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When sexual violence is weaponised: CRSV through the prism of the international criminal law

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Introduction

Conflict-related sexual violence (further as CRSV) is one of the most serious forms of crimes that can occur during any armed conflict. Its gravity was stressed under the United Nations Security Council Resolution 1820[1] that recognised CRSV as a tool of war that can "*significantly exacerbate situations of armed conflict*" and "*can impede the restoration of international peace and security*." Due to its nature and attached stigma, it still remains a highly underreported crime.[2] This can seriously hinder any attempts of combating CRSV as its victims often do not come forward and fear repercussions for reporting and identifying perpetrators.

Two main obstacles lie beneath the low reporting rate. First is the psychological factor or secondary victimization. Victims feel the guilt themselves and fear being shamed or denounced by their community as many of those attacks happen in areas where taboos and prejudice can act against the victim of sexual violence. Secondary victimization has many different elements and the definition of rape and sexual violence is one of them. This issue will be further addressed later.

The second factor is a material one, it can be physically difficult for the victim to seek help as the distance, security risks or financial burden might be too high. This, along with the general environment of impunity for crimes occurring during armed conflicts, absence of a clear chain of command and lack of strong condemnation of those crimes are just several causes why sexual violence is still rampant and why it is viewed as a low-

[1] UN Security Council, Security Council resolution 1820 (2008) [on acts of sexual violence against civilians in armed conflicts], 19 June 2008, S/RES/1820 (2008), available at: https://www.refworld.org/docid/485bbca72.html.

[2] WHO, (2021). Undercounting, overcounting and the longevity of flawed estimates: statistics on sexual violence in conflict. Retrieved 12 March 2021, from https://www.who.int/bulletin/volumes/89/12/11-089888/en/.

risk crime[3]. Sexual violence is often used as a tool to humiliate political prisoners and to express dominance over a certain group.[4]

The first part of this work provides background information of mechanisms aimed at the fight against CRSV and provides their analysis. The second part provides insight into the mechanisms of the ad hoc tribunals in Rwanda and Yugoslavia, as well as of the International Criminal Court (further as ICC). The third part deals with how those justice mechanisms approached sexual violence in armed conflict and follows how the jurisdiction has changed through time and how the CRSV was regarded. The last part focuses on two latest judgments of the ICC that have the potential to further influence the international criminal law approach to sexual violence.

Research question and methodology

The goal of this thesis is to analyse the evolution of the approach of international criminal law to CRSV and provide insight into how the ad hoc tribunals for former Yugoslavia and Rwanda, as well as the ICC, have broadened possibilities of application of international criminal law to sexual violence in conflicts. The last part of this work will focus on the latest decisions and how, especially if approved in the appeal judgement, they might shape the future decision-making on sexual violence in armed conflicts.

To answer those issues, this work will use analysis and comparison of statutes of ad hoc international tribunals of Rwanda and Yugoslavia and the Rome Statute governing the International Criminal Court. Furthermore, it will provide an analysis of relevant decisions that have helped to shape the approach to sexual violence. Analysis and comparison of decisions and statues are supported with relevant literature.

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[3] GAGGIOLI, G. (2014). Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law. International Review of the Red Cross, 96(894), 503-538. doi:10.1017/S1816383115000211, p. 504.

[4] COHEN, D.K., GREEN, A.H. & WOOD, E.J., (2013). Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward. *United States Institute of Peace: Special Report*, available at: https://www.usip.org/publications/2013/02/wartime-sexual-violence-misconceptions-implications-and-ways-forward, p. 2.

For the purpose of this thesis, I will not look in detail into working mechanisms and decision making of the Special Court for Sierra Leone, as the Court did not operate solely on provisions of international law.[5] I will also focus on the material side of the law and will not address issues, such as the standing of victims in the procedure and necessary special attention and support given to victims of sexual violence. Even though this topic would be very interesting to follow and further analyse, it is out of the scope of this work.

[5] UN Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002, Art. 5.

1. Basic terms and concepts

This part will introduce several important terms and concepts that are going to be used throughout this thesis:

1.1. Sexual violence in armed conflict

According to the Secretary-General of the United Nations (further as UN), the term conflict-related sexual violence (further also as CRSV) refers to "*rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict"*.[6] This definition provides almost the same demonstrative list of acts that constitute a war crime or a crime against humanity under the Rome Statute: "*Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence*."[7] with the addition of the forced abortion and forced marriage. North Atlantic Treaty Organization (further as NATO) is following a similar approach and defines both sexual violence and gender-based violence as follows: "Any sexual and/or gender-based violence against an individual or group of individuals, used or commissioned in relation to a crisis or an armed conflict"[8] Gender-based violence, that is referred to under the definition by NATO is an umbrella term, that includes any act committed against an individual based on differences between genders. It can include physical, verbal, sexual and psychological violence.[9] This thesis will focus solely on conflict-related sexual violence. Therefore, only acts of sexual nature will be discussed. Physical contact is not

[6] UN Security Council, Report of the Secretary-General: Conflict-related sexual violence, 29 March 2019, S/2019/280, available at: https://undocs.org/S/2019/280, para.4

[7] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html, art. 7(1)(g), art. 8(2)(b)(xxii), art. 8(2)(e)(vi).

[8] NATO North Atlantic Military Committee, Military Guidelines on the Prevention of, and Response to, Conflict Related Sexual and Gender-Based Violence, 1 June 2015, para. 9

[9] Office of NATO Secretary General's Special Representative for Women, Peace and Security, Concepts and Definitions, 2019., p.19

a necessary precondition to consider the act as sexual violence, acts such as, for example, forced nudity also fall under this term.[10]

In order for sexual violence to be considered as a violation of international law, a certain threshold of severity has to be met. Here, however, every mechanism provides a slightly different answer. For example, World Health Organization (further as WHO) defines sexual violence as following: *any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work*[11]. As will be further described in the following chapters, the question of what definition to adopt in case of rape was a contentious one, as both the International Criminal Tribunal for the former Yugoslavia (further as ICTY) and the International Criminal Tribunal for Rwanda (further as ICTR) went back and forth on which definition will apply.

1.2. Objective, victim and perpetrator

It is a common misconception that conflict-related sexual violence is usually a crime driven by passion and sexual desire. More often, it is linked to projecting power and asserting a dominant and authoritative position over the victim.[12] Sexual violence is being used to oppress communities and to displace them and to spread fear, project dominance and repress.[13] In many conflicts, it has been directly ordered by superiors and/or purposefully tolerated by them. Women are often targeted due to the perceived affiliation of their husbands and sons (Somalia, Central African Republic). In other instances, they were targeted to humiliate and control the childbearing capacities of

[10] ICC, The Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014. p.3.

[11] World Health Organisation, 2002. World Report on Violence and Health, 2002, Chapter 6, Sexual Violence, available at: https://www.who.int/violence_injury_prevention/violence/world_report/en/summary_en.pdf. p. 149

[12] GAGGIOLI, G. (2014). Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law. p. 504

[13] UN Security Council, Report of the Secretary-General: Conflict-related sexual violence, 29 March 2019, S/2019/280, p.13

certain communities (Iraq, Libya, Myanmar, Nigeria, Somalia and South Sudan). Terrorist groups also use sexual violence to their advantage. They can destabilise social structures in fragile communities, or use it as a recruitment tool (sexual slaves or forced marriages as a reward for fighters) and to promote their economy through the sale of sex slaves and human trafficking.[14]

In most instances reported by the UN, it is a non-state actor that is responsible for the CRSV. However, in several cases, state actors were implicated in committing sexual violence (Democratic Republic of Congo, Myanmar, Somalia, South Sudan, Sudan, the Syrian Arab Republic).[15]

Even though sexual violence during armed conflict is predominantly committed against women and girls, there is no single identifiable profile of a victim of sexual violence and therefore it is not possible to use a one-fits-all kind of solution for their protection and prevention of sexual violence. Even though most victims are women and girls, [16] men and boys being targeted is not an exception and due to perceived stigmatization, instances of their rape are even more under-reported.[17]

1.3. Consequences of CRSV

Victims of sexual violence often suffer life-threatening injuries and require immediate health care, including the prevention of sexually transmitted diseases (further as STDs). A society that holds stigma against victims of sexual violence sometimes force them to leave their community and further escalates the stigmatisation of the victim. This especially applies to victims who became pregnant due to rape.

Furthermore, in many countries, only sexual violence against women is recognised in their legal system making it difficult to recognise the real scope of the

[14] Ibid., p.14

[15] Ibid., p.12

[16] All Survivors Project, Checklist on preventing and addressing conflict-related sexual violence against men and boys, 10 Dec 2019, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/Checklist%20English.pdf, p. 6

[17] UN Security Council, Report of the Secretary-General: Conflict-related sexual violence, 29 March 2019, S/2019/280, p.19

crime. This also further supports the misconception where women are always on the side of the victim and men are the perpetrator. In reality, as this crime is a crime of dominance and of humiliation, many men are also falling victim to sexual violence and women are found to be the perpetrator, as will be described further. Laws against LGBTI+ communities are also making the reporting process more difficult, as victims fear repercussions and penalties if they report a crime of sexual violence.[18]

1.4. UN Framework targeting CRSV

Even though not directly connected to the prosecution of criminals under international criminal law, United Nations Women Peace and Security (further as WPS) agenda provides an important framework for the protection of women and children in armed conflict.

United Nations recognized the gravity of the impact that conflict has on civilians, women and children in particular, in its Resolution 1325. Further resolutions (1820, 1888, 1889, 1960, 2106, 2122 and 2422) then focused on different parts of the WPS agenda. For the purposes of this thesis, attention will be given especially to United Nations Security Council Resolutions 1325 and 1820.

The Security Council resolution 1325 adopted in 2000, S/RES/1325(2000) (further as 1325 Resolution) was unanimously adopted on October 31st 2000[19] and builds upon several UN conferences on gender equality that started in 1975. This resolution was the first one to formally recognize the adverse effect that war and conflict have on a civilian population and especially on women and children. It clearly states that women and children are not only affected as a by-product of the conflict but are also increasingly targeted by combatants and armed forces. The resolution stands on the four main pillars:

[18] Ibid.

[19] UNSC Resolution 1325 (2000), adopted by the Security Council at its 4213th meeting, on 31 October 2000, available at: https://digitallibrary.un.org/record/426075?ln=en,

participation, protection, prevention and relief and recovery. [20] Especially for prevention and recovery, international criminal law comes into play, as it can ensure that the perpetrators are prosecuted and that there is a clear refusal of the environment of impunity for perpetrators of atrocities.

The resolution also recognizes the urgent need to mainstream the application of a gender perspective and analysis into peacekeeping operations and other field operations, creating training guidelines and materials on the protection, rights and particular needs of women as well as when negotiating and implementing peace agreements. All parties are to protect women and girls from gender-based violence and to end the impunity of its perpetrators.[21]

This resolution has become a building stone for the WPS agenda, as it clearly sets out priorities for the protection of those vulnerable. There are several other resolutions related to this topic but especially United Nations Security Council resolution 1820 adopted in 2008 (further as UNSC Resolution 1820).

The UNSC Resolution 1820 focuses directly on sexual violence in conflict and is built on the idea that sexual violence is used as a tactic of was and leads to deterioration of the armed conflict situation. It also diminishes chances for peaceful resolution as it directly targets human dignity. The Resolution expressly states that CRSV can constitute a war crime, a crime against humanity or one of the constitutive acts of genocide. It further calls for the end of impunity of the perpetrators.[22] Something especially important for criminal justice.

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[20] Office of the Special Advisor on Gender Issues and Advancement of Women, Landmark resolution on Women, Peace and Security (Security Council resolution 1325). (2021). Retrieved 12 March 2021, from https://www.un.org/womenwatch/osagi/wps/#:~:text=The%20Security%20Council%20adopted%20resolution,security%20on%2031%20October%202000.&text=It%20also%20calls%20on%20all,in%20situations%20of%20armed%20conflict

[21] UNSC Resolution 1325 (2000), adopted by the Security Council at its 4213th meeting, on 31 October 2000, available at: https://digitallibrary.un.org/record/426075?ln=en, para. 9.

[22] UNSC, Security Council resolution 1820 (2008) [on acts of sexual violence against civilians in armed conflicts], 19 June 2008, S/RES/1820 (2008), available at: https://www.refworld.org/docid/485bbca72.html,

2. Overview of the struggle to adopt a legal framework to prohibit and punish CRSV

2.1. International Humanitarian Law

Sexual violence has been always a part of armed conflicts. From the beginning, the violent environment where almost everything is permitted has led to one of the most heinous crimes. The first explicit prohibition of sexual violence in armed conflicts came with the Instructions for the Government of Armies of the United States in the Field (Lieber Code) on 24 April 1863. This was the first attempt to codify the law of armed conflict, prepared by a professor at the Colombian College in New York and promulgated by then-president Abraham Lincoln. It became a basis and inspiration for other countries to adopt similar regulations as well as enforced the struggle for an international code of law of armed conflict.[23] Drawing from international customary law, it prohibited: "*All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants"* and introduced a death penalty or "*other severe punishment as may seem adequate for the gravity of the offense."*[24] Such a prohibition applied both in a conflict at home and in other hostile countries, whenever the perpetrator was an American soldier.[25]

The Hague Conventions of 1899 and 1907[26] do not explicitly address the crime of sexual violence but the prohibition can be interpreted[27] based on the following

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[23] ICRC, Treaties, States parties, and Commentaries - Lieber Code, 1863, available at: https://ihl-databases.icrc.org/ihl/INTRO/110,

[24] Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, LL.D., Originally Issued as General Orders No. 100, Adjutant General's Office, 1863, (Lieber Code). 24 April 1863, para. 44.

[25] Ibid., p. 47.

[26] by Hague Conventions it is referred to a series of international treaties that contain rules regulating warfare, adopted at international conferences in 1899 and 1907. The list of those treaties can be found here: Hague Conventions | How does law protect in war? - Online casebook, 2021. *Casebook.icrc.org* [online]: https://casebook.icrc.org/glossary/hague-conventions

[27] GREY, R. (2019). Prosecuting sexual and gender-based crimes at the International Criminal Court. Cambridge University Press, DOI: 10.1017/9781108652346, p.7.

wording: "*Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected."*[28] A similar approach was adopted by drafters of the Geneva Conventions adopted in 1949 that only indirectly mention the prohibition of sexual violence as: "*Prisoners of war are entitled to respect for their persons and honour. Women shall be treated with all consideration due to their sex."*[29]

The first explicitly mentioned prohibition of rape under international law came in the aftermath of the second world war. In order to prosecute criminals of the Major Axis, the United Nations War Crimes Commission was established in 1942 and started its work a year later. Three main Allied powers (U.K., U.S.A., USSR) have issued a joint statement that Nazi criminals shall be judged in the countries where their crimes were committed. Those major criminals whose crimes were of an international character and could not be geographically localised were to be judged by a joint decision of Allies. Neither the London Charter[30] nor the Tokyo Charter[31] does specifically mention sexual violence and the International Military Tribunal (further as Nuremberg Tribunal) has infamously failed to punish crimes of sexual nature.[32] The International Military Tribunal for the Far East (further as Tokyo Tribunal), however, has explicitly included rape as one of the crimes brought against the defendants. No charges, however, were brought against several

[28] Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, Annex - Section III : Military Authority Over The Territory Of The Hostile State – Regulations, art. 46.

[29] Geneva Convention relative to the treatment of prisoners of war, 75 UNTS 135, Geneva, 12th August 1949, art.3.

[30] United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945, available at: https://www.refworld.org/docid/3ae6b39614.html [accessed 14 March 2021]

[31] Charter of the International Military Tribunal for the Far East, signed in Tokyo on 19 January 1946, amended 26 April 1946

[32] KHEN, H., HAGAY-FREY, A. (2013). Silence at the nuremberg trials: The international military tribunal at nuremberg and sexual crimes against women in the holocaust. Women's Rights Law Reporter, 35(1), 43-66, p. 44.

instances of mass rape and against the enslavement of more than 200 000 "comfort women" held in Japanese military brothels.[33]

It was only in 1949 when the Geneva Convention relative to the Protection of Civilian Persons in Time of War[34] was adopted that included specific provision regarding the protection of civilians from rape: "*Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."*[35] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (further as Additional Protocol I) from 1977 further strengthen the protection by including "*outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution any form of indecent assault;"*[36] in additional protocol 1 and "*any degrading treatment, rape, enforced prostitution and any form of indecent assault"* in Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (further as Additional Protocol II) [37].

2.2. Prohibition of CRSV under international criminal law

To prosecute those, who were responsible for mass atrocities that happened in Yugoslavia and Rwanda, the UN has decided to establish two ad hoc international tribunals *"for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed"*[38] In 1993 the International Criminal Tribunal for the former Yugoslavia and 1994 International Criminal Tribunal for Rwanda

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[33] HENRY, N., (2013). Memory of an Injustice: The "Comfort Women" and the Legacy of the Tokyo Trial. *Asian Studies Review*, 37(3), pp.362-380. p. 366.

[34] Geneva Convention relative to the protection of civilian persons in time of war, 75 UNTS 287, Geneva, 12th August 1949.

[35] Ibid., Art. 27.

[36] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), 1125 UNTS 3, adopted: 8th June 1977, entry into force: 7th December 1978, art. 75.

[37] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) 1125 UNTS 609, adopted: 8th June 1977, entry into force: 7th December 1978, art. 4.

[38] United Nations Security Council resolution 827, S/RES/827, adopted on25 May 1993, para. 2.

were the first international courts to explicitly criminalize CRSV and to define the customary law governing the prohibition of gender-based violence during armed conflicts in their case law. ICTY was also the first international court to explicitly implement rape as a crime against humanity.[39] ICTR Statute follows the ICTY Statute in listing rape as a crime against humanity[40] and furthermore, specifically lists "*rape, enforced prostitution and any form of indecent assault"* under Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.[41] Rape as a war crime was usually classified as an outrage against personal dignity by the ICTY.[42] One of the major obstacles that faced both Tribunals was the lack of an international definition of rape as will be further described in the following chapter.

Rome Statute brought in 1998 the most comprehensive list so far of crimes under international law, including specific provisions regarding various forms of sexual violence: "*rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity"* both as a crime against humanity[43] and as a war crime in conflicts of both international[44] and non-international character[45].

2.3. Prohibition of CRSV under international human rights law

The relationship between human rights law and humanitarian law would be a topic for its own stand-alone work. I will therefore just try to shed a light on the main concepts related to the topic of the work. While rape is not specifically prohibited under

[39] Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended 7 July 2009 by resolution 1877), 25 May 1993, Art.5.

[40] Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), adopted on 8 November 1994, Resolution 955 (1994), Art. 3 (g).

[41] Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), adopted on 8 November 1994, Resolution 955 (1994), Art. 4 (e).

[42] ICTY, *Prosecutor v. Anto Furundžija*, Trial Judgement, Case No. IT-95-17/1-T, 10 December 1998, para 173.

[43] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, Art. 7. para. 1 (g).

[44] Ibid., Art. 8 (2) (b) (xxii).

[45] Ibid., Art. 8 (2) (e) (vi).

international human rights instruments, its prohibition is enshrined under several general clauses, such as, for example, protection of cruel, inhuman or degrading treatment under the ICCPR[46].

The prosecutor at the ICC Ms Fatou Bensouda has declared the office of the prosecutor will, in accordance with the Rome Statute[47] interpret the Statute in line with the universally recognised human rights, including women's rights and gender identity such as CEDAW or 1995 Beijing Declaration and Platform for Action and will take account evolution of human rights.[48] Therefore even when applying provisions of international criminal law, it is important to involve the human rights aspect into interpretation.

[46] International Covenant on Civil and Political Rights, 99 UNTS 171, Adopted: 16 December 1966, Entry into force: 23 March 1976, Art. 7.

[47] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, Art. 21(3).

[48] ICC, The Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014, available at: https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf, Art. 27.

3. Ad hoc international tribunals and the ICC

3.1. The ICTY

The ICTY has been established by the UNSC resolution 827 on 25 May 1993 in order to prosecute "*serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."*[49] The Statute of the International Criminal Tribunal for the Former Yugoslavia (further as ICTY Statute) sets its material jurisdiction over four international crimes: Art. 2 - Grave breaches of the Geneva Conventions of 1949, Art. 3 Violations of the laws or customs of war, Art. 4 Genocide and Art. 5 – Crimes against humanity.

The ICTY has been entrusted with primacy over national courts and thus was able to prosecute even those, who have already been tried by the national courts, but were either not found guilty of international crimes or the court was found not to be impartial and independent and was shielding the prosecuted.[50]

With the collapse of the Soviet Union and nationalism rising in the Balkans, tensions inside the Socialist Federal Republic of Yugoslavia resulted in smaller conflict over the independence of Slovenia (1991) and brutal conflicts in Croatia (1991-1995) and Bosnia and Herzegovina (1992-1995).

The deadliest conflict was over Bosnia and Herzegovina where both Croatia and Serbia were trying to assert their strategic dominance. This area was more multi-ethnic than the other parts of the former Yugoslavia. The Kingdom of Serbs Croats and Slovenes was formed with the dissolution of the Austro-Hungarian empire, later changing its name to the Kingdom of Yugoslavia. While this kingdom was created to connect Slavic nations in the region, the religious divide prevailed up to today. During the Second World War,

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[49] Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended 7 July 2009 by resolution 1877), 25 May 1993, Art. 1.

[50] Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended 7 july 2009 by resolution 1877), 25 May 1993, Art. 9, 10.

ČEPELKA, Č., ŠTURMA, P.. Mezinárodní právo veřejné. 2nd edition.,C.H. Beck, 2018. Academia iuris (C.H. Beck). ISBN 978-80-7400-721-7, p. 506.

the territory was divided up by axis powers and many of the atrocities have occurred with different Yugoslav groups fighting each other leading to several massacres. After the Serbian group "Partisans" has won, its leader and the future leader of Yugoslavia has executed up to 100 000 Croat soldiers. [51]

The post-war period was rather calm, however, the different groups rarely actually lived together, as many villages were separated by their religion. In 1991, 44 % Bosnians were Muslim population, 31 % Orthodox Serbs and the smallest group were Catholic Christian Croats, who constituted 17 % of the population.[52]

In the 1990s elections, strongly nationalistic parties were elected throughout Yugoslavian states, which was a gateway for the federation to fall apart. After the referendum in March 1992 when over 60 % of Bosnian citizens voted for independence. Bosnian Serbs immediately began a campaign to assert control of the territory with backing up from the Yugoslav People's Army and Serbia. Bosnian Croats rejected the authority of the Bosnian government as well and backed by Croatia started their own military campaign. More than half of the population was displaced and more than 100,000 people killed and thousands of women were systematically raped and civilians were sent to detention centres before the Dayton peace deal was initiated in November 1995. The most notable atrocity happened in the town of Srebrenica where more than 8,000 Bosnian men and boys were executed.[53]

[51] *Prosecutor v. Duško Tadić*, Trial Judgement, Case No. IT-94-1, 17 May 1993, para. 62, 63.

[52] *Prosecutor v. Duško Tadić*, Trial Judgement, Case No. IT-94-1, 17 May 1993, para. 56, 57

[53] A Short History of the Balkan Wars, from 1991 to 1999, 2021. Kathmandu & Beyond [online], available at: https://www.kathmanduandbeyond.com/history-balkan-wars-1991-1999/

3.2. The ICTR

The ICTR was established by the United Nations Security Council resolution 955[54] on 8 November 1994. Earlier same year, between April and July, around one million of the mostly civilian population was massacred.[55]

On the background of the Genocide in Rwanda lies, among other factors ethnical division of the country. While 85% of the country were ethnically Hutus, the country was long dominated by the Tutsi minority. In 1959 Hutus managed to overthrow the ruling Tutsi monarchy, forcing thousands of Tutsis into exile. Rwandan Patriotic Front (RPF) that was formed from exiled Tutsis invaded Rwanda in 1990 and clashes continued until a peace deal was signed in 1993. Short-lived peace ended on 6 April by the downing of the plane that was carrying the president of Rwanda. Hutus immediately blamed this incident on Tutsis and began coordinated genocide against Tutsis and moderate Hutus in the country. In only 100 days, around 800 000 people were slaughtered, mostly by the *Interahamwe* militia organisation members.

The scale of atrocities was amplified by the organization-like society in Rwanda that was tightly bottom-up organised. The youth branch of the ruling party was turned into a militia that carried out the slaughters, road stops were established to check ethnical identity cards (implemented by Belgic colonial administration) and kill any Tutsi or Hutu supporting them[56]. Women were often raped and taken as sexual slaves.

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[54] Security Council resolution 955 (1994) [on establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal], S/RES/955(1994), adopted on 8 November 1994

[55] Review of the Sexual Violence Elements of the Judgements 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 [online], 2010. [cit. 2021-03-14]. ISBN 9210562887. ISSN edsuno. Dostupné z: doi:10.18356/882d39fd-en, p. 46.

[56] Rwanda genocide: 100 days of slaughter, 2021. BBC News [online], available at: https://www.bbc.com/news/world-africa-26875506, accessed: 10th February 2021.

The ICTR statute provides for material jurisdiction over the crime of genocide, crimes against humanity and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.

3.3. The ICC

The ICC was established on 17 July 1998 with the adoption of the Rome Statute as the first treaty-based permanent international court. Rome Statute entered into force on 1 July 2002. Currently, there are 122 state parties to the Court, of which 33 are from Africa, 28 from Latin America and the Caribbean, 25 from Western Europe and other states and 18 from both Eastern Europe and Asian-Pacific states.[57] There are 18 judges elected for 9 years. With much importance for the CRSV crimes and WPS protection agenda in general, the ICC asks countries to consider gender balance when electing judges. Furthermore, the ICC prosecutor is obliged to appoint an expert on sexual and gender-based violence.[58]

The ICC examines four crimes that are "*unimaginable atrocities that deeply shock the conscience of humanity"* and "*threaten the peace, security, and well-being of the world".* Those crimes are considered to be "*of the concern to international community as a whole".*[59] It has been decided, in order to attract the broadest support for the Statute, to include only core crimes.[60] Namely, ICC has jurisdiction over four crimes:

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[57] The States Parties to the Rome Statute, 2021. *Asp.icc-cpi.int* [online], available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx, accessed: 10 March 2021

[58] DALLAN, A., 2009. Prosecuting conflict-related sexual violence at the International Criminal Court. SIPRI Insights on Peace and Security. No. 2009/1 May 2009, available at: https://www.sipri.org/sites/default/files/files/insight/SIPRIInsight0901.pdf, p. 10.

[59] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, preamble

[60] WAGNER, M., The ICC and its Jurisdiction – Myths, Misperceptions and Realities (April 8, 2003). Max Planck Yearbook of United Nations Law, Vol. 7, p. 409, 2004, Available at SSRN: https://ssrn.com/abstract=1586566, p. 415

a) The crime of genocide;

b) Crimes against humanity;

c) War crimes;

d) The crime of aggression.[61]

The crime of aggression was only defined with the amendment adopted on the first Review Conference in Kampala, Uganda in 2010 and jurisdiction of the Court over it has not begun until 17 July 2018, based on the adoption of the resolution by the Assembly of State Parties on 15 December 2017.[62]

In order to further specify what necessary elements actually constitute those crimes, Elements of Crimes[63] have been adopted in accordance with the art. 9 of the Rome Statute. Elements of Crimes are to support the Court when interpreting and applying the law to specific cases.

For the purpose of this thesis, only those crimes that can be considered as a CRSV are going to be further examined and their elements explained.

3.4. War Crimes

We can describe war crimes as violations of laws and customs of international humanitarian law that was criminalised as such in either a treaty or an international custom.[64] In past, war crimes and grave breaches of the Geneva Conventions of 1949 were seen as two distinct concepts, as can be seen from articles 2 and 3 of the ICTY statute. Under the Rome Statute, those two concepts were combined together under art. 8, which provides prohibition of grave breaches of the Geneva Conventions of 12 August

[61] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, Art. 5

[62] ICC, How the Court works, 2021. *Icc-cpi.int* [online], available at: https://www.icc-cpi.int/about/how-the-court-works, accessed: 10 March 2021

[63] International Criminal Court (ICC), Elements of Crimes, 2011, ISBN No. 92-9227-232-2

[64] SCHWARTZ, A. (2014). *War Crimes*, in: Max Planck Encyclopedia of Public International Law, Article last updated: September 2014

1949 and other serious violations of the laws and customs applicable in international armed conflict. For conflicts of non-international character, 8 (2) (c) will apply for serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 and (e) for other serious violations of the laws and customs applicable in armed conflicts not of an international character.[65]

The scope and application of war crimes under the ICTY and the ICTR has been, when compared with the approach towards crimes against humanity and genocide, rather distinctive[66] which will be further described in the following lines.

3.4.1. The ICTY

The ICTY Statute recognises war crimes under two separate norms. First, under art. 2 it stipulates grave breaches of the Geneva Conventions of 1949.

Article 3, on the other hand, serves as a general clause for other acts that violate international humanitarian law but do not amount to grave breaches of Geneva Conventions or other international crimes.[67]

3.4.1.1. Grave Breaches

Article 2 of the ICTY statute indicates eight individual crimes that can amount to grave breaches. Those crimes are directly enshrined in Geneva Conventions 1949[68].

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[65] ÖBERG, M. D., (2009), The absorption of grave breaches into war crimes law. *International Review of the Red Cross*. 2009. Vol. 91, no. 873, p. 163-183.
DOI 10.1017/s181638310999004x. Cambridge University Press (CUP), available at: https://www.icrc.org/en/doc/assets/files/other/irrc-873-divac-oberg.pdf, p. 163.

[66] METTRAUX, G, (2006), International crimes and the ad hoc tribunals. Oxford : Oxford Univ. Press., DOI: ISBN 0-19-927155-0, p. 24.

[67] *Prosecutor v. Duško Tadić,* Trial Judgement, Case No. IT-94-1, 7 May 1997, para. 559.

[68] Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, 75 UNTS 31, Geneva, 12th August 1949, art., 50;
Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea, 75 UNTS 85, G Geneva, 12th August 1949, art. 51,
Geneva Convention relative to the treatment of prisoners of war, 75 UNTS 135, Geneva, 12th August 1949, art. 130;
Geneva Convention relative to the protection of civilian persons in time of war, 75 UNTS 287, Geneva, 12th August 1949, 147.

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages.

The necessary conditions for grave breaches are much stricter than for violations of laws and customs of war under art. 3. The act has to be committed as part of an armed conflict of an international character and there has to be a nexus between the crime and the armed conflict. Those who have been targeted have to be considered as "protected" persons under Geneva Conventions 1949.[69]

Armed conflict of an international character

The question of whether a certain situation amounts to armed conflict widely debated as opinions considerably differ. The International Committee of the Red Cross defines international armed conflict as follows:

> *"any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no*

[69] Prosecutor v. Radolav Brdanin, Trial Judgement, Case No. IT-99-36-T, 1 September 2004, para. 121.

> *difference how long the conflict lasts, or how much slaughter takes place.*[70]

This was further confirmed by the ICTY in the case of Tadić:

> *"an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."*[71]

As can be read from the Commentary on the Geneva Convention, any conflict when armies of two states are involved is going to be considered an international armed conflict. Neither longevity nor intensity of the conflict is important and neither is recognition of the state of war by one of the parties. Therefore, for the international conflict, the Geneva Conventions 1949 are following the principle of factual conflict without the necessity of actual mutual recognition of the conflict by the parties.

International character

As the provisions on grave breaches under Geneva Conventions are aimed at armed conflicts, the scope of Art. 2 ICTY statute does not allow to prosecute internal conflicts. The question of whether a conflict is international is often contentious, as it has clear political implications.

To establish whether the conflict is international, it either has to be between two states, or one state intervenes into internal conflict and this conflict internationalises or some of the parties to the conflict act on behalf of a foreign state[72]. The ICTY has

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[70] ICRC, Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, ICRC, Geneva, 1952, available at: https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf, p. 32.

[71] *Prosecutor v. Duško Tadić*, Trial Judgement, Case No. IT-94-1, 7 May 1997, para. 561.

[72] *Prosecutor v. Duško Tadić*, Appeal Judgement, Case No. IT-94-1-A, 15 July 1999, para.84.

established a test of overall control to establish, whether a certain entity is acting on behalf of another state.[73]

At first, the ICTY trial chamber decided to apply the effective control test and decided that the perpetrator cannot be charged with grave breaches, but the appeal chamber arrived at a different conclusion. It found, that for organically formed groups it is enough that they act under the **overall control** of the state.

Nexus between crime and armed conflict

For any crime to be considered a grave breach of Geneva Conventions 1949 there has to be established a nexus between the alleged crimes and the armed conflict. This means a close relationship between the hostilities and the crime committed. It is not necessary for the violation to happen in the exact area of hostilities.[74] The ICTY has established "*the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities"*[75] and that it is sufficient that the hostilities and the alleged crimes "*were closely related to the armed conflict as a whole"*.[76]

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[73] *Prosecutor v. Duško Tadić*, Appeal Judgement, Case No. IT-94-1-A, 15 July 1999, para.120

In order to do so, the tribunal looked at the ICJ judgement in the case Concerning Military and Paramilitary Activities in and Against Nicaragua. Even though in the case of Nicaragua v USA ICJ had to decide on whether USA was responsible for international law by non-state actors and ICTY was concerned with individual responsibility, the question whether to apply international humanitarian law and more specifically whether the conflict can be regarded as international is the same. In that case, ICJ took a strict approach and settled the bar as of dependence on one side and control on the other to such extent that the group would be considered as on organ of the US government to establish effective control. The agents would have to be paid and coordinated by the state but also given specific instruction on the commitment of the crimes.

[74] *Prosecutor v. Radolav Brdanin*, Trial Judgement, Case No. IT-99-36-T, 1 September 2004, para. 123.

[75] *Prosecutor v. Duško Tadić*, Decision on the Defence Motion on Jurisdiction, Case No. IT-94 1, 10 August 1995, para. 67.

[76] *Prosecutor v. Duško Tadić*, Trial Judgement, Case No. IT-94-1, 7 May 1997, para. 573.

The ICTY has found that norms under Geneva Conventions clearly apply to a broader geographical area as well as uses a broader temporal frame beyond the end of the hostilities.[77]

The important part is that the conflict itself enabled the commission of the crime, either through empowering the perpetrator or through the environment of impunity. In Kunarac Judgement the ICTY has decided that for the nexus between crime and the armed conflict to be found, the actual hostilities can already be shifted to different geographical area, however, if the crimes are "*committed in furtherance or take advantage of the situation created by the fighting"*, it is still going to be considered as sufficient for the war nexus to be established.[78] On the other hand, crimes that are clearly only parasitical on the opportunities created by war or crimes perpetrated privately for private reasons would not satisfy the war nexus necessity.[79]

Protected person

There are three categories of protected persons as provided for in Geneva Conventions 1949 and their Additional Protocols.

I. Combatants hors de combat (prisoners, wounded, sick, shipwrecked and surrendering, including parliamentarians and people accompanying them)
II. Persons Performing Humanitarian Functions (medical personnel, religious personnel, civil defence personnel and relief personnel)
III. Civilians in the hands of the party of the conflict, special protection is given to women and children.[80]

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[77] *Prosecutor v. Duško Tadić*, Decision on the Defence Motion on Jurisdiction, Case No. IT-94 1, 10 August 1995, para. 70.

[78] *Prosecutor v. Kunarac et. al.,* Trial Judgement, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 568.

[79] METTRAUX, G., (2006), International crimes and the ad hoc tribunals. Oxford: Oxford Univ. Press., DOI: ISBN 0-19-927155-0, p. 44.

[80] KRIEGER, H., (2011), *Protected Persons,* Article last updated: March 2011, in: Max Planck Encyclopedia of Public International Law (online), available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e979?rskey=4YrTel&result=1&prd=MPIL

In general, civilians are considered protected persons (if other requirements are fulfilled), as long as they do not take part in the hostilities.[81] It is important to recognise that nationality cannot be seen in its strict sense, as the current conflicts are more and more often between different groups (ethnic, religious etc.) rather than between two established countries. Therefore, the ICTY has already in its first judgement found that rather than nationality, the important element is the allegiance to the party of the conflict and its control over the person. Furthermore, even though for many atrocities during the Yugoslavian conflict, the perpetrator and their victim were of the same nationality, the perpetrator has often acted as an agent of a different state. Such as was the case when the perpetrator, who by nationality was from Bosna and Hercegovina, but operated on behalf of another state.[82]

3.4.1.2. Violations of the laws or customs of war

In separate article 3, the Statute of the ICTY provides a basis for the prosecution of all violations of international humanitarian law, be it the law of conduct of hostilities (Hague law) and law protecting victims of war (Geneva law) not covered by other articles. The list as stated under the article is non-exhaustive and is used as a general clause for those crimes that constitute violations of laws or customs of war but at the same time, do not fall under the scope of other articles. The court has confirmed the residual character of this article stating: "*Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable"*.[83] and further: "*The only limitation* [of article 3] *is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous)".*[84]

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[81] METTRAUX, G, (2006), International crimes and the ad hoc tribunals. Oxford: Oxford Univ. Press., DOI: ISBN 0-19-927155-0, p. 65

[82] *Prosecutor v. Duško Tadić*, Appeal Judgement, Case No. IT-94-1-A, 15 July 1999, para. 167.

[83] *Prosecutor v. Duško Tadić*, Decision on the Defence Motion on Jurisdiction, Case No. IT-94 1, 10 August 1995, para. 91.

[84] Ibid., para. 87, *Prosecutor v. Duško Tadić*, Trial Judgement, Case No. IT-94-1, 7 May 1997, para. 559.

Armed conflict

Article 3 of the ICTY Statute covers also conflicts of a non-international character. For those, however, it is first necessary to establish a certain intensity and organization of parties, in order to distinguish internal armed conflict from short insurrections and terrorist activities that are not covered by international humanitarian law.[85] Art. 1(2) of the Additional Protocol II provides a negative definition of non-international armed conflict:

> *Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.*[86]

There have been identified two conditions that need to be fulfilled in order for the conflict to be considered as non-international armed conflict (if it is not an international armed conflict as described above). There needs to be a minimum level of intensity of the hostilities and non-governmental groups need to be organised in a way, there is a certain command structure and they need to be able to sustain military operations.[87]

The demonstrative list of prohibited acts that, if other conditions are fulfilled, are considered as a violation of the laws or customs of war under art. 3 of the ICTY Statute goes as follows[88]:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

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[85] *Prosecutor v. Duško Tadić*, Trial Judgement, Case No. IT-94-1, 7 May 1997, para. 562.

[86] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) 1125 UNTS 609, adopted: 8th June 1977, entry into force: 7th December 1978

[87] ICRC Opinion Paper, How is the Term "Armed Conflict" Defined in International Humanitarian Law? International Committee of the Red Cross (ICRC) Opinion Paper, March 2008, available at: https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf, p. 3.

[88] Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended 7 July 2009 by resolution 1877), 25 May 1993, Art. 3

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

3.4.2. The ICTR

When comparing the scope of the war crimes jurisdiction of the ICTY and the ICTR, it is essential to recognise that both conflicts were very different in their nature. The conflict in Rwanda was predominantly an internal one.[89] For this reason, art. 4 of the ICTR statute establishes the common art. 3 of the Geneva Conventions 1949 and the Additional Protocol II from 1977 as the basis for the prosecution of war crimes in Rwanda.

Specifically, it mentions the following acts:

a) *Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;*
b) *Collective punishments;*
c) *Taking of hostages;*
d) *Acts of terrorism;*
e) *Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;*
f) *Pillage;*

[89] METTRAUX, G, (2006), International crimes and the ad hoc tribunals. Oxford: Oxford Univ. Press., DOI: ISBN 0-19-927155-0, p. 27.

g) *The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;*
h) *Threats to commit any of the foregoing acts.* [90]

Compared to ICTY, the scope of jurisdiction over war crimes of ICTR is limited to serious violations of the common art. 3 of Geneva Conventions and Additional Protocol II, provisions that are focused on armed conflicts of a non-international nature. Also, ICTR does not focus on the rules of conduct of hostilities or Hague law.[91] Another difference is that ICTR offers an exhaustive list of acts that can be prosecuted as war crimes, while acts listed under art. 3 ICTY statute are demonstrative.

Where the ICTR Statute goes further in prosecuting war crimes is the criminalization of threats to commit any of the acts mentioned under the art. 4, however, this provision has never been actually used.[92]

3.4.3. The ICC

The ICC has broadened the scope of war crimes which can be seen from the article 8, where the Rome Statute enumerates 51 different crimes. Together with the traditional ones that could have been seen under the ICTY and ICTR respective statutes, the ICC adds to the list of war crimes committed in non-international armed conflict new crimes such as conscripting child soldiers, attacking peacekeepers or gender-based crimes. Under art. 8 it criminalises grave breaches, other serious violations of the laws and customs, serious violations of article 3 common to the four Geneva Conventions of 12

[90] Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), adopted on 8 November 1994, Resolution 955, art. 4.

[91] ICRC, Law of the Hague | How does law protect in war? - Online casebook, 2021. Casebook.icrc.org [online], available at: https://casebook.icrc.org/glossary/law-hague#:~:text=As%20opposed%20to%20the%20'law,Conventions%20of%201899%20and%201907, accessed: 13 March 2021.

[92] METTRAUX, G, (2006), International crimes and the ad hoc tribunals. Oxford: Oxford Univ. Press., DOI: ISBN 0-19-927155-0, p. 28.

August 1949 and other serious violations of the laws and customs applicable in armed conflicts not of an international character.[93]

3.5. Crimes against humanity

Crimes against humanity intend to punish such acts that go against the basic principles of humanity and defy the universal values of the international community as a whole.[94] What defines them and separates them from other international crimes is, that they are targeted at the civilian population and are a part of a widespread and systematic attack.[95] As mentioned before, the scope of crime against humanity is fairly similar under the art. 5 ICTY and art. 3 ICTR statutes. While the enumerated acts listed as crimes against humanity are the same under both statutes, the necessary conditions are set for each of the Tribunals and the ICC differently.

3.5.1. General requirements for crimes against humanity

While for the act to be considered a crime against humanity under ICTY Statute it was necessary to be committed in an armed conflict of either international or internal character, ICTR statute followed a different approach and required widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The requirement of the crime against humanity to be part of the armed conflict does not necessarily mean that the crime has to be committed as part of the hostilities themselves, but it is used more as a temporal framework. Only with the beginning of hostilities, international humanitarian law applies, including crimes against humanity. [96] Therefore, we cannot speak of a condition of a substantive relationship to be

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[93] MRÁZEK, J. International Criminal Court, War Crimes and Crimes against Humanity. In: ŠTURMA, P. (ed.) The Rome Statute of the ICC at Its Twentieth Anniversary. Leiden/Boston: Brill/Nijhoff, 2019, p. 70.

[94] ACQUAVIVA, G., POCAR, F., Crimes against Humanity in Max Planck Encyclopedia of Public International Law, Article last updated: June 2008, accessible at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e768?rskey=0I8xXO&result=1&prd=MPIL .

[95] *Prosecutor v. Tihomir Blaškić,* Trial Judgement, Case No. IT-95-14-T, 3 March 2000, para. 201.

[96] METTRAUX, G, (2006), International crimes and the ad hoc tribunals. Oxford: Oxford Univ. Press., DOI: ISBN 0-19-927155-0, p. 152

established like with war crimes and there is no need to establish a connection between the crime and the conflict. The existence of the armed conflict at a relevant time and place is satisfactory.[97]

While the ICTY does not specifically mention the condition of the attack being widespread or systematic, the court has established that those elements are implied by the very nature of the attacks and has made this condition a part of its judgements, also following implementation of the widespread or systematic in the ICTR Statute and the Rome Statute.[98]

The ICTY has divided the common elements of the crimes against humanity into 5 parts:

(i) *"There must be an attack*
(ii) *The acts of the perpetrator must be part of the attack*
(iii) *The attack must be "directed against any civilian population"*
(iv) *The attack must be "widespread or systematic"*
(v) *The perpetrator must know of the attack the wider context in which his acts occur and know that his acts are part of the attack."*[99]

ICTR took a different and a more restrictive approach when requiring the widespread and systematic attack to be based on certain grounds, namely national, political, ethnic, racial or religious.[100]

Those elements represent the conditions under which alleged crimes have happened. First, the objective element demands that specific acts have to occur as a part of a wider contextual attack against the civilian population. This is usually considered as a first condition. It is not enough for the act to happen in the background of widespread

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[97] *Prosecutor v. Duško Tadić*, Trial Judgement, Case No. IT-94-1, 7 May 1997, para. 573.

[98] *Prosecutor v. Tihomir Blaškić,* Trial Judgement, Case No. IT-95-14-T, 3 March 2000, para. 202.

[99] *Prosecutor v. Kunarac et. al.,* Trial Judgement, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 410.

[100] Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), adopted on 8 November 1994, Resolution 955, art. 3.

violence against the civilian population, but have to be a part of it, meaning that the civilian population has to be a primary target and not just a circumstantial victim.[101]

The second condition, for the attack to be committed in a widespread or systematic way, is to distinguish individual incidental acts where perpetrator acts on their own. On the contrary, a crime against humanity has to be either widespread, meaning on a large scale, which can be completed through a series of individual acts or through one act that is committed on a mass scale. The second alternative is that the attack is systematic. This means that the attack is organised in a way that refutes the possibility of those acts being random.[102]

The Rome Statute has adopted this approach and for cases in front of the ICC, crimes against humanity are defined under the art. 7 and the Rome Statute asks for the act to be part of a *widespread or systematic attack and directed against any civilian population*.[103] The contextual attack is further defined in the second paragraph of this article as: *"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."*[104]

The main difference between the approach of the Tribunals and of the ICC is the requirement of the attack against civilian population being pursuant or in furtherance of a policy to commit the attack[105] and that the war nexus conditionality was completely left out of the crimes against humanity provision. For this reason, crimes against humanity as stipulated in the Rome Statute can also involve those acts, that are not strictly conflict-

[101] *Prosecutor v. Kunarac et. al.,* Trial Judgement, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 421.

[102] METTRAUX, G, (2006), International crimes and the ad hoc tribunals. Oxford: Oxford Univ. Press., DOI: ISBN 0-19-927155-0, p. 171.

[103] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, art. 7.

[104] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, art. 7(2)

[105] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, art. 7(2)(a)

related. However, the substance of individual crimes stays the same and therefore, for the purpose of this thesis, I will involve also sexual violence as a crime against humanity in front of the ICC.

3.5.2. List of crimes stipulated in statutes

Both ICTY and ICTR use the same list of crimes that can be prosecuted by the Tribunals. For the purpose of this thesis, points (c), (f), (g), (h) and (i) are especially important, as will be described in the following section.

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation;
(e) Imprisonment;
(f) Torture;
(g) Rape;
(h) Persecutions on political, racial and religious grounds;
(i) Other inhumane acts.[106]

The Rome Statute adds several new elements. First, and for the purpose of this thesis most importantly, it adds other forms of sexual violence than rape to the list: *sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.*[107] Which will be discussed more specifically in the later chapters.

[106] Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended 7 July 2009 by resolution 1877), 25 May 1993, art. 5.

Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), adopted on 8 November 1994, Resolution 955, art. 3.

Second, the grounds for persecutions are extended to include also ethnicity, culture and gender and "*other grounds recognised as impermissible under international law"*.[108]

3.6. Genocide

Genocide, as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, art. II, means committing one of the enumerated acts (killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about the physical destruction of a group in whole or in part, imposing measures to prevent births and/or forcible transfers of children to another group) with the intention to "*destroy, in whole or in part, a national, ethnical, racial or religious group"*[109]. This definition was practically word by word copied in the statutes of both international tribunals ICTY and ICTR as well as to the Rome Statute. A will be further describer in the later chapter, sexual violence can especially amount to causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about the physical destruction of a group or even imposing measures to prevent births.

In order for the crime to be considered as genocide, the **criminal act** (*actus reus),* one of the enumerated acts in the Rome Statute under Art. 6 a) – e), has to be committed with the specific **intent**. Meaning the acts enumerated in the Rome Statute have to be committed with intent to destroy *in whole or in part, a national, ethnical, racial or religious group*.

Scale

To what extent is the part of the targeted group considered large enough to constitute genocide is not strictly defined as many different aspects come into play. In the ICTR case of *The Prosecutor v. Jean de Dieu Kamuhanda*, the Tribunal has agreed that there is no way of establishing a specific numeric threshold for the crime of genocide as

[108] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, art. 7(h).

[109] Convention on the Prevention and Punishment of the Crime of Genocide, 277 UNTS 72, Adopted: 9 December 1948, Entry into force: 12 January 1951, art. 2.

anything more than an "*imperceptible number of the targeted group can be of proportionate scale to establish evidence to prove the intent of destruction of the group"*.[110]

Destruction of the group

While the *destruction of the group* is generally understood to mean physical or biological destruction, other actions, such as destruction of religious buildings and houses, can be taken into account as evidence of the intent to destroy the group.[111] What is more, in his dissenting opinion, Judge Shahabuddeen expressed the view that while the acts that are listed have to be of a physical or biological nature, the intent itself does not need to be strictly physical or biological. He uses *a contrario* argument that while acts under the Art 4 (2) c) and d) explicitly require the intent to be physical or biological destruction (deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part and imposing measures intended to prevent births within the group. While the act listed is physical or biological, the intended destruction, according to the dissenting opinion can also be non-physical.[112]

[110] ICTR, *prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, 22 January 2003, para. 627, 628.

[111] ICTY, *Prosecutor v Radislav Krstić*, Trial Judgement, Case No. IT-98-33-T, 02 August 2001, para. 580.

[112] ICTY, *Prosecutor v Radislav Krstić*, Appeal Judgement, Case No. IT-98-33-A, 19 April 2004, Partial Dissenting Opinion of Judge Shahabuddeen, para. 54,

4. CRSV as international crimes

The statute of the ICTY provides explicit prohibition of sexual violence only by listing rape as one of the crimes against humanity[113] The drafters of the ICTR Statute went another step further to list it also among Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, together with humiliating and degrading treatment, enforced prostitution and any form of indecent assault as outrages upon personal dignity.[114]

Acts of and rape and other forms of sexual violence can be also prosecuted under other provisions that do not, at the first sight, mention sexual violence. As will be described further, it can also amount to torture and persecution as crimes against humanity, as well as torture, wilfully causing great suffering, inhumane treatment and outrages on personal dignity as war crimes.

Rome Statute has affirmed the wide scope of sexual violence as war crimes by explicitly enumerating next to rape, several other sexual crimes as war crimes:

> *"Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence …."*

that either constitutes a grave breach of the Geneva Conventions[115] if we are speaking about an international conflict or a serious violation of article 3 common to the four Geneva Conventions 1949[116]. The Rome Statute also contains the same list as Crimes against humanity under art. 7,1(g).

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[113] Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended 7 July 2009 by resolution 1877), 25 May 1993, Art. 5(g)

Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), adopted on 8 November 1994, Resolution 955, Art. 3(g)

[114] Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), adopted on 8 November 1994, Resolution 955, Art. 4(e)

[115] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, art, 8(2)(b)(xxii)

[116] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, art, 8(2)(e)(vi),

The Rome Statute, together with the Elements of Crimes, is nowadays the most comprehensive document when speaking about sexual- and gender- based crimes under international law. Not only it enumerates several acts that constitute sexual violence, but also the definitions of those crimes account for their variety and diversity. It is also the first international law document that explicitly involves sexual violence in its various forms as grave breaches of Geneva Conventions.[117]

The first case to specifically mention rape and sexual violence as crimes against humanity and war crimes was the case of *Prosecutor v. Tadić*. This trial considered crimes of Bosnian Serb, former karate expert and café owner in Kozarac, a small town that pre-conflict used to be predominantly Muslim. As Tadić became more and more nationalistic and anti-Muslim his café became a meeting point for Serb nationalists and he became the leader of those groups. He admired Slobodan Milosevic and supported the idea of Greater Serbia with "no place for Muslims" and quickly became involved in politics and with the Serb Democratic Party (SDS).[118] After the town has been ethnically cleansed, he became its leader and was elected president of the Local Board of the SDS. Many of the non-Serb civilians were being detained in several prisons in the vicinity. Tadic, who was described as „Butcher of Omarska" by Bosnian refugees was charged with 34 counts of crimes against humanity and grave breaches of the Geneva Conventions. He actively participated with Serb forces in attacks on non-Serb residential areas and committed several acts of killings, torture, sexual assaults, and violations. Even though there was not enough evidence for Tadic to be charged with committing crimes of rape himself, he was found guilty of aiding and abetting crimes of sexual violence.[119]

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[117] UHLÍŘOVÁ, K., Vývoj mezinárodního trestního práva v kontextu kriminalizace sexuálního násilí. In: Mužské právo : jsou právní pravidla neutrální? (Vydání první). (2020). Wolters Kluwer. p. 163

[118] *Prosecutor v. Duško Tadić*, Trial Judgement, Case No. IT-94-1, 7 May 1997, para. 63-68.

[119] ELLIS, M. (2006) 'Breaking the Silence: Rape as an International Crime', Case Western Reserve Journal of International Law, 38(2), pp. 225–248. Available at: http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,shib&db=edshol&AN=edshol.hein.journals.cwrint38.18&lang=cs&site=eds-live&scope=site, p. 226.

4.1. Rape

Rape is the most notorious sexual crime that occurs throughout armed conflicts. It is estimated that during the Yugoslavian war, there were up to 60 000 cases of rape and sexual assaults and in 100 days of the Rwandan genocide, up to half a million women were raped[120]. During almost eleven years of internal conflict in Sierra Leone, more than 64 000 cases of rapes and sexual violence were recorded.[121]

This part will look at how the tribunals and ICC have approached the crime of rape as an international crime and how the definition of rape has changed. It will also analyse, case by case various different landmark cases that have shaped how sexual violence is approached in international criminal law.

In the following lines, I will describe how the approach to the crime of rape was changing through time. Neither of the ad hoc international tribunals had a definition of rape codified in its statute and so they needed to find an appropriate definition through their decision-making and through a thorough analysis of international as well as national provisions. While ICC does not have a specific provision in the Rome Statute, it builds its arguments on the one described in the Elements of Crimes. This document is to assist in the interpretation of the crimes stipulated in the Rome Statute.[122] This document was adopted at the Assembly of States Parties in 2002 and is next to the Rome Statute and Rules of Procedure to be applied primarily as applicable law.[123]

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[120] SZPAK, A. (2013), Sexual Slavery Before Ad Hoc International Criminal Tribunals and the International Criminal Court, European Scientific Journal, June 2013 edition vol.9, No.16, available at: https://www.researchgate.net/publication/263659435_Sexual_Slavery_Before_Ad_Hoc_International_Criminal_Tribunals_and_the_International_Criminal_Court, p. 317.

[121] ELLIS, M. (2006) 'Breaking the Silence: Rape as an International Crime', Case Western Reserve Journal of International Law, 38(2), pp. 225–248. Available at: http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,shib&db=edshol&AN=edshol.hein.journals.cwrint38.18&lang=cs&site=eds-live&scope=site, p.226.

[122] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, art.9.

[123] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, art.21.

The main divergence that has arisen through decisions of ICTY and ICTR is whether the act should be based on the element of non-consent by the victim or focus more on the means of the perpetrator, such as force, threat of force or coercion. This distinction can have further implications not only for the conviction rate of the perpetrators but also for the protection of victims from secondary victimization.

4.1.1. The ICTY and ICTR

First definition

The first time when the crime of rape had to be defined by the tribunals was in 1998, in the case of Akayesu.[124] Former teacher and mayor of Taba commune Akayesu who was found guilty of genocide and crimes against humanity. His indictment first did not include charges of sexual violence and had to be altered, after the testimony of a witness who described her six-year-old daughter being raped and described what she heard about other young girls that were raped at the city hall. Another witness testified to being raped and witnessing the rape of other women and hearing about cases of rape right in the city hall.[125] Another witness described being severely beaten, leaving her disabled and raped multiple times by a number of men. She described witnessing the death of her sister who was raped and cut with a machete.[126] This occurred after women were seeking refuge in the city hall and Akayesu was witness to those atrocities and was able to prevent them from happening. Other witnesses described him as "supervisor".[127]

The tribunal decided, that it will not try to mechanically describe objects and body parts, but instead decided for a very short description of the concept of rape, with the aggression of sexual nature as the core element of the crime.

[124] EBOE-OSUJI, C. (2012). International law and sexual violence in armed conflicts (International humanitarian law series v. 35). Leiden: M. Nijhoff., 145.

[125] ICTR, Prosecutor v. Jean-Paul Akayesu, Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 416.

[126] Ibid., para. 421.

[127] Ibid., para. 427.

From the beginning, the Tribunal has acknowledged that the definition of rape goes way beyond what is commonly understood by intercourse and wanted to adopt such a definition that would be adequate to the scope of the crime. The decision not to involve a mechanical description of the crime was also made with consideration for the victims, that would otherwise need to describe in detail and thus live through again the atrocities that have been committed against them. The Tribunal has drawn parallels with the crime of torture, which is also not defined through specific acts, but rather through means and purposes [128] and declared that since rape shares similar purposes (intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person) and also violates personal dignity of the victim, the definition should follow a similar, more general pattern. [129]

"The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive..."[130]

Rather than focusing on the invasive nature of the crime, the court has turned its attention to the coercive nature. The ICTR has further reiterated that the wording: "circumstances which are coercive" does not necessitate a physical force and can be of psychological nature (threats, duress and praying on fear in general). It went further to highlight that even the surrounding environment can constitute coercion and that armed conflict or military presence of hostile forces can create such an environment.[131] This meant that there was no need to examine whether the victim acted a certain way in order to establish whether the act was consensual or not, as the coercive environment (for example presence of Interahamwe during the act) was enough to prove that the act was

[128] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, Adopted: 10th December 1984, Entry into force: 26th June 1987, para. 1.

[129] ICTR, *Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 687.

[130] Ibid., 688.

[131] Ibid., 688.

not consensual.[132] In the same year, the ICTY has first decided in the case of Mucić that there was no need to depart from this definition and adopted it word by word.[133]

A few months later, however, the ICTY has decided to adopt a new definition. In the case of Furundžija, the Tribunal has built upon other international documents and highlighted that rape is the *"the most serious manifestation of sexual assault"*. As for the definition, on one hand, the tribunal agreed with the ICTR in Akayesu, that the objective is to punish the aggression of rape. On the other hand, it had decided to conduct its own review of national norms defining rape and came to a different conclusion. The Tribunal has concluded that the definition brought in Akayesu is too general to conform to the principle of specificity. In order to find such a definition that would be specific enough to satisfy the principle of criminal law *nullum crimen sine lege stricta* it has compared several national criminal norms prohibiting rape and came to a conclusion that the trend for a broader view of the crime of rape that should involve even such acts, that would previously be considered as sexual or indecent assault if the main principle of physical penetration is present.[134]

The Tribunal has further developed the idea that even forced penetration of mouth should be considered rape under international criminal law, even though there was no overwhelming majority of national norms pointing in that direction as many states would consider oral rape as sexual assault. The argumentation was based on the idea, that oral rape constitutes "*a most humiliating and degrading attack upon human dignity."*[135] and as such, it shouldn't be classified as a lesser crime than rape. This idea was further supported in other cases and adopted by the ICC that stated: *"oral penetration, by a sexual*

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[132] HANSEN-YOUNG, Thekla, 2005. Defining Rape: A Means to Achieve Justice in the Special Court for Sierra Leone. *Chicago Journal of International Law* [online]. **6**(1), 479-494 [cit. 2021-03-13]. ISSN 15290816, p. 479.

[133] ICTY, Prosecutor v. Zdravko Mucic et al., Trial Judgement, Case No. IT-96-21-T, 16 November 1998, para. 479.

[134] EBOE-OSUJI, C. (2012). International law and sexual violence in armed conflicts (International humanitarian law series v. 35). Leiden: M. Nijhoff, p. 147.

[135] ICTY, *Prosecutor v. Anto Furundžija*, Trial Judgement, Case No. IT-95-17/1-T, 10 December 1998, para. 183.

organ, can amount to rape and is a degrading fundamental attack on human dignity which can be as humiliating and traumatic as vaginal or anal penetration."[136]

The definition brought by the ICTY in the case of Furudžija was as follows:

"the sexual penetration, however slight:

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

by coercion or force or threat of force against the victim or a third person."[137]

The decision to specify the crime of rape through a more rigorous description of the actus reus was not at first adopted by the ICTR. In the case of Musema, the director of a tea factory and economic leader of the commune was found guilty of genocide and crimes against humanity which included charges of rape. Among others, he was alleged of inciting the killing of the Tutsi population and encouraging the raping of Tutsi girls and women as a reward.

The ICTR when deciding on crimes of rape acknowledged the reasoning in Furundžija and especially agreed that forced oral penetration should be considered as rape. The Tribunal needed to decide whether to follow the conceptual definition from Akayesu or whether to lean towards a more mechanical approach adopted in Furundžija. The tribunal pointed out that it was the ICTY in the case of Furundžija that highlighted how the norms on rape are fast evolving in the direction of broadening the scope of the prohibition of this crime. Based on this dynamicity, the Tribunal has decided to follow the definition from Akayesu, which will be more easily adaptable to the evolutive conception of rape.[138] It has further built on the Akayesu decision by dismissing any

[136] ICTY, The Prosecutor v. Jean-Pierre Bemba Gombo, Trial Judgement, para. 101.

[137] ICTY, *Prosecutor v. Anto Furundžija*, Trial Judgement, Case No. IT-95-17/1-T, 10 December 1998, para. 179, 185.

[138] ICTR, *Prosecutor v. Alfred Musema*, Trial Judgement, Case No. ICTR-96-13-T, 27 January, para. 228.

efforts to mechanically describe rape, but rather emphasised the element of aggression that takes a sexual form under coercive circumstances.[139]

In 2001, the ICTY continued in line with the previous judgment regarding Furundžija, built upon the more specific definition of rape and agreed with the actus reus as was stipulated. It has however pointed out that while the definition was sufficient for the case of Furundžija, it was narrower than needed under international law and was not adequate for the case at hand, Kunarac.[140] The tribunal has stated that neither force, threat of force or coercion are the fundamental element of rape and that there are other factors that can lead to a non-consensual or non-voluntary penetration on the side of the victim, which is the foundation of the crime of rape, as the attack is especially violating the victim's sexual autonomy.[141]

When examining the *Furundžija* case, the Tribunal found that the coercion was to be interpreted broadly as to encompass "*most conduct which negates consent"*[142] and has decided that, while coercion was sufficient in the previous case, under international law any sexual penetration without consent should be considered as rape. The correct wording should be founded on the absence of voluntary consent based on the victim's free will.

> *"...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 Court has therefore also clearly defined mens rea of rape and this definition was adopted in many upcoming trials:

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[139] ICTR, *Prosecutor v. Alfred Musema*, Trial Judgement, Case No. ICTR-96-13-T, 27 January, para. 226.

[140] ICTY, *Prosecutor v. Dragoljub Kunarac et al.,* Trial Judgement, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 436.

[141] Ibid., para. 438, 457.

[142] Ibid., para. 459.

"…the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim. "[143]

The importance of this case lies in the broader definition, where the crime is constituted by committing unwanted sexual penetration, something much easier to prove than coercion.[144] The appeals chamber also noted that the circumstances of most of the cases that consider either war crimes or crimes against humanity will almost always be coercive.[145]

This shift was criticised by Chile Eboe-Osuji, who pointed out that the element of rape should be force, threat of force or coercion, as there would not be such necessity to question victims whether there was consent or not. This question might be necessary in the case of rape under the national law, where the absence of force can be misused by perpetrators as a defence against the charges (most notably in cases of rape by partner etc.). However, in the context of international criminal law, the coercive environment and environment of violence is almost always omnipresent and therefore easy to prove. The need to prove lack of consent therefore only brings in another element the prosecution will have to tackle and might prove dangerous in further inflicting secondary victimization.[146]

There was a clear need to address those discrepancies and to settle on an adequate definition that would be satisfactory both in terms of describing the crime as well as in establishing whether it is lack of consent or force, threat of force and coercion that establish the crime of rape.

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[143] Ibid., para. 460.

[144] ELLIS, M. (2006) 'Breaking the Silence: Rape as an International Crime', Case Western Reserve Journal of International Law, 38(2), pp. 225–248. Available at: http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,shib&db=edshol&AN=edshol.hein.journals.cwrint38.18&lang=cs&site=eds-live&scope=site, p.229

[145] ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Appeal Judgement, Case No. IT-96-23& IT-96-23/1-A, 12 June 2002, para. 130.

[146] EBOE-OSUJI, C. (2012). International law and sexual violence in armed conflicts (International humanitarian law series v. 35). Leiden: M. Nijhoff, p. 154, 155.

The trial chamber in Gacumbitsi had decided to take sort of a middle ground when it acknowledged that "*any penetration of the victim's vagina by the rapist with his genitals or with any object constitutes rape.*"[147] While this definition might seem to clearly come from Kunarac, the Tribunal has referenced both Akayesu and Kunarac and stated that even other acts constitute rape under the Art. 3(g) of the ICTR Statute, which would be more appropriate for the Akayesu definition. The appeals chamber, however, referred to the definition set out by ICTY in the case of Kunarac and addressed the question of consent.[148]

Regarding the question of whether lack of consent or coercion should be the element behind rape, the court has skilfully interconnected those two streams of thought by stating, that non-consent can be proved by the existence of coercive circumstances, under which real and free consent is not possible. The tribunal has further underlined that it is not necessary to prove force but simply proving the coercive environment of the genocide campaign and detention of the victim will be enough to prove non-consent. Gacumbitsi therefore clearly followed in the Kunarac line and underlined the lack of consent as the element of rape.

Furthermore, it has clearly stated that there is no need to actually bring an additional burden on the victim through inquiring whether their actions might have been considered as consent, on the other hand, neither it is necessary to prove force. The *background circumstances* will be satisfactory proof to show that free consent was not possible.[149] Similarly, to establish the necessary mens rea of the perpetrator, it is enough to show that he knew about the coercive circumstances that make free and genuine

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[147] ICTR, *Prosecutor v. Sylvestre Gacumbitsi,* Trial Judgement, Case No. ICTR-2001-64-T, 17 June 2004*,* para*.* 321.

[148] ICTR, *Prosecutor v. Sylvestre Gacumbitsi,* Appeal Judgement, Case No. ICTR-2001-64-A, 7 July 2006, para. 152.

[149] ICTR, *Prosecutor v. Sylvestre Gacumbitsi,* Appeal Judgement, Case No. ICTR-2001-64-A, 7 July 2006, para. 155.

consent impossible.[150] The cases decided later adopted definition brought by the ICTY in the case of Kunarac as the most adequate one under international law.[151]

4.1.2. The ICC

The ICC can back up its interpretation and decision-making on the definition that was provided for in Elements of Crimes. While the common elements change whether we are speaking about rape as a war crime or crime against humanity, the definition of the act of rape stays the same:

> *"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.*
>
> *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."*[152]

What is apparent from this definition, the Assembly of States Parties to the Rome Statute that has adopted the Elements of Crime has decided to build upon the definition from Kunarac, as it adopted the mechanical description based on penetration. However, it has added several elements, reflecting the broad nature of the crime of rape.

First, the definition does not specify which body part needs to be penetrated and provides for a gender-neutral approach and second. Second, the definition allows for both

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[150] Ibid., 157.

[151] ICTY, *Prosecutor v. Radovan Karadžić,* Trial Judgement, Case No. IT-95-5/18-T , 24 March 2016, para. 511;

ICTY*, Prosecutor v. Jadranko Prlić et al.,* Trial Judgement, Case No. IT-04-74-T, 29 May 2013, para. 511.

[152] Part 1, 2 of the definition provided for in Elements of crime, for the crime of rape as crime against humanity: Art. 7 (1) (g) and as a war crime Art. 8 (2) (b) (xxii) in international armed conflict and Art. 8 (2) (e) (vi) in the conflict of non-international character.

force, threat of force and coercion as well as for the invasion of a person not able to give genuine consent. When interpreting the condition: *taking advantage of a coercive environment*, the ICC has referenced to Akayesu, showing that the presence of armed forces will amount to a coercive environment. The number of people involved in the commission of the crime as well as the temporal or territorial closeness of hostilities will be also important to assess, whether there was a coercive environment.[153] The Elements of Crime also mention that rape was committed on a victim who "*was incapable of giving genuine consent…due to natural, induced or age-related incapacity"*.[154] This provision does not make it necessary for the prosecution to prove lack of consent, but rather the inability of the victim to give the genuine consent, which is important, as already described before. Otherwise, it might make the work of prosecution more difficult and also might necessitate more active participation of victims, leading to further suffering.

For both rape as war crimes and crimes against humanity, the Rome Statute makes it necessary to prove that the act was committed with intent and knowledge to both conduct and consequence (this applies to all crimes, if not specified otherwise, under the Statute).[155] The Court defines the mental element as follows:

> *"Intent will be established where it is proven that the perpetrator acted deliberately or failed to act such that penetration took place or whereas he or she was aware that such a consequence would arise in the ordinary course of events."*[156]

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[153] Prosecutor v. Jean-Pierre Bemba Gombo, Trial Chamber III, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 103.

[154] International Criminal Court (ICC), Elements of Crimes, 2011, ISBN No. 92-9227-232-2, available at: https://www.refworld.org/docid/4ff5dd7d2.html [accessed 13 March 2021], Article 7 (1) (g), this provision also applies to sexual slavery, enforced prostitution, enforced sterilization and sexual violence as both crimes against humanity and war crimes.

[155] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, Art. 30.

[156] ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Judgement, Case No. ICC-01/04-01/07-3436, 20 March 2014, para. 970.

Also, the perpetrator had to be aware that the invasion is being committed by force, threat of force, coercion or by taking advantage of a coercive environment or against a person incapable of giving genuine consent.[157]

To find a proper definition of rape is a vital and cumbersome task. Many different factors have to be considered and how rape is defined will not only affect the success rate of convictions but also how necessary will it be for the victims to provide their testimonies against the perpetrator.

As can be seen from the cases above, ICTY and ICTR went back and forth with what kind of definition they decided to adopt for the crime of rape. The broadest definition focusing on the coercive nature of the crime, without describing the act itself that was brought in the judgement concerning Akayesu was soon deemed insufficient, the idea of coercion being on the background of the crime of rape stayed into further cases. Even though for a while, non-consent was considered to be the main element to be proven for the crime of rape to be established, the ICC has decided that condition of coercive environment will better suit the concept of rape under international criminal law and will enable to bring more perpetrators to justice.[158]

4.2. Torture

Classifying sexual violence as torture does not only provide more opportunity to charge the perpetrators with this crime, it also reaffirms the idea that those crimes violate the fundamentals of international law and its prohibition is a jus cogens norm.[159] The definition of torture, however, was before only delivered in human rights conventions and therefore it was necessary for the Tribunals to find an appropriate definition of torture before it was possible to find that sexual violence will amount to this definition. As the definition of torture under international criminal law would be a subject broad enough for

[157] Ibid.

[158] ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Judgement, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 105.

[159] Torture, 2021. *International Justice Resource Center* [online], available at: https://ijrcenter.org/thematic-research-guides/torture/#:~:text=As%20one%20of%20the%20most,action%20against%20those%20who%20torture. accessed: 10 March 2021.

its own thesis, I will restrict myself to address it only shortly by referring to the jurisdiction of international tribunals.

Mucić was the first case where the Court has recognised rape as a form of torture and thus was able to convict the accused of rape as war crimes both as grave breaches under ICTY Statute art. 2, as well as Violations of the laws or customs of war under art. 3. This case considered four accused, three of whom were charged with sexual violence (among other crimes) against Bosnian Serbs being detained in Čelebići prison camp, after Bosnian Muslim and Bosnian Croat forces took control of the territory.[160] As rape is not specified under the grave breaches of Geneva Conventions relating to international armed conflicts nor is it mentioned in the common article 3, concerning armed conflicts that are not of an international character, the tribunal needed to explore the possibility to charge rape under the provisions relating to torture and inhuman treatment.[161]

The Tribunal has defined the following elements of torture:

> *(i) "There must be an act or omission that causes severe pain or suffering, whether mental or physical,*
> *(ii) which is inflicted intentionally,*
> *(iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,*
> *(iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity."*[162]

[160] ICTY, *Prosecutor v. Zdravko Mucic* et al., Appeal Judgement, Case No. IT-96-21-A, 20 February 2001, para. 1.

[161] ICTY, *Prosecutor v. Zdravko Mucic et al.,* Trial Judgement, Case No. IT-96-21-T, 16 November 1998, para. 475.

[162] Ibid., para. 494.

It was also acknowledged that rape by a public official will almost always have the purpose of intimidation or any other of the before mentioned ones.[163] In Kunarac, however, the Tribunal has found that the last element, providing for the crime to be perpetrated by a state official, is not necessary under international criminal law.[164] A comparison should be drawn to Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[165], that specifically mentions that the crime of torture has to be perpetrated through infliction, instigation or with consent or acquiescence of a public official or someone acting in an official capacity. However, when comparing prohibition of torture under human rights provisions and under the international criminal law, the Tribunal came to a conclusion that: *"The characteristic trait of the offence in this context is to be found in the nature of the act committed rather than in the status of the person who committed it."*[166]

Already the ICTR in Akayesu, while not charging rape as a form of torture, it has made a parallel between both crimes: "*Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment control or destruction of a person. Like torture 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".*[167] ICTY has built upon this by stating that: "*The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long-lasting."*[168] This was further developed in Kunarac, where

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[163] *Prosecutor v. Zdravko Mucic et al.,* Trial Judgement, Case No. IT-96-21-T, 16 November 1998, para. 495

[164] ICTY, *Prosecutor v. Dragoljub Kunarac et al.,* Trial Judgement, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 496.

[165] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, Adopted: 10th December 1984, Entry into force: 26th June 1987, Art. 1.

[166] ICTY, *Prosecutor v. Dragoljub Kunarac et al.,* Trial Judgement, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 495.

[167] ICTR, *Prosecutor v. Jean-Paul Akayesu,* Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 597.

[168] ICTY, *Prosecutor v. Zdravko Mucic et al.,* Trial Judgement, Case No. IT-96-21-T, 16 November 1998, para. 495.

the tribunal has confirmed that: "*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.*"[169]

The idea of charging sexual violence as torture was adopted and approved by the prosecutor of the ICC stating, that since the crime of torture allows for prosecution of inflicted pain or suffering on any discriminatory bases it allows sexual (and gender) violence to be charged as such.[170]

The same act of rape can be charged and convicted as both rape and torture have different distinctive elements. For torture, it is inflicting pain or suffering aimed at obtaining information or a confession, punishing, intimidating, coercing or discriminating, whereas, for rape, the main element is sexual penetration.[171]

4.3. Outrages upon personal dignity

Outrages upon personal dignity are enshrined in the common article 3 of the Geneva Conventions 1949. The act causes serious humiliation or degradation of the victim, but neither direct physical nor mental harm are necessary. The underlying element is the suffering that arises from the humiliation, which enables prosecution of sexual violence as such. At first, the suffering needed to be "lasting", however, the ICTY has changed its approach and decided that real and serious humiliation and degradation would suffice. How long the effects take place can account for the seriousness.[172] As those are very subjective conditions, the ICTY brought in the objective element: "*the humiliation*

[169] *Prosecutor v. Dragoljub Kunarac et al.*, Appeal Judgement, Case No. IT-96-23& IT-96-23/1-A, 12 June 2002, para. 150.

[170] ICC, The Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014, available at: https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf,, p. 35.

[171] ICTY, *Prosecutor v. Dragoljub Kunarac et al.,* Trial Judgement, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 557.

[172] ICTY, *Prosecutor v. Dragoljub Kunarac et al.,* Trial Judgement, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 501.

has to be so intense that the reasonable person would be outraged." Furthermore, the act has to be intentional.[173]

The definition of outrages upon personal dignity is therefore as follows:

> *(i) "that the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and*
> *(ii) he knew that the act or omission could have that effect."*[174]

The ICC has adopted a definition that is practically the same:

> *(i) "The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.*
> *(ii) The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity."*[175]

The only difference is that the objective condition of the act is generally recognised as an outrage upon personal dignity is already implemented in the definition.

4.4. Persecution

The crime of persecution was already recognised in the Nuremberg trials, where the tribunal wanted to capture the specificity of crimes that were committed especially against certain groups of the population. In Nuremberg, the crime of persecution had to

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[173] ICTY, *Prosecutor v. Zlatko Alekovski*, Trial Judgement, Case No. IT-95-14/1-T, 25 June 1999, para. 56.

[174] ICTY, *Prosecutor v. Dragoljub Kunarac et al*., Trial Judgement, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 514.

[175] International Criminal Court (ICC), Elements of Crimes, 2011, ISBN No. 92-9227-232-2, available at: https://www.refworld.org/docid/4ff5dd7d2.html [accessed 13 March 2021], Art. 8 (2) (c) (ii) – grave breaches, Art. 8 (2) (b) (xxi) other serious violations of the laws and customs applicable in international armed conflict.

be found together with another crime against humanity[176]. This condition, however, was rejected by the ICTY and therefore the definition is as follows:

ICTY defined persecution as:

(i) "the perpetrator commits a discriminatory act or omission;
(ii) the act or omission denies or infringes upon a fundamental right laid down in international customary or treaty law;
(iii) perpetrator carries out the act or omission with the intent to discriminate on racial, religious or political grounds;
(iv) the general requirements for a crime against humanity pursuant to Article 5 of the Statute are met."[177]

The same definition was adopted by the ICTR[178] as well as under the Rome Statute[179], which also added several grounds of discrimination: political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law.[180]

Rape and sexual assaults, if they amount to the definition stated above can all amount to persecution as a crime against humanity as it: *"This offence embraces all serious abuses of a sexual nature inflicted upon the integrity of a person by means of coercion, threat of force or intimidation in a way that is humiliating and degrading to the victim's dignity*."[181]

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[176] POCAR, Fausto, 2006. Persecution as a Crime under International Criminal Law. *Journal of National Security Law* [online]. **2**(2), 355-366 [cit. 2021-03-13]. ISSN 15533158, p. 357, 358.

[177] ICTY, *Prosecutor v. Naletilić & Martinović*, Trial Judgement, Case No. IT-98-34-T, 31 Mar 2003

para 634.

[178] ICTR, *Prosecutor v. Laurent* Semanza, Trial Judgement, Case No. ICTR-97-20-T, 15 May 2003, para. 347.

[179] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, Art. 7(1)(h).

[180] Ibid.

[181] ICTY, *Prosecutor v. Radolav Brdanin,* Trial Judgement, Case No. IT-99-36-T, 1 September 2004, para. 1012.

Especially interesting for this thesis is the idea of persecution on the basis of the gender of the victim, as newly provided under ICC. However, unfortunately, there were no cases so far that would go in that direction.

4.5. Other forms of sexual violence

This part will take a closer look at how other forms of sexual violence were considered in front of the ad hoc tribunals for Yugoslavia and Rwanda, as well as how the ICC has made use of the wide explicit list of acts considered sexual violence. For the purpose of this thesis, closer focus will be given to those forms as enumerated in the Rome Statute: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, other forms of sexual violence.[182]

4.5.1. Sexual slavery

Trafficking in persons in general often soars during conflicts, as many become more vulnerable to the traffickers, especially women and children. This oftentimes leads to psychological trauma as well as physical harm.

During the Second World War, the Japanese army created the so-called "comfort system" that still resonates within the society in the region. More than 200 000 women from occupied territories were captured and held in Japan operated brothels and went through systematic sexual slavery and suffered physical and sexual abuse.[183] While at the Tokyo trial, as already mentioned before, the perpetrators were not charged for those actions. Today there are still some initiatives to correct this injustice.[184]

Even though the crime of sexual slavery was unknown to the ICTY, the crime against humanity of enslavement under art. 5(c) was found to encompass such a violation.

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[182] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, 7(1)(g), 8(2)(b)(xii) and 8(2)(e)(vi).

[183] https://www.dw.com/en/south-korean-court-orders-japan-to-pay-damages-to-comfort-women/a-56165321

[184] The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery - non judiciary "tribunal" set up by NGOs to gather evidence and testimonies and try the perpetrators, more: http://www.internationalcrimesdatabase.org/Case/981

Kunarac was found guilty of enslavement as he and other soldiers brought women to their house and treated them as property. They were kept in the house and were sexually abused anytime the soldiers returned to the house. [185] Similarly, Kovac from the same proceeding was found guilty of enslaving one of the victims and sexually using her whenever he pleased. She was constantly raped and abused until one day, she was sold to another soldier.[186]

The tribunal has defined the act of enslavement as:

...the exercise of any or all of the powers attaching to the right of ownership over a person. The mens rea of the violation consists in the intentional exercise of such powers.[187]

The tribunal has highlighted that exploitation is one of the indicators of enslavement and that it can be done through, among others, rape and prostitution.[188] To assess whether there was an instance of enslavement, the Tribunal has first declared that victims were treated as personal property, that they were ordered around and forced to perform sexual services for soldiers, they were not free to leave when they wanted (even though one of them had keys, there was no real chance of escape). All in all, they were stripped of any control over their lives which amounted to enslavement.[189] Another example of the intent of the captors to treat the victims as their own property and as a sexual object was when they called them their wives, who have to provide sexual services whenever they pleased.[190]

As for the ICC, the definition of sexual slavery is the same whether it concerns crimes against humanity or war crimes of both international and non-international

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[185] ICTY, *Prosecutor v. Dragoljub Kunarac et al.,* Trial Judgement, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 739.

[186] *Prosecutor v. Dragoljub Kunarac et al.,* Trial Judgement, Case No. IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 753.

[187] Ibid. 540.

[188] Ibid. 542.

[189] Ibid. 742.

[190] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Judgement, Case No. ICC-01/04-01/07-3436, 20 March 2014, para. 1000.

character. The victim is forced through the use of rights of ownership by the perpetrator to engage in one or more acts of sexual nature. Rights of ownership can be the following: purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.[191]

The first element of this crime is the deprivation of autonomy of the victim (for example measures preventing escape) and exercise of powers over the person in such a way, they are regarded rather as an object than a human being,[192] this is shared with the crime of enslavement. The second element provides for the deprivation of sexual autonomy. The perpetrator has to be aware that they are exercising de-facto ownership powers over the victim and intentionally forces the victim to engage in acts of sexual nature.[193] Those acts can be varied and can involve rape but also do not have to include physical contact as long as they target sexuality.[194]

4.5.2. Enforced prostitution

The prohibition of enforced prostitution can be found already in the Geneva Convention IV, which calls for the protection of women:

> "*against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."*[195]

[191] International Criminal Court (ICC), Elements of Crimes, 2011, ISBN No. 92-9227-232-2, available at: https://www.refworld.org/docid/4ff5dd7d2.html [accessed 13 March 2021], p.8

[192] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Judgement, Case No. ICC-01/04-01/07-3436, 20 March 2014, para. 978.

[193] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Judgement, Case No. ICC-01/04-01/07-3436, 20 March 2014, para. 981.

[194] *Prosecutor v. Dominic Ongwen*, Trial Judgement, Case No. ICC-02/04-01/15-1762, 4 February 2021, para. 2716.

[195] CHARPENTIER-GARANT, A. (2012). Understanding and Prosecuting Crimes of Enforced Prostitution Under the Framework of the Rome Statute. SSRN Electronic Journal. 10.2139/ssrn.2230612, p. 25.

Furthermore, both additional protocols mention enforced prostitution as one of the acts, that should be prohibited any time and, in any place, and by both civilians and military agents.[196]

While it was not specifically mentioned under the ICTY Statute, the ICTR, on the other hand, could operate directly with it as one of the enumerated acts of outrages upon personal dignity. Unfortunately to no use, as the ICTR did not charge anyone with this crime.

The Rome Statute provides for the prohibition of enforced prostitution explicitly under both war crimes[197] and crimes against humanity[198]. Elements of crime explain enforced prostitution as: "*perpetrator forces through use of force, threat of force or coercion the victim to engage in acts of sexual nature expecting financial or other advantage in exchange"*.[199]

Charpentier-Garant points out to linguistical difference between English, French and Spanish version, as the English version could be interpreted in a way, that only such perpetrator who forced the victim to engage in prostitution for the first time. This however would be against the ratio of this provision and would add another requirement.[200] What distinguishes this crime from the above-described crime of sexual slavery is the element

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[196] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), 1125 UNTS 3, adopted: 8th June 1977, entry into force: 7th December 1978, art. 75(2)(b),

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) 1125 UNTS 609, adopted: 8th June 1977, entry into force: 7th December 1978, art. 4(2)(e).

[197] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, Art. 8(2)(b)(xxii), 8(2)(e)(vi).

[198] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, Art. 7(1)(g).

[199] International Criminal Court (ICC), Elements of Crimes, 2011, ISBN No. 92-9227-232-2, available at: https://www.refworld.org/docid/4ff5dd7d2.html [accessed 13 March 2021], art. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

[200] CHARPENTIER-GARANT, A. (2012). Understanding and Prosecuting Crimes of Enforced Prostitution Under the Framework of the Rome Statute. SSRN Electronic Journal. 10.2139/ssrn.2230612, p. 39.

of "*pecuniary or other advantage*". Whether this advantage is actually received is irrelevant.[201]

4.5.3. Forced pregnancy

Even though neither of the ad hoc tribunals has actually charged acts of forced pregnancy, there were cases, where witnesses told stories where perpetrators directly mentioned that impregnating their victims and forcing them to have a child of the assailant ethnicity was their goal.[202] In former Yugoslavia, some camps were nicknamed "rape camps"[203] due to the rampant occurrence of this crime. Women after being impregnated were being held captive until they gave birth.[204] It was with the Bosnian conflict in mind that drafters of the ICC have decided to include the crime of forced pregnancy.[205]

Under the ICC, forced pregnancy means the following:

> *"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."*[206]

The fact that the victim has been made forcibly pregnant is not thought to be necessarily an act of the perpetrator who is charged with the crime of forced pregnancy[207].

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[201] LIPOVSKÝ, Milan, 2020. Nepřímá hmotněprávní úprava ochrany dětí v Římském statutu. In: *Ochrana žen a dětí v mezinárodním právu,* Studies in Human Rights, 14 [online], ISBN 9788076300026 [cit. 2021-03-13], p. 103.

[202] *Prosecutor v. Radolav Brdanin,* Trial Judgement, Case No. IT-99-36-T, 1 September 2004, para 1011.

[203] SALZMAN, T. (1998). Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia. Human Rights Quarterly, 20(2), p. 348-378.

[204] Amnesty International, Forced Pregnancy, A Commentary on the Crime in International Criminal Law, 30 June 2020, Index number: IOR 53/2711/2020, (2020), p. 7.

[205] *Prosecutor v. Dominic Ongwen*, Trial Judgement, Case No. ICC-02/04-01/15-1762, 4 February 2021, para. 2718.

[206] International Criminal Court (ICC), Elements of Crimes, 2011, ISBN No. 92-9227-232-2, available at: https://www.refworld.org/docid/4ff5dd7d2.html [accessed 13 March 2021], p.38

[207] LIPOVSKÝ, Milan, 2020. Nepřímá hmotněprávní úprava ochrany dětí v Římském statutu. In: *Ochrana žen a dětí v mezinárodním právu,* Studies in Human Rights, 14 [online], ISBN 9788076300026 [cit. 2021-03-13], p. 103.

The actus reus of the crime lays in confinement that is supposed to lead to birth (whether this actually happens or not is irrelevant). As for the intent, the wording provides alternatives. Either the intent is to change the ethnic composition (as was apparent in the case before ICTY, where women were forced to have children of certain ethnicity), or to carry out other grave violations of international law, such as rape, sexually enslavement, enslavement and torture.[208] The specific harm is in restricting the sexual and reproductive autonomy of the victim so that she is unable to choose, whether she will continue with the pregnancy.[209] The element of being forcibly made pregnant encompasses the same coercive circumstances as other crimes of sexual violence.[210]

Due to concerns from the Holly See and other states that the provision might be regarded as violating abortion laws in some countries, a final sentence was added to prevent misunderstanding, saying that none of the provisions should be interpreted as interfering with national pregnancy laws.[211]

4.5.4. Enforced sterilization

The ICC defines forced sterilization as a deprivation of reproductive capacity that is not justified by medical or hospital treatment or is done without the genuine consent of the person. This deprivation of reproductive capacity is supposed to be a permanent one and for genuine consent, it is especially highlighted that it cannot be obtained through deception.[212]

The crime of enforced sterilization as an international crime has appeared already during the Nuremberg trials, where there were accounts of mutilation of sexual organs

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[208] *Prosecutor v. Dominic Ongwen*, Trial Judgement, Case No. ICC-02/04-01/15-1762, 4 February 2021, para. 2727.

[209] Amnesty International, Forced Pregnancy, A Commentary on the Crime in International Criminal Law, 30 June 2020, Index number: IOR 53/2711/2020, (2020), p. 10

[210] *Prosecutor v. Dominic Ongwen*, Trial Judgement, Case No. ICC-02/04-01/15-1762, 4 February 2021, para. 2725.

[211] ICC, *Prosecutor v. Dominic Ongwen*, Trial Judgement, Case No. ICC-02/04-01/15-1762, 4 February 2021, para. 2721.

[212] International Criminal Court (ICC), Elements of Crimes, 2011, ISBN No. 92-9227-232-2, available at: https://www.refworld.org/docid/4ff5dd7d2.html [accessed 13 March 2021], art. 7(1)(g)-5

during experiments as well as forced sterilization of the Jewish population. The ICTY later ruled that sexual mutilation can amount to enforced sterilization.[213]

4.5.5. Other forms of sexual violence, sexual assault

This category was used by the ad-hoc tribunals as a chapeau category for crimes of sexual nature under coercive circumstances.[214] ICC follows in this approach and provides prohibition of any act of sexual nature committed by force, threat of force or coercion that is of comparable gravity to the ones mentioned above. This is a general provision that was included to ensure that the Court is able to operate with the necessary flexibility.[215]

Sexual violence is not limited to physical invasion of the human body and may include acts that do not involve penetration or even physical contact.[216] Acts that do not include penetration but are still a serious sexual assault can be punished under international law if other conditions are fulfilled:

"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 in a way that is degrading and humiliating for the victim's dignity"[217]

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[213] LUPING, Dianne, 2009. Prosecuting Sexual and Gender-Based Crimes Before International/Ized Criminal Courts: Investigation and Prosecution of Sexual and Gender-Based Crimes Before the International Criminal Court. *American University Journal of Gender, Social Policy* [online]. **17**, 431 [cit. 2021-03-14]. ISSN LEXNEXLR., p. 443

[214] ICTR, *Prosecutor v. Jean-Paul Akayesu,* Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 598.

[215] WAGNER, M., The ICC and its Jurisdiction – Myths, Misperceptions and Realities (April 8, 2003). Max Planck Yearbook of United Nations Law, Vol. 7, p. 409, 2004, Available at SSRN: https://ssrn.com/abstract=1586566, p. 448.

[216] ICTR, *Prosecutor v. Jean-Paul Akayesu,* Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 688.

[217] *Prosecutor v. Anto Furundžija*, Trial Judgement, Case No. IT-95-17/1-T, para. 186.

4.6. CRSV as a constituent act of genocide

The definition from the Genocide Convention was adopted by both ICTR, ICTY as well as by ICC and provides provided for 5 acts that can constitute the crime of genocide:

> *(i) "Killing members of the group;*
> *(ii) Causing serious bodily or mental harm to members of the group;*
> *(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."* [218]

Even though the list is formulated as exhaustive[219], the acts themselves are quite general and framed rather as a result, which means many different acts can amount to them, including rape and sexual violence. Especially causing serious bodily or mental harm to members of the group was used to prosecute and convict sexual violence as genocide.

The decision to look at sexual violence as an act constituting genocide was not an easy task. In the case of *Prosecutor v. Akayesu*, the ICTR was the first to recognize sexual violence and was the first among many charged with rape or sexual violence as a crime of genocide[220]. The Tribunal had to go through a thorough explanation, how sexual violence can lead up to the destruction of the group. What makes this case even more emblematic is, that at first the prosecution did not include charges of sexual violence and

[218] Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, Adopted: 9 December 1948, Entry into force: 12 January 1951, art. 2

[219] EBOE-OSUJI, C. (2012). International law and sexual violence in armed conflicts (International humanitarian law series v. 35). Leiden: M. Nijhoff, p. 160.

[220] ROGERS, S. (2016). Sexual violence or rape as a constituent act of genocide: Lessons from the ad hoc tribunals and a prescription for the International Criminal Court. The George Washington International Law Review, 48(2), p. 285: more than half of the ICTR indictments included rape or sexual violence as genocide;

only added them after being instructed by the Tribunal upon hearing testimonies of widespread rapes in the commune.[221]

The Tribunal has highlighted that rape and sexual violence in general, if all conditions are fulfilled, "*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*"[222]. It should be considered as one of the cruellest and detrimental ways of inflicting serious bodily and mental harm. In the case at hand, the Tribunal has ruled that if rapes and sexual violence are a part of the genocidal intent to destroy a certain group, it can constitute genocide. [223] The genocidal intent can be illustrated on the testimony of one woman who was spared because the attackers did not know whether she was Tutsi or Hutu and another one, who testified that Tutsi women married to Hutu men were not raped, as they would "deliver Hutu children".[224]

The Tribunal was thus able to convict Akayesu of genocide through killing members of the group and by causing serious bodily or mental harm to members of the group. The acts described were aimed solely against Tutsi women and were often accompanied by beatings, mutilation and humiliation. Due to the nature of sexual violence, it was proven that the perpetrators caused serious bodily and mental harm to their victims leading to their physical and psychological destruction. Furthermore, often the sexual violence directly preceded killings and was aimed at inflicting as much humiliation and suffering as possible.[225]

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[221] ROGERS, S. (2016). Sexual violence or rape as a constituent act of genocide: Lessons from the ad hoc tribunals and a prescription for the International Criminal Court. The George Washington International Law Review, 48(2), p. 274.

[222] *Prosecutor v. Jean-Paul Akayesu,* Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 733.

[223] ICTR, *Prosecutor v. Jean-Paul Akayesu,* Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 731.

[224] ROGERS, S. (2016). Sexual violence or rape as a constituent act of genocide: Lessons from the ad hoc tribunals and a prescription for the International Criminal Court. The George Washington International Law Review, 48(2), p. 277.

[225] ICTR, *Prosecutor v. Jean-Paul Akayesu,* Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 733.

It is clear how rape and sexual violence causes lifelong suffering. The brutal way with which rapes and sexual violence were committed left many women disabled, mutilated, unable to bear children and mentally scarred for the rest of their lives. The Tribunal has also highlighted that it is not necessary for the *serious bodily harm* to be „*permanent or irremediable*, " and that even acts that do not immediately lead to death, such as sexual violence and rape can be considered as acts of genocide.[226]

Sexual violence can also serve as a measure to prevent births within the group. First, it can lead to victims unable or unwilling to have children or it can be used as a tool to humiliate both men and women, break their will and isolate them from the rest of society. This effect is especially magnified in societies, where victims of rape and other forms of sexual violence are perceived as unworthy and soiled, leading to further victimization of the victim. It can also be used as a tool to forcibly impregnate women in the group and thus "dilute" the ethnic, national, religious or racial identity of the group.[227]

Furthermore, in societies that determine membership to their group based on the father of the child, a child that is a consequence of wartime rape will be often rejected by its community as it is going to follow the status of its father. Therefore, intentionally impregnating a woman during a rape in order to force her to give birth to a child who will not consequently belong to her group can be considered as imposing measures intended to prevent births within the group as in the Statute, Art. 2, (2)(d). and therefore, a form of genocide.[228] Clear recognition of forced pregnancy as an act that through forcing certain

[226] ICTR, *Prosecutor v. Juvénal Kajelijeli*, Trial Judgement, Case No. ICTR-98-44A-T, 1 December 2003, para. 815.

[227] ROGERS, S. (2016). Sexual violence or rape as a constituent act of genocide: Lessons from the ad hoc tribunals and a prescription for the International Criminal Court. The George Washington International Law Review, 48(2), p. 273.

[228] *Prosecutor v. Jean-Paul Akayesu,* Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 507, 508; supported by ICTR, *prosecutor v. Clément Kayishema*, ICTR-95-1-T, 21 May 1999, para, 117.

ethnicity on a child can constitute genocide as a way of making the area ethnically homogenous.[229]

The case of *prosecutor v. Kayishema* considered rape as an act used to deliberately inflict conditions of life calculated to bring about the physical destruction of the group in whole or in part, as provided for under art. 2 (2)(c) of the ICTR statute.[230] Importantly, the tribunal has stated that this provision provides also for such acts that do not destroy the group immediately but lead to its destruction through time. Rape is one of those acts.[231]

Even though the ICTR has found that sexual violence and rape can lead up to charges and convictions of the crime of genocide, as they can be considered as all acts stipulated (killing, causing serious bodily or mental harm, inflicting conditions of life calculated to bring about physical destruction as well as preventing births), the ICTY has a much shorter record.[232] In one of the most recent as well as most prominent cases, *prosecutor v Karadić*, however, the ICTY has recognised that "*women, men, girls, and boys were subjected to rape and other acts of sexual violence, involving serious abuses of a sexual nature* that were cause of *serious mental or physical suffering or injury"*.[233]

While it seems to be clear that acts of sexual violence perpetrated as an instrument of war can constitute the crime of genocide, there is still only a little evidence that courts are willing to adjudicate it as such and invoke a criminal liability for the perpetrators and their superiors. To finish this segment and demonstrate how sexual violence destroys the group, I would like to cite Mark Ellis, Legal Advisor to the Independent International

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[229] ERIKSSON, M. (2011). Defining Rape: Emerging Obligations for States under International Law?. Leiden, The Netherlands: Brill | Nijhoff. doi: https://doi.org/10.1163/9789004225954, p. 142.

[230] ROGERS, S. (2016). Sexual violence or rape as a constituent act of genocide: Lessons from the ad hoc tribunals and a prescription for the International Criminal Court. The George Washington International Law Review, 48(2), p. 283.

[231] ICTR, *prosecutor v. Clément Kayishema*, ICTR-95-1-T, 21 May 1999, para 116.

[232] ROGERS, S. (2016). Sexual violence or rape as a constituent act of genocide: Lessons from the ad hoc tribunals and a prescription for the International Criminal Court. The George Washington International Law Review, 48(2), p. 287.

[233] ICTY, *Prosecutor v. Radovan Karadžić*, Trial Judgement, Case No. IT-95-5/18-T , 24 March 2016, para. 2581.

Commission on Kosovo: "*The widespread practice of rape against Muslim women was more than a consequence of war; it was an instrument of war intent on destroying the cultural fabric of a targeted group."*[234]

4.7. Sexual violence against men

Lastly, rape and sexual violence against men and boys have so far not been prosecuted as stand-alone sexual violence but rather as part of the torture and inhuman treatment, even though there are several instances when tribunals were deciding on men forced to rape women, perform oral sex on their captors and batons being thrusted into their anuses.[235] While sexual violence against men was rampant in the conflict in Rwanda, only case to convict perpetrators for those crimes classified it as a crime against humanity, without explicitly defining it as sexual violence.[236]

It seems that for the time being, rape and sexual violence in armed conflicts was regarded mostly as a crime against women. Which by the majority is,[237] however, not acknowledging male victims of sexual violence disregards a big part of the picture. With the ICC this might change as the Rome Statute provides the most gender-neutral definition of rape and sexual violence so far, which accounts even for instances when it is the perpetrator of rape, who is being penetrated, and therefore allows a bigger field for recognition of rape of men and boys (cases of men forced to provide sexual services etc.).[238] Even though the case against Jean-Pierre Bemba Gombo was dropped after

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[234] ELLIS, M. (2006) 'Breaking the Silence: Rape as an International Crime', Case Western Reserve Journal of International Law, 38(2), pp. 225–248. Available at: http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,shib&db=edshol&AN=edshol.hein.journals.cwrint38.18&lang=cs&site=eds-live&scope=site

[235] BROUWER, A. (2013). Sexual violence as an international crime: Inderdisciplinary approaches (Series on transitional justice v. 12). Cambridge: Intersentia, p. 94.

[236] UHLÍŘOVÁ, K., Vývoj mezinárodního trestního práva v kontextu kriminalizace sexuálního násilí. In: Mužské právo: jsou právní pravidla neutrální? (First edition). (2020). Wolters Kluwer, p. 151.

[237] UHLÍŘOVÁ, K., Vývoj mezinárodního trestního práva v kontextu kriminalizace sexuálního násilí. In: Mužské právo: jsou právní pravidla neutrální? (First edition). (2020). Wolters Kluwer, p. 140.

[238] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Judgement, Case No. ICC-01/04-01/07-3436, 20 March 2014, para. 963.

appeal, the trial chamber has highlighted that the definition of rape provided for in Elements of Crimes is meant to be gender-neutral and both perpetrator and victim can be both men and women.[239]

[239] *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Judgement, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 100.

5. Recent developments in the jurisprudence on sexual violence

In this part, I will try to more closely analyse the two most recent decisions of the ICC that has dealt with sexual violence in the context of armed conflict. Those both of the cases are waiting on an appeal, so the result still might change.

The ICC is a platform to prosecute conflict-related sexual violence both as a war crime and as a crime against humanity in the states that have ratified the Rome Statute or when referred to by UNSC. Unfortunately, even though sexual violence is better enshrined in the Statute than it was for the ICTY and the ICTR, the low effectivity of the ICC when convicting perpetrators of sexual violence diminishes the positive effects of the Statute.[240] With the latest two cases, however, this might change for the better.

The first case was decided on 8 July 2019, and the International Criminal Court has delivered a sentence against Bosco Ntaganda a military leader from Congo, also nicknamed Terminator, who was found guilty of committing sexual violence (rape and sexual slavery) both as a war crime and as a crime against humanity. It is the first case when charges of sexual violence were unanimously confirmed by the Court.

Among the crimes he was accused of, there was sexual violence against civilians, rape and sexual slavery of child soldiers. It is the last point that has made this case especially interesting and important, as it is the first time, the ICC deals with rapes of child female soldiers who were raped and sexually enslaved by members of the same group. The defence position was that those soldiers were taking part in hostilities and therefore were not considered as protected persons under international law. The prosecutor countered that three distinct principles are at play: a) ban on unlawfully recruiting children, b) the right of civilians not taking direct part in the hostilities to remain free from direct attack and c) the fundamental and universal protection against

[240] UHLÍŘOVÁ, K., Vývoj mezinárodního trestního práva v kontextu kriminalizace sexuálního násilí. In: Mužské právo: jsou právní pravidla neutrální? (First edition). (2020). Wolters Kluwer, p. 145.

inhumane treatment afforded all persons not actively participating in hostilities.[241] The Court confirmed the prosecutor's position by saying that sexual violence in conflict is never justifiable and that there is no provision under international humanitarian law, that would exclude sexual violence among people in the same group form international protection.[242]

The Court ruled that as long as there is proof that the sexual violence took place in the context of and was associated with an armed conflict, the protection applies also for crimes committed on members of armed forces by members of the same group.[243] While criticised by some for overly expanding the interpretation of protected persons, this has already happened in the past when ad hoc tribunals interpreted the protected person status when applying condition of allegiance to a state instead of condition nationality.[244]

The second case that is now waiting for appeal is the latest case decided by the ICC and is also one of the more controversial ones. Dominic Ongwen, brigade Commander of the Sinia Brigade of the Lord's Resistance Army (LRA), was charged with 70 counts of crimes against humanity and war crimes.[245] The importance of this case rests in the fact, that Ongwen was himself abducted by the LRA and enlisted into the military as a child soldier at the age of 10 and grew up to become a brutal warlord. He stood trial for crimes that he himself knew well, as he suffered through them in his

[241] MODZELESKI, Elizabeth, 2018. The International Criminal Court Appeals Chamber Ruling in Ntaganda: An Opportunity to Improve Accountability for Sexual and Gender-Based Crimes against Men and Boys. *Georgia Journal of International and Comparative Law* [online]. 47(3), 699-744 [cit. 2021-03-14]. ISSN 0046578X, p. 730.

[242]Ibid. 733.

[243] ICC, *Prosecutor v. Bosco Ntaganda*, Trial Judgement, Case No. ICC-01/04-02/06-2359, 8 July 2019, para. 965.

[244] UHLÍŘOVÁ, K. Contribution of the International Criminal Court to the Prosecution of Sexual and Gender-Based Crimes: between Promise and Practice. In: ŠTURMA, P. (ed.) The Rome Statute of the ICC at Its Twentieth Anniversary. Leiden/Boston: Brill/Nijhoff, 2019, 101

[245] ICC, Ongwen Case, 2021. Icc-cpi.int [online], Available at: https://www.icc-cpi.int/uganda/ongwen, Retrieved on 12th March 2021

youth.[246] This actually was part of the defence strategy, as one of their arguments was that he still was a child soldier at the time with LRA since his abduction and suffering as a child soldier inhibited his mental growth.

He stood trial for committing sexual and gender-based violence against ten women. Among those charges were rape, sexual slavery and for the first time before ICC, forced marriage. He also gave orders to abduct and distribute among soldiers more than 100 women as their wives.[247] Forced marriage is not explicitly mentioned under the crimes against humanity and therefore, the Court has decided to charge it under the residual category of other inhumane acts[248] and defined it as:

"forcing a person, regardless of his or her will, into a conjugal union with another person by using physical or psychological force, threat of force or taking advantage of a coercive environment."[249]

Ongwen was convicted of forcing women into marriage with himself, as well as forcing them to marry soldiers of his Sinia Brigade.

This can prove as an extremely important decision, as it would enshrine the crime of forced marriage among crimes against humanity. While the practical effect is hard to predict, I believe it could certainly strengthen the fight against this crime and provide a good basis for combined efforts to eradicate it. By involving forced marriage among

[246] KAN, Gamaliel, 2018. The Prosecution of a Child Victim and a Brutal Warlord: The Competing Narrative of Dominic Ongwen. SOAS Law Journal [online]. 5(1), 70-82 [cit. 2021-03-14]. ISSN 20552068, p. 75.

[247] ICC*, Prosecutor v. Dominic Ongwen*, Trial Judgement, Case No. ICC-02/04-01/15-1762, 4 February 2021, para. 206-216.

[248] Rome Statute of the International Criminal Court, 2187 UNTS 3, Adopted: 17 July 1998, Entry into force: 1 July 2002, art. 7(1)(k).

[249] ICC, *Prosecutor v. Dominic Ongwen*, Trial Judgement, Case No. ICC-02/04-01/15-1762, 4 February 2021, para. 2751.

crimes against humanity, the ICC has provided a clear indication that it is one of the most gruesome violations of international law.[250]

6. Conclusion

The aim of this thesis was to analyse the development and current status of how sexual violence in armed conflicts is perceived through the prism of international criminal law.

The first part of this thesis provided an overview of the main terms and topics and presented, why focus on prosecuting perpetrators of sexual violence in armed conflicts is a necessary struggle, that not only brings justice for the victims but also helps in rehabilitation and post-conflict reconstruction processes.

The following part is focused on how the prohibition of sexual violence in conflicts developed. It follows the shift in thinking that enabled us to see sexual violence, not as something inevitable in armed conflicts and something that happens as collateral damage, but to regard it as something preventable. Sexual violence in armed conflict is no longer seen as a crime of passion, but rather as a tool of war, a method of destroying the dignity and morale of the victims and society as a whole.

The third part of this work provides a contextual framework of conflicts in former Yugoslavia and Rwanda, as well as a general overview of how the International Criminal Court operates. Furthermore, it closer analyses war crimes, crimes against humanity and crime of genocide as viewed by the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC). Those three crimes are especially important, as sexual violence in armed conflicts was found to amount to them.

Next, this thesis looks at how acts of sexual violence were decided upon by both ad hoc tribunals as well as by the ICC, and how has the approach developed through time.

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[250] UHLÍŘOVÁ, K., Vývoj mezinárodního trestního práva v kontextu kriminalizace sexuálního násilí. In: Mužské právo: jsou právní pravidla neutrální? (First edition). (2020). Wolters Kluwer, para. 171.

First, it shows how even defining rape was a difficult task as there were several issues to be dealt with, such as whether to adopt a general definition or to provide a mechanical description of the prohibited act. Another big issue with the definition was, whether it should be coercion or lack of consent that are essential for the conviction of rape. The definition that is provided in Elements of Crimes of the ICC provides a specific definition, that on the other hand offers the most neutrality regarding the gender of the victim and perpetrator. Second, it described how sexual violence can amount to other provisions, such as torture or outrages upon personal dignity and provides a closer analysis of other forms of sexual violence. It also develops the idea of how sexual violence can become the constitutive element of genocide if done with specific genocidal intent.

The last part discusses two latest decisions of the ICC that involved convictions of sexual violence in armed conflicts and brought several new elements, such as war crimes where both perpetrator and victim are from the same group and has classified the crime of enforced marriage as a crime against humanity. Both of the cases might turn very important for the future prosecution of perpetrators of sexual violence in armed conflicts.

The ability to prosecute sexual violence in conflicts depends on many different factors. While the ICTY Statute did not offer many provisions directly prohibiting sexual violence, the tribunal has used its opportunity and charged many perpetrators. 74 out of 161 accused had charges of sexual violence raised against them and 32 of those individuals were convicted.[251] With the ICC and Rome Statute, the legal framework prohibiting sexual violence got a major boost. It has been explicitly listed among war crimes and the wide range of different acts has not only enabled prosecutors to better target those crimes, but it has also helped establish a better idea, which acts of sexual violence can amount to violations of international criminal law.

The evolution of definition also shows how different aspects come into play, from the specificities of the case at hand, as in the question of coercion vs. non-consent in cases

[251] ICTY, Crimes of Sexual Violence In Numbers, International Criminal Tribunal for the former Yugoslavia, 2021. *Icty.org* [online], availabla at: https://www.icty.org/en/features/crimes-sexual-violence/in-numbers

of Furundžija and Kunarac, as well as to how the tribunal is composed, as we could have seen in the case of Semanza, where the ICTR has decided to come back to the definition from Akayesu and to disregard the definition from Kunarac.

From the track record, however, it is clear that there is still a long way to go. In a number of cases, sexual violence crimes were charged and there was enough evidence that the crimes happened, nevertheless, there was still a reluctance to derive criminal responsibility of superiors for crimes, as in the case of Lubanga, it was the prosecutor himself, who instructed investigators not to pursue crimes of sexual violence. As this was the first case decided by the ICC, there was pressure to deliver justice in a swift manner, and sexual violence charges often involve more rigorous and lengthy investigation and depositions of many witnesses.[252]

[252] UHLÍŘOVÁ, K. Contribution of the International Criminal Court to the Prosecution of Sexual and Gender-Based Crimes: between Promise and Practice. In: ŠTURMA, P. (ed.) The Rome Statute of the ICC at Its Twentieth Anniversary. Leiden/Boston: Brill/Nijhoff, 2019, p. 92.

List of Abbreviations

CRSV	Conflict-related Sexual Violence
DRC	The Democratic Republic of the Congo
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	The Statute of the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY Statute	The Statute of the International Criminal Tribunal for the Former Yugoslavia
Nuremberg Tribunal	International Military Tribunal
Tokyo Tribunal	International Military Tribunal for the Far East
JNA	Yugoslav People's Army
Lieber Code	the Instructions for the Government of Armies of the United States in the Field
LGBT+	Lesbian, Gay, Bisexual and Transgender+
LRA	Lord's Resistance Army
NAC	National Action Plans
NATO	North Atlantic Treaty Organization
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts	Additional Protocol I
Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts	Additional Protocol II

RPF	Rwandan Patriotic Front
SDS	Serb Democratic Party
STDs	Sexually transmitted diseases
The U.K.	United Kingdom
The U.S.A.	United States of America
UN	United Nations
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolutions
USSR	Union of Soviet Socialist Republics
WHO	World Health Organization
WPS	Women, Peace and Security

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Sexuální násilí jako zbraň: CRSV z pohledu mezinárodního trestního práva

Abstrakt

Cílem této práce je popsat právní úpravu zákazu sexuálního násilí v ozbrojených konfliktech, se zaměřením na přístup mezinárodního trestního práva. Tato práce se ve svých šesti částech věnuje především úpravě obsažené ve statutech ad hoc tribunálů pro bývalou Jugoslávii a Rwandu a v Římském Statutu Mezinárodního trestního soudu a jejich rozhodnutími v otázkách sexuálního násilí.

První část seznamuje čtenáře se základními pojmy týkajícími se sexuálního násilí a hlavními termíny, které jej budou při čtení práce provázet. Kromě toho se také krátce věnuje agendě: Ženy, mír a bezpečnost, která byla založena rezolucí Rady bezpečnosti OSN 1325 a zakotvuje, mimo jiné, nutnost mezinárodního úsilí v boji proti sexuálnímu násilí v ozbrojených konfliktech.

Druhá část se věnuje historickému ukotvení zákazu sexuálního násilí v ozbrojených konfliktech a vývoji v přístupu mezinárodního práva k tomuto zločinu od obecných zákazů znásilnění až po konkrétní úpravu v mezinárodním právu a statutech mezinárodních trestních tribunálů a Mezinárodního trestního soudu.

V další části se tato práce zabývá obecně ad hoc mezinárodními trestními tribunály pro bývalou Jugoslávii a Rwandu a Mezinárodním trestním soudem, jejich vznikem a základním právním rámcem upravujícím válečné zločiny, zločiny proti lidskosti a zločin genocidy.

Čtvrtá část se věnuje tomu, jak právě ICTY, ICTR a ICC rozhodovaly v případech sexuálního násilí. Část této kapitoly se věnuje znásilnění a tomu, jak se vyvíjela definice skrze jednotlivá rozhodnutí. Další část se zaměřuje na jiné formy zločinů proti lidskosti a válečných zločinů, jako které může být sexuální násilí klasifikováno. Na závěr jsou pak v této části rozebrány ostatní formy sexuálního násilí, tak jak je vyjmenovává Římský statut Mezinárodního trestního soudu.

Pátá část rozebírá dvě poslední rozhodnutí Mezinárodního trestního soudu a zamýšlí se nad jejich možnými dopady na budoucí stíhání pachatelů sexuálního násilí

v ozbrojených konfliktech. Jak případ *prokurátor v. Bosco Ntanganda,* tak *prokurátor v. Dominic Ongwen* se přináší několik nových aspektů, které tato část rozebírá.

Poslední šestá část této práce shrnuje poznatky této práce a předkládá možný výhled do budoucna.

Klíčová slova: sexuální násilí, ozbrojené konflikty, mezinárodní trestní právo

When sexual violence is weaponised: CRSV as a violation of international criminal law

Abstract

The aim of this thesis is to describe the legal regime of sexual violence in armed conflicts, with a special focus on international criminal law provisions. This work is divided into six parts that focus especially on legal provisions of the statutes of the International Criminal Tribunals for Former Yugoslavia, the International Criminal Tribunal for Rwanda as well as on the Rome Statute of the International Criminal Court and decisions of those international judicial bodies in cases involving sexual violence.

The first part introduces to the reader basic terms and concepts that will follow them throughout this work. Additionally, a small subpart is dedicated to the Women, Peace and Security agenda introduced by the UN Security Council Resolution 1325 that, among other themes, highlights the necessity of strengthened international focus and cooperation in fighting sexual violence in armed conflicts.

The second part deals mainly with the historical context of the adoption of the prohibition of sexual violence in armed conflicts and describe the development in approach of international law towards this crime, from general prohibitions of rape to specific enumeration of norms prohibiting sexual violence in statutes of ad hoc international tribunals and International Criminal Court.

The next chapter focuses on a general introduction to ad hoc international criminal tribunals for Former Yugoslavia and Rwanda and to International Criminal Court, their establishment and basic legal framework regarding war crimes, crimes against humanity a crime of genocide.

Forth and fundamental part focuses on how the ICTY, the ICTR and the ICC decided in cases that involved sexual violence. The first part of this chapter deals with rape and how its definition evolved throughout the decisions. The second part focuses on other forms of crimes against humanity and war crimes, that were also used to prosecute sexual violence in armed conflicts. The next part describes other forms of sexual violence as enumerated by the Rome Statute.

The fifth part describes the two last decisions of the International Criminal Court and presents their potential effect on future prosecution of perpetrators of sexual violence in armed conflicts. Both *prosecutor v. Bosco Ntaganda* and *prosecutor v. Dominic Ongwen* bring several new aspects, that are described in this chapter.

Last, sixth part summarises findings of this work and offers potential foreshadowing into future.

Key words: sexual violence, armed conflicts, international criminal law