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RAPE AND SEXUAL VIOLENCE IN INTERNATIONAL CRIMINAL LAW:
From phenomenology to jurisprudence

Master's thesis

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INTRODUCTION

> „After the soldiers killed her husband and sons, five of them held her down and forced her to watch as three others raped her 10-year-old daughter. Her name was Nyalaat. When the men were done, Mary says, "I couldn't even see my little girl anymore. I could only see blood." Then the men took turns with Mary. Nyalaat died a few hours later."[1]

A mother's pain and grief. A 27-year-old woman who watched her life destroyed during a conflict in South Sudan. Yet it is not a particularly unusual story. Children clinging to their mothers' legs, crying, as their mothers are taken aside to be raped by soldiers. Mothers watching their daughters sexually abused, mutilated, killed.[2] Enslaved women in rape camps, released when finally pregnant.[3] Rape as a tactic of war is presumably as old as war itself.

Broken bodies, deaths, unwanted pregnancies, child abandonment, HIV and other sexually transmitted diseases, genital mutilation, pain, isolation, stigmatization, shame, depression, anxiety, suicide, fear, anger, humiliation, social exclusion, eroticism of violence, discrimination, inequality, body objectification, development of rape culture,[4] if to name just some of the consequences of rape. The health consequences of sexual violence can influence the reproductive and mental health, behavior and also the fatality of the victims.

Rape as a tactic has been a highly effective method of dehumanisation, domination, humiliation, and in a sense an attack against the masculinity of men for whom these rapes ought to prove that they are unable to protect their women.[5] In some cultures the status of being a victim of sexual violence is seen as the victim is defiled and dishonored. They are ostrascized by their community, rape might also take away their worthiness to marriage or to

[1] A. Baker. Survivors of wartime rape are refusing to be silenced. Story series of "Secret War Crime." Time 2016. Accessible: http://time.com/war-and-rape/ (01.02.2018).
[2] Ibid.
[3] D. M. Crowe. War Crimes, Genocide, and Justice: A Global History. New York: Palgrave Macmillan 2014, p. 343.
[4] K. T. Hagen, S. C. Yohani. The Nature and Psychological Consequences of War Rape for Individuals and Communities. International Journal of Psychological Studies 2010, vol. 2, no. 2, p. 14.
[5] C. De than. E. Shorts. International Criminal law and human rights 2003, p. 347.

give birth to children. Consequently, sexual violence can destroy not just individuals, but families and communities in a way no other weapon ever could. And then comes the darkest secret of sexual violence as a tactic of war – victims are not just women. Social hierarchies and gender roles tend to have an enormous effect on the notion of male rape, even when authorities are dealing with the aftermath, the existence of the issue is often denied. The stigmatization that comes with male rape is even more dishonoring than female rape. The position that men have in some societies creates the situation where it is far harder for them to fight for justice in case of male rape. There have been many male sexual violence cases reported throughout history, also one-third of the cases referred in this thesis have dealt with male rape, castration, mutilation, sexual assaults etc. These are not isolated cases, yet the problem somehow remains largely invisible and is often absent from international jurisprudence. Beside the social stigmatization and ostracism, the victims of male rape can also face accusations of homosexuality[6] and persecution.[7] Thus, for receiving persecution and possibly even punishment, it is understandable why male rape is beyond under-reported.[8]

[6] Research suggests that some police officers are homophobic towards the victims of male on male rape since there is still belief on the myth that male rape is solely a homosexual issue. The victims are labelled homosexual, weak, less masculine or less men, and perceived as less legitimate victims and less deserving for help. *See, e.g.* N. Abdullah-Khan. Male rape: The emergence of a social and legal issue. Springer 2008. P. NS. Rumney. Policing male rape and sexual assault. The Journal of Criminal Law 2008, vol. 72, no. 1, pp. 67-86. And, S. Sivakumaran. Male/male rape and the" taint" of homosexuality. Human Rights Quarterly 2005, vol. 27, no. 4, pp. 1274-1306. And these studies only analyzed the police perceptions over the issue, not the general public's. Most of these researches were conducted in Western countries, which are indeed quite liberal compared to e.g. some African countries. For instance, homosexuality in Africa is outlawed in 33 countries, e.g. in Sudan, northern Nigeria and Somalia homosexuality is punishable by death. In countries like Uganda, Sierra Leone, Tanzania, you can receive life imprisonment for homosexual acts.

[7] Not just homosexual relations between men are prohibited, but most of these countries also prohibit sexual relationship between females. To understand the level of stigma and persecution, it would be important to note, that it is not just hate crimes committed against the LGBT community and prosecuting people for homosexuality/homosexual acts, but also something that reflects the cultural affiliations over the response to homosexuality is that the term *corrective rape* was coined in South Africa which is a hate crime of raping one for their sexual orientation with the intended consequence of turning the person heterosexual, thus to punish and reinforce social norms. E.g. in South Africa, which is a more liberal country than its neighbours, the prevalence of corrective rape has only increased over years. The practice of using rape to persecute homosexuals makes it understandable why people would be afraid to report same-sex rape in some countries (just to clarify, in South Africa homosexuality is legal and that is probably the reason we have most reported cases of corrective rape from South Africa). Thus, by reporting, it is not just the punishment by the authorities and the stigma you have to be afraid of but also community members. They clearly take homosexuality more seriously than prosecuting rape crimes. – *See also*, S. Hawthorne. Ancient hatred and its contemporary manifestation: The torture of lesbians. The Journal of Hate studies 2006, vol. 4, no. 1, pp. 33-58. A. Martin, et al. Hate crimes: the rise of corrective rape in South Africa. Action Aid 2009, *and this article* - Men are also corrective rape' victims, 2014. Accessible: http://bhekisisa.org/article/2014-04-11-men-are-also-corrective-rape-victims (11.03.2018).

[8] H. M. Zawati. Impunity or immunity: wartime male rape and sexual torture as a crime against humanity. Journal on Rehabilitation of Torture Victims and Prevention of Torture 2007, pp. 27-47.

Lawlessness over the issue can create a culture of impunity. It is hard to imagine a situation where an ordinary rule of international law would permit rape under any circumstances, and purely by this logic rape evinces the non-derogable character necessary for establishing a principle of *ius cogens*. Furthermore, rape is included as a constituent element of every accepted peremptory norm. Yet in contrast to other norms that *de facto* have the status of *ius cogens*, the international community remained in relative silence for a long time. It is for relatively recently when the international law made substantial developments in defining and prosecuting rape under the international criminal law. The practice of international courts and tribunals to apply to rape and sexual violence is in a way both distinct and overlapping. But regardless of the hardships, the tribunals have seen in their search for the adequate definition of the crime of rape, they have made many significant efforts for furthering the development of the jurisprudence of rape and sexual violence in international criminal law.

The definition of sex crimes differs in many ways, there are different offences that fall into the category of sex crimes, the differences in national legislations, differences in prosecution etc., but in general sex crimes involve illegal or coerced sexual conduct, usually for sexual motives, against another person.[9] Though, even nowadays in many jurisdictions the definition can be gender-biased and too narrow, e.g. it is rape only when the victim is female (male rape is not acknowledged in law) and the narrow definitions often define rape as a penile penetration of vagina, which means that oral and anal penetration is not considered as a rape crime.[10] Not only that, the category under which the jurisdiction regards the crime has differed from rape being seen as a crime of violence, a crime of property, a crime of sex or a crime against honor.[11] Regardless how we define sex crimes, sexual violence as a tactic often occur as a whole different phenomenon with its own distinct characteristics compared to sex crimes committed mainly on sexual motivation. The *malum in se* nature and motives of the sex crimes as a tactic may differ in such a level, that it is substantial, particularly with regards to the contemporary international criminal law practice, to acknowledge, recognize and prosecute such acts. To this day, rape remains to be one of the most vastly under-reported and inadequately litigated of all international crimes.[12]

[9] M. D. Smith. (ed.). Encyclopedia of rape. Greenwood Publishing Group 2004, p. 169.
[10] Ibid, p. 169-170.
[11] Ibid.
[12] J. A. Jones. Addressing the Use of Sexual Violence as a Strategic Weapon of War. Inquiries Journal 2013, vol. 5. No. 04, p. 1. Accessible: http://www.inquiriesjournal.com/articles/732/addressing-the-use-of-sexual-violence-as-a-strategic-weapon-of-war (01.02.2018).

It is clear that not all sex crimes happening during conflicts do not fall under the scope in question since some acts can be perpetrated by individuals not belonging to armed forces but in an opportunistic way of taking advantage, and committing horrible things to people in a situation of impunity, chaos and hatred. Sex crimes that are not first-hand driven by sexual motives, but used as a tool, means, strategy, weapon or however to call it, with the motivation of achieving specific goals by using sex crimes as an instrument of terror should fall under what we recognize as grave breaches. The striving intentions can be just terrorizing the population, but also destroying the whole communities, breaking up families, ethnic cleansing, deliberately infecting women with HIV etc. Moreover, the problem with sexual violence is, that its impact is far more reaching than just during the conflict. Some are never able to leave the battlefield for their sufferings.[13]

Rape and other forms of sexual violence are probably one of the worst violations of one's bodily integrity that can occur. Nevertheless, some major differences prevail in both *actus reus* and *mens rea* of the crime of rape while considering if the crime occurs in the context international criminal law or outside of it. Rape and other forms of sexual violence can amount to international crimes if the conditions for these crimes are fulfilled. The author believes that sexual violence that can amount to international crimes, which are referenced as sexual violence as a tactic throughout this thesis, is distinct from sexual violence perpetrated for sexual motives. The author claims that three distinctive characteristics emerge when talking about tactical sexual violence. The first is the motive for the crime, the second is the very nature of the act itself, and thirdly, the context in which the crime takes place. Hence, the objective of this study is establishing what the concept of rape and sexual violence as a tactic is about, and then illustrating how the definition of rape crime ought to be regarding the concept of rape as a tactic and does the current law and practice correspond to it. As the line between rape and other forms of sexual violence is not always that clear and homogeneous, sexual violence in general, is also included in the analysis.

The object of this thesis is rape and sexual violence as international crimes. The research gap the author intends to fill is combining the phenomenon and the jurisprudence of rape as a tactic to understand how the jurisprudence ought to be in the light of the phenomenology. It is an interdisciplinary analysis, which includes both legal and criminological notions. The thesis

[13] Background Information on Sexual Violence used as a Tool of War. Accessible: http://www.un.org/en/preventgenocide/rwanda/about/bgsexualviolence.shtml (01.03.2018).

has two parts, one focusing on the phenomenon and the second part on the jurisprudence of rape and sexual violence in international criminal law.

Firstly, the aim is to determine what is rape and sexual violence as a method to commit international crimes. This, however, does not mean that there is a distinction made between war and peace. Beside war crimes, the analysis includes the crime of genocide and crimes against humanity which do not need a nexus with an armed conflict. The idea is to establish the distinct character of rape and sexual violence as a tactic, which is committed in the context of deliberate violence with specific intentions, and to distinguish tactical sexual violence as tool for group-based oppression from sexual violence that has more to do with individual physic's space and is first-hand driven by sexual motives. Though the latter is more common in peacetime, as stated, for the purposes of this thesis, the distinction between war and peace is irrelevant. The first chapter gives a brief overview of the historical narratives related to tactical rape, contemporary practice and related law. The second chapter of the analysis is a case-study of the phenomenon of rape as a tactic. The analysis is comparative in the sense that the nature and the motives of tactical rape in different conflict settings are subject to comparison. For this, the author analyzed the qualitative data from the case-law of four international courts and tribunals – International Criminal Court (ICC), International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the former Yugoslavia (ICTY), and the Special Court for Sierra Leone (SCSL). The analysis will focus on three main facets to determine the phenomenon of tactical rape crime: (i) the context of the crimes (where, on what circumstances); (ii) the nature of the crimes (the matter of how); and (iii) the motives striving behind the crime (the matter of why).

The jurisprudence part of the thesis includes two chapters which focus on prosecuting and defining rape and sexual violence. As the term sexual violence encompasses different crimes, e.g. rape, sexual assault, sexual slavery, forced impregnation etc., the principal focus is on the crime of rape and how in practice the distinction between rape and other forms of sexual violence is made as the line between the two is not always that clear and unequivocal. However, for limited space, different forms of sexual violence will not receive specific attention but are explained under the general term of sexual violence. Thus, the third chapter explains how rape has been prosecuted under international law, under which crimes and which elements must be fulfilled for that. The fourth chapter will focus on the definition of the crime of rape (and sexual violence) under the international criminal law, five different definitions are subject to analysis. For that the author will critically investigate the evolving

practice of international courts and tribunals on the issue of the definition of rape under the international criminal law, primarily relying on the court practice of ICTY, ICTR, ICC and SCSL. The data from the second part is an important determinant to understand whether the definition adequately addresses the phenomenon of tactical rape and gives solid protection to the victims. The non-consent issue is specifically argued there.

The author firmly believes, while taking into account the nature and the motives of rape as a tactic, the coercive environment itself is abrogating the possibility to genuinely consent. For that, the author sets out a hypothesis, that the consent paradigm, where the non-consent is an element of the definition of the crime of rape in international criminal law, does not adequately address the phenomenon of rape as a tactic. The author further sets out the following research questions to be answered: (i) what is rape as a tactic; (ii) what are the elements of the crime of rape in international criminal law; (iii) do those elements adequately address the crime of rape under international criminal law, in particular taking account the specific nature, context and motives of the crime; (iv) what is the distinction between rape and other sexual violence.

The primary sources of the thesis are the international legal framework governing the prohibition of rape and sexual violence in the context of international criminal law and international humanitarian law, and the jurisprudence of the ICC and the *ad hoc* tribunals. To some extent, the author also relied on the peer-reviewed literature, comments on the case law and reports of different NGOs. The author used analytical and comparative methods for analysis.

The following keywords characterize this thesis: international criminal law, rape as a tactic, systematic sexual violence.

PART I. RAPE AND SEXUAL VIOLENCE AS A TACTIC

Chapter 1. Antecedent background

Rape has always been present in the history of humanity. Even the early religious texts[14] and greek mythology[15] included references to rape. Sexual violence is an efficient tool. The most common reasons for why sexual violence is used in conflicts are: (i) rape as a reward; (ii) rape as a means of creating cohesion between combatants; (iii) rape as a strategy of war; (iv) rape as a means to destroy social and cultural coherence; (v) rape for economic ends; (vi) rape as a means of extracting information.[16] Thus, rape has been both, part of, and a consequence of, war. The latter notion is not stipulating that it is inevitable. Rape itself has not changed over time, what has changed is our perceptions, definitions and laws governing rape.[17]

The prohibition against rape in war was codified as far back at the Lieber Code of 1863, and it did state that any soldier convicted would be punished with the death penalty. Though it was expressly prohibited already in 1863 and it showed awareness of sexual violence in armed conflict, the international community was not ready to resolutely confront the matter.[18] Some decades later, the Hague Conventions made some vague commitments to respect family honor and rights,[19] but these were of limited value since rather little legislative foundation was

[14] In Zechariah 14:2, the verse goes: "for I [God] will gather all the nations against Jerusalemm to battle, and the city shall be taken and the houses looted and the women raped." Deuteronomy 20:14 adds to the thought of when one goes to war: "You may, however, take as your booty the women, the children, livestock, and everything else in the town, all its spoil. You may enjoy the spoil of your enemies, which the Lord your God has given you." The biblical texts are both a reflection of early days androcentrism and patriarchy, but in addition the Bible does seem to reflect that rape is normative in religious scriptures. For more examples, S*ee*, e.g. Gen 34:29, Deut 21:10-14, Numbers 31, Judg. 5:28-30, 21:12-14, Isa 13:16, Jer 6:11, Zech 14:2.

[15] *See, e.g.* the rape of Helen of the Troy, Medusa, Philomela, Leda, Europa, Demeter, Antiope, Cassandra, Chrysippus etc. In many cases, associating both gods and men with sexual violence serves to pardon the crimes and also normalises and tolerates rape by proclaiming that they, the gods and men, are helpless to this invincible craving. *See, e.g.* C. Schodde. Rape culture in classical mythology. Found in antiquity 2013. Accessible: https://foundinantiquity.com/2013/10/06/rape-culture-in-classical-mythology/#_ftn1 (11.03.2018).

[16] War on Women: Time for Action to End Sexual Violence in Conflict. Nobel Women's Initiative 2011. Accessible: http://nobelwomensinitiative.org/wp-content/uploads/2013/09/war-on-women-web.pdf (11.03.2018).

[17] M. D. Smith. Encyclopedia of rape. Greenwood Publishing Group 2004, p. ix.

[18] A. Gillespie. A History of the Laws of War: Volume 3: The Customs and Laws of War with Regards to Arms Control. Bloomsbury Publishing 2011, p. 152.

[19] Hague Conventions of 1899 and 1907, Art. 46: "Family honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected. Private property cannot be confiscated."

given.[20]

The International Military Tribunal at Nuremberg (Nuremberg tribunal) and International Military Tribunal for the Far East (Tokyo tribunal) largely neglected the question of prosecution of sexual violence.[21] Regardless that the protection against sexual violence was weak, the enforcement of this protection was minimal if not non-existent. The trials were held for individuals considered most culpable for the atrocities. The Nuremberg Tribunal prosecuted people for war crimes, crimes against peace, and crimes against humanity.[22] The Nuremberg Trial set of transcripts, which is a 42 volume set and contains a 732-page index, does not include words ”rape” nor ”sexual violence” in any headings or sub-headings regardless that sexual violence was extensively committed and documented.[23] The Tribunal failed to include any form of sexual violence charges and did not expressly prosecute such crimes, instead The Court did add rape by implication as torture. The Tokyo Tribunal did expressly prosecute rape, but to a limited extent in relation to other crimes and not one rape victim was called to give evidence. With one month 200 000 people were killed. Nanking massacre included both mass murder and mass rape. Rape was systematic, often in a form of gang rape, targeting women regardless of their age (the reports claim that the age of rape victims ranged between seven to seventy).[24] The estimates tell us that approximately 20 000 cases of rape occurred. [25] Thus, the prevalence is of such a scale that rape could no longer be ignored and neglected as an international crime. However, the Tokyo tribunal created a controversial narrative of events which shaped the memory of history as they saw it better. The strong bias in these trials added to the criticism, thus for some, it seemed that the trials were merely victor’s justice. The reluctance of the tribunal to classify rape as a serious crime of war still sought no justice for the victims, neglected the worthy of its prosecution. Sexual violence was not expressly enumerated in the Charters of neither of the Tribunals. The Tokyo

[20] K. D. Askin. War crimes against women: Prosecution in international war crimes tribunals. Martinus Nijhoff Publishers 1997, p. 152.
[21] T. F. Lawson. A shift Towards Gender Equality in Prosecutions: realizing legitimate enforcement of crimes committed against women in municipal and international criminal law. Southern Illinios University Law Journal 2008, vol. 33, p. 204.
[22] United Nations, Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8.08.1945, 82 U.N.T.C. 280.
[23]K. D. Askin, Kelly D. Prosecuting wartime rape and other gender-related crimes under international law: extraordinary advances, enduring obstacles. Berkeley Journal of International Law 2003, vol. 21, p. 295.
[24] Basic Facts on the Nanjing Massacre and the Tokyo War Crimes Trial. Accessible: http://www.cnd.org/njmassacre/nj.html (11.03.2018).
[25] C. J. Picart. Attempting to go beyond forgetting: The legacy of the tokyo imt and crimes of violence against women. East Asia Law Review 2012, vol. 7, pp. 1-49.

Tribunal did at least include crimes of sexual nature to the indictment, although rape was labelled as a mistreatment, inhumane treatment, ill-treatment and a failure to respect family honor and rights.[26]

There have been two ways of prohibiting sexual violence and rape. One is by expressly prohibiting rape, and the other possibility is being encompassed in less explicit provisions (e.g. torture, inhumane treatment, inhumane acts, willfully causing great suffering or serious injury to body etc.). Though rape was recognized as a war crime since the Tokyo tribunals, and was incorporated in Control Council Law (CCL) No. 10 of Art. II(c) which recognized rape as a crime against humanity,[27] the Geneva Convention 1949 showed that the fair labelling of sexual violence was still lacking. Art. 27 stated, that women need particular protection from attacks against their honor. The article expressly enumerates rape as one of the attacks against honor.[28] This, however, was highly significant for the victims and for the international community that we made efforts on acknowledging the issue at all. But still, we did not recognize sexual violence as a grave breach. And the language – rape and sexual violence are classified as of ”attacks against the honor of women” or ” outrages upon human dignity.” The language instils the belief that a woman is dishonored and loses her dignity, this is a widespread belief, yet there should be no room for such fallacies in international humanitarian or criminal law. The position that these are honor crimes, marginalizes victims and trivialises these crimes. [29]

It was also added to Geneva Conventions (1977) and their additional protocols. Rape is prohibited by Article 76(1) of Additional Protocol I[30] which states that ” Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”[31] Additional Protocol II[32] also explicitly prohibited

[26] M. M. Deguzman. An expressive rationale for the thematic prosecution of sex crimes. FICHL Publication Series No. 13. Bejing: Torkel Opsahl Academic Epublisher 2012, page 37.
[27] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity. 20.12.1945, 3 Official Gazette Control Council for Germany 50-55 (1946).
[28] International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, art. 27.
[29] C. De Than. E. Shorts. International Criminal Law and Human Rights. London: Sweed and Maxwell 2003, p. 349.
[30] Protocol additional to the geneva conventions of 12 august 1949,and relating to the protection of victims of international armed conflicts (protocol i), OF 8 JUNE 1977, 1125 U.N.T.S. 3.
[31] Ibid, Art. 76(1).

rape against all persons who do not take direct part of or who have ceased to take part of the hostilities at any time and any place whatsoever.[33] Though rape was not granted the status of a grave breach, it is possible to claim that rape can constitute a grave breach of the Convention by implication to some categories explicitly mentioned, e.g. torture or inhumane treatment.[34] In 1994 the United Nations Security Council (UNSC) did recognize rape as a grave breach of the Geneva Conventions in their report. They also stated that International Tribunal will provide justice. The Commission also noted that peace requires justice and justice starts with the truth.[35] Around that time, ICTY and ICTR were established. The prosecution of war crimes in general is a quite recent development, but the contribution and commitment of these tribunals to prosecute rape as international crimes have been indispensable.

As the short overview of the legal developments was introduced, let us for a second also consider some figures of sexual violence in conflict. Systematic gang rapes, by going door to door to capture and rape of at least 20 000 Chinese women during Nanking Massacre. Brutal rapes, mutilations, and killings. Not even children were exempt.[36] We do not know the exact number of rapes committed during the WWII, but the estimates are from hundreds of thousands to millions. The suggestion for this numbers comes from the unprecedented number of illegal abortions performed in Germany between 1945 and 1948. We are talking about one million illegal abortions here. Women from ages eight to eighty raped during WWII.[37] Between 200 000 to 400 000 women and girls raped during Bangladesh Liberation War with some consequences as e.g. thousands of pregnancies from rapes, birth of war babies, abortions, infanticide and suicide if rapes did not kill you.[38] Up to half a million rape and sexual violence victims in Rwanda conflict over the course of 100 days. The first mass rape to be determined as genocidal rape.[39] An estimated 25 000 to 50 000 incidences of rape or other forms of sexual violence during Bosnian War, repeated gang rapes and creation of

[32] Additional Protocol II, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 609, entered into force 7.12.1978.
[33] Ibid, art. 4(2)(e).
[34] *Supra note* 28.
[35] Final Report of the Commission of experts established pursuant to Security Council Resolution 780, UN Doc. S/1994/674, 1994 para-s. 58-60, 232-253.
[36] G. Xingzu, et al. Japanese Imperialism and the Massacre in Nanjing. Chapter X: Widespread Incidents of Rape. Accessible: http://museums.cnd.org/njmassacre/njm-tran/njm-ch10.htm (01.02.2018).
[37] A. Beevor. The Fall of Berlin 1945. London: Penguin Books 2003, p. 410.
[38] L. Sharlach. Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda. New Political Science, 2002, vol. 22 (1), pp. 89–102.
[39] A. Walsh. International Criminal Justice and the Girl Child, in L. Yarwood (ed). Women and Transitional Justice: The Experience of Women as Participants. London: Routledge 2012.

”rape camps.”[40] Tens of thousands of rape victims during the Darfur genocide, where genital mutilation and rape of children is by no means an unfamiliar practice.[41] In Guatemala, gang rape is a particular army strategy. Soldiers are also ordered to do the ”percha” which is a practice of 20 or 30 soldiers raping a single woman. This is what we know as rape unto death.[42] In the Democratic Republic of Congo (DRC) rape has been used as a weapon of war for decades. Today rape is almost a cultural phenomenon.[43] Margot Wallstrom, the UN special representative in conflict called DRC rape capital of the world by claiming that rape is a dominant feature in the country.[44] A study published in 2011 claimed that out of the population of 70 million people 1.8 million women had been raped.[45] This was seven years ago. This conflict is defined as a war against women for a reason. In Burma, both the Army and Border Guard Police have taken part in committing gang rapes against civilians fleeing the country. The violence against Rohingya Muslims is what UN called the ”textbook example of ethnic cleansing.”[46] According to the Médecins Sans Frontières, half of the rape victims who arrive at the camps on the Bangladesh border are minors, some even under the age of 10.[47] A study in 2009 analyzed 27 countries with on-going or recently-ended armed conflicts and found that war rape, which according to that study meant either widespread or brutal rapes, was omnipresent in all 27.[48] Algeria, Angola, Burundi, Cambodia, Chad, Colombia, Cote d’Ivoire, Iraq, Liberia, Peru, Sri Lanka… And the list goes on. This is the contemporary reality. Millions of people have been and are being raped in conflict.

[40] C. S. Snyder. On the Battleground of Women’s Bodies: Mass Rape in Bosnia-Herzegovina. Journal of Women and Social Work 2006, pp. 184-195.
[41] S. Clark Miller. Atrocity, Harm, and Resistance: A Situated Understanding of Genocidal Rape, in A. Veltman, K. J. Norlock (eds). Evil, Political Violence, and Forgiveness: Essays in Honor of Claudia Card. Lexington 2009, pp. 53-76.
[42] M. L. Leiby. Wartime sexual violence in Guatemala and Peru. International Studies Quarterly 2009, vol. 53, no. 2, p. 459.
[43] S. McCrummen. Prevalence of Rape in E. Congo Described as Worst in World. Washington Post Foreign Service 2007. Accessible: http://www.washingtonpost.com/wp-dyn/content/article/2007/09/08/AR2007090801194.html (11.03.2018)
[44] UN official calls DR Congo rape capital of the world. BBC 2010. Accessible: http://news.bbc.co.uk/2/hi/8650112.stm (20.03.2018)
[45] A. Peterman, et al. Estimates and determinants of sexual violence against women in the democratic republic of congo. American journal of public health 2011, vol. 101, no. 6, pp. 1060-1067.
[46] T. Khin. Rohingya: A Preventable Genocide Allowed to Happen. Insight Turkey 2017, vol. 19, no. 4, pp. 43-53.
[47] F. MacGregor. Rohingya girls under 10 raped while fleeing Myanmar, charity says. The Guardian 2017.
[48] K. Farr. Extreme war rape in today’s civil-war-torn states: A contextual and comparative analysis. Gender Issues 2009, vol. 26, no. 1, pp. 1-41.

Chapter 2. The phenomenon of rape and sexual violence as a tactic

In this section, the phenomenology of rape and sexual violence as a tactic is subject to analysis. Rape and sexual violence as a tactic in this section depict those acts of sexual violence that are used as a tool, strategy or a means to commit core international crimes. That means that those acts are committed with a specific purpose. To understand what is tactical rape and what acts exactly constitutes rape the analysis will focus on three main facets to determine: (i) the context of the crimes; (ii) the nature of the crimes; and (iii) the motives for the crimes. By first the nature of tactical rape is subject to analysis in order to determine how exactly tactical rape takes place, what are the central characteristics, the tendencies etc. Then, the motives striving behind the crime i.e. the question why the crime of rape takes place, why it is used, what purpose(s) it serves. And thirdly, the context in which these crimes take place, so questions like where and on what circumstances will be analyzed. The analysis will rely mainly on the court practice, some supportive materials will be used from previous studies. Two cases from SCSL, three cases from ICC, nine cases from ICTR and 19 cases from ICTY, altogether 33 cases were chosen for current section's analysis (see the list of cases in Appendix 1.). All of these cases were included in this study on the basis of whether the court documents included relevant descriptions of the nature, motive and/or context of the rapes occurred. For the distinction between rape and sexual violence to be clear, rape under this section means (unlawful) sexual penetration of body orifices.

2.1. The nature

Firstly, the data demonstrated some general tendencies that are applicable to describe the notion of tactical rape and its nature. However, the data revealed that every conflict had also its own specific 'handwriting' in the sense that in every conflict there were certain peculiarities that were not visible in other conflicts. Firstly, the common tendencies will be explained and then country-specific tendencies will be subsequently argued.

Two main characteristics prevail that differentiate tactical rape from rape crimes committed for sexual gratification – the gravity of violence and the degree of humiliation. The author is not contending that these things do not occur when sexual violence is perpetrated for sexual motives, though surely not that rapidly and with such scope, rather that these characteristics are particularly common in tactical rape cases and therefore constitute the essence of these crimes.

2.1.1. The violence

The gravity of violence is not the same mainly since in rape cases for sexual motives, the violence is usually a means used for the rape, i.e. the violence is used just as much as needed to coerce a person or to force a person into the sexual act. And sometimes the threat of violence is already enough to meet the ends. With tactical rape, the violence is often used as a second tool together with rape to inflict more pain and suffering for the victim, to humiliate more. It is common that victims are severely beaten before, during or after the rape. Biting and pinching[49] were also reported. In the *Zelenovic* case one victim, who was repeatedly raped, in one of those instances was raped by at least ten soldiers in turn. The rape was so violent that the victim lost consciousness.[50] In Rwanda the beatings and cutting (usually with a machete) were commonplace. In *Kajelijeli* case a mother witnessed her 15-year-old handicapped daughter raped by many different perpetrators. The mother was beaten until she lost consciousness and when she regained consciousness, her daughter's dead body was covered with blood.[51] Another witness described how she was beaten and then raped by at least six people before she lost consciousness.[52] Throughout these cases a pattern of a kind came evident – these victims were often raped and sexually assaulted until they collapsed in a state of exhaustion.

Beside beating, biting, stabbing and cutting, some witnesses' reported incidences of piercing victims' sexual organs using a spear, cutting off the breasts or other body parts of the victims, such as in *Muhimana* where the rape victim's legs and arms were cut off and she was left to die a slow and painful death.[53] In *Musema* one witness stated that during the rape they cut her head and shoulder with a machete and she was kicked in the stomach.[54] In *AFRC* case one of the victims died from the gang-rape due to excessive bleeding.[55] The violence is used together with the rape (and also separately) just to cause as much pain and suffering to the victims as

[49] Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22.02.2001, para. 328.
[50] Prosecutor v. Dragan Zelenovic (Sentencing Judgment), IT-96-23/2-S, International Criminal Tribunal for the former Yugoslavia (ICTY), 4.04.2007, para-s. 21, 38.
[51] The Prosecutor v. Juvénal Kajelijeli (Judgment and Sentence), ICTR-98-44A-T, International Criminal Tribunal for Rwanda (ICTR), 1.12.2003, para. 638.
[52] Ibid, para. 654.
[53] The Prosecutor v. Mikaeli Muhimana (Judgement and Sentence), ICTR- 95-1B-T, International Criminal Tribunal for Rwanda (ICTR), 28.04.2005, para. 359.
[54] The Prosecutor v. Alfred Musema (Judgement and Sentence), ICTR-96-13-T, International Criminal Tribunal for Rwanda (ICTR), 27.01.2000, para. 835.
[55] The Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused), SCSL-04-16-T, Special Court for Sierra Leone, 20.06.2007, para. 1023.

possible. The Prosecution also brought that out in the *Celebici* case: ”The Prosecution contends, *inter alia*, that Hazim Delić personally participated in monstrous crimes. He murdered a number of detainees, he brutally raped a number of the women in the prison-camp and then boasted about it, and he frequently beat detainees, often using a baseball bat, causing his victims to suffer broken ribs. The Prosecution submits that he took a sadistic pleasure in the infliction of pain, for example, when he used an electrical device to shock detainees, he would laugh in response to pleas for mercy from the victims.”[56] Though all, vaginal, anal and oral penetration were traumatizing and also painful for the victims, it was clear that the most cruel and painful way to penetrate was anally. All of the rapes that included anal penetration also included at least vaginal penetration and sometimes oral too. There was no separate incident of rape by anal penetration (expect in male rape cases). The victims reported extreme pain, bleeding and permanent physical damages caused by the anal penetration.[57]

In the *RUF* case, an expert witness TF1-081 testified that between March and December 1999 she examined 1,168 patients. 99% of these patients were abducted after the invasion on the 6th of January 1999. 58,5% (648) had been subject to rape, some by more than two and even up to 30 men; 24,1% (281) complained of vaginal discharge, 27.9% had pelvic inflammatory disease (both are transmitted through sexual intercourse), over 17% were pregnant. Also noteworthy that 80% of the patients were girls between the ages 14 to 18.[58]

As inserting objects into the vagina and anus of the victims and also raping the victims with objects was not common in the Balkans (at least not according to the selected cases), it was part of the ”handwriting” in Rwanda and Sierra Leone. Half of the ICTR and SCSL cases included witness statements about the occurrence. In *Prosecutor v. Gacumbitsi* the accused travelled in a caravan of vehicles and announced via megaphone: ”Hutu that save Tutsi should be killed Tutsi girls that have always refused to sleep with Hutu should be raped and sticks placed in their genitals.”[59] Inserting sharpened sticks into the private parts of the victims was also present in the *RUF, Muhimana* and *Kajelijeli* case. In *Prosecutor v. Musema* the witness

[56] Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Trial Judgement), IT-96-21-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16.11.1998, para. 1254.
[57] *See examples*, Mucic, para-s. 964, 1263; Furundzija para-s. 46, 87; Kunarac, para. 170; Bemba, para. 466.
[58] Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused) (Trial judgment), Case No. SCSL-04-15-T, Special Court for Sierra Leone, 2.3.2009, para. 1520.
[59] The Prosecutor v. Sylvestre Gacumbitsi (Annex II: The Indictment to Trial Judgement), ICTR-2001-64-I, International Criminal Tribunal for Rwanda (ICTR), 17.06.2004, para. 39.

J testified that this method was used to torture the victims to death. As she explained, men struck sharpened sticks into the private parts of the female victims while they were alive. The victims were screaming. Most were killed with the sticks. Those, who somehow survived, were then killed with clubs or machetes. She also witnessed her daughter being murdered in that way.[60] In *Gacumbitsi* a young Tutsi woman explained how a group of about thirty attackers assaulted her mother, they drove a wooden stick into her mother's genitals right through her head. Then the same attackers raped her and after that forced a branch slightly longer than a meter into her genitals. This wounded her and caused her to bleed excessively.[61]

Mutilation was also something that was more common to Rwanda, though, some form of sexual mutilation was present in two ICTY cases. In the *Milošević* case witness B 1461 explained that they were forced to bite off and swallow genitalia of other victims.[62] In *Tadic* case, similar statements were made where Witness H and Witness G were forced to bite off the testicles of another male detainee.[63] In Sierra Leone, the sexual violence was combined with sexual mutilations. The rebels were also cutting the private parts of both female and male civilians with a knife.[64]

2.1.2. The humiliation

One thing to say is that these crimes occur in a systematic way. Though the prevalence and the systemic way of committing these crime is in some sense more illustrating the context in which the tactical rape occurs, at the same time it does also illustrate the idea that most of these individual counts of rapes are part of the bigger picture. This means that it is rarely the case of an opportunistic person using the possibilities of conflict situation to commit crimes such as rape. Rather it is a common tool or practice. Beside excessive violence there is also the astonishing degree of humiliation and degradation the rape as a tactic often encompasses. This is strongly tied to the motive since by analyzing the common tendencies of rape it was clear that humiliation is one of the main goals of rape. Degrading treatment and humiliation during rape was present in most of the cases. While one thing is that such personal violation

[60] Prosecutor v. Musema, ICTR-96-13-T**,** para. 834. Prosecutor v. Muhimana, ICTR-95-1B-T, para. 396.
[61] Prosecutor v. Gacumbitsi, para-s. 207-208.
[62] The Trial of Slobodan Milosevic (IT-02-54), ICTY. Transcript 6.5.2003, p. 20222. Accessible: http://www.icty.org/x/cases/slobodan_milosevic/trans/en/030506IT.htm (01.03.2018).
[63] Prosecutor v. Dusko Tadic (Trial Opinion and Judgement), IT-94-1-T, International Criminal Tribunal for former Yugoslavia (ICTY), 7.05.1997, para-s. 198, 206.
[64] Prosecutor v. Sesay, *supra note* 58, para. 1208.

as rape is anyhow considerably humiliating, in Bosnia there also appeared discriminatory comments such as ”I want to see how muslim women fuck”[65] and ”you should enjoy being fucked by a serb;”[66]

In couple of ICTY cases, victims reported that the perpetrators ejaculated over their bodies after the rape.[67] In these cases, it was visible that ejaculation was done in a way that would humiliate the victim even more. For instance, in *Bralo,* the perpetrator rape the victims in front of a number of people repeatedly, bit her and repeatedly ejaculated over her body. It was done in a demeaning manner. The Trial Chamber considered this exacerbated humiliation and degradation of the victim to be of aggravating gravity of an already serious offence: “These actions demonstrate a desire to debase and terrify a vulnerable woman, who was at the complete mercy of her captors. It is therefore incumbent upon the Trial Chamber to take into account these particular circumstances as having aggravated the gravity of his rape of Witness A.”[68]

Another way perpetrators made to humiliate the victims was forcing the victims to lick the perpetrator’s penis clean after being anally raped.[69] In another case, the perpetrators forced a couple to have sexual intercourse in the presence of other civilians and their own daughter. After the enforced rape the perpetrators forced the man’s daughter to wash her father’s penis clean.[70] Both of those were done in front of an audience, including soldiers and civilians. The public humiliation element was present in all conflicts analyzed here. In many cases, there were reports that other civilians were forced to watch the rapes, beatings and other forms of sexual violence. In the *RUF* case, men with guns ordered witness TF1-217 to watch and count the men raping his wife. Children were also forced to watch. After his wife was raped by eight fighters, they stabbed and killed her.[71] These actions were clearly motivated by domination and control. Showing the men that we can rape and kill your wives in front of your children, your communities, and nothing you can do about it. These acts have nothing to

[65] Prosecutor v. Radoslav Brdjanin (Trial Judgement), IT-99-36-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 1.09.2004, para. 513.
[66] Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22.02.2001, para. 342.
[67] Prosecutor v. Bralo, para-s. 15, 34. Prosecutor v. Mucic, para-s. 958, 960, 961.
[68] Prosecutor v. Miroslav Bralo (Sentencing Judgment), IT-95-17-S, International Criminal Tribunal for the former Yugoslavia (ICTY), 7.12.2005, para. 34.
[69] Prosecutor v. Anto Furundzija (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10.12.1998, para-s. 87, 266.
[70] Prosecutor v. Issa Hassan Sesay, *supra note* 58, para. 1302.
[71] Ibid, para-s. 1194, 1195.

do with sexual motives, but everything to do with power. And this kind of humiliation is, unfortunately as became evident from these cases, probably one of the most efficient ways of depriving the power and the will to fight back. Their goal is to instil fear, powerlessness and the sense of insecurity among the people. This is how they seize their power.

After being raped, two Tutsi girls were taken outside of the house (naked) and other civilians were invited to come and see how naked Tutsi girl looks like. The girls, they had to spread their legs apart and wait there, guns aiming at them, people looking, mocking. "Everyone passing should see what the vagina of a Tutsi woman looks like."[72] The public element is what has been firmly made use of by the perpetrators in most of the cases. And usually, the public element is what made the event the most degrading for the victims.

While inserting objects as a pattern was already explained during the previous section, causing pain and suffering was not the only objective for its use. The practice was exercised so widely since beside the physical suffering it was also degrading and humiliating for the victims. In *Gacumbitsi* it was the most obvious that raping and inserting sticks into the private parts of the victims is a deliberate and concerted campaign against (Tutsi) women since the accused agitated others to pursue with the practice. In one case it was reported that the men inserted a pistol into the vagina of one of the females. The weapon was left there overnight. As this might be done for inflicting pain, the female was not allowed to move or take the weapon out, it does seem more about humiliating the victim in this case.[73]

There was also evidence of male rape occurring – something that has gone greatly unacknowledged. While it was not as often reported as female rape and we do not have the estimates of the prevalence, these cases of male rape are extremely degrading by nature and therefore make it understandable why the victims do not wish to disclose. In the *Bemba* case, the witness P23 explained that he was anally gang-raped by three soldiers, in front of his family members and neighbour. He was left both with physical and mental harm, since people in his community disrespect him due to the rape. He considered that he is a "dead man" because of what happened to him.[74] In ICTY sexual violence against men was thorougly discussed in *Tadic* and *Milošević* cases. In the latter case, there was this whole new dimension of sexual violence as a tool explored that was not in any other case before discussed. The case

[72] Muhimana, *supra note* 53*,* para. 265.
[73] Sesay, *supra note* 58, para. 1208.
[74] Prosecutor v. Jean-Pierre Bemba Gombo (Trial Judgement), ICC-01/05-01/08, International Criminal Court (ICC), 21.03.2016, para. 494.

included male rape, forced oral sex, forced incest, gang rapes and sexual mutilation (as explained previously). Witness B-1461 explained in his testimony that fathers and sons were singled out by forcing people to align and to identify those of common descent. The names were recorded and as the close relations were identified, fathers and sons were forced to pair up and in front of others, to strip, and perform oral sex to each other. Fathers were the first to perform fellatio to their sons, and after that the sons had to do the same thing to their fathers. Altogether around twenty men had to go through this treatment, at the same time, other men in the building were ordered to watch what was going on on the stage.[75] Male rape (and sexual violence) is even more stigmatized and therefore unfortunately notably under-reported.

2.1.3. Other patterns

In addition to the violence and humiliation, in these cases, rape is often committed in a form of a gang-rape. From 19 of the ICTY cases analyzed at least in 9 cases there was evidence of gang-rapes. In ICTR at least 8/9 cases were gang-rapes and all of the analyzed ICC and SCSL cases included gang-rapes. And what makes it even more inhumane, that no one was safe. As discussed above victims were both male and female. One witness explained that she was heavily pregnant and was raped by penetration so brutally that she vomited during the incident.[76] From these 33 case-studies, at least one more pregnant women was reported raped and afterwards stabbed to death. The woman was eight months pregnant at the time.[77]

According to the cases, victims were also handicapped people, elderly and even children. In Trnopolje camp even girls 16 to 17 were raped.[78] In another case, it was reported that one of the girls who was raped constantly over the period of a couple of weeks was a twelve-year-old girl.[79] A 15-year-old girl was raped during an interrogation after three soldiers accused her of not telling the truth.[80] In Rwanda children as rape victims were nothing new. The youngest reported victim was a six-year-old girl who was raped by three Interahamwe when they came

[75] Transcript of Slobodan Milosevic Trial, *supra note 62,* pp. 20221-20223.
[76] The Prosecutor v. Sylvestre Gacumbitsi (Trial Judgement), ICTR-2001-64-T, International Criminal Tribunal for Rwanda (ICTR), 17.06.2004, para. 203.
[77] Musema, *supra note* 54*,* para. 833.
[78] Prosecutor v. Brđanin (Trial Judgement), IT-99-36-T, International Criminal Tribunal for former Yugoslavia (ICTY), 1.09.2004, para. 514.
[79] Prosecutor v. Momćilo Krajišnik (Trial Judgement), IT-00-39-T, International Criminal Tribunal for former Yugoslavia (ICTY), 27.09.2006, para. 641.
[80] Zelenovic, *supra note* 50*,* para. 22.

to kill her father.[81] In Sierra Leone, many witnesses reported that even nine to ten years old girls were raped.[82]

When it comes to perpetrators, they were almost solely men. Still, Pauline Nyiramasuhuko is the first ever woman being prosecuted and found guilty of sexual violence by an international criminal court or tribunal. Somehow women are not expected to fit the image of a sex offender. However, Nyiramasuhuko was convicted by ICTR on sexual violence charges. Women are also involved as perpetrators of sexual violence. Though most cases have never been (and probably never will be) judged in international courts and tribunals, female perpetrators is not a singular thing.[83] Victimization by female perpetrators is more common than we could expect. A study showed that female perpetrator of sexual violence was reported by 40 per cent of the female survivors and 10 per cent of the male survivors.[84] This one-dimensional gender-bias that females are practically never playing a role in mass atrocities, particularly in sexual violence, is a dangerous discourse. While feeding those gendered normative assumptions about human behavior, we create a flawed perception of the reality which in turn can undermine bringing justice and fighting impunity. Whether this bias had the effect on the definitions of rape crime will be discussed in Chapter IV.

Thus, rape as a tactic by its nature is a extremely brutal and violent act, often taking place in a form of a gang-rape, with a high prevalence of repeatedness and with a special purpose of humiliation and degradation. Victims are both male and female, regardless of age.

2.2. The motives

With this phenomenon the sexual motives in most cases seem to be secondary if not irrelevant. Though, in *Bemba* the Court stipulated that some MLC soldiers considered the victims to be ”war booty,”[85] spoils of war, so to speak. There might be some differences between the commission of rape when it is done with the underlying ideology that victims are

[81] The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2.09.1998, para. 416. Accessible: http://unictr.unmict.org/en/cases/ictr-96-4 (01.03.2018).
[82] Sesay, *supra note* 58, para. 992. Brima, *supra note 55*, para. 591.
[83] A. Smeulers. Female Perpetrators: Ordinary or Extra-ordinary Women? International criminal law review 2015, vol. 15, no. 2, pp. 223-224.
[84] L. Lawry, K. Johnson, J. Asher. Evidence-based documentation of gender-based violence. In Sexual violence as an international crime: Interdisciplinary approaches. Intersentia Ltd 2013, pp. 300-301.
[85] Prosecutor v. Jean-Pierre Bemba Gombo (Trial Judgement), ICC-01/05-01/08, International Criminal Court (ICC), 21.03.2016, para. 567.

”war booty” and when its a tactic of war. The former does carry more of sexual motives, whereas the latter is of tool to humiliate and to destroy etc. However, such stipulation was evident only in one case out of 33 included in the analysis. In most cases, it was about power and control. In some cases the purpose of rape was expressly stated, e.g. the Kunarac himself expressed the view of rape as a mechanism for power and control by stating that raping Muslim women is their way to affirm domination and superiority over the Muslims.[86] Though, in this case it was more about ethnicity than gender, the same logic about asserting superiority follows in other conflicts.

The inescapable reality is that rape in the context of international crimes is (mainly) used as a weapon against civilians to destroy both individuals and communities. When analyzing these cases, some patterns formed out. The main reasons rape was used are the following (in random order): (i) to obtain information (as some rapes were committed during or as part of an interrogation); (ii) to coerce the victims into performing certain acts or refraining from certain acts (e.g. to co-operate, to provide information, forced labor, not to rebel, not to escape etc.); (iii) to punish the victims (e.g. in the *Mucic et al*. Case, where the victim was raped to punish her for the acts of her husband); (iv) to intimidate the victims by creating the atmosphere of fear and powerlessness; (v) to destroy (individuals, communities, will to live or to fight back etc.). In the *Akayesu* case, a mother begged soldiers not to rape her daughters in front of her, rather kill them instead. The man replied that ”the principle was to make them suffer,” thus they raped the girls in an atrocious manner, mocking and taunting them (in front of their mother).[87] It was clear that their goal was to cause as much mental distress and degrading treatment as possible.

When discussing the country-specific patterns some observations can be made. The rapes in Rwanda and Bosnia are certainly rather distinct by motive. The rapes in Bosnia were used to impregnate women so they would carry a baby of enemy’s ethnicity and therefore the rapes did not include the same degree of humiliation as in Rwanda. The rapes of women were more about the prevention of births within a particular ethnic group. In Rwanda, the intention to destroy Tutsis by raping them was linked to a high degree of humiliation and it was more about demoralizing and destroying the collectives of people with the humiliation and stigma around being a victim of rape. However, the male rape in Bosnia was more similar to what was happening in Rwanda since the idea was to weaken and demoralize the male victims. It

[86] Krajišnik, *supra note* 79*,* para. 640.
[87] Akayesu, *supra note* 81*,* para. 430.

had nothing to do with sexual motives since in most cases male detainees were forced to perform sexual acts to other detainess and the perpetrators were not physically involved in male rape.

In Sierra Leone the brutality of rapes were of similar kind to Rwanda since using objects to commit rape or inserting objects to humiliate and cause pain was frequent in both cases. When in Rwanda and Bosnia the motives of sexual violence, rape in particular, was quite clear, in Sierra Leone it is more complex. Sexual violence and specifically the chosen acts of sexual violence were often sporadic and irregular in the sence that there was no consistent pattern unlike with other two examples. Not arguing that sexual violence was not committed in a widespread or systematic way, it was both. But when looking at their specific methods it seems like this was a concerted campaign with the specific goal to terrorize. Thus, it was not about destroying a group, not about getting women pregnant, but specifically terrorizing the whole community by a weapon of sexual violence. Many women were raped in front of their families and then killed. But the family members were often left alive. This is clearly to terrorize, to instil fear among the community. As male and female captives were paired up and forced to have sexual intercourse, this is for humiliation, a game of power and dominance. Brutal gang rapes against both women and men. Inserting objects into genitalia. Capturing civilians and making them sexual slaves. And a distinct feature of Sierra Leone was the amputation of hands, usually by machete. As amputation was often done after rape, the soldiers were trying to cause as much pain and suffering as possible, but still left some victims alive. For they to suffer. So, in Sierra Leone the motives were mainly about intimidation, furthering dominance and control over people, undermining the relationships in community by creating an atmosphere of brutal violence and oppression.

In Kenya, the rapes were targeted against a specific group – perceived Organge Democratioc Movement (ODM) supporters. It was part of post-election violence. Thus, the motives for these rapes were of persecution and punishment of certain civilians. Thereby, there exist some general motives of rape and sexual violence being used as a tool, but every conflict has its own distinctiveness in both the commence of rape (and sexual violence) and the specific motives.

2.3. The context

The court has previously stated that coercive environment can also be taken into account, thus, we can also look at the larger context where these crimes happen. The doctrine of the coercive environment is a vital necessity for the victims since they do not have to prove their own lack of consent and the circumstances that are being taken into account go beyond the individual's psychic space. This means that there have to be circumstances established that create the inherent compulsion. The courts have held that wartime-like circumstances equal to coercive circumstances.[88] In *Akayesu* the Court considered some key factors about the coercive environment: (i) the number of individuals effectively supporting the sexual encounter; (ii) whether the incident immediately followed a situation involving combat; and (iii) the brandishing and/or usage of weaponry.[89] There is no one and clear definition of coercive environment, international courts and tribunals have relied on broad statements of the context, as e.g. that in cases of war crimes or crimes against humanity the circumstances will be almost universally coercive.[90]

When analyzing these cases the context was clearly coercive. "Reliable documentary evidence from several sources estimates that up to five thousand civilians were killed, one hundred had limbs amputated, thousands were raped, thousands were abducted, civilians were used by rebels as human shields and entire neighbourhoods were burnt to the ground, often with civilians inside their houses."[91] In *Sesay* the Court confirmed that sexual violence was spreading in an uncontrollable manner, it was targeted against the civilian population in an atmosphere of violence, oppression and lawlessness. Sexual violence was used as a weapon of terror against the female population. It was carried out in calculated and coordinated manner. The perpetrators employed perverse methods of sexual violence against men and women of all ages.[92] Thus, these rapes happened in a planned manner, in a systematic way. Most of the rapes in Bosnia and Rwanda happened either in a widespread or systematic context or in the context of a genocide.

Beside the larger context, we can also observe a bit closer the atmosphere and setting in which these rapes occurred. In *Krstic* the atmosphere was described by explaining that people

[88] Prosecutor v. Kunarac (Appeals Judgement), IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 12.06.2002, para-s. 129-130.
[89] Akayesu, *supra note* 81, para-s. 688, 692, 693.
[90] Kunarac, *supra note* 49, para. 130.
[91] Brima, *supra note* 55, para. 236.
[92] Sesay, *supra note* 58, para. 1347.

nearby could see the rape, but could do nothing about it because of the military presence. People were too scared. You could hear women screaming or see them being dragged away for rapes. And many were so terrified that they committed suicide by hanging themselves. Throughout the night and early the next morning, stories about the rapes and killings that happened, spread through the camp and the terror escalated.[93] Rape was commonplace throughout the camps during the Balkan war. Detainees were humiliated, threatened, beaten, females were called out by camp guards to be raped, people were forced to perform sexual acts on each other while others were watching, also it was announced that mothers and daughters would be raped publicly.[94] In detention centers, there were extremely poor hygienic conditions, insufficient food supplies and no medical care. And while being held in inhumane living conditions, victims were beaten, raped, killed, and subject to psychological abuse.[95] People fought like animals over bread, licked the walls to get water from condensation, some started to hallucinate or became mentally disturbed due to living conditions. When women tried to seek protection from police, their complaints were ignored. And when they sought refuge from police, they were subject to more violence.[96]

Thereby we can state that the context where rape as a tool for group-coercion happens is almost always different from the context in which sexual violence for sexual gratification happens. One thing is that most of these rapes are committed in war or in the context of genocide, or in a widespread or systematic manner. Thus, the victims often reasonably foresee their chances of getting raped since it is so prevalent. And beside the larger context looking closer at the setting, it is clear that the living conditions in some cases already cause fear and terror. This phenomenon explained is not a crime taking place at the individual's psychic space. It is rather an extenstion of war on the bodies of the victims.

[93] Prosecutor v. Radislav Krstić (Trial Judgement), IT-98-33-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 02.08.2001, para. 46.
[94] Brđanin, *supra note* 78, para-s. 518, 845, 847, 1018.
[95] Krajišnik, *supra note* 79, para. 1150.
[96] Ibid, para. 640.

PART II. INTERNATIONAL JURISPRUDENCE OF RAPE AND SEXUAL VIOLENCE

When rape cases are tried, rape laws are created or applied, communities rethink what rape is. Contextual and empirical presumptions impact what we consider about the forms and prevalence of force in sexual interactions. This influences the public consciousness and judicial determinations of law and fact. International legal developments over the issue of rape and sexual violence are truly significant since they also send a message to the wider audience than just those closely affected, that international community is decisive about certain behavior that we deem unacceptable. The definition of rape circles around force and unwanted sexual intercourse. The emphasis tends to be on either compulsion or lack of agreement. Force abrogates autonomy.[97] The goal of this part of the thesis is to determine the jurisprudence of rape and sexual violence in international criminal law, i.e. how the crime of rape is regulated under international law, how it is prosecuted by international courts and tribunals, and in the last chapter the definition of rape in international criminal law is subject to analysis. The goal is to establish how rape is defined in practice and what are the elements of the crime. While it is clear that with addressing sexual violence the compromise must be made between the rights of the victims and witnesses, the rights of the accused and the needs of the international community as a whole, equity is hard to reach. The data from the previous chapter is an important determinant of whether the nature, motives and the context of rape as a tactic have been taken into account while fighting impunity and offering protection and acknowledgement to all victims.

Chapter 3. The prosecution of rape and sexual violence in international criminal law

It was during the 20th century when international jurisprudence came to recognize rape and other crimes of sexual violence as part of international law. Currently, the crime of rape under the international criminal law is explicitly stated in the law. The ICTY and ICTR Statutes explicitly enlist rape, which means these specifically classify rape as a crime, give it the same gravity as murder, enslavement etc., and relieve the memory of law which held that rape is

[97] C. A. Mackinnon. Defining rape internationally: a comment on Akayesu. Columbia Journal of Transnational Law 2005, vol. 44, no. 940, pp. 940-958.

something of a honor violation. The ICTR Statute Art 3 (1) (g) claims that ICTR shall have the power to prosecute people who have committed a crime against humanity of rape and rape as a war crime. Under ICTY Statute rape is explicitly mentioned in Art 5 which also regards crime against humanity of rape. The Rome Statute mentions the crime of rape under crimes against humanity and war crimes. Rape is not a free-standing crime and can only be prosecuted as an act of war, genocide, or crime against humanity. This means that for rape to be prosecuted at all, firstly the general ingredients proper to each category of crime (e.g. genocide) and then the specific ingredients of the sub-class crime (e.g. rape) must be fulfilled.[98] This means that international law determines which instances of rape count as international crimes, but this also makes a statement about which rape does not count.[99] Simply accepting the crime of rape as part of the international criminal law does not do justice. The lack of coherence and clear consensus on international arena undermines the aim of the acknowledgement. The ICC and the *ad hoc* tribunals have had extensive practice on prosecuting sexual violence, e.g. only in ICTY 48% of the individuals had charges of sexual violence included in their indictments. Current chapter will demonstrate what the practice of international courts and tribunals is stipulating about how rape and sexual violence is prosecuted, what requirements must be fulfilled for that and how the practice has evolved.

3.1. Rape as a crime against humanity

In 1998 in *Furundzija* it was stated that when rape fulfills the threshold criteria it may also amount to a violation of the laws and customs of war, grave breach of the Geneva Convention or an act of genocide.[100] When the crime is committed as part of a widespread or systematic attack directed against any civilian population, rape among other acts enlisted in Art 7 of the Rome Statute, may constitute crimes against humanity. Beside rape, Art 7(g) includes sexual slavery, enforced sterilization, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity as possible means for committing crimes against humanity. The nexus with armed conflict is not required. The physical element must include grave forms of sexual violence, the contextual element means that it must be committed as part of a widespread or systematic attack directed against any civilian population and the *means rea* requires the knowledge of the attack. Rape as a crime against humanity does not

[98] A. Cassese. The statute of the international criminal court: some preliminary reflections. European Journal of International Law 1999, vol. 10, p. 148.
[99] K. C. Richey. Several steps sideways: international legal developments concerning war rape and the human rights of women. Texas Journal of Women and the Law 2007, vol. 17, no. 109, p. 119.
[100] De Than and Shorts, p. 104.

acknowledge an individual violation of the autonomy and integrity of one's body, one's humanity, instead it must be proven to be committed as part of a widespread or systematic attack on a civilian population – that means it is *prima facie* established in a violation of humanity as collective.[101]

The *Akayesu* case defined rape as a crime against humanity when firstly, the rapes were committed (i) as part of a widespread or systematic attack; (ii) on a civilian population; and (iii) on certain catalogued discriminatory ground(s), i.e. national, ethnic, political, racial, or religious grounds.[102] For rape to be considered as widespread it must be large scale, massive, recurrent or continuous action, carried out collectively with considerable serious consequences and is directed against a cluster of victims.[103] For rape to qualified as systematic, it must be "organised and following a regular pattern on the basis of a common policy involving substantial public or private resources." This policy needs not to be formal, but can be some form of a preconceived plan.[104] And lastly, the elements of the rape crime must also be fulfilled. This means that rape is not committed under orders or committed with no discriminatory basis do not fall under this category. Thus, the defence called witnesses who explained that in their opinion the rapists were more about satisfying their own sexual needs, there was no intent to destroy Tutsis but rather to have sexual intercourse with beautiful women, so the defence was trying to play the spontaneous act of desire card which intended to prove that there was no racial or genocidal intent accompanying the rapes.[105] This did not work and both the general and specific elements were proven. Thus, under the international criminal law, it is necessary to prove that rape does not occur occasionally or spontaneously during war by opportunistic people on personal motives but to distinguish those from rape as a crime against humanity.

In SCSL in the case of *Sesay et al.,* where the accused were charged with rape as a crime against humanity, the Chamber cared to explain that since during armed conflicts where rapes occur on a large scale, there are specific circumstances. By that, the Court meant the strong social stigma in certain societies and since the elements of the crime are difficult to satisfy, circumstantial evidence may be used to demonstrate the *actus reus* of the rape.[106] This is also an important development supporting the victims since with rape crime, gathering direct

[101] Richey, p. 111.
[102] Akayesu, *supra note* 81, para. 598.
[103] Ibid, para. 580.
[104] Ibid, para. 580.
[105] Ibid, para. 442.
[106] Sesay, *supra note* 58, para. 149.

evidence is tricky, particularly forensic evidence, i.e. not all victims report rape, register their injuries through a doctor, not all victims are left alive, and the shame and stigmatization is often that strong that seeking justice is more of a punishment for the victim. As stated, the crime of rape as crimes against humanity with its complexity in elements is rather difficult to establish. Rape as a crime against humanity has been tried in all of the courts included in the analysis.[107]

3.1.1. Other inhumane acts

The offence of other inhumane acts is a residual clause that covers a broad range of underlying acts that are not explicitly enumerated as a list. This is material since we cannot predict the future of crimes against humanity in that sense that we could determine with certainty all the possible acts and provide the necessary protection. The more specific we get, the more restrictive we get. As other inhumane acts is a crime against humanity, this means the act must be part of a widespread or systematic attack directed against a civilian population. The conduct must be of similar gravity and seriousness as other prohibited crimes against humanity, the act must be carried out intentionally and the perpetrator must be aware of the factual circumstances and intended to inflict serious bodily or mental harm. Previous charges of other inhumane acts have included e.g. rape, mutilation, sexual violence, forced marriage, forced prostitution and forced nudity.[108]

In *Brima* the Chamber stipulated that since in their statute an exhaustive category of sexual crimes is particularised, thus the offence of other inhumane acts, though residual, must ”logically be restrictively interpreted as applying to only acts of a non-sexual nature amounting to an affront to human dignity.”[109] The jurisprudence of other tribunals has not given that strong support to that other inhumane acts should be confined to acts only of a non-sexual nature. In the *Prosecutor v. Kenyatta*, the Pre-Trial Chamber explained that other inhumane acts is a residual category of crimes in the system of art. 7(1) of the Statute (crimes against humanity), thus if a conduct could be charged as another crime specified under the provision of crimes against humanity, it would be impermissible to charge it as other inhumane acts. According to the Elements of the Crimes and the fundamental principles of

[107] *See*, in SCSL cases Prosecutor v. Brima, Prosecutor v. Sesay; and in ICC the Bemba case.
[108] R. Cryer et al., An introduction to International Criminal Law and Procedure (Second Edition), New York: Cambridge University Press 2010, p. 265-266.
[109] Brima, *supra note* 55, para. 697.

criminal law, this residual category of crimes against humanity must be interpreted in a conservative, not broad manner.[110]

The case of *Prosecutor v. Tadic* was the first case before the ICTY, and the accused was found guilty of other inhumane acts as a crime against humanity and a cruel treatment as a war crime. Though these charges encompassed forcing a male detainee to perform fellatio on another detainee and biting off his testicles.[111] The indictment nor the judgment acknowledged the sexual nature of the offences but identified it as cruel treatment and inhumane act. Yet, this is not the only example. Cases of men being subject to crimes of sexual nature have included genital mutilation, forced oral sex, other forced sexual acts, blunt trauma to genitals, rape etc. Though not all crimes related to e.g. genitals are not necessarily crimes of sexual nature (e.g. blunt force trauma to genitals can be an act of violence without any sexual reference), the question remains – why in some cases of rape the label is of other inhumane acts instead of a label that would reflect the sexual nature of the crime? The reasoning on under which label to prosecute remains unclear since there is no general rule to this.[112] Though in order to ensure the fair application of the label, some guidelines about the reasoning of choosing the 'correct' label would be beneficial, yet the author does not support that there ought to be more restrictions since this could impede justice.

3.2. Rape as a war crime

There does not exist one single document in international law that codifies all war crimes. Lists of war crimes can be found in both international humanitarian law and international criminal law treaties, as well as in international customary law. Art. 8 of the Rome Statute enumerates quite the list of war crimes. War crimes are violations of international humanitarian law that incur individual criminal responsibility under international law. In contrast to genocide and crimes against humanity, war crimes must take place in the context of an armed conflict (either international or non-international). The nexus with the armed conflict is vital to set apart a war crime from a purely domestic offence.[113] The Rome statute categorizes war crimes as: (i) Grave breaches of the 1949 Geneva Conventions, related to

[110] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11, International Criminal Court (ICC), 23.01.2012, para. 269.
[111] Prosecutor v. Dusko Tadic (Trial Opinion and Judgement), IT-94-1-T, International Criminal Tribunal for former Yugoslavia (ICTY), 7.05.1997, para. 206.
[112] C. Grootveld. The ICTY and Sexual Violence as a Crime Against Humanity. Thesis, Tillburg University 2012, p. 93. Accessible: http://arno.uvt.nl/show.cgi?fid=122469 (1.3.2018)
[113] Kunarac, *infra note* 117, para. 58.

international armed conflict; (ii) other serious violations of the laws and customs applicable in international armed conflict; (iii) serious violations of Article 3 common to the four 1949 Geneva Conventions, related to armed conflict not of an international character; (iv) other serious violations of the laws and customs applicable in armed conflict not of an international character. The conflicts in Rwanda and in Bosnia were of such magnitude that these received the attention of the international community, henceforth rape was viewed as a method of warfare and was acknowledged as a war crime by the jurisprudence of the *ad hoc* tribunals in the late 1990s.

Art. 8(2)(a)(ii) and (iii) of the Rome Statute, which are torture or inhumane treatment and wilfully causing great suffering cover rape by implication. Rape and sexual violence are specifically mentioned in Art. 8(2)(b)(xxii) of the Rome Statute.[114] However, as the para. 1 of the Art. 8 states, the Court shall have jurisdiction over war crimes in particular when committed as part of a plan or policy of a large-scale commission of such crimes.[115] This does not mean that these are jurisdictional prerequisites of elements for prosecuting war crimes, but rather the factors that are to be taken into account by the prosecutor when considering whether to open investigations.[116]

The contextual element of war crimes means that the crimes are committed in the context of an international/non-international armed conflict and the conduct was associated with the context. The Appeals Chamber in *Kunarac* explained that war crime is shaped by or dependent upon the environment, though it does not have to be planned or committed in the context of some form of policy.[117] The *mens rea* requires the knowledge of both, the individual prohibited act and the contextual element. The victims can be non-combatants or combatants, wounded and sick members of the armed forces, prisoners of war and civilians, including medical and religious personnel, humanitarian workers and civil defence staff.[118]

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[114] Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.
[115] UN General Assembly, Rome Statute of the International Criminal Court, 17.07.1998, art. 8. Accessible: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (01.03.2018).
[116] K. Dörmann. war crimes under the Rome statute of the International Criminal Court, with a special focus on the negotiations on the elements of crimes. Max Planck Yearbook of United Nations Law 2003, vol. 7, p. 348.
[117] Prosecutor v. Kunarac (Appeals Judgement), IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 12.06.2002, para. 58.
[118] Ibid.

The ICTY established a precedent over the issue of war rape. In *Furundzija*, the Trial Chamber stipulated, after brief historical reminder of the Lieber Code, Hague Convention IV, CCL, Tokyo Tribunal and Nuremberg Tribunal, that these have contributed to the evolution of universally accepted norms of international law prohibiting rape (as well serious sexual assault). The Appeals Chamber reaffirmed that rape has been recognized as a war crime by the international community for a long time.[119] In *Kunarac*, where rape was prosecuted as a violation of the laws or customs of war, it was concluded by the Appeals Chamber that rape meets the requirements[120] and constitutes a recognized war crime under the customary international law. The Chamber supported the conclusion *ipso facto* that rape is universally criminalised in domestic jurisdictions, explicitly prohibited in the IV Geneva Convention and in Additional Protocols I and II, and recognized as a serious offence in the jurisprudence of international bodies e.g. EC and Inter-American Commission of Human Rights.[121] ICC dealt with an interesting precedent of war crimes of rape and sexual slavery of child soldiers in the case of Ntaganda. The Defence argued over the matter that war crimes of rape and sexual slavery cannot apply in case of being committed against the member of the same group as the perpetrator is and that such conclusion by the Trial Chamber is an unjustified extension of the scope of war crimes law. The Appeals Chamber, however, explained that Art. 8(2)(b)(xxii) and (2)(e)(vi) of the Rome Statute does not provide *expressis verbis* that the victims of rape or sexual slavery must be ”protected persons” or ”persons taking no active part in the hostilities.” [122] Thus, there is no general rule in international humanitarian law that categorically excludes members of an armed group from protection against crimes committed by the members of the same armed group.[123] For now, we just have to wait to see the outcome since this is another example of international courts solving the previously unanswered matters related to sexual violence in international criminal law.

[119] Prosecutor v. Anto Furundzija (Appeals Chamber), IT-95-17/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 21. 07.2000, para. 210.
[120] four requirements to trigger Art. 3 of the Statute of the ICTY ”(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature...; (iii) the violation must be ‘serious’, that is to say, it must constitute a breach of a rule protecting important values...; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.” as stated by the Tadic Appeals Chamber, jurisdiction decision, para. 94.
[121] Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgement), IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 12.06.2002, para-s. 194, 195. Accessible: http://www.icty.org/case/kunarac/4 (03.03.2018).
[122] Prosecutor v. Bosco Ntaganda (Appeals Chamber), ICC-01/04-02/06 OA5, International Criminal Court (ICC), 15.06.2017, para. 46.
[123] Ibid, para. 69.

3.2.1 Rape as torture

Both the ICTY and ICTR have also prosecuted rape as a war crime of torture. The prohibition of torture is a *ius cogens* norm. Torture in armed conflict is specifically prohibited by international treaty law,[124] though torture is prohibited both in times of peace and during an armed conflict. Under the international humanitarian law, the definitional elements of torture are not the same as under human rights law, particularly the presence of a state official or any other authority. The Trial Chamber in *Kunarac* explained that the elements of the offence of torture are: "(i) the infliction, by act or omission, of severe pain or suffering, whether physical or mental; (ii) the act or omission must be intentional; (iii) the act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person."[125] The acts that constitute torture are not expressly catalogued, thus it can be any act that causes severe pain or suffering, both physical or mental, and is intentionally inflicted on a person for such purposes as mentioned. Rape can constitute torture. The Trial Chamber in the *Furundzija* concluded that Article 3 of the Statute covers torture and outrages upon personal dignity, including rape. Moreover, torture by means of rape is a particularly grave form of torture.[126] For rape to be categorized as torture, both the elements of rape and the elements of torture must be fulfilled. Rape must be the tool to torture a person (e.g. to inflict severe pain or suffering).

The *ad hoc* tribunals have not determined the absolute degree of pain required, but severe pain or suffering as a consequence of rape was accepted in many cases. In *Akayesu* judgement, the Chamber compared rape and torture and found that both are used for similar purposes, e.g. intimidation, punishment, humiliation etc., and in both matters it is a violation of personal dignity. According to the Court, rape constitutes torture when it is inflicted, instigated by a public official or a person in an official capacity.[127] In *Mucic et al.* the Trial Chamber concluded that rape can be included within the offence of torture if it meets the elements of the offence. In Bosnia, rape as torture was employed to punish and/or intimidate the victims and their communities.[128] The Court agreed that rape gives rise to pain and suffering and not just during the act, but the physical, psychological and social consequences

[124] The 1949 Geneva Conventions, Additional protocols of 1977, The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, and other instruments.
[125] Kunarac, *supra note* 49, para-s. 496-497.
[126] Furundzija, *supra note* 119, para. 295; and, Zelenovic, *supra note* 50, para. 36.
[127] Akayesu, *supra note* 81, para. 597.
[128] Mucic, *supra note,* 56, para. 448.

of rape must be analyzed.[129] The Court further elaborated that the psychological suffering of the victim is often aggravated by the social and cultural conditions and therefore can have acute and long-lasting effect on the victim's life.[130] In *Kvocka*, the Chamber held that after considering the objective severity of the harm inflicted, subjective criteria will also be relevant for assessing the gravity of the harm (e.g. effect of the treatment upon the particular victim, victim's age, gender, state of health).[131] In *Zelenović*, e.g. a group of around 60 Muslim women were arrested and taken to a detention center where these women were interrogated and threatened with sexual assault and murder. Some women were raped during the interrogations, sometimes gang-raped, sometimes more than on one occasion. The victims suffered unspeakable pain, repeated humiliation, intimidation and indignity. The victims were unarmed and defenceless, kept in harsh conditions for long periods of time. Most of the rapes, in that case, qualified for both, rape and torture. One of the most gruesome examples is witness 75, who was raped as a punishment after the interrogation by at least ten soldiers in turn in such a violent way that she lost consciousness.[132]

3.3. Genocidal rape

We cannot place all crimes on a continuum of seriousness or create a hierarchy of gravity, nonetheless, certain crimes are for a reason considered the "crime of crimes."[133] Amongst the most heinous crimes against humanity is the crime of genocide. That is a systematic destruction of a protected group.[134] The 1948 Genocide Convention Art. II defines genocide as an act committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.[135] Five different categories of acts are listed, these are: (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

[129] Mucic, *supra note* 56, para. 486.
[130] Ibid, para. 495.
[131] Prosecutor v. Miroslav Kvovka (Trial Chamber), IT-98-30/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 02.11.2001, para. 143.
[132] Prosecutor v. Dragan Zelenovic (Summary of the Sentencing Judgement for Dragan Zelenovic), IT-96-23/2-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 04.04.2007, para. 143.
[133] Furundzija, *supra note* 119, para. 5.
[134] R. Lemkin. Axis rule in occupied Europe: Laws of occupation, analysis of government, proposals for redress. The Lawbook Exchange Ltd. 2005, p. 79.
[135] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 9 1948, 78 UNTS 277, art 2.

group; (v) forcibly transferring children of the group to another group.[136] According to Art. 1 of the Genocide Convention, genocide can be committed both, during the time of war and peace.[137] One that makes the crime of genocide different from other international crimes, is the *dolus specialis* – the genocidal intent. There must be evidence of the special intent to destroy a protected group in whole or in part.[138]

Though none of the statutes explicitly acknowledge that rape can be a constituent part for committing genocide, rape can be used as a means to commit genocide and the practice of international tribunals support the notion. Genocidal rape is specifically rape under orders, it is rape under control – rape unto death, rape as a massacre, an instrument of destruction, to shatter a community, to eradicate people.[139]

Though sometimes rape was a prelude to murder, sometimes the women were left alive so they would have to live with the humiliation.[140] For example, Pauline Nyiramasuhuko was reported to have ordered the soldiers: ”before you kill the women, you need to rape them.”[141] A witness in the same also stated that Nyiramasuhuko ordered the Interahamwe to kill men and rape women before killing them.[142] Women were meant to suffer before they were killed. After raping and killing the woman, her naked body was often left there for others to see.[143] The strategic aims of leaving the victim of a targeted group alive, knowing that this makes the victim stigmatized, possibly ostracized by the community, possibly forced to exile - it shatters the community. In *Akayesu* the Chamber recognized that genocidal rape was one of the most effective and serious ways of inflicting injury and harm on Tutsi women, and this is what was advancing the destruction of the entire Tutsi group. Rapes resulted in physical and psychological destruction of Tutsi women, their families and the community they were part of.[144] Women were left alive so they would bring humiliation to her family and close ones. Sexual violence was a tactic to bring about the destruction of the spirit, of the will to live, and

[136] Ibid.
[137] Ibid.
[138] C. Tournaye. Genocidal Intent before the ICTY. International and Comparative Law Quarterly 2003, vol. 52, no. 2, p. 450.
[139] S. L. Russell-Brown. Rape as an act of genocide. Betkeley Journal of International Law 2003, vol. 21, no. 2, pp. 350-374.
[140] Ibid.
[141] P. Landesman. A Woman’s Work. New York Times Magazine 2002.
[142] The Prosecutor v. Pauline Nyiramasuhuko (Appeal judgement), ICTR-98-42-A, International Criminal Tribunal for Rwanda (ICTR), 14.09.2016, p. 184, footnote 1189.
[143] Human Rights Watch/Africa. Shattered lives: Sexual violence during Rwandan genocide and its aftermath. Human Rights Watch 1996. Accessible: https://www.hrw.org/reports/1996/Rwanda.htm (01.03.2018).
[144] Akayesu, *supra note* 81, para. 731.

of life itself.[145] It was evident from *Akayesu*, that in Rwanda, rape was seen worse than death since not only the victims begged to rather being killed than raped, but also the mother of the victims begged the same.[146]

Rape was notably cost-effective because you only had to rape once and yet there were so many possibilities of outcomes, some more predictable, some less, but all the consequences served the purpose in one way or another. In the context of genocide with the intent to destroy a group of people in whole or in part rape served a purpose for instance when people, not just individuals, but the community felt shame afterwards. It made people want to leave and never return. Also, AIDS contracted through rape and the estimates of the prevalence are breath-taking. According to Amnesty International only in Rwanda seven out of ten genocide rape survivors are living with HIV/Aids.[147] As the report claims, rape as a tool for genocide is marking people for death.

Akayesu judgement was not significant just for defining rape, but also finding that rape can be an *actus reus* of genocide. Rape was used as a tool of violence against a group with the intent to destroy that group in whole or in part.[148] Beside using rape as means, other elements have to be fulfilled for an act to be considered as a crime under international criminal law, e.g. in case of the crime of genocide, the following elements also must be fulfilled: (i) the crime of rape is a committed as part of a widespread or systematic attack; (ii) on a civilian population; (iii) on exhaustive discriminatory grounds mentioned in ICTR Statute (national, ethnic, political, racial or religious grounds).[149] As an example, Jean-Paul Akayesu was convicted of rape as a crime against humanity, and genocide, for which rape constituted a great part, since rape of Tutsi women was proven to be systematic and the victims were all only and solely Tutsi women. Tutsi women were subjected to sexual violence just on the basis of being Tutsi.[150]

However, the genocide committed in Rwanda and Bosnia are different by nature. Since in Bosnia, the rapes were used to impregnate women so they would carry a baby of enemy's

[145] Akayesu, *supra note* 81, para. 732.
[146] Ibid, para. 430.
[147] Rwanda: "Marked for Death", rape survivors living with HIV/AIDS in Rwanda. Amnesty International 2004. Accessible: https://www.amnesty.org/download/Documents/92000/afr470072004en.pdf (19.03.2018).
[148] Akayesu, *supra note* 81, para-s. 494-499, 505-508, 685-695, 730-734.
[149] Ibid, para. 598.
[150] Ibid, para. 732.

ethnicity, it was more about the prevention of births within a particular ethnic group. Rape worked as a measure to prevent births not just by impregnating the women, but also by the fact that in case of Bosnia we are talking about a patriarchal society, membership of a group is determined by the identity of the father, thus raping and impregnating the woman, the child will not belong to its mother's group. Also, rape victims are viewed as tarnished and unclean, not suitable for marriage nor carrying children anymore. In Rwanda, the rapes were to humiliate and demoralize. This shows that rape can be used as a versatile tool – by committing one act it will serve in many ways to achieve the desired aim.

Chapter 4. The definition of rape and sexual violence in international criminal law

The crime of rape is specifically prohibited by treaty law. The Geneva Conventions of 1949, Additional Protocol I of 1977 and Additional Protocol II of 1977 prohibit rape at any time and in any place whatsoever. Yet, there is no definition of rape in international law. ICTY and ICTR have been the most mettlesome and made the most pivotal advancements regarding rape in conflict. These tribunals were not the first who convicted people for rape since Tokyo Tribunal also convicted perpetrators for committing the crime of rape,[151] but rather the first international tribunals which gave close scrutiny to the issue of the definition of the crime. And since ICC and SCSL have also created their own definitions, the contribution of these institutions is also included in the analysis.

4.1. International Criminal Tribunal for Rwanda

It was in 1998 when the first case in the international arena, where the elements of rape were discussed. It was the case of *Prosecutor v. Akayesu* in ICTR and through a spontaneous testimony of a witness, who stated that her six-year-old daughter had been raped by three Interahamwe. The initial indictment, however, did not include sexual violence charges. So this testimony got Court's attention. The Indictment was amended and additional charges were included. The Court even mentioned that they take note of the public concern for the historical exclusion of rape and other forms of sexual violence from the prosecution of war crime, but certainly now, the matter is in the interest of justice.[152] The Court recognized rape as an extremely grave crime and that rape can be used to commit genocide or crimes against humanity. This acknowledgement was the first crucial step. The Court stipulated that rape is "one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm."[153] The ICTR also agreed that there is no commonly accepted definition of the crime of rape under the international criminal law, therefore one must be created. The Chamber explained that in certain national jurisdictions rape has been defined as non-consensual intercourse, but there have been variations on the act of rape since it may involve

[151] The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2.09.1998, para. 490. Accessible: http://unictr.unmict.org/en/cases/ictr-96-4 (01.03.2018).
[152] Ibid, para-s. 417, 416.
[153] Ibid, para. 731.

insertion of objects and/or the use of bodily orifices.[154]

The Chamber stated that rape is a form of aggression and that it is not possible to derive the definition of the essential elements of the crime of rape just by the mechanical description of objects and body parts. It explained on the example of The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) that it is the conceptual framework of state-sanctioned violence that must be centred, not cataloguing the specific acts. [155] Thus, the Trial Chamber used an analogy from torture and explained that rape should be defined by its purpose to the perpetrator in context, aligned with its specific nature as being sexual. This, however, is understandable due to the fact that the mechanical definition might not cover all possible conducts that it ought. In particular, since rape is not mainly used for sexual purposes but rather for degradation, intimidation, humiliation, punishment, destruction etc. The precise acts to meet the ends can vary to a great extent.

As the Chamber did not reference or take an example from case law or instruments of international law (it is possible that there was no epitome to take example from), the Chamber created a *sui generis* definition for rape in international law. The Chamber came up with a rather broad definition of rape: ”a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”[156] Sexual violence in this sense, which includes rape, is any act of sexual nature, not just coercive vaginal intercourse, but this can mean also any type of sexual penetration, also oral and anal, and the insertion of a finger or tongue into the vagina. And not just perpetrator using his own body parts, but also using objects for penetration or forcing the victims to engage in a physical invasion of a sexual nature. Physical invasion of a sexual nature does not necessitate that it has to be the perpetrator who personally executes the physical invasion by e.g. his own penis or by using objects. That means that when the victim is forced to e.g. perform fellatio on another person (who can also be a victim), this would be rape under this definition.

The Chamber also dealt with sexual violence, which is a broader category since sexual violence is not limited to a physical invasion of the human body. Thus, it may include acts without penetration or physical contact (e.g. forced nudity).[157] The Chamber brought an

[154] Ibid, para. 596.
[155] Ibid, para. 597.
[156] Akayesu, *supra note* 151, para. 598.
[157] Ibid, para-s. 686, 688 - Such act was described by Witness KK, who was raped by using a piece of wood, and this, according to the Court’s views, constituted rape.

example by asserting the act described by one witness, when the Interahamwes forced a piece of wood into the sexual organs of a woman, constituted rape in the Tribunal's view.[158] The distinction between rape and other forms of sexual violence is that rape is a physical invasion of a sexual nature compared to any act of a sexual nature, which is committed under circumstances that are coercive to the victim.[159] The Tribunal was keen to explain why the mechanical description of objects and body parts cannot be used. The Tribunal elaborated the issue by stating that witnesses were unable or reluctant to disclose graphic anatomical details of sexual violence they endured and in such intimate matters cultural sensitivity should be involved.[160] An major feature of this definition is gender neutrality, there is no reference that the perpetrator must be a man and the victim a woman. Particularly when considering that in 2011 Pauline Nyiramasuhuko was found guilty of genocidal rape. Also, this allows prosecution for an act where men are also victims.

Also, since it is difficult to prove the coercion, the Court further elaborated that the coercion does not have to be a physical force, but may also appear as threats, extortion, intimidation and other forms of duress.[161] The Court also acknowledged that coercion may be inherent in certain circumstances, such as armed conflict or the military presence. This means that when the conditions are of overwhelming force present in certain contexts[162] that are to be used as a campaign against the victims, scrutiny over individual consent is unreasonable.[163] This wide interpretation takes into account the people, but specifically women already in a vulnerable situation.[164] The Trial Chamber did not address the lack of consent as an element, but also *mens rea* was never an issue. Not even in the Appeals Chamber.[165] That consent was left out from the elements of the rape crime is both rational and practical, particularly when considering rape as an international crime. In domestic jurisdictions it is comprehensible that consent is the focal element to distinguish between legal sexual contact and punishable sexual violence.[166] Yet, rape and sexual violence that falls under the jurisdiction of the *ad hoc* tribunals is committed in circumstances which amount to international crimes (e.g. genocide), the inequality of power positions and the coercive environment is inherent in such

[158] Ibid.
[159] Ibid, para. 688.
[160] Ibid, para. 687
[161] Ibid, para. 688.
[162] e.g. widespread or systematic attack against any civilian population.
[163] MacKinnon, *supra note* 97, p. 943.
[164] Akayesu, *supra note* 151, para. 688.
[165] *See*, Prosecutor v. Akayesu (Appeals Chamber), ICTR-96-4-A, International Criminal Tribunal for Rwanda (ICTR), 1.06.2001. Accessible: http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-4/appeals-chamber-judgements/en/010601.pdf (1.03.2018).
[166] N. Pillay. Equal Justice for Women. Arizona Law Review 2008, no. 50, pp. 657, 666-667.

circumstances.

If we consider different possible acts discussed during the previous chapter, this definition is broad enough to cover all the possibilities listed – vaginal, anal or oral rape by a penis or other body part(s) or objects. Though this does not mention anything about the perpetrator or his physical involvement in the physical invasion, this definition could cover also the acts of male rape that were discussed in the previous chapter where e.g. two brothers were forced to perform a fellatio to each other.

In the same year, ICTY came up with their own definition of rape in *Furundzija* case (discussed in next chapter). This definition was different from what the Trial Chamber in *Akayesu* came up with. In 2000 in the *Prosecutor v. Musema*, ICTR discussed the definition of rape provided by ICTR and ICTY. The ICTR did explain that the essence of rape is not in the description of body parts or objects involved, rather in the aggression of a sexual nature under coercive circumstances.[167] The Trial Chamber preferred the conceptual definition of rape over mechanical definition since on their view the conceptual definition accommodates better evolving norms of criminal justice. Thus, as the Chamber referenced to *Furundzija* definition, they decided to adopt the definition of rape and sexual violence set forth in the *Akayesu* judgement.[168] The trend continued in 2003 when in *Niyitegeka* the Court used the definition set forth in *Akayesu*.[169] By that time, ICTY had already set forth their second (controversial) definition in the *Kunarac* case, which had the non-consent as an element of rape (discussed in the next chapter). And as these definitions were not endorsed in ICTR before, in 2003 came along a quite controversial judgement in ICTR.

In the *Semanza* case, the Trial Chamber referenced to *Akayesu*'s definition as broad and *Kunarac's* definition[170] as narrower. The Chamber noted that the mechanical style of defining was previously rejected by the Tribunal, but still managed to somehow find the comparative analysis in *Kunarac* to be persuasive. Thus, the Chamber adopted the definition of rape created by the ICTY in the *Kunarac's* decision and further explained that the *mens rea* of rape

[167] Musema, *supra note* 54, para. 226.
[168] Ibid, para-s. 220-229.
[169] Prosecutor v. Eliézer Niyitegeka (Trial judgement and sentence), ICTR-96-14-T, International Criminal Tribunal for Rwanda (ICTR), 16.5.2003, para. 456.
[170] As stated in Semanza, para. 344 - the ICTY's definition as "the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of theperpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator. Consent for this puporse must be given voluntarily and freely and is assessed within the context of the surrounding circumstances.

is that the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim.[171] The Chamber did give this slight alleviation to proving consent by purporting that consent for the sexual act must be given voluntarily and freely and is assessed within the context of the surrounding circumstances.[172] Though almost like offered an alleviation with this last part of the previous sentence that surrounding circumstances may also be taken into account, this still does not do justice since many acts that fall under the *Akayesu* definition of rape, become burdensome or even impossible to prove under the *Semanza* definition.[173] It is rather hard to understand for what this controversial definition was used since the factual circumstances of rapes happening during this case did not give any indication of that these victims who were sexually violated before they were killed, might have consented to neither of the aforementioned acts. Somehow the court neglected these victims. The Court also neglected the larger context in which these crimes take place. The Court thought it is more noteworthy to focus on mechanical body parts and interactions between body parts. The Court also rethought the rape crime to as it is something happening on the individual level, they neglected the nexus with the war situation. The non-consent element makes this case to look even irrational since no other crime against humanity, when other standards have been met, has required the act to be proven nonconsensual. The Court made something that was used to commit a crime against humanity to be like sex – you either consent or you do not, depending on your wishes.[174] Thus, the Chamber disregarded the fact that these rapes occur as mass atrocities, outlining these as more of individual sexual interactions giving the possibility of even considering such acts as potentially consensual. As a consolation prize the Court stated that now when the definition is changed, and if other acts of sexual violence that do not satisfy the narrow definition, the Court may still prosecute these sexual acts as other crimes against humanity such as torture, persecution, enslavement, or other inhumane acts.[175]

In 2003 another case was settled in ICTR – *Prosecutor v. Kajelijeli.* The Trial Chamber once again reviewed the jurisprudence of rape. The Chamber referenced to *Akayesu* and its conceptual definition but decided not to use it. Then the Chamber made reference to both *Furundzija* and *Kunarac* definitions and somehow decided that regarding the evolution of the law in this matter and the endorsement of the mechanical definition with the non-consent as

[171] Prosecutor v. Laurent Semanza (Trial Judgement and Sentence), ICTR-97-20-T, International Criminal Tribunal for Rwanda (ICTR), 15.5.2003, para-s. 345-346.
[172] Ibid, para. 344.
[173] Mackinnon, *supra note* 97, p. 952.
[174] Mackinnon, *supra note* 97, p. 952.
[175] Semanza, *supra note* 171, para. 345.

an element, this approach was more persuasive and therefore the Chamber adopted *Kunarac's* definition of rape. This means that the actus reus of rape is constituted by: "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; where such sexual penetration occurs without the consent of the victim." *Mens rea* of rape as a crime against humanity was stated to be with the intention to effect the sexual penetration, with the knowledge that it was being done without the victim's consent.[176] The Chamber followed the footsteps of *Semanza* Trial Chamber by stating that when other acts of sexual violence fall outside of this definition, the Court may prosecute such acts as other inhumane acts.[177] Nothing in the circumstances or the facts of this case indicated to such need as to replace the working *Akayesu* definition with this narrow definition. This, however, decontextualizes rape as a tactic by ignoring the concept of these crimes and making these more of like individual sexual interaction matters when including the consent as an element. Consent definition emphasizes on the individual space instead of the surrounding context. This may have detrimental effect on the way we view rape as a tactic.

The Chamber was convinced that rapes and sexual assaults were committed by *Interahamwe*, but the majority could not conclude that the Accused was physically present during the commission of the rapes and sexual assaults or that beyond reasonable doubt the Accused specifically instructed the commission of rape. The accused ordered to kill, but according to the Majority, the commission of rape was a collateral crime.[178] Judge Arlette Ramaroson did not agree with the Majority's rationale for dismissing the charge of rape, thus she wrote in a dissenting opinion that a separate sentence for *Kajelijeli's* criminal responsibility for rape should still be envisaged. She further explained that the evidence supported the allegations and the decision of dismissal lacked both in fact and in law.[179] She felt that the *ratio decidendi* for the majority decision was full of inconsistencies and explained on false grounds.[180] The majority analyzed the killings at the same time as rape, since many of these happened basically the same time. The same witnesses testified on both acts, rapes and killings. But somehow the majority did not find the testimonial evidence of rape enough. Moreso, the

[176] Prosecutor v. Juvénal Kajelijeli (Trial judgement and sentence), ICTR-98-44A-T, International Criminal Tribunal for Rwanda (ICTR), 1.12.2003, para-s. 910-915.
[177] Ibid, para. 916.
[178] Ibid, para-s. 680-683.
[179] Prosecutor v. Juvénal Kajelijeli (Dissenting opinion of Judge Arlette Ramaroson), ICTR-98-44A-T, International Criminal Tribunal for Rwanda (ICTR), 1.12.2003, para. 2.
[180] Ibid, para. 4.

Court challenged the credibility of these testimonies and were somehow not able to conclude superior accountability for rapes, but with the same testimonies, the Chamber was able to conclude for the killings. Judge Ramaroson agreed that the evidence does not sufficiently prove that Kajelijeli planned the rapes, there was sufficient evidence to determine that Kajelijeli did instigate, order, aid and abet the commission of rape(s). Thus, instead of superior responsibility the Judge saw more fit to apply Kajelijeli's responsibility as an accomplice to the rapes committed by *Interahamwe* since the Accused gave orders to rape, instigated the commission of rape and aided and abetted the perpetration by providing material aid and moral support to his *Interahmawe*.[181] The dissent was well reasoned and therefore it would have been intriguing to see the Appeals Chamber's stand on the matter. However, the Prosecutor missed the deadline to appeal rape charges.

In 2004, in *Kamuhanda* the Chamber followed the exact same path as the previous two cases, by endorsing the *Kunarac's* definition and consoling the impact with the possibility of the other inhumane acts label instead of rape when necessary. It was evident that somehow the mechanical definition is seen as a more detailed definition.[182] And the Chamber tends to draw equal signs between detailed and legally more accurate. This is a bit flawed presumption since detailed as with stronger accuracy and detailed as if having more details (by quantity) does not equal the same meaning. However, the Trial Chamber in *Kamuhanda* decided to slide with the same fallacy by not analysing the concept of these crimes and on which part the previous jurisprudence adequately addresses the issue, but rather just compared two definitions on paper, separating the law from the facts, and choosing the one more detailed but not more accurately addressing the concept of rape.[183]

In 2005 ICTR went back to the old route with *Muhimana,* where the the *Akayesu* definition of rape was endorsed.[184] The Chamber accurately analyzed prior relevant judgements. As was elaborated that though rape has been historically defined in many national jurisdictions as "non-consensual sexual intercourse," the Trial Chamber in *Akayesu* used factual findings from their case (thrusting a piece of wood into sexual organs) to state that this definition is an inadequate response to rape prosecuted under their jurisdiction.[185] As rape is not always committed in the form of an intercourse, but can be also committed with objects, this path

[181] Ibid, para-s. 74, 75, 92.
[182] Prosecutor v. Jean de dieu Kamuhanda (Trial Judgement), ICTR-95-54A-T, International Criminal Tribunal for Rwanda (ICTR), 22.01.2004, para-s. 705-710.
[183] Ibid.
[184] Muhimana, *supra note* 53, para. 535.
[185] Ibid, para. 538.

would have been too narrow. The Chamber also noted that *Akayesu* definition has not been adopted *per se* in all subsequent jurisprudence of the *ad hoc* Tribunals by referencing to *Semanza, Kajelijeli,* and *Kamuhanda,* which all ignored the conceptual definition and used mechanical instead. Still, the Chamber was of opinion that the circumstances in most cases charged under the international criminal law, such as genocide, crimes against humanity, or war crimes, will be almost universally coercive, thus vitiating true consent.[186] This is a victory in a sense since this approach clearly reckons the nature, motives and context in which these crimes occur.

Though in *Gacumbitsi* case the Chamber did not deal with creating a new definition, the Appeals Chamber in 2006 dealt with the main contradiction of previous jurisprudence on the matter – the consent element. The crime of rape, when it is within the Tribunal's jurisdiction, occurs in the context of such circumstances in which the genuine consent is impossible. Therefore, the Prosecution does not have to bear the burden of proving non-consent and knowledge.[187] The Chamber also elaborated on the practical matter of how may non-consent be proven. The non-consent can beyond a reasonable doubt be proven by proving the existence of coercive circumstances under which the meaningful consent is impossible. That does not mean evidence of force *per se*, but also the background circumstances that can negate the genuine consent, such as ongoing genocide campaign or the detention of victims.[188] Though, the Appeals Chamber sought to provide practical guidelines to address prosecutorial difficulties on proving coercion, force or consent, the Chamber also accepted the lack of consent and knowledge as elements of the crime of rape. This was an unfortunate culmination of the legacy of the ICTR. Albeit, the *Akayesu* definition continues to be used in practice.

4.2. International Criminal Tribunal for Yugoslavia

The ICTY elaborated the same issue also in 1998, in the case of the *Prosecutor v. Furundzija*, where Anto Furundzija was found guilty of torture and outrages upon personal dignity including rape, as violations of the laws or customs of war.[189] The Trial Chamber

[186] Ibid, para. 546.
[187] Prosecutor v. Sylvestre Gacumbitsi (Appeals Judgement), ICTR-2001-64-A, International Criminal Tribunal for Rwanda (ICTR, 7.7.2006, para. 147-153.
[188] Ibid, para. 155.
[189] Prosecutor v. Anto Furundzija (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, para-s. 274-275.

acknowledged rape as the most serious manifestation of sexual assault. Regarding the definition of the crime of rape, ICTY took a different view than ICTR. While ICTY did reference to *Akayesu* decision and their non-mechanical definition, ICTY stated that the Chamber must seek the definition of the basis of "*nullum crimen sine lege stricta*," thus was decided to create a new definition. And for arriving at an accurate definition of rape, it was seen necessary to look at the principles of the major legal systems, also national laws.[190] The Trial Chamber analyzed the laws of several jurisdictions and stipulated that according to the Penal Codes of some states[191] the *actus reus* of rape consists of penetration (however slight) of the female sexual organ by the male sexual organ. According to other states,[192] rape can be committed against a victim of either sex. The Trial Chamber concluded that from the survey of national legislation, though there were discrepancies, rape is in most legal systems considered as a forcible sexual penetration of the human body by the penis or forcible insertion of any other object into the vagina or anus.[193] Then the Chamber came up with their own definition.

The Trial Chamber stated that the following elements may be accepted as objective elements of rape:

- "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

(b) 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."[194]

ICTY did take a step further with the definition while adding to objective elements the possibility of the threat of force against a third person. While explicitly adding this element, it provides more clarity and certainty. The Court made a reference to an article in the Penal Code of Bosnia and Herzegovina, which criminalized coercing a female into sexual intercourse by force or threat to endanger the life or body of the victim or someone close to her. This takes into consideration situations where physical violence is not used, but instead, e.g. the perpetrator threatens to kill the child of the victim. Situations like these would then

[190] Ibid, para. 177.
[191] Chile, China, Germany, Japan and Zambia.
[192] Austria, France, Italy, Argentina.
[193] Furundzija, *supra note* 189, para. 181.
[194] Ibid, para. 185.

fulfill the coercion element.[195]

However, the problem with this definition is that it is gender-biased. According to this definition, one may be prosecuted only if he is male. Female can be prosecuted only if she used an object, but not in case of forced oral sex, because forced oral sex is punishable only when the perpetrator has a penis. Then, certain sexual conducts which would have constituted rape according to *Akayesu* definition, are not included e.g. penetrating vagina using a finger. Because according to the definition, it is rape only when vagina or anus is penetrated by the penis (of the perpetrator) or an object. Other body parts are not included though. The problem here is if we consider the forced fellatio cases, the situation where one male detainee is forced to perform oral sex on another male detainee. Forcing one person to rape another is a problem under this definition, unlike the ICC in this case, where the definition "conduct resulting in penetration" which allows a broad interpretation while not stating that the perpetrator him-/herself must invade the body. The ICC definition here would allow to fall those rapes also under the rape definition where a third person is used to commit rape. This is essential since there have been many cases in practice where the perpetrators force another person to commit the rape. With this definition, the practice is what will determine.

In *Prosecutor v. Brđanin* there is a reference to fellatio, but no charges on the matter.[196] In *Todorovic* six men were forced to perform fellatio on each other on three different occasions,[197] and as this did not fulfill rape requirements under the working definition, it was prosecuted as sexual assault.[198] In *Mucic* the forced fellatio was also not treated as rape, but inhumane treatment and cruel treatment.[199] Though it was noted that forced fellatio could constitute rape, the Chamber still decided to find that this was an attack against human dignity.[200] In *Češić* plea agreement, the Chamber explained that these situations ought to be covered also where the accused caused the victim(s) to be sexually penetrated without their consent, thus it does not have to be the penis of the perpetrator but forced fellatio cases should also constitute rape.[201] Yet this attitude was not evident in subsequent cases.

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[195] Furundzija, *supra note* 189, para. 180.
[196] Brđanin, *supra note* 78, para. 824.
[197] Prosecutor v. Stevan Todorovic (Trial Chamber sentencing judgement), IT-95-9/1-S, International Criminal Tribunal for former Yugoslavia (ICTY), 31.7.2001, para. 9.
[198] Prosecutor v. Stevan Todorovic (Indictment), IT-95-9-I, International Criminal Tribunal for former Yugoslavia (ICTY), 29.06.1995, para. 31.
[199] Mucic, *supra note* 56, para. 1060.
[200] Ibid, para. 1066.
[201] Prosecutor v. Ranko Cesic (Plea Agreement), IT-95-10/1-PT, International Criminal Tribunal for former Yugoslavia (ICTY), 28.10.2003, para 5.

Though it is more than welcome that the Trial Chamber wished to arrive at accuracy in definition, the Chamber failed to realize a fundamentally flawed premise that was present. While the Chamber sought for common denominators, as was stated, from national rape laws, an example was taken from jurisdictions, which criminalize a different phenomenon – a crime mainly committed for sexual motives in a greatly different context. None of these examples had dealt with the crime of rape in a context where it is used as a tool of group coercion.[202] The domestic rape crime is not the correct paradigm from which to interpret a definition for rape as an international crime. If at all, it would have been more appropriate to take an example of those national laws that criminalize sexual acts between people in unequal power position e.g. prisoners and guards, teachers and students. Even just understanding the ideology behind using rape as a group-coercion would have had a more appropriate outcome on the definition. Tactical rape is rarely a singular, isolated act that influences only the victim. The main idea of using rape as a tool is the broader ideological dynamic, and social and community consequences. As it is meant to harm the group or a community, by intimidating other people in the group, by fragmenting or destroying the community ties (with fear, shame, stigmatization and ostracism), enforcing subordination of the group members by making them know who has the power and control. It is for social control, coercion and intimidation to terrorize compliance of the group, not the specific individual. As was explained in Chapter II, the context of tactical rape in practice is already taking place in a coercive environment which negates the possibility to consent, though this is not a particular problem of this definition. Taking an example of national rape laws ignores the specifics of rape as a tactic. And as national rape laws are created, each will, in its own way, also reflect the broader historical and cultural implication, societal standpoints, and the problems in practice. But as we are talking about a very different phenomenon, many national laws often include *actus reus* similar to this definition, a mechanical description. And this might be reasonable in national law if an act is committed mainly for sexual purposes, the mechanical definition works to distinguish consensual sexual activity from an illegal sexual activity. But with group-coercion, the perpetrators will choose means that will fit the purpose. The specific acts can vary greatly as was seen in Chapter II. Forcing other people to commit rape (e.g. forced fellatio cases in ICTY) is a way to humiliate the victims, other members of the group and destroying or at least weakening the community ties. By taking into account the group-coercion, the definition would not include gender-bias since, in order to coerce a group, the perpetrator need not be a male, need not be committing rape by his penis and the victim would not also be assumed to be a female. If the purpose is to e.g. humiliate or destroy, then male rape is an effective tool.

[202] MacKinnon, *supra note* 97, para. 946.

Furundzija Trial Chamber elaborated on the forced oral penetration issue by explaining that according to the survey data, some States treated forced oral penetration as sexual assault and some states categorized it as rape. Since there was no uniformity on the matter, the Chamber held that forced penetration of the mouth by the male sexual organ is one of the most humiliating and degrading attacks upon human dignity. The protection of dignity as a value here is treated with the uttermost significance. And since forcible oral sex can be just as humiliating and traumatic experience for the victim as anal or vaginal penetration, and taking into account the fundamental principle of protecting human dignity, this principle helped to favour widening the definition of rape so as it covers forced oral sex.[203] But in practice, there still seems to be a gender-bias, since forced fellatio when the victim is female is seen more as a crime of rape and as a sexual crime, but in male rape, it is more about dignity and inhumane nature of the acts.

However, the second objective element means that an act has to be committed under circumstances which are coercive or by using force, hence force or coercion were now accepted as elements of the rape crime. The element of using force was taken from the notion that all jurisdictions[204] surveyed by the Trial Chamber required an element of force, coercion, threat, or acting without the consent of the victim. The force was given a broad interpretation, thus it included the situation where the victim is helpless or unable to give consent (e.g. due to age or mental incapacity).[205]

The Chamber clarified that international criminal rules punish both rape and any serious sexual assault falling short of actual penetration. This prohibition ought to include all serious abuses of a sexual nature upon the physical and moral integrity of a person by a coercion, threat of force or intimidation in such way that is humiliating and degrading for the victim's dignity. And as pointed out by the Chamber, both rape and sexual assault are criminalised acts under international law, and the distinction here is material for the sentencing purposes, not an issue of investigating or prosecuting.[206]

In 2001, ICTY continued with the same issue, the crime of rape, in the case of *Prosecutor v. Kunarac, Kovac & Vokovic.* This was the first conviction by the ICTY considering rape as a

[203] Furundzija, *supra note* 189, para-s. 182, 183, 184.
[204] Chile, Japan, German, Zambia, China, Austria, France, Italy, Argentina, Pakistani, India, Sourth Africa, Uganda, New South Wales, USA, Netherlands, England, Wales, Bosnia and Herzegovina.
[205] Furundzija, *supra note* 189, para-s. 179, 180.
[206] Ibid, para. 186.

crime against humanity. It is important to note that contrary to war crimes in cases of crimes against humanity the nexus to armed conflict is not required. The trial against those three accused has been also called the ”rape camp case since the sexual violence against the victims was a systematic campaign and the victims were held in the detention center (and in other places also) in captivity, and they were raped on regular basis.”[207] The Trial Chamber once again analyzed the definition of the crime of rape. It reviewed Tribunal’s jurisprudence and domestic laws of multiple jurisdictions and concluded another dimension of the definition. The Chamber agreed that the elements which were set out in the *Furundzija* case, constitute *actus reus* of the crime of rape in international criminal law. Still, as explained, the facts in *Furundzija* were narrower and the definition did not reflect the appropriate scope of the crime under international law.[208] The new dimension, however, was about clarifying the second element of *actus reus*, i.e. the threat, force or coercion. The Trial Chamber elaborated that that second element is more narrowly stated that is required by international law. ”The Furundžija definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.”[209] The Chamber tried to look at the common denominators and came to the conclusion that rape is a sexual penetration that happens without the consent of the victim and therefore stipulated that it is not only force, the threat of force, and coercion but also the absence of consent or voluntary participation of the victim.[210]

Further, the Trial Chamber explained that on basis of the relevant law of different jurisdictions suveyed during the Furundzija case which classify relevant sexual acts as the crime of rape can be divided into three broad categories:
”(i) the sexual activity is accompanied by force or threat of force to the victim or a third party; (ii) the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or (iii) the sexual activity occurs without the consent of the victim.”[211]

The Court continued by stating that it is not just force or threat of force, but there can be certain other specified circumstances. These include the situations where the victim is in a

[207] Judgement of Trial Chamber II in the Kunarac, Kovač and Vuković Case, Press Release from 22.02.2001. International Criminal Tribunal for Former Yugoslavia (ICTY). Accessible: http://www.icty.org/case/kunarac/4 (03.03.2018).
[208] Kunarac, *supra note* 49, para. 459.
[209] Ibid, para. 438.
[210] Ibid, para. 440.
[211] Ibid, para. 442.

state of being unable to resist, was particularly vulnerable or incapable of resisting because of mental or physical incapability, or when the victim was influenced by surprise or misrepresentation.[212] By exemplifying current notion the Court references to national laws of many countries', including Estonian Criminal Code according to which rape was defined as sexual intercourse "by violence or threat of violence or by taking advantage of the helpless situation of the victim."[213] These examples included references to mental illnesses, being drugged or unconscious, age (being a minor), psychological pressure, physical illness etc. The emphasis was put on the meaning of such provision which claims that in some cases the absence of force or threat of force there may be certain other reasons which cause the victim to be in a state of incapacity of giving an informed or reasoned refusal to the act.[214] Thus, the absence of victim's free and genuine consent to sexual penetration can constitute rape.

The Court stated that in international law the *actus reus* of the crime of rape is constituted by: "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) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration and the knowledge that it occurs without the consent of the victim."[215]

The first two sections (a and b) are literal excerpts from the *Furundzija* case. But in this case, regarding the consent element, the Chamber adopted a new approach, which used "lack of consent" instead of "coercion or force or threat of force." This alteration to the definition gives solid protection to the victims and ends the perpetrators' defence for evading liability while arguing e.g. that physical force was not used. Although force provides clear evidence of lack of consent, the non-consent does not always equal to force. Since certain circumstances in which the crime of rape is taking place, in some cases negate the possibility of meaningful consent. So the underlying rationale here is that the narrow focus on force would permit perpetrators to evade liability. The Trial Chamber established that the definition has to take into account the situation of taking advantage of coercive circumstances of vulnerable people,

[212] Ibid, para. 446.
[213] Ibid, para. 448.
[214] Ibid, para-s. 446-451.
[215] Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgement), IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 12.06.2002, para. 129. Accessible: http://www.icty.org/case/kunarac/4 (03.03.2018).

where there is no need to rely on physical force.[216] And lastly, as seen by the aforestated conclusions of the Trial Chamber, there are two *mens rea* requirements – the intent covering the sexual act itself and also proof of the knowledge that the sexual act occurred without the consent of the victim. Though no supporting argument for that was given by the Trial Chamber, it is clear that the reasonable mistake of fact defence to negate the required *mens rea* of the crime would be possible for the accused ones. The appeals panel rejected the appellants' arguments that the definition is inaccurate and explained that a narrow focus on force or threat of force would be inappropriate and allow for perpetrators to evade liability.[217]

The *mens rea* requirement could be problematic for both, the victims for acknowledgement and the prosecution to prove. The issue with the *mens rea* requirement was immediately put to test also. The accused, Dragoljub Kunarac, argued that he thought he had consensual sexual relations with the victim who genuinely consented to this act. In this case, the victim was not threatened by the accused, but by another soldier who threatened to kill the victims if she did not satisfy the desires of his commander, Dragoljub Kunarac. The accused argued that he had no knowledge of this.[218] Though, this was a close one since under this definition it might even have worked. The Trial Chamber rejected the statements by the accused and determined that the accused possessed knowledge of the surrounding circumstances (the general context of war, other women were being raped there, that victim was in captivity and feared for her life) that illustrated the lack of consent on victim's part. The Chamber accepted that the accused was aware that the victim was raped by other soldiers before him and was in the full knowledge that the victim did not freely consent to sexual intercourse with him.[219] The second part of the *mens rea* gives the perpetrators some room to evade justice (see also Chapter 4.4. about the same issue in Sesay).

The Trial Chamber analyzed the basic principle underlying the crime of rape in national jurisdictions and determined that it was the serious violation of sexual autonomy which is still surrounded with the consent issue since the violation happens when the person subject to the act has not freely agreed to it or is not a voluntary participant otherwise.[220] Thus, the ICTY Trial Chamber once again inspected the jurisprudence and domestic laws of multiple jurisdictions while making the flawed premise even stronger to navigate to course in the

[216] Ibid, para.133.
[217] Ibid, para. 129.
[218] Kunarac, *supra note* 49, para-s. 644, 645, 646
[219] Ibid, para. 647.
[220] Ibid, para. 457.

nonconsent direction. As stated, none of these examples had dealt with the crime of rape in a context where it is used as a tool of group coercion.[221] This played little role in the outcome. And the proof of force shifted into the proof of consent. This is retrogression instead of development.

On appeal, the appellant challenged the definition of rape by stating that in order to demonstrate non-consent there has to be continuous and genuine resistance by the victim(s) throughout the duration of the sexual intercourse, otherwise it can be interpreted as the victim consented to the sexual intercourse.[222] The Appeals Chamber agreed with the Trial Chamber's definition of rape, however, made note of two points. Firstly the Chamber rejected the Appellants "resistance" requirement since it was not supported by customary law and for the argument that without continuous resistance it is not possible for the perpetrator to understand that his attention is unwanted is wrong on the law and absurd on the facts.[223] The author agrees as for one reason why it does not make sense is that when there is no resistance present this does not indicate that the person freely and genuinely consented to the act. Also, resistance might prompt a more violent response and to demand proof of resistance would put an unjust burden on victim's shoulder.[224]

Secondly, the *actus reus* changed to a great amount with this case. The appeals panel explained that this case does not reject the definition created during the *Furundzija* case, but rather wanted and tried to explain the relationship between force and consent. However, it is not possible to agree with the notion since there is a significant change in the elements of the rape between two cases. Force and consent are distinct elements since the former is about the actions of the perpetrator, while with the latter it is describing the state of the victim.[225] Though with caution, Appeals Chamber did not depart from the definition, it did try to soften the non-consent part by giving reason into why in certain coercive circumstances true consent will not be possible. The Chamber stated that in cases of war crimes or crimes against humanity the circumstances will be almost universally coercive and negate the possibility of true consent.[226] And since these rapes happened in detention centers, their line of reasoning

[221] MacKinnon, *supra note* 97, para. 946.
[222] Kunarac, *supra note* 215, para. 125.
[223] Ibid, para. 128.
[224] S. Schwartz. An argument for the elimination of the resistance requirement from the definition of forcible rape. Loyola of Los Angeles Law Review 1983, vol. 16, p. 580.
[225] Amnesty International. Rape and sexual violence: Human rights law and standards in the international criminal court. Amnesty International Publications 2011, p. 6.
[226] Kunarac *supra note* 215, para. 130.

regarding the consent issue again was supported by relying on the state and national laws. However, this time, the author must state, that they did not go wrong with that. Though the Appeals Chamber themselves stipulate, that they support their line of reasoning with laws that are designed for circumstances far removed from war context, it is reasonable and logical to state sexual offences committed against people under detention negates their possibility to truly consent. The law reasonably recognized the unequal positions of power and the coerciveness that is inherent in the situation. It is not clear why the Court did not depart from the non-consent element in the decision since they did argue against it but still left it there to exist. They did highlight the need to presume non-consent in cases like these, with similar circumstances.[227]

It is as win regarding this case, but still a zero-sum game from the part that the Appeals Chamber did not use their power to end the non-consent issue which clearly is a shift to retrogression, particularly considering the already vulnerable position rape victims are in. While considering the data from the II Chapter of this thesis, the line of reasoning Appeals Chamber used to support the reality of protection the victims need. Here, the author is specifically emphasizing on the context in which these crimes occur. And making non-consent something that has to be proven in such crimes, it clearly disregards the essence of rape as a tactic.

Though these landmark cases set eminent milestones in the history of international law by creating the first-ever definitions of rape crime in international law, the incompatible and inaccurate definitions bring about the inconsistent prosecutions and convictions.[228] The lack of clear definition of rape has resulted in certain acts being treated as secondary crimes.[229] There is still a need for cogency, but also for the Tribunals to take into account the specific nature of these crimes for that to be achieved.

4.3. International Criminal Court

The role of ICC is crucial since it is a permanent court with the authority to investigate and prosecute the most serious of crimes that concern the international community. While ICTR only dealt with Rwanda, and ICTY only with Former Yugoslavia, the ICC has dealt with the

[227] Ibid, para. 131.
[228] Hilmi M. Zawati. Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals. Oxford Scholarship 2015, p. 78.
[229] Ibid, p. 80.

most serious international crimes in Darfur, Kenya, DRC, Mali, Uganda, Libya etc. The permanent nature of the court makes its normative and symbolical contribution to the international law (and community) to be substantial. And with the support of 123 nations, the ICC could be the most effective body for prosecuting the crime of rape.[230] Article 7(g) of the ICC Stature prohibits rape and, also sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. This means that the case must meet the gravity threshold for admissibility.[231] ICC, unlike the Tribunals, did not form the working definition of rape through a case, but before they even prosecuted the first rape case.

The ICC established the definition of rape in international law while looking at the work of the two tribunals. The definition of rape itself is the same under the crimes against humanity and war crimes. According to the 'Elements of Crimes' the *actus reus* of rape crime is the following:

- "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.
- 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."[232]

This definition seems to be a compromise between the preceding definitions from ICTR and ICTY practice, a middle ground from both sides. The sexual act of rape can be in various forms of sexual activity if it is proved to be forced. The first section mentions 'any part of the body' which means that e.g. hands or fingers can be considered as means for the forced sexual act. This definition includes both side, the perpetrator and the victim, thus the penetration can

[230] The State Parties to the Rome Statute. ICC. Accessible: https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (1.03.2018).

[231] There are four factors that have commonly been taken into account when assessing the gravity: (i) the scale; (ii) the nature; (iii) the manner of commission of the crimes; and (iv) their impact. – *See*, Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report, 11.6.2014, para. 136.

[232] International Criminal Court (ICC), *Elements of Crimes*, 2011, 7 (1)(g)-1 and Article 8 (s)(b)(xxii)-1.

be done by the perpetrator to the victim as well as by the victim to the perpetrator. This means that for an act to constitute rape, there is either penetration of sexual organs or with sexual organs. Yet, it is not clear whether forced masturbation is covered. Or forced sexual intercourse with animals.[233]

ICC's definition is not gender-biased like in *Furundzija* case. This means that ICC has taken into account that there is no difference on the gender of the victim or the perpetrator. Thus, for fairness, men are also considered as possible victims and as was presented in Chapter II of this thesis, male rape is a real concern and does also need an adequate answer. The Court takes into account that women can also be perpetrators.

In the second paragraph, ICC describes the conditions under which the behavior explained in paragraph 1 constitutes rape. And as seen, the ICC has given a broad scope for these terms and physical resistance is not required. As the term 'such as' indicates, there are certain enumerated grounds given as an example, but other grounds may also be applicable. Besides, ICC has also added the momentous notion, which especially during wartime situations and due to the coercive environment, is extremely relevant - the threat against a third person. The last part of the second paragraph seems to be an interesting addition, which is to some extent more similar to how States in their national legal system approach to what constitutes rape. This was also discussed during *Kunarac* case, when the Trial Chamber explained that just force or threat of force approach is too narrow, whereas there can be certain other specified circumstances (e.g. age, mental illness etc.).[234] However, the wording of the *Kunarac* definition was not as satisfying as the one over here. Protecting people incapable of giving genuine consent according to ICC refers to people who are affected by natural, induced or age-related incapacity.[235] This gives necessary protection to certain vulnerable groups, e.g. children, physically disabled people etc. In the *Prosecutor v. Bemba* the Court stipulated that if rape is committed against a person incapable of giving genuine consent then Prosecution have to prove only the victim's incapacity to genuinely consent by natural, induced or age-related circumstances.[236] Articles defining the crime of rape only include *actus reus* of the crime. *Mens rea* is not explicitly stated, therefore Art 30 of the Rome Statute applies. The article in question claims that [f]or the criminal responsibility and liability, all material

[233] N. B. Maier. The Crime of Rape under the Rome Statute of the ICC: With a Special Emphasis on the Jurisprudence of the Ad Hoc Criminal Tribunals. Amsterdam Law Forum 2011, vol. 3, pp 148.
[234] Kunarac, *supra note* 49, para. 446.
[235] Elements of Crimes, *supra note* 232.
[236] Bemba, *infra note* 243, para. 107.

elements are committed with intent and knowledge.[237] Thus, to fulfill the *mens rea* requirement, it must be proven that the perpetrator's intent covers the act of invading the body of another person by penetration and secondly, that perpetrator knows that it was committed by using force or coercion elaborated in the second article of the elements stated in previous sections. Whereas the ICC did not use the "lack of consent" as an element, instead, they have two mens rea requirements and also allow for a mistake of fact defence.

Though the consent matter was quite clearly established by the Elements of the Crimes, the Rules and Procedures Art. 70 adds two important notions to proving sexual violence. The consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;[238] which is a wise thing to assert since the lack of resistance was already argued in *Kunarac* and ICC thoughtfully chose to prevent possible future defences based on the lack of resistance notion. The second addition was pointing out that the credibility, character or predisposition to sexual availability (of the victim or witness), cannot be inferred by reason of the sexual nature of prior or subsequent conduct.[239] Art. 71 explains that the Court will not admit evidence of the prior or subsequent sexual conduct of the victim or witness.[240]

ICC was the first one to reference to age-related capacity, i.e. what we know as the age of consent in national jurisdictions. Though the age of consent varies in different jurisdictions, e.g. in Europe, it varies between 14 to 18, in Africa, it ranges from age 12 to 18 (e.g. 18 in Rwanda, DRC and Kenya). The ICC included in its rape definition the notion "incapable of giving genuine consent." The footnote of the paragraph explains that the incapability can be affected by natural, induced or age-related incapacity.[241] The specific age is not provided by the ICC, presumably they will take an example from different national jurisdictions to determine the age of consent when necessary. And in this case, taking an example from national jurisdictions would be reasonable since many national jurisdictions have solved the issue by setting a specific age under which a person is incapable of genuinely consenting. Though social sentiments and cultural relativity can be strong determinants of the differences, the practice can indicate some relevant patterns for either the minimum age or substantiating the age-related incapacity.

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[237] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17.07.1998, Art. 30.
[238] Rules and Procedures, ICC, Art. 70(1)(c).
[239] Ibid, para. Art. 70(1)(d).
[240] Ibid, Art. 71.
[241] Elements of Crimes, *supra note* 232.

In 2012 the first ever conviction was made in ICC. It was the case of *Lubanga.* Regardless that there was evidence about the widespread rape, particularly against girl child soldiers, the sexual violence crimes were not included in the charges.[242] We had to wait four more years for this definition to be used by the court.

It was in 2016 when ICC convicted a person for a crime of rape. In a landmark judgement, in the case *Prosecutor v. Bemba*, the definition of rape created by the ICC got its plea to the fullest. Notably, when we compare it with ICTY and ICTR definitions of the crime of rape. Jean-Pierre Bemba Gombo (Bemba) was convicted for his responsibility as a commander-in-chief for crimes of murder, pillage and rape which were committed by soldiers under his effective control and authority. Bemba was charged with two counts of sexual violence: rape as a crime against humanity and rape as a war crime. Intriguing, in this case, is that the victims included both men and women; *inter alia* rape of children even as young as 10-years old. For the ICC's definition being gender neutral and for it containing the special protection for certain vulnerable groups, at least in this case, there was a legal foundation for the protection of all victims.[243]

While being familiar with the inadequate track ICTY took, ICC's definition does not feel that dissatisfactory. However, there was this kind of anticipation that ICC will resolve the definitional debate. The Trial Chamber explained that non-consent was intentionally left out of the definition by the drafters as this requirement would undermine the efforts to bring perpetrators to justice.[244] The Court does angle toward force and coercion by stating that if the Prosecution is able to prove force, threat of force or coercion or taking advantage of the coercive environment, then there is no need to prove the victim's lack of consent. This however still left open the possibility of the consent issue.[245] The statement suggests that when the Prosecution is unable to prove force, threat of force or coercion or coercive environment it is possible to rely on the victim's lack of consent. This will possibly be determined by the future cases.

[242] L. Gambone. Failure to Charge: The ICC, Lubanga & Sexual Violence Crimes in the DRC. Foreign Policy Association 2009. Accessible: https://foreignpolicyblogs.com/2009/07/22/failure-to-charge-the-icc-lubanga-sexual-violence-crimes-in-the-drc/ (01.03.2018).
[243] Prosecutor v. Jean-Pierre Bemba Gombo (Trial judgement), ICC-01/05-01/08, International Criminal Court (ICC), 21.03.2016.
[244] Ibid, para. 105.
[245] Ibid, para. 106.

4.4. Special Court for Sierra Leone

The SCSL differ from previous discussed international courts since SCSL is a hybrid tribunal. This means that it combines both, the international and domestic forces for prosecution. It was created by an agreement between the UN and Sierra Leone, but this can also have an impact on prosecuting sexual violence. That is because SCSL has a limited mandate, it applies both national and international law, it is located in Sierra Leone and is funded purely by donations.[246]

Still, the SCSL had an obvious upper hand in defining the rape due to the considerable body of precedent that its predecessors have created. SCSL dealt with the definition of the crime of rape in 2007. It was the case of *Prosecutor v. Brima et al.* Rape was used as a means to commit a crime against humanity. The Trial Chamber reviewed the work of both tribunals and ICC.

The Court made reference to *Akayesu, Delalic, Furundzija, Musema, Kunarac and Semanza*, and adopted the following definition of rape:

- "The non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator; and
- The intent to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."[247]

The definition has similarities with the ICTY's *Kunarac* definition since it also has an emphasis on the lack of consent instead of the threat or force. The Trial Chamber elaborated by referencing to the *Kunarac's* Appeal Judgement that consent must be given voluntarily, as a result of the victim's free will and that force or threat is not an element *per se* of rape, because other relevant factors and circumstances can influence victim's ability to consent regardless of force or threat.

[246] Bringing Justice: the Special Court for Sierra Leone: Accomplishments, shortcomings, and needed support. Human Rights Watch 2004. Accessible: https://www.hrw.org/report/2004/09/08/bringing-justice-special-court-sierra-leone/accomplishments-shortcomings-and (01.03.2018).
[247] Brima, *supra note* 55, para. 693.

It was the first case where the age of consent was stated. According to the Trial Chamber, children below the age of 14 cannot give valid consent. This is extremely material since it has not been discussed in previous cases, regardless that during other hearings there were victims even younger than the age of ten.[248] Setting a precise age is momentous for cases where children are used for sex but violence or threats were not present. In these cases, it is possible that violence or threat of violence is not necessary due to the child's age-related incapacity to consent.

The Court also explained that the offence of other inhumane acts is a residual clause[249] which covers a broad range of underlying acts that are not explicitly enumerated in the Statute. Since there is an exhaustive category of sexual crimes particularised in the Statute,[250] the offence of other inhumane acts, regardless that it is residual, must logically be restrictively interpreted as applying only to acts of a non-sexual nature amounting to an affront to human dignity. Though it is understandable, that there should be no specific list of acts falling under the other inhumane acts since it would possibly create an undesirable situation where acts not falling under the exhaustive list would have otherwise fulfilled the criteria.

However, in 2009, in the case *Prosecutor v. Sesay et al*. the Trial Chamber adopted a new version of a definition.

- "The Accused 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 Accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
- 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;
- The Accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and

[248] Ibid, para. 694.
[249] UN Security Council, Statute of the Special Court for Sierra Leone, 16.01.2002, Art. 2(i). Accessible: http://www.refworld.org/docid/3dda29f94.html (01.03.2018).
[250] Ibid, Art. 2(g).

- The Accused knew or had reason to know that the victim did not consent."[251]

This definition is clearly combined from the *Kunarac's* definition and the ICC's definition. The Trial Chamber explained that the first element of the *actus reus* defines the type of physical invasion of the body that constitutes rape. They made reference to *Furundzija* case by stating that any part of the body includes genital, anal or oral penetration. The definition of invasion is broad since it covers all three possibilities – penetration by sexual organ, by any other part of the body (e.g. digital penetration) or by an object. The importance of this could not be stressed since Furundzija definition did not include penetration by any other body part except the penis. And the definition is gender-neutral, which is extremely material.[252]

The Chamber continued to explain the second element of the *actus reus* by stating that the essence of the second element is to describe the circumstances under which a person is not capable of voluntarily and genuinely consenting to the act. The second element is an exact excerpt of ICC's definition, however, the Trial Chamber interpreted the content and the meaning of this element by relying on the *Kunarac's* Appeal Judgement. In *Kunarac* the Court included the absence of consent as the *conditio sine qua non* of rape. The references and explanations the Court used made things puzzling since they actually did not include the lack of consent as an element into the definition, but still argued in favor of it.[253]

The mens rea in *Sesay* is not the same as in *Kunarac*. It is a bit broader and gives more room for the prosecution to prove the case. In *Kunarac* it was "the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."[254] In Sesay firstly the proof of the accused's intention to the sexual penetration or reasonable knowledge that this would occur. The second part needs proof of either knowing or had reason to know the victim did not consent. This means that the proof needed does not have to indicate beyond reasonable doubt that the accused was aware, but it can also be that one has reason to be aware of the lack of consent. This definition allows to use the coercive environment instead of the lack of consent, i.e. the perpetrator had know or had to have a reason to know about the coercive circumstances that negate the possibility of genuine consent. The Court used more

[251] Sesay, *supra note* 58, para. 145.
[252] Ibid, para. 146.
[253] Ibid, para. 147.
[254] Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgement), IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 12 June 2002, para. 129. Accessible: http://www.icty.org/case/kunarac/4 (03.03.2018).

effective *mens rea* requirements than in *Kunarac* since the language and the elements are already trying to avoid the congestions the Trial Chamber in *Kunarac* had to deal with.

4.5. Synopsis

The judicial creativity of the courts and tribunals over the rape definition has been versatile. In September 1998 the first definition of rape was created. The conceptual definition in *Akayesu* did not include a mechanical description of body parts, gender-bias or non-consent as an element. Instead, it tried to capture the true nature of rape. ICTR started off with a strong example by creating a broad and progressive definition.

In ICTY, the *Akayesu* definition was endorsed and applied in *Delalić* case. Yet, the *Furundzija* Trial Chamber, also in 1998, decided to depart from the conceptual definition and to capture an accurate definition. To arrive at an accurate definition based of the principle of *nullum crimen sine lege stricta*, the Trial Chamber took an example from the national legislation of different states and captured the objective elements of the rape crime as a mechanical description of body parts. The Chamber also emphasized that any form of captivity vitiates consent. This view was later endorsed in the *Kvocka et al.* Then, the main difference on definitional matter was on the *actus reus* of the crime, where ICTR had a broad conceptual definition emphasizing on a physical invasion of a sexual nature and ICTY had a more narrow definition emphasizing on *expressis verbis* stated combinations of possible acts that require penetration. However, in 2001 the ICTY moved away from the contemplation of the conceptual vis-á-vis mechanical to a completely new dimension. The Trial Chamber in *Kunarac* adopted a new definition which introduced the non-consent as an element of the definition.

The *Akayesu* definition was also endorsed in *Musema,* and a comparison between the *Akayesu* and *Furundzija* definitions were made and the former was seen as more appropriate to adapt to the evolving norms of criminal justice. However, *Akayesu* definition was not adopted in all subsequent jurisprudence of the ICTR. In *Semanza, Kajelijeli* and *Kamuhanda*, the Trial Chambers shifted away from the conceptual definition and decided to use a mechanical definition instead. One reason for that can be that in *Akayesu* the Chamber explained that there is no accepted definition in international law and only referenced to CAT (while using an analogy from torture). No other sources of international law, no instruments or examples of

case-law was identified or used to support the definition. The lack of discussion supporting the creation of the definition opposed to the fact that in *Kunarac*, the references and examples were of abundant, it is no wonder that the Chambers in *Semanza, Kajelijeli* and *Kamuhanda* found the explanation of persuasive authority. One does wonder if the Chamber in *Akayesu* would have offered a substantial interpretational basis for the definition of rape, might have the outcome been different?

Subsequent cases in ICTR tried to reconcile between the disparate definitions of rape and ended up combining the mechanical and conceptual approaches in some ways. In *Gacumbitsi* the consent disparity was solved by the Chamber accepting that the lack of consent is an element of the crime of rape. The lack of consent can be proven by establishing coercive circumstances. The *Akayesu* definition was subsequently used by the ICTR in later cases. However, the impact of these cases has been imperative, if not for arriving at one working definition, then at least building up a cogent interpretational basis of the elements of the crime of rape in international criminal law. The legacy of these two *ad hoc* tribunals continues to live and unfold through the evolving jurisprudence of international criminal law.

For ICC to create a working definition the Court had the possibility to observe and avoid the hardships and mistakes of the *ad hoc* tribunals. The ICC definition is a compromise between the ICTR and ICTY definitions. The *actus reus,* instead of sexual penetration uses the term invasion resulting in penetration. The definition does not include gender-bias, takes into account possible ways of penetration and it has given a broad scope to the conditions under which the invasion resulting in penetration would constitute rape. Albeit, the ICC still allows evidence of consent if force or coercion are not proven beyond reasonable doubt. As ICC is different from the *ad hoc* tribunals in the sense that it is a permanent court and its statute is the product of many years of diplomatic negotiations and deliberations, the working definition is both, an indispensable marker but also a result of various compromises.

The SCSL was able to create a definition by following the footsteps of its predecessors. The first definition was rather similar to *Kunarac's* definition as it also emphasized on the non-consent as an element. The second definition by the SCSL was combined by the ICC's and the *Kunarac's* definition. Though the first two paragraphs were almost identical to the ICC's definition, the *mens rea* was broader and thus more effective than in *Kunarac*. Yet, the definition adopted by the Trial Chamber in *Sesay* was mechanical instead of conceptual. The lack of consent is the most unfortunate addition to this definition since as was argued

previously, the lack of consent should be legally irrelevant in case of rape as an international crime.

Thus, previous definitions have struggled to establish the relationship between force, coercion and consent, and between the mechanical and conceptual dilemma, it is notable that current practice supports the notion that coercive environment negates the possibility to truly consent. Though, as the author supports the *Akayesu* definition as the most compatible and adequate to address the phenomenon of rape as a tactic, the broad definition can also result in miscategorization of certain acts. The strenght of the ICC's definition of rape is that it is comprehensive and accurate, and the definition has managed to abstain from the previous definitional mistakes of the *ad hoc* tribunals. Therefore, the author is of opinion that the ICC has a strong and cogent definition.

As expressed by Nuremberg Tribunal more than seventy years ago the laws of war "are not static, but by continual adaptation follow the needs of a changing world".[255] It is clear that rape laws have come a long way, but as the essence of this quote explains, there is a need for continual adaptation and with modern definitions, the same applies. Some definitions yet are not following the needs of a changing world and disregard the phenomenon of rape as a tactic by its essence. The *Akayesu* and the ICC definition are yet to be the most coherent to follow the needs of a changing world.

[255] Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1.10.1946, vol. 1, p. 221.

CONCLUSIONS

Rape as a tactic is about punishing, destroying and dehumanizing. Rape as a tactic is a violation of sexual autonomy that includes abhorrent violence with a high degree of humiliation. It is used as a tactic by virtue of it being as a means to an end and often being part of a widespread and systematic policy against civilians.

The jurisprudence of rape and sexual violence in international criminal law has rapidly evolved from the 1990s. Though, the standpoint of what exactly is sexual violence is not unequivocal. However, in practice the Courts have differentiated between rape and sexual violence by holding that the latter is broader than rape and means any act of sexual nature which do not include actual penetration (e.g. molestation) and does not necessarily have to include physical contact (e.g. forced nudity). The discussion over the definition of rape has been vigorous, yet there remains still no consensus as to the one appropriate definition in international criminal law. While the ICTR defined rape broadly as an act of sexual violence paralleling with torture, the ICTY, ICC and SCSL chose the narrow path creating a definition that mirrors national rape laws. If we just consider the definitions of these four judicial bodies previously presented, two main things create inconsistency and uncertainty: (1) the consent question – whether this is an element of rape or not; and (2) whether the *actus reus* is of conceptual or should include a detailed list of physical acts.

The element of consent is problematic on both theoretical and practical level. When we emphasize on nonconsent as a definitive element of rape, we emphasize on deprivation on sexual freedom, a denial of individual self-acting. Consent views love or passion gone wrong, so to speak. However, when we emphasize on coercion as definitive, we create a definition that sees rape fundamentally as a crime of inequality, of force, status, or relation. Coercion recognizes power (domination and violence). The difference was effortlessly explained by Catharine MacKinnon in one of her essays where she stated that consent definitions have proof of rape turn on victim's and perpetrator's mental state – who wanted what and who knew what when. This view makes the crime to be taken place in individual physic space. Coercion definitions diverge by turning the proof of rape on physical acts, surrounding context, or exploitation of relative position – who did what to whom (and sometimes why). Thus, the consent definitions tend to make the same events of crime happen in the individual place, one-at-a-time interactions, coercion definitions tend to express the social, contextual,

and collective sense of the crime.[256] And while considering the essential characteristics of rape as a tactic, particularly the context, it is compelling to maintain that definition(s) of rape that prosecute international crimes and emphasize on consent, are fundamentally erroneous because they neglect the nature and context of these crimes. The context of war or genocidal campaign or widespread sexual violence already negates the individual physic space and instinctively create a climate of subordination for the victims. Consent as an element of rape should be legally irrelevant. If we consider the law and the facts of these cases, the coercive circumstances and the violent inequality of power positions, these rapes are taking place in a context where the function is to commit collective crimes. And still presuming that in conflict these people might have wanted the act, regardless of the force present, is purely unintelligible. Consenting to violence seems anyhow nonsensical, and in some jurisdictions, it is not even legally possible. For those reasons, consent appears to be legally incompatible with the international crime of rape. Thus, the evidence confirms the initial hypothesis to be correct - the consent paradigm, where the non-consent is an element of the definition of the crime of rape in international criminal law, does not adequately address rape as a tactic since these definitions neglect the nature and context of the crime.

The second serious concern is adding the gender-bias into the definition akin the ICTY did, this is both shameful and unfair. Defining rape purely as male domination over women creates the culture of stereotypes portraying men as perpetrators and women as victims, translating rape of men as abnormal and immaterial. There ought to be no room for gender-bias in rape definition(s). The presumption that perpetrators are men will firstly create the flourishing impunity for female perpetrators. But for even worse, presumption that victims are only women will create a mindset where the protection of the bodily integrity and dignity of men is seen as trivial. Thus, we marginalize the group of victims that is already out of sight, out of mind. It is time to realize that contemporary (tactical) rape is not a construction purely of male sexual domination. Rape is often about negotiating power between ethnicities, religions, cultures, and other collectives with similar construction. True, women and girls make the vast majority of those affected by the sexual violence, but this cannot make any other group of victims less material. To some extent, the international criminal law has failed to recognize male rape equal to female rape. If this fight for the rights of the victim against the impunity is limited and selective by inadequate answers by these courts and tribunals, rape remains to be insufficiently addressed. All definitions come with some reservations, but the definition that is the most adequate answer to the rape crimes prosecuted under the

[256] MacKinnon, *supra note* 97, p. 941.

international criminal law, while taking into account the specific nature, motives and context, is the *Akayesu* definition.

The need and the acknowledgement of the need to the eradication of rape have resulted in rape being prohibited in every major domestic legal system, included in treaty law, and customary law. The definitions that emerged from these landmark cases have laid the strong foundation for establishing accountability and fighting impunity. Yet, it is still work in process since no definition of rape under international law prevails, and the practice of these courts and tribunals have shown that not all developments equal to progress. Unsound definitions can still post barriers to the justice and further the cycle of impunity. While regarding the phenomenon of rape as a tactic often being a widespread and systematic campaign against the victims, it is essential to balance both, the individual needs of the victims against the collective human rights of the victims. The rape laws fail the victims, the potential future victims and the whole community when they neglect to recognize the context of violent inequality in which these crimes occur. They fail to neglect the nature of these crimes operating with false presumptions that these rapes are somehow individual sexual interaction matters. They fail to address the reality by creating more inequality while creating the consent element for rape crime. But what we can do, is to fight more efficiently, provide stronger protection for the victims, and maybe, through that, give at least some form of redress to the survivors. The legal value of rape ought to recover from centuries of ineptitude.

As we can all agree that some malevolent deeds are unavoidable, again
rape at no time can be construed as the necessary evil.

Võõrkeelne resümee

Seksuaalvägivalla sõjalise strateegiana kasutamine ei ole uus nähtus. Tegu on efektiivse meetodiga dehumaniseerimaks, alandamaks, karistamaks ning domineerimaks ohvrite üle. Seksuaalvägivald hävitab mitte ainult indiviide, vaid ka terveid kogukondasid. Tegu on efektiivse relvaga, sest seksuaalvägivalla kasutamine ei nõua materiaalseid resursse ning hõlmab endas lugematuid kombinatsioone võimalikest tagajärgedest (nt HIV/aids, stigmatiseerimine, depressioon, suitsiid, rasestumine, kogukonnast välja tõrjumine). Ohvrite hulgas on nii mehi kui naisi, lapsi ja vanureid, erivajadustega inimesi ja lapseootel naisi – kes iganes eesmärgi täitmiseks sobib.

Käesolev magistritöö on kirjutatud teemal **”vägistamine rahvusvahelises kriminaalõiguses.”** Töö keskendub vägistamisele sõja-, genotsiidi- ja inimsusevastaste kuritegude kontekstis ning on jaotatud kaheks osaks. Esimene osa käsitleb vägistamist kui fenomeni süsteemiebaõiguse kontekstis selgitades, millega täpselt tegu on. Eesmärk on vägistamine kui nähtus sisuliselt defineerida. Analüüs keskendub kolmele olulisele tahule nähtuse mõistmiseks: (i) vägistamise loomus (ehk kuidas ja millisel viisil neid toime pannakse); (ii) motiivid (ehk millisel eesmärgil vägistamist kasutatakse); ning (iii) kontekst (ehk kus ja millistes tingimustes vägistamine toime pannakse). Selleks kasutas autor Rahvusvahelise Kriminaalkohtu (ICC), Endise Jugoslaavia Eritribunali (ICTY), Rwanda Eritribunali (ICTR) ja Sierra Leone Eritribunali (SCSL) kohtulahendeid.

Teine osa käsitleb vägistamise kui rahvusvahelise kuriteo jurisprudentsi. Juriidiline osa keskendub nii rahvusvahelisele praktikale kohtutes kui ka õiguslikule definitsioonile. Teisisõnu, kuidas vägistamiskuritegusid rahvuvahelistes kohtutes ja tribunalides käsitletud on, milliste kuritegude raames menetletakse, millised elemendid selleks täidetud olema peavad ning kuidas vägistamine rahvusvahelises kriminaalõiguses defineeritud on. Siinkohal on aluseks võetud ka esimesest osast saadud tulemused vägistamise kui nähtuse sisust, mis aitas hinnata, millised juriidilised definitsioonid nimetatud nähtusele adekvaatselt vastavad. Erilist tähelepanu sai nõusoleku puudumine kui element vägistamise definitsioonist.

Autor usub, et keskkond, kus need vägistamised toimuvad omavad piisavat sundi võtmaks ära võimaluse tõelist nõusolekut anda. Autor seadis hüpoteesiks, et ”nõusoleku lisamine vägistamise elemendiks rahvusvahelises kriminaalõiguses ei vasta adekvaatselt vägistamise kui taktika nähtusele.” Autor seadis järgnevad uurimisküsimused: (i) mis on sõjaagne

vägistamine; (ii) millised on vägistamiskuriteo elemendid rahvusvahelises kriminaalõiguses; (iii) kas need elemendid adresseerivad vägistamist kui nähtust adekvaatselt, võttes arvesse nimetatud nähtuse olemust, motiive ja konteksti; ning (iv) kuidas praktikas eristatakse vägistamist muust seksuaalvägivallast.

Töö tulemusena selgus, et vägistamine kui taktika on seksuaalautonoomia rikkumine, mis hõlmab ebainimlikku vägivalda ning tugevalt inimväärikust alandavat kohtlemist. Kui üldiselt on vägistamise eesmärgid peamiselt seksuaalse sisuga, siis taktikaline vägistamine on eelkõige strateegia, mille eesmärk on karistadada, hävitada, hirmutada, dehumaniseerida ja alandada. Taktikaline vägistamine ei ole indiviidi, vaid eelkõige kogukonna või inimsuse vastu suunatud kuritegu. Vägistamine strateegiana on harva üksikjuhtumina esinev, enamasti on tegu süstemaatiliste ja laiaulatuslike episoodidega. Teise peatüki analüüsi tulemusena on selge, et ebainimlik vägivald, mida vägistamistega ühes kasutatakse, on väga levinud ning pigem kasutusel kui eraldiseisev viis, et inimesele võimalikult palju valu, kannatusi ja alandust põhjustada. Kui seksuaalsetel motiividel toimepandud vägistamiste puhul on vägivald pigem vahend, et murda ohvri tahe ning saavutada seksuaalautonoomia rikkumine, siis taktikalise vägistamise puhul on seksuaalsed eesmärgid pigem teisejärgulised.

Ebainimlik vägivald hõlmas ohvrite vägistamist esemetega, samuti ka peale vägistamist erinevate esemete inimpiirkondadesse sisestamist (nt. Rwandas oli tavaliseks ohvreid puutükkide ja okstega vägistada, teravaid esemeid kasutades seksuaalorganeid läbistada), intiimpiirkondade lõikumist (esines nt Rwandas ja Sierra Leones), jäsemete maha lõikamist peale vägistamist (tüüpiline Sierra Leonele), grupiviisilisi vägistamisi (omane kõikidele analüüsitud konfliktidele) ning korduvaid vägistamisi. Ohvreid vägistati sageli seni, kuniks nad teadvuse kaotasid või vigastustesse surid. Bosniale omaseks oli ka vägistamislaagrite[257] nähtus, kus naised olid meestest eraldatud eesmärgiga neid korduvalt vägistada kuniks nad rasestuvad ja vaenlase last kannavad. Alandus oli teine eesmärk, milleks vägistamist kasutati. Sageli pandi vägistamised toime avalikult, perekonna või kogukonna ees. Paljudes kogukondades peetakse vägistamise ohvriks langemist häbiväärseks, ohvreid tõrjutakse või lausa heidetakse kogukonnast välja.

Ning miski, mida ühiskond sageli ei soovi tunnistada - ka mehed langevad seksuaalvägivalla ohvriks. Meeste vastu suunatud vägistamist ja seksuaalvägivalda esines mitmetes kaasustes.

[257] Rape camp - Kinnipidamisasutused või laagrid, kus naisi hoiti spetsiaalse eesmärgiga neid vägistada.

Kui Aafrikas vägistasid sõdurid pigem ise meessoost ohvreid, tehes seda avalikult nende perekonna või kogukonna ees, et neid võimalikult suures ulatuses alandada, siis Bosnias konfliktist joondusid välja teistsugused mustrid. Seal sundisid sõdurid kinnipeetavaid omavahel seksuaalakte toime panema. Näiteks sunniti nii isasid ja poegasid kui ka vendasid omavahel oraalseksi harrastama ning seda tehti avalikult, teiste ees. Meesohvritest aga leidub veel vähem asitõendeid kui naisohvritest, peamiselt stigma ja häbimärgistamise tõttu, mis ohvriks olemisega kogukonna poolt kaasneb. Ning vägistamisi ei pane toime ainult mehed. Praktika näitab, et ka naised on osalevad seksuaalvägivalla toimepanemises. 2011. aastal mõisteti Pauline Nyiramasuhuko kui esimene naine, rahvusvahelises kohtus süüdi vägistamises genotsiidikuriteona.

Eelnevast lähtudes on oluline, et rahvusvaheline kriminaalõigus vastaks vägistamise nähtusele viisil, et ükski ohver ei jääks vajaliku kaitse ning kurjategija karistuseta. Rahvusvahelises õiguses puudub ühene ja universaalne vägistamise definitsioon. Vägistamist ja seksuaalvägivalda eristab praktikas see, et vägistamine eeldab kehaõõnsusesse tungimist ehk penetratsiooni. Käesolevas töös analüüsiti viit rahvusvaheliste kohtute ja tribunalide poolt loodud definitsiooni, mille tulemusel selgus, et mitte kõik definitsioonid ei vasta vägistamise nähtusele adekvaatselt. Näiteks esineb definitsioone, mis on sooliselt diskrimineerivad, käsitledes teatud aktide puhul vaid mehi võimalike kurjategijatena ning naisi ohvritena (ICTY definitsioonid). See aga tekitab olukorra, kus naised pääseksid karistuseta ning samal ajal meeste langemist vägistamise ohvriks ei peeta samaväärseks kuriteoks kui naiste vägistamist. Teine läbiv probleem definitsioonides on seotud nõusoleku puudumise käsitlemisega vägistamiskuriteo elemendina. Lähtudes nende vägistamiste olemusest, motiividest ja kontekstist, millega rahvusvaheline kriminaalõigus tegeleb, ei tohiks nõusoleku puudumine olla kuriteokoosseisu element ega juriidiliselt määrav. Atmosfäär, kus need vägistamised toime pannakse sisaldab juba iseenesest sellist sundi, mis eitab isiku võimalusi tõelist nõusolekut anda. Seetõttu ei tohiks nõusoleku puudumise tuvastamine olla nõutav vägistamiskoosseisu täitmiseks. Analüüsi tulemusel leidis kinnitust hüpotees, et nõusoleku puudumine vägistamiskuriteo elemendina ei vasta adekvaatselt rahvusvahelises kriminaalõiguses käsitletava vägistamise nähtusele. Definitsioon, mis eelnimetatud nähtuse erisustele kõige adekvaatsemalt vastab on 1998. aastal *Akayesu* kaasuses (ICTR) loodud kontseptuaalne definitsioon.

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77. The Prosecutor v. Alfred Musema (Judgement and Sentence), ICTR-96-13-T, International Criminal Tribunal for Rwanda (ICTR), 27.01.2000.
78. Prosecutor v. Eliézer Niyitegeka (Trial judgement and sentence), ICTR-96-14-T, International Criminal Tribunal for Rwanda (ICTR), 16.5.2003.
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Appendix 1. List of selected cases

SCSL

1. Prosecutor v. Brima, et al. AFRC Case, SCSL-04-16-T
2. Prosecutor v. Sesay et al. RUF case SCSL-04-15-T

ICC

3. Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08
4. Prosecutor v. Germain Katanga, ICC-01/04-01/07
5. Prosecutor v. Kenyatta, ICC-01/09-02/11

ICTR

6. Prosecutor v. Akayesu, ICTR-96-4-T
7. Prosecutor v. Gacumbitsi, ICTR-01-64
8. Prosecutor v. Kajelijeli, ICTR-98-44A
9. Prosecutor v. Kayishema et al. ICTR-95-1
10. Prosecutor v. Muhimana, ICTR-95-1B
11. Prosecutor v. Musema, ICTR-96-13
12. Prosecutor v. Nyiramasuhuko et al., ICTR-98-42
13. Prosecutor v. Rutaganda, ICTR-96-3-T
14. Prosecutor v. Semanza, ICTR-97-20

ICTY

15. Prosecutor v. Blaskic, IT-95-14
16. Prosecutor v. Bralo, IT- 95-17
17. Prosecutor v. Brđanin, IT-99-36
18. Prosecutor v. Cesic, IT-95- 10/1
19. Prosecutor v. Furundžija, IT-95-17/1
20. Prosecutor v. Krajisnik, IT-00-39
21. Prosecutor v. Kordić & Čerkez, IT-95-14/2
22. Prosecutor v. Krstic, IT- 98-33
23. Prosecutor v. Kunarac et al. IT-96-23 & 23/1
24. Prosecutor v. Kvočka et al. IT-98-30/1
25. Prosecutor v. Milošević, IT-02-54
26. Prosecutor v. Mucić et al. IT-96-21
27. Prosecutor v. Šainović et al. IT-05-87
28. Prosecutor v. Dragan Nikolić, IT-94-2
29. Prosecutor v. Sikirica et al. IT-95-8
30. Prosecutor v. Stakić, IT-97-24
31. Prosecutor v. Tadić, IT-94-1
32. Prosecutor v. Todorović, IT-95-9/1
33. Prosecutor v. Zelenović, IT-96-23/2

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