduction is used to proliferate members of one group and simultaneously to prevent the reproduction of members of another, it is a form of destruction*."[416]

Furthermore, as stated above, it has also been argued that forced pregnancy can constitute genocide by imposing measures intended to prevent births within the group. This argumentation is, again, largely based on the ICTR's statement in *Akeyasu*, where the Trial Chamber stated that "*In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group. [...] Furthermore, [...] measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate."*[417]

Moreover, it is argued that when a woman is pregnant with the child of "an enemy" she cannot be pregnant with a child of her own group, and after giving birth to the "child of enemy" she might be too devastated to ever give birth again. Therefore, it is claimed that the trauma suffered by the victim of forced pregnancy could cause her not to procreate in the future and thus be considered genocide as it constitutes an imposition of measures designed to prevent births within the group.

Another argument that can be used to support the treatment of forced pregnancy as genocide is the required special intent element which is similar

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[414] ICC Elements of Crimes, Article 6(b), footnote 3. The term "this conduct" refers to causing serious bodily or mental harm to one or more persons from element 1.

[415] Boon, Kristen: "*Rape and forced pregnancy under the ICC Statute: Human dignity, autonomy and consent*" in Columbia Human Rights Law Review Volume 32, Issue 3 (2001), page 625, at page 663

[416] Fisher, Siobhan: "*Occupation of the Womb: Forced Impregnation as Genocide*" in Duke Law Journal Volume 46, Issue 1 (1996), page 91, at page 120-121

[417] ICTR, case ICTR-96-4 *Prosecutor v Akayesu*, Trial Chamber Judgment of 02 September 1998, paras 507-508

to the special intent necessary for genocide, and which doesn't exist for any of the other crimes against humanity in the Rome Statute. Since this intent requirement puts the focus on the attack of an ethnic group, it has also been argued that the crime of forced pregnancy is not actually concerned with protecting women as individual persons, but rather that it, like the prohibition of genocide, is designed to protect collectives, *i.e.* ethnic groups.[418]

However, these arguments are not without criticism and other commentators argue that forced pregnancy cannot be considered as genocide. While it is a terrible act which causes great bodily and mental harm, the question is how can it destroy a group? They ask the question how the creation of life (although through horrible means) can be equated to genocide which is the worst kind of destruction of life and how the creation of individuals destroys a group.[419] They also criticize the arguments that in patriarchal societies the identity of the child is based on the father, and state that "*the ethnic composition of the group is not affected because the child will still in part belong to the mother's group. Children, after all, receive in equal parts genetic material from mother and father. [...] [T]o treat forced pregnancy as genocide is to substantiate the myth that identity is determined solely by the ethnicity of the father; it is to accept the notion that the mother's ethnicity is erased from the offspring. [...] Treating forced pregnancy as genocide is to validate the notion that a child must be ethnically and culturally pure to belong to a particular people*."[420]

Moreover, further criticism is drawn from the claim that the special intent for forced pregnancy and genocide is not the same and that it cannot be presumed that the "*intent to affect the ethnic composition of a population*" is the same as the "*intent to destroy, in whole or part, a national, ethnic, racial or religious group*" and that the intent required for forced pregnancy always includes the intent to destroy a group, as this would turn every case of forced pregnancy (as a crime against humanity or war crime) into genocide, which is not what the drafters of the Rome Statute had in mind.[421]

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[418] See generally Drake, Alyson M: "*Aimed at protecting ethnic groups or women? A look at forced pregnancy under the Rome Statute*" in William and Mary Journal of Women and the Law Volume 18, Issue 3 (2012), page 595

[419] Carpenter, Robyn Charli: "*Forced Maternity, Children's Rights and the Genocide Convention: A Theoretical Analysis*" in Journal of Genocide Research, Volume 2, Issue 2 (2000) page 213, at pages 218-222

[420] Milanović, Milan: "*Vessels of reproduction: forced pregnancy and the ICC*" in Michigan State Journal of International Law, Volume 16, Issue 2 (2008), page 439, at pages 453-455

[421] Milanović, Milan: "*Vessels of reproduction: forced pregnancy and the ICC*" in Michigan State Journal of International Law, Volume 16, Issue 2 (2008), page 439, at page 456

7.4 Negotiations on the crime of forced pregnancy

In order to understand the crime of forced pregnancy and the definition given in the Rome Statute, it is also necessary to consider its negotiation and drafting process. Forced pregnancy is one of the most contentious crimes in the Rome Statute, and which involved the most difficult negotiations. The result of these difficult negotiations can be seen in the definition of forced pregnancy.

Women's rights, and especially women's rights to sexual autonomy and independence, are still a controversial and underdeveloped issue in some parts of the world. Therefore, the inclusion of forced pregnancy into the Rome Statute faced much opposition, especially from countries and organisations that opposed or outlawed abortion, such as the Holy See, Ireland, Poland, Arab States and anti-abortion NGOs. Their fear was that including forced pregnancy in the Rome Statute might affect their national laws on abortion and, more generally, promote women's rights to reproductive self-determination.[422] Moreover, some states believed that there was no need at all for a separate crime, but that forced pregnancy was a result of rape and the rape itself should constitute the crime, while the forced pregnancy should only be an aggravating factor of the rape.[423]

This opposition led to the inclusion of clause. which is designed to protect national laws on pregnancy and abortion, in the definition of the crime of forced pregnancy in Article 7(2)(f) of the Rome Statute: "*This definition shall not in any way be interpreted as affecting national laws relating to pregnancy*". This means that states' abortion laws are protected and isolated from the Rome Statute and that states have no obligation to allow abortion, even in cases of forced pregnancy as a crime under the Rome Statute, if they do not wish to do so.

7.5 Prosecution of forced pregnancy

The crime of forced pregnancy has so far not been charged or prosecuted before the ICC or the SCSL and it seems that the definition of the crime

[422] Boon, Kristen: "*Rape and forced pregnancy under the ICC Statute: Human dignity, autonomy and consent*" in Columbia Human Rights Law Review Volume 32, Issue 3 (2001), page 625, at page 658

[423] Drake, Alyson M.: "*Aimed at protecting ethnic groups or women? A look at forced pregnancy under the Rome Statute*" in William and Mary Journal of Women and the Law Volume 18, Issue 3 (2012), page 595, at page 607

itself makes it very difficult to prosecute. Specifically, the primary problem would be special intent that must be proven, which might make it an insurmountable task to prosecute forced pregnancy successfully.[424] This additional element elevates the evidentiary requirements of forced pregnancy above all other crimes against humanity and war crimes, nearly to the level of genocide: in addition to the contextual elements of crimes against humanity and war crimes and ordinary mental elements for those crimes, the Prosecutor would have to prove an additional level of intent which, as demonstrated by prosecutions of genocide, can be very difficult to prove.

Another potential problem with prosecuting forced pregnancy is that the *actus reus* of the crime, that is the confinement of a forcibly pregnant woman, might not be committed by the same person who forcibly impregnated her. In such case, the Prosecutor would likely have to prove two different crimes: first the rape (forcible impregnation) and then the confinement of a pregnant woman with the necessary intent. But to what extent does the rape have to be proven and what if the rapist was unknown or not found? And if the rapist was identified and present, would it mean that he would also, in a way, be tried in the trial of the perpetrator of the forced pregnancy? Another question relates to the perpetrator's awareness of the forced pregnancy and the standard of such knowledge which must be proven.[425]

Since forced pregnancy is a newly criminalized act it is likely that there are many more ambiguities. However, the evidentiary difficulties in prosecuting forced pregnancy, especially proving the requisite intent, might mean that it is unlikely we will see a successful prosecution of this crime before the ICC or the SCSL.

[424] Drake, Alyson M.: "*Aimed at protecting ethnic groups or women? A look at forced pregnancy under the Rome Statute*" in William and Mary Journal of Women and the Law Volume 18, Issue 3 (2012), page 595, at page 608

[425] Milanović, Milan: "*Vessels of reproduction: forced pregnancy and the ICC*" in Michigan State Journal of International Law, Volume 16, Issue 2 (2008), page 439, at page 444

8. Enforced sterilization

8.1 Introduction

Like many of the gender-based crimes mentioned above, enforced sterilization was also expressly recognized for the first time in the Rome Statute of the ICC. It is listed both as a crime against humanity[426] and as a war crime.[427] It is interesting to note that, although it accepted and listed all the other newly recognized crimes from the Rome Statute, the SCSL did not list enforced sterilization as a crime in its Statute. It should also be noted that, in addition to being a war crime and a crime against humanity, if done with the requisite intent enforced sterilization will without doubt constitute genocide, under the heading "*imposing measures intended to prevent births within the group*". In fact, forced sterilization is perhaps one of the main measures that could be used to prevent births within a group.

Although forced sterilization was expressly listed for the first time in the Rome Statute, these acts were prosecuted before, in the *Medical case* before the Nuremburg Tribunal[428] in the aftermath of World War II. In the *Medical Case* several Nazi doctors were found guilty of crimes against humanity and war crimes under the Control Council Law No 10,[429] for conducting mass medical experiments in the Nazi Auschwitz and Ravensbruck concentration camps, among which was also the enforced sterilization of victims.[430]

Inclusion of enforced sterilization in the Rome Statute was inspired by these events, but also by reports of violent sexual acts committed during armed conflicts which resulted in severe reproductive damage, such as sterilization.[431] Although enforced sterilization is listed among sexual crimes in the Rome Statute, some claim that it does not belong there, since enforced sterilization is not necessarily a result of sexual violence. It can also be the result of medical procedures or medical experiments, such as operations, use of drugs for sterilization, etc. However, enforced

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[426] In Article 7(1)(g) of the Rome Statute

[427] Ibid, Articles 8(2)(b)(xxii) and 8(2)(e)(vi)

[428] US Military Tribunal Nuremberg, The United States of America vs. Karl Brandt et al, Judgment of 19 July 1947 – available at http://werle.rewi.hu-berlin.de/MedicalCase.pdf (15.09.2012)

[429] Available at http://avalon.law.yale.edu/imt/imt10.asp (15.09.2012)

[430] Schabas, William A.: „*The International Criminal Court: A Commentary on the Rome Statute*" (Oxford University Press: 2010), page 174

[431] Oosterveld, Valerie: "*Gender-Based Crimes Against Humanity*" in ed Sadat, Leila Nadya: "Forging a Convention for Crimes Against Humanity" (Cambridge University Press: 2011), page 78, at page 92

sterilization can also be a consequence of sexual acts, such as sexual mutilation, rape with objects or violent rape, of sexually transmitted diseases, failed abortions, etc.[432] This is likely why it was listed among crimes of sexual violence.

8.2 Elements of enforced sterilization

The common elements of enforced sterilization in the ICC are:[433]

1. *The perpetrator deprived one or more persons of biological reproductive capacity*.[434]
2. *The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent*.[435]

(contextual elements omitted)

It should be noted that the text of these elements is gender-neutral, meaning that the crime of enforced sterilization can be committed against both men and women. The statute also adopts a wide approach towards the method through which enforced sterilization can occur, so it does not limit it to only physical operations or removals of organs, for example, and includes other medical or chemical means, as well as any other means through which a person is deprived of biological reproductive capacity (such as by sexual violence, as mentioned above).

However, the deprivation of biological reproductive capacity cannot be purely temporary and must be permanent. This is evident in the footnote added to element 1, which states that "*[t]he deprivation is not intended to include birth-control measures which have a non-permanent effect in practice*." Therefore purely temporary birth control methods, the effects of which pass with time, would not constitute the crime of enforced sterilization. However, it should be noted that if temporary methods of birth

[432] Oosterveld, Valerie: "*Gender-Based Crimes Against Humanity*" in ed Sadat, Leila Nadya: "Forging a Convention for Crimes Against Humanity" (Cambridge University Press: 2011), page 78, at page 92

[433] ICC Elements of Crimes, Article 7(1)(g)-4, Article 8(2)(b)(xxii)-5 and Article 8(2)(e)(vi)-5

[434] Element 1 has a footnote, which states: "*The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice*."

[435] Element 2 has a footnote, which states: "*It is understood that 'genuine consent' does not include consent obtained through deception*."

control were constantly repeated so that they had a permanent effect in practice, it would constitute the crime of enforced sterilization.[436]

Coming to the second element, it should be noted that just depriving a person of biological reproductive capacity is not in itself a crime, and that sterilizations can be lawful. Thus the second element determines which sterilizations shall be considered as an international crime. For example, sterilizations which were medically justified, even without the person's consent, would not constitute enforced sterilization, and neither would medically unjustified sterilizations but which were done with the consent of the person.

However, this element is footnoted as well. The footnote states that "*[i]t is understood that 'genuine consent' does not include consent obtained through deception*." This footnote clarifies that the consent given must be voluntary and informed consent, by a person who understands the consequences of consenting to such a procedure. During the negotiations of the Rome Statute several delegations demanded that the term "voluntary and informed consent" be used so that situations of deception do not occur. Such situations include where the person is not fully informed of the procedure/medication or of the consequences it will produce. As a compromise, the above footnote was added to clarify that any consent obtained by deception will not be valid and such procedures could constitute war crimes or crimes against humanity.[437]

8.3 Prosecution of enforced sterilization

Finally, it should be noted that, in addition to there being scant literature on the topic, the crime of forced sterilization has so far not been brought before the ICC or any of the *ad hoc* tribunals (as other inhumane acts, for example).

[436] Dörmann, Knut: „*Elements of War Crimes under the Rome Statute of the International Criminal Court Sources and Commentary*" (Cambridge University Press: 2004), page 331

[437] Ibid

9. Any other form of sexual violence of comparable gravity

9.1 Introduction

The previous five crimes of sexual violence are all now expressly recognized in international criminal law through the Rome Statute of the ICC, which also confirmed and codified existing customary international law at the time. As we have seen above, most of those crimes were expressly listed in international law for the first time in the Rome Statute.

However, since, unfortunately, people's imagination and potential for horrible acts towards others is endless, these crimes are not sufficient to cover all sexual acts which persons might be subjected to in armed conflict. Therefore, the last formulation of "*any other form of sexual violence of comparable gravity*" was added to the Rome Statute, as an umbrella clause to cover other potential acts of sexual violence that might be committed during armed conflict. This inclusion of the clause results in the classification of such acts as crimes against humanity[438] or war crimes.[439]

This allows the ICC to prosecute even those sexual acts which are not expressly enumerated in the Rome Statute, but which might be of a similar nature or gravity to those that are, and to not leave them unpunished. For example, the Trial Chamber of the SCSL stated in the *AFRC* case, that although it eventually dismissed the charge, "*'[a]ny other form of sexual violence' in the context of crimes against humanity is a residual category of sexual crimes listed under Article 2(g) of the Statute [of the SCSL], and may encompass an unlimited number of acts. [...] The prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation*."[440]

The United Nations Special Rapporteur on systematic rape, sexual slavery and slavery-like practices defined sexual violence as "*any violence, physical or psychological, carried out by sexual means or targeting sexuality. Sexual*

[438] Rome Statute, Article 7(1)(g)

[439] Rome Statute, Article 8(2)(b)(xxii) and Article 8(2)(e)(vi)

[440] SCSL, Case SCSL-04-16 *The Prosecutor vs. Brima, Kamara and Kanu (AFRC Case)*, Trial Chamber Judgment of 20 June 2007, para 720

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. [...] Sexual violence also characterizes situations in which two victims are forced to perform sexual acts on one another or to harm one another in a sexual manner."[441]

This formulation of "any other form of sexual violence of a comparable gravity" does not exist in the Statutes of the ICTY or ICTR, but it has been accepted, although slightly altered,[442] in the Statute of the SCSL among the provisions on crimes against humanity.[443]

It has been claimed that certain legal difficulties exist regarding this residual clause and the general residual clause for crimes against humanity of "other inhumane acts" in Article 7(1)(k) of the Rome Statute, as they seem to somewhat overlap. And indeed, the ICTY and ICTR, whose Statutes do not contain "any other form of sexual violence of comparable gravity" have treated such acts as "other inhumane acts".[444] However, that has not prevented the Rome Statute and SCSL Statute from using this formulation.

9.2 Elements

According to the Elements of Crimes of the ICC, the common elements of any other form of sexual violence of comparable gravity as a crime against humanity[445] and as a war crime[446] are:

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 of 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.*

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441 Final report submitted by Special Rapporteur McDougall, Contemporary forms of slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict, E/CN.4/Sub.2/1998/13 of 22 June 1998, paras 21 and 22

442 To be discussed below

443 SCSL Statute, Article 2(g); The provisions on war crimes do not have this formulation, although Article 3(e) of the Statute mentions "any form of indecent assault"

444 Schabas, William A.: „*The International Criminal Court: A Commentary on the Rome Statute*" (Oxford University Press: 2010), page 175

445 ICC Elements of Crimes, Article 7(1)(g)-6

446 Ibid, Article 8(2)(b)(xxii)-6 and Article 8(2)(e)(vi)-6

2. *Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute. * (sexual violence as a crime against humanity)*

*[2. The conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions.] * (sexual violence as a war crime)*

3. *The perpetrator was aware of the factual circumstances that established the gravity of the conduct*.

(contextual elements omitted)

The first and the third elements are identical for both crimes against humanity and war crimes. The second element is, however, slightly different. The second element regarding sexual violence as a crime against humanity compares the gravity of the "other act of sexual violence" to other offences of crimes against humanity in Article 7(1)(g) of the Rome Statute. The second element of sexual violence as a war crime, however, compares the gravity of the "other acts of sexual violence" to other grave breaches of the Geneva Conventions.

The first element is designed to cover two different situations: firstly, situations where the perpetrator commits sexual acts against the victim him/herself and, secondly, situations where the victim is forced or coerced to perform sexual acts, [447] such as, for example, sexually molesting women (without intercourse), forced nudity, forcing victims to perform sexual acts on each other, or similar sexual acts which are not already enumerated.

The second element, regarding crimes against humanity, was added in order to satisfy the principle of legality, *i.e.* the *nullum crimen sine lege* principle. It was feared that without this qualifying element, the category of "any other sexual act" would be too vague and would not offer certainty on what acts are included, thus violating the principle of legality.[448] It should be noted that this element is not found in the Statute of the SCSL. Whereas the Rome Statute mentions "[...] any other form of sexual violence of comparable gravity", the Statute of the SCSL simply mentions "any other form of sexual violence."[449]

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[447] Cryer, Friman and Robinson, Wilmshurst: "*An Introduction to International Criminal Law and Procedure*", (Cambridge University Press, New York: 2010), page 258

[448] Oosterveld, Valerie: "*Gender-Based Crimes Against Humanity*" in ed Sadat, Leila Nadya: "Forging a Convention for Crimes Against Humanity" (Cambridge University Press: 2011), page 78, at page 93

[449] SCSL Statute, Article 2(g)

Regarding war crimes, the term "any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions" in the Rome Statute was much debated. Some argued that this formulation indicated the conduct that would be prosecuted under this heading must also constitute one of the crimes already defined in Article 8(2) of the Statute and in addition involve violent sexual acts. However, most delegations did not agree that this meant the act had to fall under one of the enumerated grave breaches of the Geneva Conventions, and so interpreted element two of the crime in the Elements of Crimes as simply stating that the conduct must be comparable to a grave breach of the Geneva Conventions.[450]

The second element creates a threshold of seriousness, so that the acts warrant being described as crimes against humanity.[451] There was some concern that this element meant that the acts in question have to be exactly like rape or resemble it. However, this element simply states that the act of sexual violence must be comparable in gravity to any of the crimes enumerated and this has been accepted to include a wide range of acts, including sexual acts that do not involve physical contact.[452]

The third element deals with the mental element necessary. During the negotiations there was a disagreement among delegations whether the ordinary mental element of Article 30 of the Rome Statute[453] should fully apply to these acts. In order to avoid a mistake of law defence, the formulation "awareness of the factual circumstances" was adopted as the most appropriate standard.[454]

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[450] Dörmann, Knut: „*Elements of War Crimes under the Rome Statute of the International Criminal Court Sources and Commentary*" (Cambridge University Press: 2004), page 332

[451] Cryer, Friman and Robinson, Wilmshurst: "*An Introduction to International Criminal Law and Procedure*", (Cambridge University Press, New York: 2010), page 258

[452] Oosterveld, Valerie: "*Gender-Based Crimes Against Humanity*" in ed Sadat, Leila Nadya: "Forging a Convention for Crimes Against Humanity" (Cambridge University Press: 2011), page 78, at page 94

[453] Rome Statute, Article 30 (Mental element): "*(1) Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. (2) For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. (b) For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly*."

[454] Dörmann, Knut: „*Elements of War Crimes under the Rome Statute of the International Criminal Court Sources and Commentary*" (Cambridge University Press: 2004), page 332

9.3 Prosecution of any other form of sexual violence

As stated above, the crime of "any other form of sexual violence" is only found in the Rome Statute and the Statute of the SCSL. However, all the tribunals, including the ICTY and ICTR, have dealt with sexual acts which do not fit in one of the enumerated sexual crimes in their Statutes.

The ICC, so far, has not sentenced any accused for "other sexual crimes". However, it has charged "other sexual crimes" in the case against Laurent Gbagbo, where the accused was charged with "rape and other sexual violence" as a crime against humanity under Article 7(1)(g) of the Rome Statute. However, the Warrant of Arrest[455] and the Decision on the Prosecutor's Application for a Warrant of Arrest[456] either do not contain any information on the alleged crimes or are heavily redacted, so it is not possible to determine what acts the Prosecutor has qualified as "any other form of sexual violence of comparable gravity." Moreover uncertainty continues as the charges have not yet been confirmed.

As the statutes of the ICTY and ICTR only list rape as a sexual crime against humanity, any sexual acts (including those expressly listed in the ICC Statute, like sexual slavery) which do not fall under rape, have to be prosecuted on other grounds. Therefore, these courts have generally prosecuted other acts of sexual violence as crimes against humanity of "other inhumane acts",[457] although they could also constitute outrages upon personal dignity and serious bodily or mental harm.

In *Akeyasu* the ICTR Trial Chamber stated that "*[t]he Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. 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*."[458]

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[455] ICC, case ICC-02/11-01/11 *The Prosecutor v Laurent Gbagbo*, Warrant of arrest of 23 November 2011

[456] ICC, case ICC-02/11-01/11 *The Prosecutor v Laurent Gbagbo*, Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo of 30 November 2011

[457] In Article 5(i) of the ICTY Statute and Article 3(i) of the ICTR Statute; Schabas, William A.: "*The International Criminal Court: A Commentary on the Rome Statute*" (Oxford University Press: 2010), page 275

[458] ICTR, case ICTR-96-4 *Prosecutor v Akayesu*, Trial Chamber Judgment of 02 September 1998, para 688

Regarding examples of other acts of sexual violence which have been found to qualify as crimes against humanity or war crimes, the ICTR in *Kajelijeli*,[459] found that mutilation of a woman's breast and mutilation of a dead woman constituted a crime against humanity: "*The Chamber found that […] the Interahamwe raped and killed a Tutsi woman called Joyce […] [and] that they pierced her side and her sexual organs with a spear […]. The Chamber found that […] a Tutsi girl named Nyiramburanga was mutilated by an Interahamwe who cut off her breast and then licked it. […] [T]hese acts constitute a serious attack on the human dignity of the Tutsi community as a whole. Cutting a woman's breast off and licking it, and piercing a woman's sexual organs with a spear are nefarious acts of a comparable gravity to the other acts listed as crimes against humanity, which would clearly cause great mental suffering to any members of the Tutsi community who observed them*."

In *Niyitegeka* the ICTR also found that castration of a dead man and mutilation with a stick of a dead woman constituted other inhumane acts: "*The witness then saw Mika cut off Kabanda's head with a machete, and castrate him. […] The genitals were hung on a spike until the witness and others found them and buried them. The witness saw his body without his genitals.*[460] *[…] [T]he Accused ordered Interahamwe to undress the body of a woman who had just been shot dead, to fetch and sharpen a piece of wood, which he then instructed them to insert into her genitalia."*[461] In its verdict, the Trial Chamber concluded: "*Crime Against Humanity (Other Inhumane Acts) - The Chamber finds that the acts committed with respect to Kabanda and the sexual violence to the dead woman's body are acts of seriousness comparable to other acts enumerated in the Article, and would cause mental suffering to civilians, in particular, Tutsi civilians, and constitute a serious attack on the human dignity of the Tutsi community as a whole*."[462]

However, even less serious acts have been found to constitute crimes against humanity under the category of other inhumane acts.[463] In *Akeyasu*, the ICTR Trial Chamber found that forced undressing and public display of women, such as public marching while naked and forcing victims to perform exercises while naked, constituted other inhumane acts: "*[T]he Accused told the Interahamwe to undress a young girl named Chantal,*

[459] ICTR, case ICTR-98-44 *Prosecutor v Kajelijeli*, Trial Chamber Judgment of 1 December 2003, paras 934-936

[460] ICTR, case ICTR-96-14 *Prosecutor v Niyitegeka*, Trial Chamber Judgment of 16 May 2003, para 303

[461] Ibid, para 316

[462] Ibid, para 465

[463] Ibid, para 697

whom he knew to be a gymnast, so that she could do gymnastics naked. [...] As Chantal was forced to march around naked in front of many people [...] the Accused was laughing and happy with this.[464] *[...] [T]he three women were forced by the Interahamwe to undress and told to walk, run and perform exercises 'so that they could display the thighs of Tutsi women.' All this took place, she said, in front of approximately two hundred people. After this, she said the women were raped*."[465]

Regarding sexual violence as other inhumane acts, the ICTY followed the ICTR's Judgement in *Akeyasu*, as well as other cases, and confirmed in the *Omarska, Keraterm & Trnopolje Camps* case[466] that *"[…] sexual violence is broader than rape and includes such crimes as sexual slavery or molestation*." This sentence had a footnote, which further stated that "*[s]exual violence would also include such crimes as sexual mutilation, forced marriage, and forced abortion as well as the gender related crimes explicitly listed in the ICC Statute as war crimes and crimes against humanity, namely 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization' and other similar forms of violence*."

Finally, cases which deal with other acts of sexual violence as crimes against humanity have also appeared before the SCSL. Among the most important precedents of the SCSL was the recognition of forced marriage as a separate crime under Article 2(i) the SCSL Statute, under the category of other inhumane acts. Due to the significance of the judgements and the arguments that forced marriage should be a crime which is expressly listed and enumerated in international criminal law, forced marriage as a crime will be separately dealt with below. However, it is first important to note that the Appeal Chamber of the SCSL also stated that, regardless of the existence of the category of "other sexual violence", sexual crimes can still be prosecuted as "other inhumane acts": "*The Trial Chamber therefore erred in law by finding that 'Other Inhumane Acts' [...] must be restrictively interpreted. [...] At the same time, care must be taken not to make it too embracing [...]. An over-broad interpretation will certainly infringe the rule requiring specificity of criminal prohibitions. [...] [T]he Appeals Chamber sees no reason why the so-called 'exhaustive' listing of sexual crimes under Article 2(g) of the Statute should foreclose the possibility of charging as 'Other Inhumane Acts' crimes which may among others have a sexual or*

[464] ICTR, case ICTR-96-4 *Prosecutor v Akayesu*, Trial Chamber Judgment of 2 September 1998, para 429

[465] Ibid, para 437

[466] ICTY, case IT-98-30/1 *Prosecutor v Kvočka et al. (Omarska, Keraterm & Trnopolje Camps)*, Trial Chamber Judgment of 2 November 2001, para 180

gender component. The Trial Chamber therefore erred in finding that Article 2(i) of the Statute excludes sexual crimes."[467]

[467] SCSL, Case SCSL-04-16 *The Prosecutor vs. Brima, Kamara and Kanu (AFRC Case)*, Appeal Chamber Judgment of 22 February 2008, paras 185-186

10. Forced marriage

10.1 Introduction

The conflict in Sierra Leone was perhaps best known in the general public for mutilations of hands and other limbs, especially in relation to the mining of diamonds in Sierra Leone, and for the use of child soldiers. However, the widespread sexual violence against women was not as well covered. One of the most terrible crimes that women were subjected to was that of forced marriage. Marriage in this context means a relationship between a rebel (RUF and AFRC soldiers) and a civilian woman that lasts longer than the moment of capture or act of rape or sexual violence, as women were usually forced to live with their captor.[468] The women were expected to have sex with their "husbands" whenever they demanded so, to be in an exclusive relationship with them, to show them loyalty, do domestic chores, have the "husband's" children, and in general do whatever the "husband" demanded.

The SCSL became the first international criminal court that expressly recognized forced marriage as a crime against humanity. The *AFRC* case was the first time that the Prosecutor brought the charge of forced marriage before the SCSL.[469] He charged the accused with forced marriage as a crime against humanity under Article 2(i) of the Statute of the Court as "other inhumane acts." However, even though the accused were found guilty for other crimes they were charged with, the Trial Chamber rejected the charge of forced marriage. One of the conditions for a crime to be accepted under other inhumane acts is that it is not the equal to another already listed crime so that it can be subsumed under that crime. The Trial Chamber therefore compared forced marriage with the crime of sexual slavery and found that they contained the same elements and that the Prosecutor did not manage to prove that the crime of forced marriage was significantly different from the crime of sexual slavery. The Trial Chamber concluded that forced marriage was subsumed under sexual slavery and that it resulted in duplicity of charges. Therefore, it rejected the charge of forced marriage.[470]

However, the Appeal Chamber did not agree with the Trial Chamber and reversed the above finding in its judgement on appeal. It disagreed that forced marriage was completely subsumed under sexual slavery, and it

[468] Gog van, Janneke: "*Coming back from the bush: Gender, youth and reintegration in northern Sierra Leone*", (African Studies Centre: 2008), page 64

[469] SCSL, Case SCSL-04-16 *The Prosecutor vs. Brima, Kamara and Kanu (AFRC Case)*, Trial Chamber Judgment of 20 June 2007

[470] Ibid, paras 93-95

stated that "*no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery. While forced marriage shares certain elements with sexual slavery […] there are also distinguishing factors*."[471] The shared elements are that both forced marriage and sexual slavery involve non-consensual sex (rape) and deprivation of liberty, but they also have other elements: an element of exclusivity between the victim and perpetrator and a forced conjugal association which results in physical and mental suffering for the victim.[472] These elements mean that, in the Appeal Chamber's opinion, forced marriage is not predominantly a sexual crime, like sexual slavery.

10.2 Definition of forced marriage

The Appeals Chamber defined forced marriage in Sierra Leone as a "*situation in which the perpetrator through his words or conduct or those of someone for whose actions he is responsible, compels a person by force, threat, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim*."[473]

The Appeals Chamber also stated that the forced "wife" had to perform various marital duties, such as regular sexual intercourse, domestic labour, such as cleaning, cooking, farming, giving birth to her "husband's" child and to be loyal to her "husband".[474] To the Appeals Chamber this is enough to distinguish forced marriage from sexual slavery, which is dominantly a sexual crime, while forced marriage is not.

The Appeals Chamber also concluded that forced marriage was of a similar gravity to other crimes against humanity. It stated that forced marriage inflicts grave suffering on the victims and that the severity of suffering is comparable to some listed crimes against humanity, such as, for example, rape.[475] Women are often abducted by force from their homes and sometimes very young girls are taken as "wives." The "marriage" often lasts for a long time, until the "husband" gets tired of his "wife" and oftentimes results in the woman not returning to her home or society for fear of being

[471] SCSL, Case SCSL-04-16 *The Prosecutor vs. Brima, Kamara and Kanu (AFRC Case)*, Appeal Chamber Judgment of 22 February 2008, para 195.

[472] Jain, Neha: "*Forced Marriage as a Crime against Humanity – problems of definition and prosecution*" in Journal of International Criminal Justice Volume 6, Issue 5 (2008), page 1013, at page 1021

[473] SCSL, Case SCSL-04-16 *The Prosecutor vs. Brima, Kamara and Kanu (AFRC Case)*, Appeal Chamber Judgment of 22 February 2008, para 196.

[474] Ibid, para 190

[475] Ibid, para 200

labelled a rebel and a "bush wife." However, it must be noted that the Appeal Chamber did not convict the accused of forced marriage. Although it rejected the findings by the Trial Chamber about forced marriage, it did not think that it was necessary to convict the accused of the crime.

10.3 Elements of forced marriage

Although the crime of forced marriage was charged for the first time in the *AFRC* case, accused (Hassan Sesay, Morris Kallon and Augustine Gbao) were only convicted of this crime was in the *RUF* case.[476] In this case forced marriage was charged under "other inhumane acts" as crimes against humanity under Article 2(i) of the Statute. It was not charged under other forms of sexual violence in Article 2(g) of the SCSL Statute, as the Prosecutor characterized forced marriage as a multi-layered crime which is not only of a sexual nature. The Appeal Chamber for the *RUF* case supported the Trial Chamber's findings on forced marriage and did not offer a different opinion. Considering that these cases before the SCSL were the first time a charge of forced marriage was attempted before an international criminal tribunal, there are still some unclear issues. The SCSL focused very much on the sexual aspect of forced marriage in Sierra Leone, but failed to completely evaluate other important elements of forced marriage.[477]

However, from the above judgements in the *AFRC* and *RUF* cases, we can recognize the elements which must be fulfilled for forced marriage to be prosecuted as a crime against humanity. As the case law demonstrates, in addition to the general requirements the following elements are necessary to constitute the crime of forced marriage:[478]

1. *The perpetrator conferred a status of marriage, through words or conduct, on one or more persons, by force or coercion. Examples of force or coercion include through fear of violence; duress; detention; psychological oppression or abuse of power against the victim; or taking advantage of a coercive environment or the incapacity of that person to give consent (even if women stay in the "marriage" it does*

[476] SCSL, Case SCSL-04-15*The Prosecutor vs. Sesay, Kallon and Gbao (RUF Case)*, Trial Chamber Judgment of 2 March 2009

[477] Jain, Neha: "*Forced Marriage as a Crime against Humanity – problems of definition and prosecution*" in Journal of International Criminal Justice Volume 6, Issue 5 (2008), page 1013, at page 1019

[478] Ibid, at page 1031

not automatically mean they have given consent and in any case it does not change the criminal nature of the act[479]*);*

2. *The perpetrator caused such person to engage in conduct similar to that arising out of a marital relationship, including prolonged association, acts of a sexual nature, domestic labour, child bearing and other conjugal duties.*

Therefore, although the crime of forced marriage consists of elements of other crimes (such as rape, sexual slavery, enslavement, forced labour), it is more than just the sum of those crimes. The distinctiveness of the crime of forced marriage is the imposition of a marital relationship without the consent of the other party.[480] The lack of consent means that the victim is being deprived of her individual autonomy and self determination and the totality of the elements causes great mental trauma to the victim. Therefore, forced marriage is more than just rape or enslavement, as the status of "wife" causes trauma to the victim and results in her exclusion from society.

10.4 Difference between sexual slavery and forced marriage

Although, as has been stated above, the crime of forced marriage is composed of other crimes such as rape, sexual slavery and forced labour, there are important differences between forced marriage and the aforementioned crimes, especially sexual slavery. In her Partly Dissenting Opinion of the *AFRC* Trial Chamber Judgment, Justice Doherty emphasized that even though forced marriage involves components of rape, sexual violence and enslavement, these are not the determinative factors for the existence of forced marriage. The crucial element is the mental and moral trauma which results from the imposition by threat or force of a forced conjugal association by the perpetrator on the victim.[481]

Therefore, the focus is on the psychological suffering which is caused by the use of the label "wife" on the victim, which can lead to the victims' stigmatization and the rejection of the victims by their families and

[479] SCSL, Case SCSL-04-16 *The Prosecutor vs. Brima, Kamara and Kanu (AFRC Case)*, Trial Chamber Judgment of 20 June 2007, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages), paragraph 45

[480] Jain, Neha: "*Forced Marriage as a Crime against Humanity – problems of definition and prosecution*" in Journal of International Criminal Justice Volume 6, Issue 5 (2008), page 1013, at page 1031

[481] SCSL, Case SCSL-04-16 *The Prosecutor vs. Brima, Kamara and Kanu (AFRC Case)*, Trial Chamber Judgment of 20 June 2007, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages), paragraphs 52 & 53

community. This would also cause prolonged mental suffering and make reintegration into the community almost impossible for the victims.[482] This emphasis on the word "wife" and the imposition of a "conjugal status" in forced marriage, rather than on the sexual elements, is perhaps also justified because free consent in marriage is one of the essential principles of all legal systems,[483] and is protected by various international documents.[484] Therefore, it is the imposed conjugal association (marriage) and the status of "wife" or ("bush wife") that separates forced marriage from other similar crimes (such as sexual slavery).

10.5 Forced marriage before the ICC?

It was believed that the practice of the SCSL regarding forced marriage could perhaps also be relevant for the ICC in its future work, as the provisions[485] on crimes against humanity in the statutes of both the SCSL and ICC are very similar. This may be attributed to the fact that the SCSL Statute is based on the Statute of the ICC. Even though forced marriage is not expressly listed in the Rome Statute, the ICC could also prosecute forced marriage as a crime against humanity under the category of other inhumane acts, like the SCSL.

However, it seems that the ICC has ignored the jurisprudence of the SCSL on forced marriage and its findings that forced marriage is more than just a sexual crime. As stated previously, the ICC has charged sexual slavery in two cases, where it has stated that forced marriage is a form of sexual slavery. In the *Katanga and Chui* case in the Confirmation of charges, the Pre-Trial Chamber stated that "*[i]n this regard, the Prosecution alleged that women in Bogoro: '[...] were raped and forcibly taken to military camps. Once there, they were sometimes given as a 'wife' to their captors or kept in the camp's prison, which was a hole dug in the ground. [...] The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that civilian women were abducted from the village of Bogoro after the attack, imprisoned, and forced into becoming the 'wives' of FNI/FRPI combatants, required to cook for and obey the orders of FNI or FPRI combatants. The Chamber also finds that there is sufficient evidence to*

[482] SCSL, Case SCSL-04-16 *The Prosecutor vs. Brima, Kamara and Kanu (AFRC Case)*, Trial Chamber Judgment of 20 June 2007, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages), paragraphs 48 & 51

[483] Ibid, paragraph 71

[484] For example, Universal Declaration on Human Rights, Article 16(2); International Covenant on Civil and Political Rights, Article 23; Convention on the Elimination of all Forms of Discrimination Against Women, Article 16; Convention on Consent to Marriage, Minimum Age for marriage and Registration of Marriage, Article 1(1).

[485] That is Article 2 of SCSL and Article 7 of the Rome Statute of the ICC

establish substantial grounds to believe that these civilian women were forced to engage in acts of a sexual nature. [...] Witness 249 is a Hema civilian woman [REDACTED]. She was abducted, undressed, and raped by an Ngiti combatant at the village of Bogoro. Following death threats, she became the 'wife' of an Ngiti combatant, and was repeatedly raped. She had a child as a result of these rapes during her captivity. [...] In conclusion, the Chamber finds that there are substantial grounds to believe that the war crimes of rape and sexual slavery, as defined in article 8(2)(b)(xxii) of the Statute, were committed by FNI/FRPI members."[486]

Moreover, the Pre Trial Chamber clearly stated that "*[...] sexual slavery also encompasses situations where women and girls are forced into 'marriage', domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors. Forms of sexual slavery can, for example, be practices such as the detention of women in 'rape camps' or 'comfort stations', forced temporary 'marriages' to soldiers and other practices involving the treatment of women as chattel, and as such, violations of the peremptory norm prohibiting slavery*."[487] These paragraphs clearly demonstrate that the ICC has not followed the lead of the SCSL but rather has chosen to prosecute acts of forced marriage as the crime of sexual slavery.

[486] ICC, case ICC-01/04-01/07 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges of 26 September 2008, paras 345-354

[487] Ibid, para 431

11. Procedural issues

Rape and other crimes of sexual violence are crimes whose effects extend past the physical trauma and injuries of the victim and which have significant psychological effects. These effects have been well documented and characterized as Rape Trauma Syndrome, which can manifest itself through nightmares, phobic reactions, sexual fears, and other symptoms.[488] The trauma of a particularly brutal rape or other brutal acts of sexual violence can also lead to the development of posttraumatic stress disorder. Moreover, the victims of crimes of sexual violence can also feel external effects, such as social isolation from their communities. This is particularly common in societies that emphasize a woman's virginity and chastity before marriage. Victims of rape and other sexual violence crimes can also be shunned by their communities, husbands and wider families. Some women consider rape to be a fate worse than death, believing that a raped woman loses all value in her community.[489]

In rape trials before domestic courts, defence strategies often include unwarranted attacks on the credibility of the victim, or other approaches which are intended to humiliate and intimidate the victim and establish that she is unreliable. Many of the same problems have also arisen before the ICTY, for example.[490] Therefore, the sensitivity of prosecuting rape (as well as other crimes of sexual violence) in international criminal law has lead to a number of procedural protection mechanisms being introduced by the *ad hoc* tribunals and the ICC, in their Rules of Procedure and Evidence.

The relevant provisions in the Rules of Procedure and Evidence in the three discussed *ad hoc* tribunals are very similar, if not identical. The Statutes of both the ICTY and ICTR state that "*[t]he International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.*"[491] Furthermore, the Rules of Procedure and Evidence specify that a Victims and Witnesses Section shall be created as part of the

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[488] Note that this term has been predominantly used for incidences of rape but it can be applied to other crimes of sexual violence.

[489] Beltz, Amanda: „*Prosecuting rape in international criminal tribunals: the need to balance victim's rights with the due process rights of the accused*" in St. John's Journal of Legal Commentary Volume 23, Issue 1 (2008), page 167, at pages 188-189

[490] Brammertz, Serge and Jarvis, Michelle: „*Lessons Learned in Prosecuting Gender Crimes under International Law: Experiences from the ICTY*" in ed Eboe-Osuji, Chile: "Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay" (Martinus Nijhoff Publishers: 2010), page 93, at page 109

[491] ICTY Statute, Article 22; ICTR Statute, Article 21

Registrar of the Tribunals, which shall "*(i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and (ii) provide counselling and support for them, in particular in cases of rape and sexual assault*."[492]

The ICTR goes a bit further than the ICTY, and states that the Victims and Witnesses unit shall "*(i) recommend the adoption of protective measures for victims and witnesses in accordance with Article 21 of the Statute; (ii) ensure that they receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault; and (iii) develop short term and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family*."[493] Both Tribunals stipulate that a gender sensitive approach should be taken when appointing personnel within this unit, where advantage should be given to qualified women.[494]

Moreover, all the *ad hoc* Tribunals contain, in their Rules of Procedure and evidence, provisions regarding the protection of victims and witnesses before the Tribunals. Such procedures provide for the non-disclosure of documents or information to the public,[495] non-disclosure of the identity of victims or witnesses,[496] prevention of disclosure of the victim's/witness' identity or whereabouts or of persons related to them to the public or the media, through expunging names, assigning pseudonyms, giving testimony through image or voice altering devices, closed sessions, testimony through

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[492] ICTY Rules of Procedure and Evidence, Article 34

[493] ICTR Rules of Procedure and Evidence, Rule 34; The SCSL perhaps goes furthest and has most far-reaching provisions in Rule 34 of its Rules of Procedure and Evidence, which states: "*(A) The Registrar shall set up a Witnesses and Victims Section which, in accordance with the Statute, the Agreement and the Rules, and in consultation with the Office of the Prosecutor, for Prosecution witnesses, and the Defence Office, for Defence witnesses, shall, amongst other things, perform the following functions with respect to all witnesses, victims who appear before the Special Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances: (i) Recommend to the Special Court the adoption of protective and security measures for them; (ii) Provide them with adequate protective measures and security arrangements and develop long- and short-term plans for their protection and support; (iii) Ensure that they receive relevant support, counselling and other appropriate assistance, including medical assistance, physical and psychological rehabilitation, especially in cases of rape, sexual assault and crimes against children. (B) The Section personnel shall include expert s in trauma, including trauma related to crimes of sexual violence and violence against children. Where appropriate the Section shall cooperate with non-governmental and intergovernmental organizations*."

[494] ICTY and ICTR Rules of Procedure and Evidence, Rule 34(B); Rule 34(B) of the SCSL Rules of Procedure and Evidence: „*The Section personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children. Where appropriate the Section shall cooperate with non-governmental and intergovernmental organizations*."

[495] ICTY, ICTR and SCSL Rules of Procedure and Evidence, Rule 53

[496] Ibid, Rule 69

one-way circuit television, etc.[497] Moreover, the Rules stipulate that the Chambers shall control the manner of questioning to avoid any harassment or intimidation to the victims or witnesses,[498] which is especially important when victims of sexual violence testify.

The above provisions are general ones which may apply to all victims and witnesses regardless of the crime. However the most relevant and important provision in the Rules of Procedure and Evidence of the Tribunals that is specific for crimes of sexual violence is Rule 96.[499] It provides that "*[i]n cases of sexual assault:*

(i) No corroboration of the victim's testimony shall be required;

(ii) Consent shall not be allowed as a defence if the victim:

(a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or

(b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear.

(iii) Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;

(iv) Prior sexual conduct of the victim shall not be admitted in evidence or as defence."

As stated above, in regards to the issue of consent, this Article significantly limits the possibility of the accused to mount a defence based on the consent of the victim,[500] as a defence on these grounds will be rejected on the presumption that the circumstances were such that no consent could be genuine. Such situations that result in an automatic rejection include detention, threats or oppression. Moreover, such a defence would first have to be heard *in camera* to be tested before the Chamber judges, before being put forward to the victim. Additional important rules protecting victims of sexual violence is that their testimony does not need corroboration and that their prior sexual conduct will not be relevant, as such issues are often used in national rape proceedings to intimidate or discredit the victims. This rule, that no corroboration of testimony of victims of sexual violence is required,

[497] ICTY, ICTR and SCSL Rules of Procedure and Evidence, Rule 75

[498] Ibid

[499] In the Rules of Procedure and Evidence of the ICTY, ICTR and SCSL

[500] Jarvis, Michelle: „*An Emerging Gender Perspective on International Crimes*" in eds Boas, Gideon; Schabas, William A.: "International criminal law developments in the case law of the ICTY" (Martinus Nijhoff: 2003), page 157, at page 174

is crucial as the victim is often the only witness of sexual crimes, unless they were committed publicly.[501]

As for the ICC, its Rules of Procedure and Evidence contain many similar provisions as the Rules of Procedure and Evidence of the *ad hoc* Tribunals, such as general provisions on protection of victims and witnesses before the court.[502] The ICC also has a dedicated Victims and Witnesses Unit, with its tasks and responsibilities being set out in detail in Rules 16 to 19 of the Rules of Procedure and Evidence. Specifically regarding sexual violence crimes, the Unit shall "*[take] gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings*[503] *[…] [make] available to the Court and the parties training in issues of trauma, sexual violence, security and confidentiality*[504] *[and take] gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings*."[505]

However, the ICC goes further than the *ad hoc* Tribunals regarding the role and participation of victims in cases before the Court. Rule 85 provides a definition of victims as "*(a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes*." Moreover, the ICC has made a significant contribution to allowing victims' voices to be heard before the Court. The ICC Statute pays special attention to the rights and interests of victims and goes beyond treating the victim simply as an aid in criminal proceedings and gives the victim legal standing in her or his own right.[506]

For the first time in international criminal law, victims were given the right to participate in the proceedings, present their views and concerns in ways

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[501] Leroy-Hajee, Alice: "*Prosecuting Sexual Violence at the ICTR*" in "Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay" (Martinus Nijhoff Publishers: 2010), page 185, at page 186

[502] Rules 87 and 89

[503] Rule 16(1)(d)

[504] Rule 17(2)(a)(iv)

[505] Rule 17(2)(b)(iii)

[506] Grewal, Kiran: „*The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape*" in Journal of International Criminal Justice, Volume 10, Issue 2 (2012), page 373, at page 389

which take into account their well-being, dignity and safety.[507] Victims can make an application to the Chamber to participate in the proceedings (for example by giving opening or closing statements),[508] they can have a legal representative (with financial assistance from the Court if necessary)[509] who can participate in the proceedings, attend hearings, make submissions, apply to question witnesses, etc.[510] Moreover, the ICC also contains provisions that allow victims to make a request for reparation or compensation, to be paid out from a trust fund set up for such purposes.[511]

The ICC Rules of Procedure and Evidence contain similar, although more extensive, provisions to the *ad hoc* Tribunals regarding crimes of sexual violence specifically. Rule 63(4) states that no corroboration is necessary to prove any crimes under the jurisdiction of the Court, especially sexual violence crimes. Moreover, evidence of prior or subsequent sexual behaviour of the victim will be inadmissible.[512] Regarding the issue of consent, a consent defence must also be tested *in camera* proceedings,[513] and the ICC places even more limitations on such a defence than the *ad hoc* Tribunals: "*In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:*

(a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;

(b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;

(c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;

(d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness."[514]

It should be noted that some feminist groups and legal scholars have taken the assumption that adopting broad legal provisions which limit or remove

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[507] Brouwer de, Anne Marie: „*Supranational criminal prosecution of sexual violence*" in eds Jones, Jackie; Grear, Anna; Fenton, Rachel Anne; and Stevenson, Kim: "*Gender, Sexualities and Law*" (Routledge: 2011), page 201, at page 207

[508] Rule 89

[509] Rule 90

[510] Rule 91

[511] Rules 94-99

[512] Rule 71

[513] Rule 72

[514] Rule 70

defence possibilities are the only means by which women can be protected from the negative social judgments which are associated with sexual violence, and that such legal provisions can be a way that the disproportionately low conviction rate for sexual offences is addressed.[515] Even though the *ad hoc* Tribunals have made great advances in prosecuting sexual violence, it has also been argued that there have been relatively few prosecutions when compared to the real extent and severity of rapes during the conflicts, and that international law is inherently biased against women as it is created by men and in their interests, while women's concerns are relegated to a special, limited category.[516] Thus, it is argued, sexual violence is only addressed when the act is on such a large scale that it leads to destruction of a community, which implies that rape is not a wrong in itself, but is only constitutive of such if it is an assault on the community.[517]

Nevertheless, in order to achieve legitimacy and follow international human rights standards, the limitations placed on the defence and the protective measures towards victims and witnesses must still ensure the protection of international due process rights of the accused. These rights are guaranteed in the Statutes of all the international criminal tribunals and must be balanced with the protection of victims and witnesses.[518] However, many commentators have argued that some of the protective measures, especially victim and witness anonymity, violate due process rights of the accused, especially the right to confront the accuser. Commentators argue that this latter mentioned right is a fundamental part of due process rights[519] that conflicts with witness anonymity.[520] An example of how witness anonymity can work to the detriment of the defence was in the *Tadić*[521] case, where an anonymous witness was found by the defence to be lying after being

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[515] Grewal, Kiran: "*The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape*" in Journal of International Criminal Justice, Volume 10, Issue 2 (2012), page 373, at page 386

[516] Beltz, Amanda: "*Prosecuting rape in international criminal tribunals: the need to balance victim's rights with the due process rights of the accused*" in St. John's Journal of Legal Commentary Volume 23, Issue 1 (2008), page 167, at pages 184-185

[517] Ibid, at page 207

[518] Rome Statute Articles 64(2) and 67; ICTY Statute, Articles 20(1) and 21; ICTR Statute, Articles 19(1) and 20; SCSL Statute, Article 17

[519] See Lusty, David: "*Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Tribunals*" in Sydney Law Review Volume 24, Issue 3 (2002), page 361

[520] Creta, Vincent: "*The search for justice in the Former Yugoslavia and beyond: analyzing the rights of the accused under the statute and the rules of procedure and evidence of the International Criminal Tribunal for the Former Yugoslavia*" in Houston Journal of International Law Volume 2, Issue 2, page 381, at page 391

[521] ICTY, case IT-94-1 *Prosecutor v Tadić (Prijedor)*, Trial Chamber Judgment of 07 May 1997

threatened by government forces to claim he witnessed the acts in question.[522]

On the other hand, even though a defendant's right to confrontation has been read as meaning a right to meet face to face all those who appear and give evidence at trial, such a right is not meant as an absolute right to confront all witnesses, and it is undeniable that international criminal tribunals must employ special means to protect victims and witnesses. The right to confront accusers was born out of the limitation of the state's powers, as "*[o]ne technique which is always used to maintain absolute power in totalitarian governments is the use of anonymous information by the government against those who are obnoxious to the rulers*."[523] While this is still crucial for domestic rape trials, in international criminal tribunals there is a collective governing body over which no one state has control. Moreover, the trials are monitored by international bodies, national governments and NGOs, so any potential abuse is almost impossible. However, a balancing test should be made to ensure the rights of the accused and that anonymity is reserved only for those cases where the victim or witness will be placed in significant danger by testifying.

Another issue that required attention during sexual violence trials is the treatment of victims by the court and everyone involved in the case. Trials in cases of sexual violence can be very traumatizing for the victims, especially when they testify, are interrogated or have to confront the perpetrator. Defence attorneys often ask excessive or inappropriate questions (like unnecessary details of the rape) to upset the victim and make her look like an unreliable witness. Other tactics are to damage the victim's credibility by focusing on her prior use of contraceptives, abortions or suggesting they consented. The defence attorney asked one witness, who was not selected to be raped one night, if she was jealous of those who were chosen.[524] Defence attorneys also focus on the fact that victims have been heavily traumatized, suggesting that they make unreliable witnesses due to their trauma. However, both the *Kunarac* and *Furundžija* Trial Chambers rejected such claims, stating that sexual violence victims can be reliable witnesses, even when they suffer from post-traumatic stress disorder.[525]

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[522] Beltz, Amanda: "*Prosecuting rape in international criminal tribunals: the need to balance victim's rights with the due process rights of the accused*" in St. John's Journal of Legal Commentary Volume 23, Issue 1 (2008), page 167, atpage191

[523] Ibid, at page 195

[524] Ibid, at page 200

[525] Brammertz, Serge and Jarvis, Michelle: "*Lessons Learned in Prosecuting Gender Crimes under International Law: Experiences from the ICTY*" in ed Eboe-Osuji, Chile: "Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay" (Martinus Nijhoff Publishers: 2010), page 93, at page 108

Generally, the ICTY has decisively squashed factual and legal submissions by the defence which were considered untenable. An example of such untenable claims that were rejected by the Trial Chambers was the argument by Kovač, an accused in the *Kunarac* case, who claimed the alleged victim was actually in love with him and sent him love letters.[526] Another example was the claim by Kunarac himself that one of the victims instigated sexual conduct herself. The Trial Chamber found it was highly improbable that Kunarac could genuinely have been confused by the behaviour of the girl given the general context of the existing situation, especially as she was in captivity and in fear for her life.[527] Another problematic issue for victims can be self-representation of the accused in sexual violence cases. In the *Stanković* case, the Trial Chamber rejected the request of the accused for self-representation, by noting, *inter alia*, that it would be inappropriate for the accused to cross-examine witnesses who are alleged victims of the crimes he had been charged with.[528]

Another important issue for the prosecution of sexual crimes before international criminal tribunals is the need for adequate representation of women at all levels, not only as judges but also as Prosecutors. This issue will ensure that an adequate level of sensitivity towards victims is established and that sexual violence crimes are adequately investigated, prosecuted and judged. Certainly there is a strong argument to use more women as investigators and interpreters "*in order to create a sense of intimacy and trust that is conducive to helping victims feel comfortable enough to share their stories with investigators*."[529]

[526] Brammertz, Serge and Jarvis, Michelle: "*Lessons Learned in Prosecuting Gender Crimes under International Law: Experiences from the ICTY*" in ed Eboe-Osuji, Chile: "Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay" (Martinus Nijhoff Publishers: 2010), page 93, at pages 110 and 112

[527] Jarvis, Michelle: "*An Emerging Gender Perspective on International Crimes*" in eds Boas, Gideon; Schabas, William A.: "International criminal law developments in the case law of the ICTY" (Martinus Nijhoff: 2003), page 157, at page 174

[528] ICTY, case IT-96-23/2 *Prosecutor v Stanković & Janković (Foča)*, Decision Following Registrar's Notification of Radovan Stanković's Request for Self-representation of 19 August 2005, para 21

[529] Beltz, Amanda: "*Prosecuting rape in international criminal tribunals: the need to balance victim's rights with the due process rights of the accused*" in St. John's Journal of Legal Commentary Volume 23, Issue 1 (2008), page 167, at page 202

12. Conclusion

Throughout history, most of the sufferings that women were subjected to during armed conflicts were not designated as international crimes. And when they have been criminalized, they were disproportionately omitted from efforts to enforce the law and to punish those who violate it. One only needs to look at the non-prosecution of crimes against women during World War II for an example. Even more generally, violence against women was for a long time considered a private or a family matter, where national or international actions are not appropriate. Therefore, domestic violence, mutilation and abuse of women were ignored, the perpetrators remained unpunished and the victims forced to suffer in silence. Indeed, this situation persists in certain parts of the world.

Thankfully, however, things have started changing as a reaction to the atrocities and widespread sexual violence crimes that occurred during the armed conflicts in the Former Yugoslavia and Rwanda, where rape and other sexual violence crimes were used as weapons of war, in order to terrify the civilian population, traumatize women, destroy families and communities, all with the intention of performing ethnic cleansing or genocide.

The international community recognized this and received strong support for adequately prosecuting sexual violence crimes. Especially in the ICTY, it set out from the beginning to deal with sexual violence crimes against women, although these crimes are difficult to prove and prosecute. As there are often no witnesses besides the victim and the perpetrator, the victims are often too traumatized or ashamed to admit they were raped or they do not wish to testify for fear of retribution. Nonetheless, the ICTY and the ICTR have made a great contribution to a better understanding of women's perspectives and experiences in international criminal law and shown that such atrocities must be dealt with decisively.

The ICTR and ICTY established the first definitions of rape in international criminal law through *Akayesu* and *Kunarac,* cases which were considered as groundbreaking in prosecution of sexual violence crimes against women. Moreover, in these and other cases the ICTY and ICTR have clearly established that rape and sexual violence crimes can constitute torture and genocide. The ICTY in *Kunarac* also became the first tribunal to prosecute, although indirectly as enslavement, the crime of sexual slavery.

Therefore, the ICTY and ICTR have had a crucial role in advancing prosecution of gender-based crimes against women in international criminal

law and in re-conceptualizing many crimes from a gender-perspective. These two *ad hoc* tribunals have also greatly influenced the creation of the ICC, which goes even further in advancing the prosecution of gender-based crimes against women, at least on paper. The Rome Statute became the first instrument in international criminal law to expressly criminalize the crimes of enforced prostitution, forced pregnancy and enforced sterilization, which had never previously been criminalized or prosecuted in international criminal law. It remains to be seen, however, whether this advancement on paper will be matched by the ICC's jurisprudence in practice. The SCSL, based largely on the ICC, has also contributed to the advancement of international criminal law in this regard as it became the first international criminal tribunal to prosecute forced marriage as a distinct crime. However, it seems that such practice will not be followed by the ICC, which has instead chosen to prosecute forced marriage as sexual slavery.

However, even with the amplitude of formal sanctions established by international law, there have been claims that this body of law has not done enough to address the issue of gender-based violence. That being said, the role of international criminal tribunals must be noted as an important means of fighting impunity for these crimes, ensuring their recognition and formulating a reaction. Even if there is just a small number of perpetrators tried in international criminal tribunals, in comparison to the large number of low level individual perpetrators, such prosecutions in international criminal tribunals can symbolically facilitate a better understanding of women's sufferings in war and over time attempt to ensure that women are better protected from the atrocities of war.

However, even more can and should be done, especially when it comes to the role and satisfaction of victims. International criminal tribunals generally only prosecute the most responsible persons for atrocities in armed conflicts, those on higher positions or those in command. That means that thousands of low-level perpetrators remain free, living in impunity for their acts, sometimes in the same area as their victims. More should be done to punish as many of these perpetrators as possible and show that even low-level soldiers cannot act with impunity. While this is, of course, difficult to achieve under international law, more effort should be given to supporting, training and assisting national jurisdictions in their efforts to investigate and prosecute these crimes. The ICTY, for example, has attempted such measures and has achieved, in general, strong cooperation with national criminal courts in Former Yugoslavia. This was established through the transfer of cases to national courts and the provision of training for how these crimes should be prosecuted.

Regardless of national courts, however, possibilities of reparation should also be made more available and efficient in international criminal tribunals as well. The ICTY and the ICTR do provide for reparation possibilities for victims. However, with the exception of the ICTR Support Programme for Witnesses, the reparation mechanisms have generally been neither enforced nor adjusted to provide adequate remedies to victims, and victims of sexual violence have largely been left uncompensated, while many have already died.

Therefore, this area needs to be further and constantly improved in order for a large number of victims to feel in practice more than just the symbolic value of international criminal law. It will be interesting to see how the case law of the ICC will develop in this regard and whether it will manage to offer more protection to victims of sexual violence crimes.

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