

**BREAKING A NATION'S BACKBONE: RAPE AS A
FORM OF GENOCIDE IN THE CONTEXT OF THE
RUSSO-UKRAINIAN WAR.**

Kézirat lezárásának a dátuma: 2023. november 9.
Jelige: LUX573

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Abbreviations:

AQMI: al-Qaeda in the Islamic Maghreb

CRSV: Conflict Related Sexual Violence

FPLC: Forces Patriotiques pour la Libération du Congo

HRMMU: (United Nations) Human Rights Monitoring Mission in Ukraine

ICC: International Criminal Court

ICCPR: International Covenant on Civil and Political Rights

ICL: International Criminal Law

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for the former Yugoslavia

JIT: Joint Investigative Team

LRA: Lord's Resistance Army

OHCHR: Office of the High Commissioner for Human Rights

OSCE: Organisation for Security and Cooperation in Europe

OTP: Office of the Prosecutor

SGBV: Sexual and Gender-Based Violence

UN: United Nations

UNSC: United Nations Security Council

UPC: Union of Congolese Patriots

Introduction:

Armed conflict has been a breeding ground for violence between people since the beginning of history, and sexual crimes against women have been a well-known ‘accompanying phenomenon’ of the exercise of power over another nation. Women were mere spoils of war, play tools of satisfaction and abuse to men during armed conflicts, and the unspeakable crimes committed against them went unseen. Rape was used as a weapon of war, as means to express dominance, to inspire fear. Rape was interpreted as a crime against the honour of the husband, the family, the community, and not as a crime against the individual, who had to suffer it through. With the emerge of international law, rules were set on sexual violence, but these were exclusively created and interpreted by men. The developed legal regime did not have a room for the experiences of women and girls suffering in silence, from crimes that were not even considered as crimes at that time, but consequences of war. The pattern began to change in the 1990s, and during the turn of the century, a new, progressive institution emerged, with the goal to end impunity.

This paper provides a comprehensive picture of how sexual violence is viewed, how the approach towards the topic was transformed by landmark cases. Then, it will give an analysis on similarities with formerly prosecuted cases in relation to sexual violence, especially rape committed during the Russo-Ukrainian conflict. The importance of this topic is reinforced by the fact that, although sexual violence in war is not a new phenomenon, even after all these centuries it has not been combated with means that would prevent it from ever being committed. The research wants to explore the historical and societal background of the rape happening in the conflict, and why the targeting of women can have a symbolic meaning.

Methodology:

The paper seeks to find answers to two research questions. The first question is: ‘Can we understand rape as a form of committing genocide in the context of Russo-Ukrainian war?’. The second question is: ‘Is it true that Russia uses rape as a weapon of war systematically?’. The main objective of the paper is to introduce the complexity of the rape committed during the Russo-Ukrainian conflict, and what women of Ukraine symbolize in the ongoing war.

The paper conducts the research using qualitative and inductive research methodologies. During the first chapter, the paper presents how the definition of rape and genocide evolved under international law. The second chapter further explores cases of sexual violence, especially rape prosecuted as international crimes, and how they contributed to international law on sexual

violence. This chapter offers some insights on development and criticism of prosecuting sexual violence under international law. In the third chapter, the conflict is introduced, and relevant reports are analysed with information related to sexual violence. The paper addresses the limitations of the research, and the way the suffering of Ukrainian women carries a metaphorical meaning in the society. Lastly, the paper answers the research questions in the light of the limitations.

1. War time rape as a breach of international law

This chapter summarises the evolution of defining both genocide and war time rape under international humanitarian and criminal law. The purpose of this chapter is to explore the milestone cases contributing to the definitions. The sub-chapters will present the precedents of the understanding of both definitions in different situations before the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY).

1.1. Historical background

Ever since the early times of history to the present day, sexual violence against women during wartime was considered a socially accepted practice, understood as a collateral damage of the conflict. Women were not only the victims of war, sometimes they were used as spoils of war given to the victors. Sexual violence was tolerated, if not supported, as a tool of propaganda, humiliation and even terror. The earliest mention of an international court prosecuting rape was in 1474, although the crimes committed were only illegal because of the undeclared war.¹ To end impunity, the criminalization of sexualized wartime violence has been fought for at the international level since at least the mid- 19th century. The Lieber Code of 1863 for example explicitly mentions rape in Article 44 and 47 as punishable crimes.² The Lieber Code was the first modern codification of the laws of war, however, it was only applicable in the United States, as it was a set of procedures and rules of manoeuvre to the Union soldiers during the U.S. Civil war. The intention of protecting women in armed conflict reappeared when the Fourth Geneva Convention, namely the Geneva Convention Relative to the Protection of

¹ Schwarzenberger, Georg (1968): *International Law as Applied by International Courts and Tribunals*, Stevens & sons limited, London. pp.462-66 It described the trial of 1474 in which Hagenbach, a knight in the employ of the Duke Charles of Burgundy, was charged with murder, rape, perjury, and other crimes by omission, as he as a knight has the duty to prevent and protect the innocent from such acts. Last accessed:

² United States War Department & Lieber, F. (1898) *Instructions for the government of armies of the United States in the field*. Washington: G.P.O.

Civilian Persons in Time of War was adopted.³ It became the first modern instrument to establish protection of women against rape in Article 27. However, the wording of the article already shows us how rape was interpreted by the lawmakers - explicitly men at that time - as a crime against the honour of women, and not as a crime against the individual.

1.2. The birth and application of the definition of sexual violence and war time rape under international law

For a starting point, neither the Nuremberg Trials, nor the International Military Tribunal for the Far East had explicit mention of the crime of war time rape. Later, while the discussions of the Rome Statute's Elements of Crimes were advancing⁴, the statutes of both the ICTR and ICTY have already had explicitly mentioned sexual violence, specifically rape as a constituent of crimes against humanity⁵. Furthermore, war time rape was found as constituent to the crime of torture,⁶ war crimes,⁷ genocide,⁸ and as a grave breach of the Geneva Conventions.⁹ This sub-chapter will unfold how war time rape was not only interpreted as a crime alone itself, but also as constituents of other crimes.

1.2.1. From Nuremberg and Tokyo to the present

This attitude was maintained during the mid-20th century, after the Second World War, by the Nuremberg and Tokyo military tribunals, too. Sexual violence was not included in the definitions of crimes explicitly in the Nuremberg Charter or Principles, or the Tokyo Charter, but was prosecuted under the term's other inhumane acts, ill-treatment, and failure to respect family honour and rights.¹⁰ These cases show that how rape is being handled as a crime against honour, and not as a crime against the individual. It is to be mentioned that, to a limited extent, gender-based war crimes were prosecuted, before the International Military Tribunal for the Far

³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Aug. 12, 1949), 6 U.S.T. 3316, 75 U.N.T.S. 287 (entry into force Oct. 20, 1950) art. 27. 'Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.'

⁴ UNSC Resolution 827 (25 May 1993) UN Doc S/RES/827 art 5(g); UNSC Resolution 955 (8 November 1994) UN Doc S/RES/955 art 3(g).

⁵ Prosecutor v. Akayesu, Case No. ICTR-96-4-I, Amended Indictment, 16 February 1996. Count 13; Prosecutor v. Kunarac et al., Case No. ICTYIT-96-23-T, Indictment, 19 June 1996, para 4.8.

⁶ Prosecutor v Furundžija, Case No. ICTYIT-95-17/1-T, Trial Judgment, 10 December 1998. para 4.8.

⁷ Prosecutor v Furundžija, Case No. ICTYIT-95-17/1-T, Trial Judgment, 10 December 1998. Section IX.

⁸ Prosecutor v Akayesu Case No. ICTR-96-4-I, Amended Indictment, 16 February 1996, Count 13. Mechanism for International Criminal Tribunals; Prosecutor v Akayesu, Case No. ICTR-96-4-T, Trial Judgment, 02 September 1998.

⁹ Prosecutor v Furundžija, Case No. ICTYIT-95-17/1-T, Trial Judgment (10 December 1998). para 4.8. and counts 56-59.

¹⁰ Luping, Dianne (2009). Investigation and prosecution of sexual and gender-based crimes before the international criminal court. American University Journal of Gender, Social Policy & the Law, 17(2), 431-496.

East (Tokyo Tribunal), but the Tokyo Charter¹¹ only included implicit reference to rape.¹² Furthermore, regarding the widespread rapes in 1937 committed by Japanese soldiers against civilians in Nanking, rape charges were brought against Japanese defendants as war crimes.¹³ The more inclusive definition of rape was brought forward by the ICTR's Trial Chamber I, during the Akayesu case, and the further interpretation of this definition was developed through the second and the third Trial Chamber.¹⁴ It is argued that the Rwanda Tribunals were more innovative, when it came to the defining of sexual violence related crimes, these innovations were not used to their maximum potential during the Yugoslavian Tribunals. Some have also argued that the inclusivity the ICTR trials have shown were not implemented in the later decisions of the International Criminal Court (ICC).¹⁵ According to Tanja Altunjan,¹⁶ what constitutes an act of sexual violence or gender-based violence is not clearly defined. Furthermore, these concepts are not clearly separated, and to prosecute Conflict Related Sexual Violence (CRSV) in the future, a more substantive and gender – sensitive conceptualization would be needed.

1.2.2. ICTR

The International Criminal Tribunal for Rwanda was set up to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994. Genocide, crimes against humanity and war crimes were perpetrated on a horrific scale, primarily against Tutsi civilians and moderate Hutus, after Juvenal Habyarimana, the President of Rwanda, and Cyprien Ntaryamira, the President of Burundi, were assassinated. Soldiers, politicians, paramilitary organisations and ordinary citizens were the perpetrators. The material jurisdiction of the Tribunal covered the prosecution genocide, crimes against humanity, the violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II. The Tribunal made huge contributions to

¹¹ Charter of the International Military Tribunal for the Far East (1946) (as amended Apr. 26, 1946), art. 5.

¹² Machteld Boot (2008): Commentary on The Rome Statute of The International Criminal Court: Observers' Notes, Article by Article 159, 207. Crimes Against Humanity, Article 7(1)(g): Rape... or Any Other Form of Sexual Violence of Comparable Gravity, in (Otto Triffterer ed., Christopher Hall rev., 2d ed. 2008).

¹³ The International Military Tribunal for The Far East, The Tokyo Judgment 29 April 1946 - 12 November 1948, at para 389.

¹⁴ Rogers, Shayna (2016): Sexual violence or rape as constituent act of genocide: lessons from the ad hoc tribunals and prescription for the international criminal court. *George Washington International Law Review*, 48(2), 265-314.

¹⁵ Altunjan, Tanja (2021): The International Criminal Court and Sexual Violence: Between Aspirations and Reality. *German Law Journal*, 22(5), 878-893.

¹⁶ Prosecutor v Furundžija Case No.: ICTYIT-95-17/1-T, Trial Judgment, 10 December 1998, Section IX.

international criminal law, and set many precedents in prosecuting sexual violence and rape as grave breaches of international humanitarian law.

The first milestone regarding the evolution of the definition of rape under international law was Trial Chamber I of the ICTR. In *Prosecutor v. Akayesu*, the accused is a former mayor of a Rwandan administrative unit, the Taba commune. Jean-Paul Akayesu was a government official with power over the local police, and soldiers of the Interahamwe paramilitarian group. As mayor, he was the highest-ranking authority in the commune, but he did not act on the prevention of crimes happening in the commune, and did not protect the civilians, rather incited the crimes, and ordered killings of civilians belonging to the ethnic group of Tutsis. The Court has defined rape as ‘*a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.*’¹⁷ This definition highlights the importance of coercion, and the ‘invasion’ leaves room for interpretation, it does not exclude the usage of any body parts of an individual in a sexual way, which gives the interpreter a more effective tool for prosecuting war time rape. Additionally, the term ‘*invasion*’ is gender-neutral, and can be used in cases related to all genders. In the author’s opinion, it is also a nonprovocative, non-triggering term,¹⁸ because it only includes the slightest reference to the act it defines, and this encourages the usage of the definition. The intention of being culturally sensitive was expressed¹⁹ by the Chamber, and they had drawn a parallel between how the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment²⁰ has created a framework by which they interpret the act of torture, and how the Chamber decided to define the crime. The Chamber has decided that ‘the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Chamber considered the framework- approach more useful in international law. In the passage, they also recognised that rape is a violation of personal dignity. Furthermore, the Akayesu judgment ruled that acts of sexual violence, rape, mutilations and interrogations combined with beatings, and/or threats of death, were all acts that constitute to sub-element (b) Causing serious bodily harm [or mental] harm to members of the group; therefore, can constitute genocide. In sum, in *Prosecutor v. Akayesu*, the Court recognized that sexual violence and rape may constitute genocide when committed with the

¹⁷ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, (2 September 1998) para 597.

¹⁸ By non-triggering, the author of this paper means when the victim has to testify before the Court, they will not be required to use such language, which would include graphic description of the trauma they have suffered. This definition promotes the victim-centred prosecution of sexual violence, and does not intent to trigger the victim’s trauma.

¹⁹ *Prosecutor v. Akayesu* Case No. ICTR-96-4-T, Judgment, (2 September 1998) para 594.

²⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1. Adopted by General Assembly Resolution 39/46(10 December 1984).

intent to cause serious bodily or mental harm, kill members of the group, or prevent births within the group.

This interpretation was adopted in another landmark case of the ICTR. In *Prosecutor v. Kayishema* Trial Chamber II ruled that sub-element (c) of Article 2 of the ICTR Statute - *deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*-includes methods of destruction which are not required to lead to the immediate death of members of the group the crime is inflicted on. These practices include the act of rape, withholding of medicine and food.²¹ Trial Chamber II suggested that for rapes to amount to a 'condition[s] of life calculated to bring about [a group's] physical destruction' the acts must be committed repeatedly over a substantial²² period of time, and without the intent to kill the victim by any other means.²³ This case provides us the precedent how rape may constitute genocide through sub-element (c), when rape is interpreted as an act that can contribute to the destruction of a group physically. The victims can suffer such wounds from the repeated sexual violence, that they will not be able to reproduce, or do not wish to, as a result of their trauma. In a patriarchal society, the nationality of the father will be the nationality of the children, and this gives the perpetrators the opportunity to further increase the size of their group, while the number of children born in the other group decreases.

Prosecutor v. Gacumbitsi provides us another precedent for prosecuting sexual violence, in particular rape as genocide. Gacumbitsi was former Bourgmestre (mayor) of Rusumo commune, and stood trial for his organization and involvement in a massacre and other widespread crimes against Tutsis in Rusumo commune in 1994. As quoted in paragraph 198. 21., *'Sylvestre Gacumbitsi circulated about Rusumo commune in a vehicle announcing by megaphone that Tutsi women should be raped and sexually degraded'*. This is a direct incitement to commit offences against the individuals of the protected group they intended to harm, explicitly focusing on the women of the group. In his case, Trial Chamber III re-enforced that 'serious bodily harm' indicates 'any form of physical harm or act that causes serious bodily injury to the victim, such as torture' and have added sexual violence to their interpretation.²⁴

²¹ *Prosecutor v. Kayishema* Case No. ICTR-95-1-T, Judgment, (21 May 1999) art. 116.

²² '*substantial period of time*' means different amount of times in different context. The practice of the Courts differ in how they interpret the term 'substantial'. It is also worth examining what substantiality means from the victim's point of view. The paper does not wish to examine these topics in detail.

²³ Rogers, Shayna (2016): Sexual violence or rape as constituent act of genocide: lessons from the ad hoc tribunals and prescription for the international criminal court. *George Washington International Law Review*, 48(2), 265-314.

²⁴ *Prosecutor v. Gacumbitsi*, Case No. ICTR 2001-64-T, Judgment, (June 17, 2004) para 291.

Trial Chamber III also recognised that the harm is not needed to be irremediable to constitute genocide. These two aspects combined resulted in that The Chamber recognised that the rapes caused serious physical harm to members of the Tutsi ethnic group. As follows, the Chamber decided that, as to the sub-element of the crime of serious bodily harm, Sylvestre Gacumbitsi is responsible for the crime of genocide by instigating the rape of Tutsi women and girls.²⁵

Another case worth mentioning is the case of Mikaeli Muhimana, a former Counsellor of Gishyita Commune in Kibuye Prefecture. He stood trial for working with civilians and police to kill Tutsis in Kibuye, for providing them with arms, and stood trial for organizing and participating in the coordinated killing and rape of Tutsis. The prosecution charged Muhimana with direct responsibility for genocide, complicity in genocide, and crimes against humanity for acts of murder and rape, and was found guilty in all except complicity in genocide, since he was found guilty on Count 1 for committing genocide. In the Judgment of Trial Chamber III, two of the charges included the sub-element of rape, and Muhimana both committed and abetted the crime of rape, as during the attacks, he shot at refugees and rapes Tutsi women. The accused even apologised, when he accidentally raped a Hutu girl, he had mistaken to be Tutsi; thus, the special intention required for the crime of rape to constitute genocide with the targeting of the Tutsi group was identified. The Chamber found clear evidence from his words and deed that he intended to destroy the Tutsi community with his actions, and these actions were systematically carried out.²⁶

1.2.3. ICTY

The International Criminal Tribunal for The Former Yugoslavia was established in 1993 by the United Nation Security Council's Resolution 827, for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991²⁷. The competence of the Tribunal covered the prosecution of grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity. The ICTY has further developed international criminal and humanitarian law, solved disputed legal questions, created and effective victims and witnesses programme and added new perspectives when working with the criminal

²⁵ Prosecutor v. Gacumbitsi, Case No. ICTR 2001-64-T, Judgment, 291 (June 17, 2004) para 292.

²⁶ Prosecutor v. Muhimana, Case No. ICTR 95-1B-T, Judgment (26 May 2005) para 513-518, para 552-553.

²⁷ Updated Statute of The International Criminal Tribunal for The Former Yugoslavia (as amended 7 July 2009 by UN Resolution 1877).

responsibility of superiors.²⁸ In the statute of the ICTY, Article 5, relating to crimes against humanity, lists rape as an element of crime, similarly as the ICTR statute. In the Security Council's Resolution 827 of 1993, they emphasise the seriously alarming number of continuing reports of '*massive, organized and systematic detention and rape of women*'.²⁹ In several landmark cases, the Tribunal lived with their opportunity to develop international law regarding the prosecution of sexual violence as war crime, crimes against humanity, and also as genocide.

For the first time in the history of international criminal tribunals, rape was qualified as a form of torture, in the judgment of Hazim Delić., a deputy camp commander, in a prison camp in Čelebići. He was prosecuted for the rape of two women, as he used rape, as a form of punishment. In their judgment,³⁰ the Chamber found that the violence suffered by the victims carried a discriminatory purpose, as the chosen form of punishment was of a sexual nature, because they were women. The Trial Chamber upheld the definition used in the Akayesu case, and set the principle of recognising rape as torture in customary international law.

The ICTY took a step forward when the Trial Chamber's procedures widened the prosecution's scope during the prosecution of Anto Furundžija, but also took a step backwards when defining rape in this case. In this case, it was not Furundžija himself but his subordinates who raped the woman in the presence of other soldiers. However, as the unit's commander, Furundžija was found guilty of being an abettor and accomplice for not taking action against the soldiers, but expressing encouragement³¹. The ICTY Statute only included rape as an element of crimes against humanity, and in Prosecutor v. Furundžija, it was suggested that '*[r]ape may also amount to a grave breach of the Geneva Conventions, and the laws and customs of war*'.³² In the Trial Judgment of 12 October 1998, the definition of rape was approached in a completely different way than in the Akayesu case. In paragraph 174, the Chamber defines rape as 'a forcible act', which includes penetration of the victim's explicitly listed body parts, but the penetration is 'not limited to the penis'³³. This definition, unlike the definition in the Akayesu case, represents the point of view of the perpetrator, and not the victim, and strongly emphasises

²⁸ The Tribunal's Accomplishments in Justice and Law page 5 (ICTY). https://www.icty.org/x/file/Outreach/view_from_hague/jit_accomplishments_en.pdf (Last accessed: 9 November 2023.).

²⁹ UNSC Resolution 827, S/RES/827 (1993).

³⁰ Prosecutor v. Zejnil Delali, Zdravko Muci, Hazim Deli} and Esad Land'o, Case No. IT-96-21-T (16 November 1998) para 475- 480.

³¹ Prosecutor v. Furundžija Case No.: IT-95-17/1-T, Judgment, (10 December 1998) para 42.

³² Prosecutor v. Furundžija Case No. IT-95-17/1-A, Judgment (21 July 2000) page 7, see also Prosecutor v. Furundžija Case No.: IT-95-17/1-T, Judgment, (10 December 1998) para 172.

³³ Prosecutor v. Furundžija Case No.: IT-95-17/1-T, Judgment, (10 December 1998) para 174.

the physical aspect of the crime. On such a sensitive matter, where the rights and the suffered physical and mental trauma of the victim must be kept in mind by the legislator, this definition is completely inappropriate.

Before the ICTR's historical Akayesu case had determined that sexual violence, especially war time rape can constitute genocide, the ICTY made another significant contribution to international criminal law. In the Kunarac et al.³⁴ case, the three accused Bosnian Serb army officers had organised and maintained rape camps in the eastern Bosnian town of Foča. All three accused were found guilty of rape as a crime against humanity, and also broadened the elements that constitute enslavement as a crime against humanity to include sexual enslavement. In this case, rape was used systematically to carry out a strategy of oppression and terror. In a victim's testimony, the Chamber found proof on the intention of committing the crime of rape for a discriminatory purpose, for the victim was a Muslim woman, and the sexual violence was inflicted on her so the child born by the rape would be Serb.³⁵ The Chamber's decision clearly identified rape as a tool of war, although another trial had drawn the parallel between wartime rape and discrimination even closer.

In the case of Radislav Krstić, the Chamber constituted a link between rape and ethnic cleansing which, in the context of the July 1995 Srebrenica massacre³⁶, is closely linked to genocide. Krstić was a high ranking military officer, who was commander of the Drina Corps during the operation which resulted in the genocide known as the Srebrenica massacre. Thousands tried to flee to the nearby village of Potočari for shelter, but the Bosnian Serb army entered the area, and committed rapes, which were part of the ethnic cleansing³⁷ they sought. The characterisation of their ethnic cleansing policy, as the Chamber have pointed out, there were "obvious similarities between a genocidal policy and the policy commonly known as "ethnic cleansing"³⁸. Therefore, the link between rape and ethnic cleansing were concluded. In his verdict, Krstić was not convicted for the abetting and aiding genocide, because the rapes in Potočari happened before the start of the following genocide. The ethnic cleansing, in the end, was prosecuted as a crime against humanity, for the purpose of the policy was to gain control

³⁴ Dragoljub Kunarac, Zoran Vuković and Radomir Kovač.

³⁵ Prosecutor v. Kunarac et al., Case No.: IT-96-23& IT-96-23/1-A, Judgment, (12 June 2002) para 214.

³⁶ Smith, R. Jeffrey (2023): Srebrenica massacre. Encyclopedia Britannica, Last updated: 19 Oct. 2023. <https://www.britannica.com/event/Srebrenica-massacre>. (Last accessed: 9 November 2023.).

³⁷ Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment (02 August 2001) para 562.

³⁸ Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment (02 August 2001) para 562.

over the region, and the extermination of the protected group was only a tool to achieve domination, and not the goal.

1.2.4. ICC

The International Criminal Court was established with the adoption of its governing treaty, the Rome Statute. It is the first permanent international court in the history to deal with the criminal responsibility of individuals. It was created to help end impunity for the perpetrators of the most serious crimes of concern to the international community. The four grave crimes the ICC has mandate to prosecute are: genocide, war crimes, crimes against humanity, and the crime of aggression. The Court exercises jurisdiction over breaches of international humanitarian law only if they were committed on a State Party's territory or by its nationals. The Court complements national criminal justice systems: it can prosecute cases only if national justice systems are unable to carry out proceedings or they are unwilling to do so, The United Nations Security Council can also refer cases to the ICC.³⁹

The ICC's definition of rape evolved from the Akayesu case's and the Furundžija case's definition. They took the term 'invasion' from the Akayesu case, and the term 'penetration' from the Furundžija case, resulting in a narrowed down definition, as the crime qualifies rape only if it results in the penetration of the victim's body. In addition to rape, the Rome Statute explicitly recognises 'sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, [and] any other form of sexual violence of comparable gravity'⁴⁰ as well as gender-based persecution.⁴¹ In the Elements of Crimes⁴², the definition of rape is made up from 4 components from the lists of the elements of war crime, and the crime against humanity of rape.

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

'2, The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such

³⁹International Criminal Court (2020): Understanding the ICC, page 11. <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>. (Last accessed: 9 November 2023.).

⁴⁰ Rome Statute art 7(1) (g), art 8(b)(xxii), art 8(e)(vi).

⁴¹ Rome Statute art 7(1) (h).

⁴² Elements of Crimes, art 7(1)(g)(1), art 8(2)(b)(xxii)(1), art 8(2)(e)(vi)(1).

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 third and fourth element of the rape definition is related to the qualifying elements of crimes against humanity and war crimes, related to the international character of the armed conflict, and whether the perpetrator was aware of the fact that their actions are taking place under an armed conflict, or part of a widespread, systematic attack against civilian population. The difference between whether rape qualifies as a war crime or as a crime against humanity, is in the fourth element. A single rape can be prosecuted as a war crime, however, not as a crime against humanity, as it lacks the characteristics of being part of a systematic, large-scale attack.⁴³ These two points will be important when the paper will examine the cases related to the Russo-Ukrainian war.

As written many times in the notes section of the Elements of Crimes, *‘The concept of “invasion” is intended to be broad enough to be gender-neutral.’*. In the author’s interpretation it is culturally sensitive and non-triggering from the viewpoint of the victims. Nonetheless, the term *“penetration”*, which comes from the definition of rape of the Furundžija case, as pointed out, only provides the necessary legal background if the victim is willing to give a detailed testimony about the trauma they had to suffer. By applying the term *‘penetration’*, the ICC returned to defining rape that raises concerns about victim’s honour, and represents the perpetrator’s point of view. In the United Nations Commission on Human Rights’ *‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict*, the Commission points out *‘The historic focus on the act of penetration largely derives from a male preoccupation with assuring women’s chastity and ascertaining paternity of children.’*⁴⁴. *‘Invasion’* is a broader term than *‘penetration’* as it includes both physical and psychological aspects of a victim’s trauma.

The term *‘gender’* gives a rise to other interpretational problems. When the Rome Statute was negotiated, both Catholic and Muslim states took a part in the processes, just as progressive states, who did not believe in the dual gender conception. This terminology seemed as a good

⁴³International Committee of the Red Cross: International crimes. <https://blogs.icrc.org/ir/en/international-humanitarian-law/international-crimes/>. (Last accessed: 9 November 2023.).

⁴⁴ Human Rights Watch, *‘Commentary on the Second Preparatory Commission on Rules of Procedure and Elements of Crime’*; United Nations Commission on Human Rights, *‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’* para 24. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/128/81/PDF/G9812881.pdf?OpenElement> (Last accessed: 9 November 2023.).

compromise: it was not too conservative, nor too progressive.⁴⁵ When it comes to gender-neutrality, Grey argues that ‘Article 21(3), read together with the ICCPR [International Covenant on Civil and Political Rights], indicates that the Court is obliged to interpret the law without adverse distinction or discrimination on the grounds of ‘gender’ or ‘sex’.’⁴⁶ This means that the ICC should interpret law without discrimination on the grounds of gender, and this approach applies to the interpretation of the Elements of Crimes. However, this approach does not seem to be the correct interpretation when it comes to sexual and gender-based violence (SGBV) or crimes related to women. The essence of the problem is that more subtle gender biases might go unseen when interpreting crimes on a gender-neutral terminology. Overcoming these biases may require a fundamental re-evaluation, and in some cases, a departure from common interpretations of the law. On the other hand, in Article 7. (1) h) the Rome Statute explicitly mentions ‘persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender’. With this step, the Rome Statute integrates and criminalizes organized attacks against a gender-based group.

1.3. The birth and application of the definition of genocide under international law

The aim of genocide can be summarised briefly as the destruction of a national, ethnic, racial or religious group through the destruction of its individuals. The word ‘genocide’ is derived from the Greek ‘*genos*’, meaning race or tribe, and the Latin ‘*cide*’, meaning murder.⁴⁷ Generally, to commit genocide it is not a necessity for the act to be qualified as genocide to immediately destroy the targeted group, except for extermination and mass killing of the individuals. To identify a series of actions committed against a group as genocide, they should be committed as part of a coordinated plan, aiming to destruct the essential foundations of the group’s life. ⁴⁸ For example, with targeting social, political, cultural or religious institutions, or directly targeting the security, liberty, dignity and even the lives of the individuals belonging to the group. Genocide is directed not against the individuals themselves, but at the group they are part of.

⁴⁵ Hárs, András (2022): Szexuális bűncselekmények mint nemzetközi bűncselekmények az egyes nemzetközi büntetőtörvényszékek gyakorlatában– különös tekintettel a Nemzetközi Büntetőbíróság ítéleteire. Állam- és Jogtudomány LXIII. évfolyam, 2022, 4. szám, pp. 47 – 63. p.56.

⁴⁶ Grey, Rosemary (2016): Interpreting international crimes from female perspective: opportunities and challenges for the international criminal court. *International Criminal Law Review*, 17(2), 325-350.p 335.

⁴⁷ Lemkin, Raphael (1944): *Axis Rule in Occupied Europe*. Carnegie Endowment for International Peace, USA, page 79.

⁴⁸ Lemkin, Raphael (1944): *Axis Rule in Occupied Europe*. Carnegie Endowment for International Peace, USA, page 79.

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide⁴⁹ (Genocide Convention) is considered as the primary source of law in cases where genocidal attempts arise. The Genocide Convention applies to every state, as part of international customary law, as recognised by the International Court of Justice^{50 51}, reaffirmed by the United Nations' Secretary-General⁵², then reenforced by the United Nations' Security Council⁵³. Later the Tribunals and the Rome Statute⁵⁴ uses the exact same wording for the definition of the crime of crimes, as they have adopted the text of the precedent Genocide Convention.

In Article II, The Genocide Convention defines genocide as:

''...any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;*
- (b) Causing serious bodily or mental harm to members of the group;*
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) Imposing measures intended to prevent births within the group;*
- (e) Forcibly transferring children of the group to another group. ‘*

This article names two elements, in order to prosecute the crime of genocide: the mental criteria, meaning the intention behind the act to commit the physical criteria, meaning the listed actions. This definition is rather inclusive, as the sub-elements of the crimes themselves include many possibilities to connect different crimes committed to the crime of genocide. What makes the crime of crimes unique is that it needs a *'dolus specialis'*, a special intention identified behind the crimes committed to destroy a group in whole or in part, and this intention must be clearly identified. Cultural destruction of a group may not be enough to qualify as genocide.⁵⁵ It is

⁴⁹ UN General Assembly (1948): *Convention on the Prevention and Punishment of the Crime of Genocide*, United Nations, Treaty Series, vol. 78, page 277.

⁵⁰ Advisory Opinion of the ICJ (1951): Report S/25704 as of 3 May 1993.

⁵¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, para 140.

⁵² Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808. Case No.: S/25704, 3 May 1993.

⁵³ Security Council resolution 827 on establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. Case No.: S/RES/827 (1993) 25 May 1993.

⁵⁴ Rome Statute, art.6.

⁵⁵ United Nations Office on Genocide Prevention and the Responsibility to Protect (2018): *The Convention on the Prevention and Punishment of the Crime of Genocide, 1948-2018, Appeal: Universal ratification 2018*. page 5.

argued that this definition does not include the protection of groups such as political or LGBTQ+ minorities, and it should be reevaluated.

The Genocide Convention includes four further acts, which it deems punishable as genocide in Article 3: conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; complicity in genocide. In case of war time rapes, the incitement to commit the rapes so the protected group would suffer psychological and physical hurt, and would not practice reproduction as an outcome of the rape crimes committed, is also a possibility to explore.

In the following chapters, the essay will explore the possibilities to prosecute the Russian Federation in the crime of genocide either on the mental or the physical criteria, based on the evidence of relevant cases of war time rape.

2. The practical applications of rape as an international crime

2.1 Prosecution of rape as international crimes

In the previous chapter, several important cases of prosecuting rape under international law were mentioned. This chapter would further explore these, and additional cases related to the topic of how war time rape was prosecuted as the four grave crimes: war crimes, crimes against humanity, genocide, and crime of aggression. At the end of this chapter, a summarising table is to be found, where the specific elements of the cases are indicated, and which the paper uses in the third chapter, to establish a parallel between the cases of rape happening in the Russo-Ukrainian war, and how they could be prosecuted as genocide.

2.1.1. The Akayesu case

The case the author assumed to be the most relatable to the research is the Akayesu case. The Rwandan genocide happened in 1994, when an ethnic conflict broke out between the Tutsis and the Hutus after the assassination of former president Habyarimana. Rwanda is home to three ethnic groups, the two mentioned above, and the Twas. The massacres mainly targeted Tutsis, and Trial Chamber I has noted that considering the range and the systematic nature of the attacks, and the clearly expressed intention to destroy the protected group in whole or in part, what happened between April and July 1994 in Rwanda was genocide.⁵⁶ Jean-Paul Akayesu was Bourgmestre of the Taba commune, and had authority over the local police, soldiers of the

⁵⁶ Prosecutor v. Akayesu, ICTR-96-4-T, Judgement, 2 September 1998. para 78-129.

Interahamwe and government officials, whom he had incited to commit variant acts, including murder, torture and rape of Tutsis, the '*mens rea*' in this case was to specifically target the individuals belonging to the ethnic group, and to exterminate them with different means. The Trial Chamber noted that this genocide appeared 'to have been meticulously organized' and a witness even described it as a 'centrally organized and supervised massacre'.⁵⁷ The Chamber also noted that genocidal intent can be connected to the crime of rape, through imposing measures expected to prevent births within a group, and these measures can be both physical and mental.⁵⁸ In the aftermath of the suffered act, the victim might refuse to participate in sexual activities due to the trauma suffered. For there was no uniform definition of rape before under international law, the Chamber decided to use the definition of rape as '*a physical invasion of a sexual nature, committed on a person under circumstances which are coercive*'. Sexual violence, including rape, in the view of the Trial Chamber, was considered to be any sexual natured act which was committed on a person under circumstances which were coercive. '*This act must be committed: (a) as part of a wide spread or systematic attack; (b) on a civilian population; (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious ground*'.⁵⁹ The Chamber further ruled that sexual violence is not always limited to physical invasion of the victim's body, and may include acts which do not need to involve even physical contact⁶⁰. Sexual violence also falls within the scope of '*serious bodily or mental harm*', set forth in Article 2(2)(b) the Statute (Causing serious bodily or mental harm to members of the group) under genocide; '*other inhumane acts*', set forth Article 3 (i) of the Tribunal's Statute under crimes against humanity; '*outrages upon personal dignity*' as in Article 4(e)(Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault) of the Statute under Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II. In the verdict, Akayesu was convicted on 15 counts, and was found guilty on nine of them, including 3 related to sexual violence, especially rape: Count 1 – genocide; Count 13 - crime against humanity (rape) and Count 14- crime against humanity (other inhumane acts).⁶¹

⁵⁷ Prosecutor v. Akayesu, ICTR-96-4-T, Judgement, 2 September 1998. para 126.

⁵⁸ Prosecutor v. Akayesu, ICTR-96-4-T, Judgement, 2 September 1988. para 507-508.

⁵⁹ Prosecutor v. Akayesu, ICTR-96-4-T, Judgement, 2 September 1988. para 598.

⁶⁰ Prosecutor v. Akayesu, ICTR-96-4-T, Judgment, 2 September 1988. para 688.

⁶¹ Prosecutor v. Akayesu, ICTR-96-4-T, Judgment, 2 September 1988. Chapter 8: Verdict.

2.1.2. The Gatsumbitsi case

In our second ICTR case, Trial Chamber III found Sylvestre Gatsumbitsi guilty of genocide, according to Article 2 (a) Killing members of the group and (b) Causing serious bodily or mental harm to members of the group. During the trial, it was concluded that the Rwandan population was divided into three groups: Hutus, Tutsis, and Twas.⁶² In the Indictment of the Accused, in Paragraph 4, he '*organized the campaign against Tutsi civilians in Rusumo commune, Kibungo prefecture- The campaign consisted in public incitement of Hutu civilians to separate themselves from their Tutsi neighbours*' and '*killed persons by his own hand, ordered killings by subordinates, and led attacks*' against civilians. As mayor of the Kibungo prefecture he also '*ordered [...] to carry out the official policy of massacring civilian Tutsis*'.⁶³ He '*instigated the rape of Tutsi women and girls*' on several occasion, and should have been aware that the consequences of his orders would cause suffering. The systematic nature of the rapes is clearly displayed, and the Chamber ruled that '*rapes and other acts of sexual violence were committed as part of a widespread and systematic attack against Tutsi civilians*'⁶⁴. He actively encouraged the Hutu men to commit the rapes against the other gender of the protected group, thus the gender-related side of the crime is revealed as well. The sexual violence often ended in the death of the victim, either by murder, or by physical or mental harm which could not have been reversed. He was also responsible for the actions of his subordinates, as the perpetrators of rapes were generally the same people who organised and led the attacks against the Tutsis. This case has set the example of how consent, or non-consent should be interpreted in case of sexual violence and rape under international law. In their judgement, the Appeals Chamber has ruled that non-consent, as an element of the crime can be concluded from the coercive circumstances the rape was committed under.⁶⁵ These background circumstances can be an ongoing genocide campaign, in this case.

2.1.3. The Nyiramasuhuko et al. case

In Prosecutor v. Nyiramasuhuko et al., the Prosecution has charged Nyiramasuhuko and Ntahobali with rape as a crime against humanity. and for war crimes on the sub-element outrages upon personal dignity. The case of the second Trial Chamber includes six perpetrators, all charged for conspiracy to commit genocide, complicity in genocide, genocide; the crimes

⁶² Prosecutor v. Gatsumitsi, ICTR-2001-64-T, Judgment, 17 June 2004. para 28.

⁶³ Prosecutor v. Gatsumitsi, ICTR-2001-64-T, Judgment, 17 June 2004. para 35.

⁶⁴ Prosecutor v. Gatsumitsi, ICTR-2001-64-T, Judgment, 17 June 2004. para 228.

⁶⁵ Prosecutor v. Gatsumitsi, ICTR-2001-64-A, Appeals Judgement ,7 July 2007. para 155.

against humanity of murder, persecution, extermination, and other inhumane acts; and violence to life as a war crime. The research focuses on only on the related parts of the cases of Nyiramasuhuko and Ntahobali. The Chamber has found evidence on Ntahobali personally for rape on several occasion.⁶⁶ Nyiramasuhuko was the first woman in the history to be convicted for genocide, not as a direct perpetrator, but as a conspirator, aider and abetter. In her case, the intent to organise the supportive circumstances of genocide were proven. Nyiramasuhuko ordered Interahamwe to rape Tutsi women, and additionally, the evidence confirmed that she was responsible for the actions of the soldiers of *Interahamwe* who committed rapes at the Butare prefecture office as a superior officer⁶⁷ While ordering multiple attacks on vulnerable civilians, both Nyiramasuhuko and Ntahobali ordered killings and rapes. Beyond that, Ntahobali committed rapes, and Nyiramasuhuko aided and abetted rapes, and responsible as a superior for rapes committed by members of the Interahamwe.⁶⁸ In the end, the Chamber did not enter a conviction for genocide on the basis of rape ⁶⁹, only in support of the counts of rape as a crime against humanity, and outrages upon personal dignity as a war crime. In the verdict, Pauline Nyiramasuhuko was found guilty on the seventh and eleventh count, as a superior of the Interahamwe who raped Tutsis, for rape as a crime against humanity, and for rapes as outrages upon personal dignity as a war crime⁷⁰. Arsene Shalom Ntahobali was found guilty on count 7 for rape as a crime against humanity, for committing, ordering, aiding and abetting rapes at the Hotel Ihuliro roadblock and at the Butare prefecture⁷¹. Same as his mother, Ntahobali was found guilty on count 11 of outrages upon personal dignity as a war crime, on the act of committing, ordering, aiding and abetting rapes at the Hotel Ihuliro roadblock and at the Butare prefecture office.⁷²

⁶⁶ Prosecutor v. Nyiramasuhuko et al. ICTR-98-42-T Summary of Judgement and Sentence, 7 March 2016 para 20, 23.

⁶⁷ Prosecutor v. Nyiramasuhuko et al. ICTR-98-42-T Summary of Judgement and Sentence, 7 March 2016 para 26.

⁶⁸ Prosecutor v. Nyiramasuhuko et al, ICTR-98-42-T Summary of Judgement and Sentence, 7 March 2016 para 27.

⁶⁹ Prosecutor v. Nyiramasuhuko et al, ICTR-98-42-T Summary of Judgement and Sentence, 7 March 2016 para 25.

⁷⁰ Prosecutor v. Nyiramasuhuko et al, ICTR-98-42-T Summary of Judgement and Sentence, 7 March 2016 para 44,48.

⁷¹ Prosecutor v. Nyiramasuhuko et al, ICTR-98-42-T, Summary of Judgement and Sentence, 7 March 2016 para 55.

⁷² Prosecutor v. Nyiramasuhuko et al, Summary of Judgement and Sentence, 7 March 2016 para 59.

2.1.4. The Ntaganda case

In relation to the Situation in the Democratic Republic of Congo, an important case of the ICC for the research was the Ntaganda case. Bosco Ntaganda was a commander of operation and Chief of Staff of the Forces Patriotiques pour la Libération du Congo (FPLC) or Union of Congolese Patriots (UPC) during the conflict in Ituri region, between 2002-2003. The fight in the Ituri region was for the control over its natural resources, but it also had discriminative aspects, *'ethnic or "tribal" dimension, essentially between the Hema and Lendu'* ethnic groups⁷³. In the Ituri region, approximately 18 ethnicities⁷⁴ were living, and other groups were seen as associates of one side or another, Ntaganda was convicted as an indirect co-perpetrator for both crimes against humanity and war crimes of rape on count 4 and 5, and on count 6 and 9, for crimes committed by UPC/FPLC soldiers. The Chamber distinguished between two types of victim groups: the civilian victims of the First and Second Operation (Counts 4, 5, 7 and 8), and the victims of sexual violence against female UPC/FPLC members under the age of 15 (Counts 6 and 9)⁷⁵. Namely, during the First Operation, rapes took place against the female civilian population in the towns of Mongbwalu and Kilo and Sayo, and during the Second Operation, in the towns of Kobu, Sangi, and Buli.⁷⁶ According to witness P-0014, the reference of using the rape of 'enemy women' as a means of waging war was made, and the witness explained the Chamber that the perpetrators wanted to psychologically affect the partners of the raped women, because the men would feel ashamed and overpowered of the act, for they could not protect their wife.⁷⁷ The Ntaganda case provided a larger platform to victims, while also re-interpreting what coercion means in relation to sexual violence.⁷⁸

2.1.5. The Ongwen case

In Prosecutor v. Dominic Ongwen, the case offers the whole repertoire of conflict-related sexual violence, happened in Northern Uganda between 1 July 2002 and 31 December 2005.⁷⁹ The

⁷³ Prosecutor v. Ntaganda, No.: ICC-01/04-02/06 Judgment 08 July 2019 para 21.

⁷⁴ Prosecutor v. Ntaganda, No.: ICC-01/04-02/06, Judgment 08 July 2019 para 3.

⁷⁵ Prosecutor v. Ntaganda No.: ICC-01/04-02/06 Sentencing judgment, 7 November 2019 para 90.

⁷⁶ Prosecutor v. Ntaganda, No.: ICC-01/04-02/06, Judgment 08 July 2019 para 936-938.

⁷⁷ Trial Hearing of DRC-OTP-P-0014P in the case of Prosecutor v. Bosco Ntaganda (ICC-01/04-02/06). Document No.: ICC-01/04-02/06-T-138-Red-ENG WT 23-09-2016 1/111 CVZ T. P -0014: T-136, page 57, and 59; and T-138, pages 100 to page 101. P-0014: T-138, pages 101-102 (the particular part of the session was private, yet the text of Judgment quotes the source under footnote 755 and 756 of para 293).

⁷⁸ Hárs, András (2022): Szexuális bűncselekmények mint nemzetközi bűncselekmények az egyes nemzetközi büntetőtörvényszékek gyakorlatában – különös tekintettel a Nemzetközi Büntetőbíróság ítéleteire. Állam- és Jogtudomány LXIII. évfolyam, 2022, 4. szám, pp. 47 – 63. p.62.

⁷⁹ Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Judgment (4 February 2021) para 35.

situation is one of the longest ongoing conflicts in the African continent, and it was waged by the guerilla group Lord's Resistance Army (LRA), led by Joseph Kony, and it resulted in a humanitarian crisis. The LRA's aim is to overthrow the Ugandan government, and to create a new state based on Kony's teachings. Ongwen was former commander of one of the brigades of the LRA, he personally committed, aided and abetted several of the crimes. He was charged with 70 counts and was found guilty on 61 of them. The charges included rape both as a crime against humanity and a war crime, pursuant to Article 7(1)(g) and Article 8(2)(e)(vi) of the Statute, due to the '*sustained character of the acts over a long period of time*'⁸⁰. In his case, the Chamber differentiated between the sexual and gender-based violence he was directly responsible for, and the ones not directly perpetrated by him (Counts 61 to 68). He bore commander's responsibility for all LRA proceedings, including abducting young girls and women, and forcing them to be 'bush wives' of the soldiers. The Accused himself was overseeing the distribution system among other leaders. The abducted girls were forced to have sexual intercourses with their abductors during their 'marriage', and oftentimes they have suffered injuries or became pregnant as a result of their rape. Ongwen was the first person to be charged with, and declared guilty of the crime of forced marriage as a distinct crime under article 7(1)(k), for he himself had 7 wives⁸¹ during the conflict. The Trial Chamber's decision on how forced pregnancy and forced marriage is a separate crime under crimes against humanity is proved to be another stepstone in the prosecution of sexual violence.

2.1.6. *The Al Hassan case*

A case which might provide an answer in future for this question is the Prosecutor v. Al Hassan, in the context of the Northern Mali conflict. The Ansar Dine and al-Qaeda in the Islamic Maghreb (AQMI) held control over Timbuktu during April 2012 to January 2013. The Ansar Dine and AQMI have created what they deemed a 'religious police force'. Al-Hassan allegedly joined this force in early 2012 and by May 2012 had become a member of the religious police. Al-Hassan allegedly participated in a program of forced marriages that effectively rendered Timbuktu women and girls as sexual slaves,⁸² thus promoted sexual violence and rape in the region. In the case of Al Hassan Ag Abdoul Aziz, Trial Chamber X have not concluded a judgment yet. The charges against him included rape and sexual violence both as crimes against humanity and as a war crime, in the context of '*a widespread and systematic attack by armed*

⁸⁰ Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Judgment (4 February 2021) para 3042.

⁸¹ Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Judgment (4 February 2021) para 2041.

⁸² Prosecutor v. Al Hassan, ICC-01/12-01/18, (27 March 2018).

groups Ansar Eddine / Al Qaeda in the Islamic Maghreb against the civilian population of Timbuktu and its region, between 1 April 2012 and 28 January 2013',⁸³ and forced marriage as crime against humanity and sexual slavery as war crime. The Defence argued that the Prosecution failed to establish that the Accused were aware of the crimes or made culpable contributions 'to the charged crimes of sexual framework with the framework of the common plan'⁸⁴. '[R]ape, sexual enslavement, forced marriages, were [...] not part of the common plan, but they could have been foreseeable consequences [...] of the common plan based on the ideology of the organisation, the composition of the organisation and the causative context of the time in Timbuktu.'⁸⁵ This is the first case before the ICC to try gender-based persecution⁸⁶, after it was withdrawn at pre-trial level in the Mbarushimana case.⁸⁷ Hopefully, this case opens discourse towards whether targeting women as a protected group should be considered as a contributing factor when prosecuting sexual violence.

2.2. The *mens rea* (the mental intent to commit the act) and *actus reus* (the criminal act summarizing table of the cases in 2.1

In the table, the elements indicated are: the *mens rea*- the mental intent to commit that act; the *actus reus*- the criminal act; under which crime the court has interpreted the crime; and for further clarification, the textual background, and why the cases were important in developing international law.

⁸³ International Criminal Court, Al Hassan case ICC-01/12-01/18, Case Information Sheet. <https://www.icc-cpi.int/mali/al-hassan>. (Last accessed: 9 November 2023.).

⁸⁴ Prosecutor v. Al Hassan, ICC-01/12-01/18, Public redacted version of the Defence's final submissions regarding the confirmation of charges, (31 July 2019) para 69-70, 168.

⁸⁵ Prosecutor v. Al Hassan, ICC-01/12-01/18, Public redacted version of the Defence's final submissions regarding the confirmation of charges, (31 July 2019) note 56.

⁸⁶ Prosecutor v. Al Hassan, ICC-01/12-01/18, Decision on the Confirmation of the Charges, (30 September 2019) Count 13.

⁸⁷ The Prosecutor v. Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of the Charges (16 December 2011).

Name and date of the case	<i>Mens rea</i> (The mental intent to commit the act)	<i>Actus reus</i> (The criminal act)	Which crime of the four grave crimes?	Under which article?	Under which sub-elements of crime?	How the case was important in developing the interpretation of rape?
The Prosecutor v. Akayesu (1988)	Direct and public incitement to commit genocide ⁸⁸ Targeting of individuals belonging to the Tutsi group	Extermination, murder, torture, rape, other inhumane acts	Genocide Crimes against humanity	Art. 2(2)(b) Art. 3 (i) of the ICTR Statute	Serious bodily or mental harm Other inhumane acts	First case to prosecute rape as genocide; basic definition of rape developed.
The Prosecutor v. Gatsumbitsi (2004)	Instigation the rape of Tutsi women and girls	Murder, extermination, rape (through command responsibility)	Genocide Crimes against humanity	Art. 2(3)(a) and (b); Art. 6(1) and (3) of the ICTR Statute	Killing members of the group; Causing serious bodily or mental harm to members of the group (through rape)	The lack of consent can be derived from the coercive circumstances; the OTP does not need to prove non-consent.
The Prosecutor v. Nyiramasuhuko et al. (2016)	Targeting individuals belonging to the ethnic group of Tutsis; ordering of murders and rapes of Tutsis	abduction, murder, extermination, rape (through command responsibility for Nyiramasuhuko and direct for Nhatobali)	Crimes Against Humanity and War Crimes Nyiramasuhuko: indirect responsibility for committing; direct for ordering, aiding and abetting. -Nhatobali: direct responsibility for committing, ordering, aiding and abetting	Art. 3 (g) Art 1.- Art. 4 (e) of ICTR Statute	Rape and Outrages upon Personal Dignity	The perpetrator was guilty of aiding and abetting genocide, through the ordering of rape.
The Prosecutor v. Ntaganda (2019)	Contribution to the crimes in the execution of the common plan; targeting the Lendu civilians	Rape and sexual slavery of civilians and children under the age of 15;	Crimes against humanity and War crimes	Article 7(1)(g) and Article 8(2)(e)(vi) of the Rome Statute	Rape	It was possible to establish how rape was used to influence the mental state of men in the society.

⁸⁸ Prosecutor v. Akayesu, para 560-562.' *The Chamber holds that genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.*'.

The Prosecutor v. Ongwen (2021)	Constructing a system of distributing abducted women and girls; forced marriage with seven women between 2002-2005	Abduction of girls; forced marriage; enforced pregnancy; forcing them to wed soldiers; enslavement; rape through direct and command responsibility	Crimes against humanity and War crimes	Article 7(1)(g) and Article 8(2)(e)(v i) of the Rome Statute	Rape	First declaration of crime of forced marriage as a distinct crime; interpretation of forced pregnancy and forced marriage as a separate crime under crimes against humanity.
The Prosecutor v. Al Hassan (2019)	Implementation of the 'common plan' during a systematic attack against civilians, resulting in sexual violence; Participation in and organisation of a program of forced marriages	Rape, sexual enslavement, forced marriages	Crimes against humanity; war crime crime against humanity war crime	Article 7(1)(g) and Article 8(2)(e)(v i) of the Rome Statute	Rape and Sexual violence Forced marriage Sexual slavery	Possibility to expand the definition of protected groups to women, as a protected group.

Table No. 1.: Sexual violence as international crimes. The table was edited by the author of the paper.

2.3. Conclusions of the table: possibilities of development

During the 6 examined cases, all 6 proved to be part of a widespread, systematic attack, for mainly the same reasons: the rapes were committed on a large scale against civilian population, and all, except the Ongwen case, had an ethnic dimension to it. Most of the rapes examined were committed by men against women.⁸⁹ Therefore, the question arises, whether women should be interpreted as a protected group under the Rome Statute. The possibility to interpret women, as a protected group opens up in relation to Prosecutor v. Al Hassan, even though genocide was not included in the charges. In this case the crimes were targeting women and girls especially for exploiting them, because they are biologically female.⁹⁰ Gender based

⁸⁹ exception: Prosecutor v. Dominic Ongwen, Judgment ICC-02/04-01/15 (4 February 2021) para 1471-1472. In this case a female LRA soldier raped a woman during the attack of Odek IDP camp.

⁹⁰ Epure, Georgiana (2020): Writing the Jurisprudence on Gender-based Persecution: Al Hassan on Trial at the ICC. International Justice Monitor. <https://www.ijmonitor.org/2020/07/writing-the-jurisprudence-on-gender-based-persecution-al-hassan-on-trial-at-the-icc/#:~:text=Eight%20years%20after%20Mali%20referred%20the%20situation%20to,sentencing%20without%20due%20process%2C%20and%20attacking%20religious%20buildings.> (Last accessed: 9 November 2023.).

persecution results in women deprived of fundamental human rights, such as freedom from slavery, physical integrity, the right to health, freedom from torture, to mention a few. The judgment of the Al Hassan trial will be another critical step in advancing the international legal system regarding women's rights

From the summarising of the table, we can conclude that the ICC has sufficient cases to prosecute rape as different grave crimes, however, to prosecute it as genocide deemed to be the most complicated procedure. *'Crimes of sexual violence are not explicitly listed as acts of genocide in the Rome Statute because delegations were reluctant to deviate from the wording found in the 1948 Genocide Convention.'*⁹¹ The Elements of Crimes provides clarification on how sexual violence, especially can be prosecuted as international crimes, but it is argued that there are problems with how sexual violence is characterised by international criminal law (ICL) itself.⁹² Rape is not a crime by itself under ICL, only a constituent of another "bigger" crime, giving the interpretation that crime was not committed against the individual, but against the national / ethnic group of the individual, and this absolutely contradicts the victim-centred approach the ICC ought to promote with 'ending impunity'.

Feminist scholars have argued that the over-fixation on the crime of rape when prosecuting sexual violence under ICL can have negative effects on other sexual violence related crimes, for example, the lack of reproductive health assistance.⁹³ Prosecuting rape under international law must not lead to the overlooking of other sexual violence-related crimes. Furthermore, prosecuting rapes of a bigger scale, for example, the rapes committed in Rwanda, can make other war time rapes less visible, simply because of the scale they have happened.⁹⁴ When rape is seen as a weapon of war, it is usually understood as a weapon against one specific group of victims the case is concerned with, in the cases of the ICTR, Tutsi women. This biased reasoning might lead to ignorance in relation to other group of victims.

A problematic aspect also can be the gender biased interpretation of rape as a phenomenon: usually, when we think about a victim of sexual violence, we think about women as victims. The biased thinking of people can lead to the use of the two terms – gender and women –

⁹¹ Oosterveld, Valerie (2004): Sexual Slavery and the International Criminal Court: Advancing International Law. Michigan Journal of International Law 2004/3. 605., page 638.

⁹² Grewal, Kiran (2010): Rape in Conflict, Rape in Peace: Questioning the Revolutionary Potential of International Criminal Justice for Women's Human Rights. Australian Feminist Law Journal, 33:1, 57-79, page 75.

⁹³ Rimmer, Susan H. (2010): Sexting the subject of transitional justice. Australian Feminist Law Journal 32:123–147. p. 132.

⁹⁴ Buss, Doris E. (2009): Rethinking 'rape as a weapon of war'. Feminist Legal Studies 17: pp. 145–163. pp. 159-160.

synonymously, even though sexual violence is committed against men and boys too.⁹⁵ The author of this paper does not intend to exclude the male victims of the CRSV happening during the Russo-Ukrainian conflict. The simple reason why the paper is not concerned with sexual violence happening against men is because the research is focused on how sexual violence, especially rape targeting Ukrainian women might constitute genocide.

It should be mentioned that the ICC has been active for 21 years, but the prosecution of sexual violence was not one of its priorities, yet the Court seems to be entering a slow, but steady developmental phase, as important cases await their judgment nowadays. The point of change was in June 2014, when the Office of the Prosecutor (OTP) have published a policy paper on sexual and gender-based crimes.⁹⁶ During the spring of 2023, the OTP have announced to launch public consultation on the renewal of this paper.⁹⁷ The goal of the policy paper would be to present a more survivor-centred and trauma-informed approach to investigation and prosecution in sexual violence, with providing gender analysis at all level of the OTP's work.

In the situation of Ukraine, the Court will closely cooperate with the Ukrainian authorities, when collecting evidence and examining the cases of sexual violence happened in its territory since 24 February 2022. Allegations of possible war crimes have been rising since 2014, but the intensity of the full-scale war and the crimes it brought, evidence is more recent. In the following chapter, the paper will give a factual background on the Russo-Ukrainian conflict, and draw a parallel between the ICL cases mentioned and the possible dimensions to prosecute sexual violence, especially rape as genocide in the Russo-Ukrainian conflict, as well as answering the research question, whether Russia uses rape as a weapon of war.

⁹⁵ Marcus, Sharon (1992): *Fighting bodies, fighting words: A theory and politics of rape prevention*. In: Butler J and Scott J (eds) *Feminists Theorize the Political*. New York, NY: Routledge, pp. 385–403. p.167.

⁹⁶ International Criminal Court, The Office of the Prosecutor (2014): *Policy Paper on Sexual and Gender-Based Crimes*. <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>. (Last accessed: 9 November 2023.).

⁹⁷ OCHA, Relief web (2023): *The Office of the Prosecutor launches public consultation to renew Policy Paper on Sexual and Gender-based Crimes*. <https://reliefweb.int/report/world/office-prosecutor-launches-public-consultation-renew-policy-paper-sexual-and-gender-based-crimes>. (Last accessed: 9 November 2023.).

3. Understanding rape as genocide in case of the Russo – Ukrainian conflict

3.1. Historical introduction of the conflict

The Russo-Ukrainian conflict began in 2014, and it is a complex and multifaceted conflict with deep historical, political, and social roots, which turned into a full-scale war on 24 February 2022, making it the first war in Europe since the end of the Yugoslavian war.

After the dissolving of the Soviet Union, Ukraine gained independence in 1991, but this period was marked with economic challenges and political instability. As a result of the Orange Revolution in 2004, a pro-Western politician was elected as president. Ten years later, during the so-called Maidan protests, the protesters wanted President Yanukovich to resign and they called for a closer integration with the European Union. During this time of instability, the Russian Federation has annexed Crimea starting on 18 March 2014. The eastern regions of Luhans and Donetsk was no longer under the authority of the Ukrainian Government.⁹⁸ Then, in 2014 a ceasefire agreement was made between representatives of Russia, Ukraine, and the Organisation for Security and Cooperation in Europe (OSCE), known as the first Minsk Agreement,⁹⁹ and a second Minsk Agreement¹⁰⁰ followed it in 2015. Both were mainly concerned about the withdrawal of specific weapons, exchange of hostages and the special status of Luhansk and Donetsk interim local self-government. These agreements have failed, and the reason for that is they did not address the problem they were meant to solve: it was the Russian Federation's goal to exercise authority over the foreign and domestic policy of Kyiv, and not the insurance of self-governing rights of some Eastern regions of Ukraine on an ethnicity-related problem.¹⁰¹

⁹⁸ International Criminal Court, The Office of the Prosecutor (2014): Report on Preliminary Examination Activities 2020. pp. 69-74. <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>. (Last accessed: 9 November 2023.).

⁹⁹ Protocol on the results of consultations of the Trilateral Contact Group with respect to the joint steps aimed at the implementation of the Peace Plan of the President of Ukraine, P. Poroshenko, and the initiatives of the President of Russia, V. Putin (Minsk Protocol, or Minsk I Agreement).

¹⁰⁰ Regional Treaties, Agreements, Declarations and Related, *Package of Measures for the Implementation of the Minsk Agreements*, 12 February 2015.

¹⁰¹ Brentler, Alexander (2023): Diplomat: Why the Minsk Agreements Failed in Ukraine. Interview with Wolfgang Sporrer, Jacobin online journal. <https://jacobin.com/2023/02/wolfgang-sporrer-interview-ukraine-war-diplomacy-minsk-agreements> (Last accessed: 9 November 2023.).

3.2. The ICC's material jurisdiction over the conflict

Ukraine is not a State Party to the Rome Statute, but they have accepted the ICC's jurisdiction over alleged war crimes happening in their territory according to Article 12(3) of the Statute. The first declaration covered the time period of 21 November 2013 – 22 February 2014¹⁰², and was turned in April 2014. The declaration was lodged by the Ukrainian Government. A second declaration followed on 4th February 2015, with a wider time frame specified for the scope, from 20 February 2015 until '*present time*'¹⁰³, and this time it was lodged by the Ukrainian Parliament, the Verkhovna Rada. In the last paragraph, it specifies the subject matter of the jurisdiction, which is '*crimes against humanity and war crimes committed by the senior officials of the Russian Federation and leaders of the terrorist organisations*' DNR' and 'LNR' 'The statement of Prosecutor Fatou Bensouda of 2020 states that it is reasonable to believe that '*a broad range of conduct constituting war crimes and crimes against humanity within the jurisdiction of the Court have been committed in the context of the situation in Ukraine.*' The admissibility of the cases lies in the fact, that the competent authorities in the territory of Ukraine and/or the Russian Federation are either inactive and does not exercise their judicial power, or they are unavailable in territory under the control of the opposing party, and obstruct their proceedings. Joint and solo referrals were made by Party States with the beginning of March 2022,¹⁰⁴ resulting in the opening of investigations by the OTP.¹⁰⁵ After the 43 referrals, the OTP have joined the Joint Investigative Team (JIT)- consisting of Lithuania, Poland, Ukraine, Estonia, Latvia, Slovakia, and Romania – first as a participant, then as a formal member.¹⁰⁶

The first conclusion of it was the first two warrants of Trial Chamber II on 17 March 2023, namely arrest warrants targeting Vladimir Vladimirovich Putin, the President of the Russian Federation, and Anna Alekseyevna Lvova-Belova, the Commissioner for Children's Rights in

¹⁰² Embassy of Ukraine to the Kingdom of the Netherlands No.: 61219/35-673-384, Declaration on the recognition of the ICC's jurisdiction (09 April 2014).

¹⁰³ Resolution of the Verkhovna Rada of Ukraine: On the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of the terrorist organisations "DNR" and "LNR", which led to extremely grave consequences and mass murder of Ukrainian nationals. (04 February 2015) page 5.

¹⁰⁴ International Criminal Court, Situations- Ukraine, Information Sheet. ICC-01/22. <https://www.icc-cpi.int/situations/ukraine>. (Last accessed: 9 November 2023.).

¹⁰⁵ Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine. (28 February 2022) Source: Office of the Prosecutor. <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening> (Last accessed: 9 November 2023.).

¹⁰⁶ Annual report of the Office of the Prosecutor, 2022. page 17. (Last accessed: 9 November 2023.).

the Russian Federation.¹⁰⁷ They are charged with war crimes for the unlawful deportation of Ukrainian children into the Russian Federation according to Article 8(2)(a)(vii) and article 8(2)(b)(viii) of the Rome Statute, however, this crime could be also regarded as the crime of genocide under Article 6 (e) the Statute. The reason for it must be found in the narrow territory the ICC can manoeuvre in relation the conflict, and especially genocide. The ICC had no case where the genocidal intent could be established, and since this is an ongoing conflict, collecting evidence on the intention is even more difficult.

Eventually, there will also be a clash between the immunities of Heads of States or Government, and individual criminal responsibility concerning grave breaches of international humanitarian and criminal law. There were precedents regarding the immunity of Heads of State under international criminal law, for example, the Al Bashir case, in which former President of Sudan was put under an arrest warrant.¹⁰⁸ Under the Rome Statute, Article 28 rules over the questions regarding superior responsibility. In the first part, it explains the responsibility of superiors in the military, and of people acting as superiors in the military. The second part expands the superior responsibility to civil superiors. Traditionally, the superior responsibility of military superiors can apply to civil superiors.¹⁰⁹ Today, the Chief of the General Staff of Russian Armed Forces is Valery Gerasimov, ranking as the highest military superior in Russia, next to President Vladimir Vladimirovich Putin as the highest-ranking civil superior.

Another question needed to be tackled is the fact that the ICC can only function as a secondary platform, when, as mentioned above, the authorities with judicial powers cannot or do not carry out their functions. In the text of the amendment of the Ukrainian Criminal Code adopted on 3 May 2022, it is written that the cooperation's aim is to prosecute crimes committed on the territory of Ukraine against Ukraine¹¹⁰ – this does not fulfil the purpose of the ICC of

¹⁰⁷ Statement by Prosecutor Karim A. A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova. (17 March 2023) Source: Office of the Prosecutor. <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>. (Last accessed: 9 November 2023.).

¹⁰⁸ Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Case Sheet. <https://www.icc-cpi.int/darfur/albashir>. (Last accessed: 9 November 2023.).

¹⁰⁹ Vetter, Greg R. (2000): Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC). In: The Yale Journal of International Law. Vol 25:89. p. 116.

¹¹⁰ Verkhovna Rada of Ukraine: On Amendments to the Criminal Procedure Code of Ukraine and Other Legislative Acts of Ukraine on Cooperation with the International Criminal Court. Document No. 2236-IX. Adoption on May 3, 2022. *'extending its jurisdiction to persons (citizens of Ukraine, foreign citizens and stateless persons) who, at the time of committing a crime falling under the jurisdiction of the International Criminal Court, were subordinated and/or acted with the aim of carrying out armed aggression against Ukraine, and/or on the basis of decisions (orders, orders, etc.) of officials, military command, or state authorities of the Russian Federation or another country that carried out aggression, or facilitated its implementation, against Ukraine.*

prosecuting all war criminals under impartiality. Even though State Parties are allowed to identify specific persons or actions when they submit their case to the ICC, only the OTP is entitled to make an indictment on a specific case.¹¹¹ As they are independent from the parties, the prosecutors are not bound by the allegations of the states. As Ukraine have resided to cooperation with the ICC, they shall fulfil their part as well with prosecuting crimes committed by their own nationals.

3.3. The alarming reports of the situation

3.3.1. Factual findings from independent sources

Under the Office of the High Commissioner for Human Rights (OHCHR), an independent fact-finding commission has been working in Ukraine since March 2014. The UN Human Rights Monitoring Mission in Ukraine (HRMMU) publicly reports on the human rights situation of the country, but since the beginning of the war, they are documenting violations of international human rights law and international humanitarian law committed by all parties to the conflict. The OHCHR report concerning the period between 24 February and 26 March 2022 has found devastating numbers: 2,909 civilians dead and 1,790 injured in the one-month period, but the report emphasises that these numbers are probably not exact, as hostilities were going on during the examined period.¹¹² The report also mentions the rising CRSV cases, the risks of human trafficking and sexual exploitation of women fleeing the country.¹¹³ Another report from the OHCHR recorded that 4,621 civilians were killed or injured in Ukraine from 1 February to 31 July 2023: - 1,028 persons killed, and 3,593 persons injured.¹¹⁴

In the report of the Independent International Commission of Inquiry on Ukraine, they referred to findings about events during late February and March 2022 in the four regions of Kyiv, Chernihiv, Kharkiv, and Sumy, as requested by Human Rights Council. They have found that the age of victims of sexual violence and gender-based crimes range by 4 to over 80 years old. Sexual violence was inflicted on men, women, children and the elderly also, and rape was used

¹¹¹ Béres, Nóra (2022): Ukrajna Esete a Nemzetközi Büntetőbírósággal: Remények és Realitások. Állam- és Jogtudomány, LXIII. évfolyam, 2022:4, pp. 47 – 63. pp. 7-8.

¹¹² United Nations Human Rights Monitoring Mission in Ukraine: Update on the human rights situation in Ukraine Reporting period: 24 February – 26 March. (26 March 2022) para 1.

¹¹³ United Nations Human Rights Monitoring Mission in Ukraine: Update on the human rights situation in Ukraine Reporting period: 24 February – 26 March. (26 March 2022) para 42-45.

¹¹⁴ United Nations Human Rights Monitoring Mission in Ukraine: Report on The Human Rights Situation in Ukraine, 1 February to 31 July 2023. (04 October 2023) para 2.

as torture. They often used forced nudity on the victims in detention.¹¹⁵ In the note by the Secretary-General, from October 2022, the Independent International Commission of Inquiry on Ukraine have already pointed out that patterns can be found between cases of sexual violence in the occupied regions.¹¹⁶

From February 2022 until the end of January 2023, the OHCHR documented 133 cases of CRSV in Kyiv, Kharkiv, Kherson, Chernihiv and Zaporizhzhia regions, from which 85 were committed against men, 45 against women, 3 against underage girls, majority attributable to the Russian forces. During the reporting period, the survivors released from captivity have reported that they suffered sexual violence, including threats of rape, if they do not provide information to their captors.¹¹⁷ In most cases, sexual violence was inflicted on the victims to obtain information, and in one case especially, where the victim did not want to confess, the Russian soldiers threatened her with “*We’ll beat Ukraine out of you*’.¹¹⁸ This might be interpreted as them trying to separate her from her national identity, or from her love for her home country with promises of physical suffering. She did not comply with them, and as punishment, she was raped repeatedly by the commander of the unit.

By the end of January 2023, the Office of the Prosecutor General reported that it had initiated investigations into 155 cases of CRSV committed by Russian armed forces (65 cases in Kherson region, 52 cases in Kyiv region, 17 cases in Donetsk region, 9 cases in Kharkiv region, 6 cases in Zaporizhzhia region, 4 cases in Chernihiv region, 1 case in Mykolaiv region, 1 case in Luhansk region) against 106 women, 38 men and 11 girls since February 2022.¹¹⁹

From February to April 2023, the HRMMU documented 25 CRSV cases committed by Russian soldiers or staff between March and October 2022, in the regions of Donetsk, Kharkiv, Kherson and Zaporizhzhia, but 16 of it were committed against men, in form of torture to obtain information.¹²⁰

¹¹⁵ United Nations Office of the High Commissioner for Human Rights (2023): Report A/77/533: Independent International Commission of Inquiry on Ukraine - Note by the Secretary-General (18 October 2022) para 88-98.

¹¹⁶ United Nations Office of the High Commissioner for Human Rights (2023): Report A/77/533: Independent International Commission of Inquiry on Ukraine - Note by the Secretary-General (18 October 2022) page 2.

¹¹⁷ United Nations Human Rights Monitoring Mission in Ukraine: Report on The Human Rights Situation in Ukraine, 1 August 2022 to 31 January 2023. (24 March 2023) para 50.

¹¹⁸ United Nations Human Rights Monitoring Mission in Ukraine: Report on The Human Rights Situation in Ukraine, 1 August 2022 to 31 January 2023. (24 March 2023) para 59.

¹¹⁹ United Nations Human Rights Monitoring Mission in Ukraine: Report on The Human Rights Situation in Ukraine, 1 August 2022 to 31 January 2023. (24 March 2023) para 97.

¹²⁰ United Nations Human Rights Monitoring Mission in Ukraine: Update on the human rights situation in Ukraine Reporting period: from 1 February to 30 April 2023. page 2.

The OHCHR Report on the human rights situation in Ukraine, related to the period between 1 February to 31 July 2023 also documented 35 additional cases of sexual violence (23 against men, 11 against women, 1 against a girl) perpetrated by members of Russian armed forces. They are considered to be consistent with patterns of conflict-related sexual violence that OHCHR has been documenting since 24 February 2022.¹²¹ In the report, the usage of sexual violence as torture is described, and also examples on the crime of sexual slavery, and unlawful detention of civilians or prisoners of war. The Office of the Prosecutor General had initiated investigations into 215 cases of conflict-related sexual violence committed by members of Russian armed forces, including violence against 12 girls and 1 boy.¹²²

3.3.2. Proof on the intention of committing genocide with the rapes

Proving genocidal intention is one of the hardest procedures under the Rome Statute- it requires special attention and a lot of evidence from reliable sources to construct the ‘*dolus specialis*’ through witness’ testimonies and other sources.

This intent might manifest in an underlying way: it might be possible to explore that when sexual violence is inflicted on women, in most cases, the perpetrators ‘had taken care of’ the partner of the victim, with illegal detention, torture, or execution. In cases where the man of the house was not absent for the reasons mentioned above, they murdered him on spot, so their victim would lose their last string of protection.¹²³

In the latest oral hearing of the Independent International Inquiry Commission on Ukraine, the representative expressed their concerned about allegations of genocide in Ukraine. They found that some aspects of the Russian rhetoric and media communications may constitute incitement to genocide.¹²⁴ They also collected further evidence on the wide-spread and systematic use of torture – and if the Russians use sexual violence as a tool of torture, the same characteristic might apply. They mentioned sexual violence used against women, ranging from the age of 19 to 83. This data has been reconfirmed by the most recent *Report of the Independent International Commission of Inquiry on Ukraine, on 19 October 2023*, with the additional

¹²¹ United Nations Human Rights Monitoring Mission in Ukraine: Report on The Human Rights Situation in Ukraine, from 1 February to 31 July 2023, (04 October 2023) para 53.

¹²² United Nations Human Rights Monitoring Mission in Ukraine: Report on The Human Rights Situation in Ukraine, from 1 February to 31 July 2023, (04 October 2023) para 61.

¹²³ United Nations Office of the High Commissioner for Human Rights (2023): Report A/77/533: Independent International Commission of Inquiry on Ukraine - Note by the Secretary-General (18 October 2022) para 88-98.

¹²⁴ United Nations Human Rights Council: 54th session –Oral Update of the Independent International Commission of Inquiry on Ukraine (25 September 2023) page 3.

information on the rape of a 16 years old pregnant girl.¹²⁵ One victim of sexual violence told that ‘*when Russian soldiers deployed to their village, they first inquired about women living alone*’.¹²⁶ This statement about the invaders might hint that they did not inquire about the well-being of the women living alone, but rather that the invaders might exploit the vulnerabilities of the women of the village, who were left behind due to the consequences of the conflict.

When rape is used as a weapon in war to pursue different military goals, it is often associated with ethnic cleansing policies. The objective of this policy is to destroy a community, and with raping the women, who associate themselves as part of that community, the community itself might feel being raped through their members.¹²⁷ This could be interpreted, under the definition of genocide, as causing a serious mental harm to the victim with the tool of sexual violence.¹²⁸ In this case, procreation in the community would decline through their harmed members, as they would refuse sexual activity in the future, due to the trauma suffered. This means that while prosecuting rape and sexual violence happened during the conflict, material evidence is not the only way to prove genocidal intent.

In an interview with Ukraine's ombudsman for human rights, Lyudmyla Denisova said that “*It is impossible at the moment (to assess the scale of sexual crimes committed by Russian troops during the occupation) because not everyone is willing to tell us what happened to them.*”¹²⁹ To prosecute the sexual violence the victims have suffered, they must give their testimonies. So far, because of the ongoing conflict, victims seek psychological support first, to be able to endure the trauma, until they are ready to open up about what has happened to them. Therefore, the number of cases will increase with the end of the conflict, as victims now focus on their survival, and psychological well-being, rather than bringing the perpetrators to justice.

It is clear from the reports that CRSV was committed by Russians against Ukrainians, and the background of the crimes strongly suggest that the perpetrators can be prosecuted for war crimes, and crimes against humanity. The policy-like nature of sexual violence can be

¹²⁵ Report of the Independent International Commission of Inquiry on Ukraine, A/78/540, 19 October 2023 (Advance Unedited Version) para 76.

¹²⁶ Report of the Independent International Commission of Inquiry on Ukraine, A/78/540, 19 October 2023 (Advance Unedited Version) para 81.

¹²⁷ Ellis, Mark (2007): *Breaking the Silence: Rape as an International Crime*. Case Western Reserve Journal of International Law 2006/2. pp. 232–233.

¹²⁸ Balthazar, Sita (2006-2007): Gender Crimes and the International Criminal Tribunals. Gonzaga Journal of International Law, 10, pp.43-48.

¹²⁹ Yogita Limaye (2022): *Ukraine conflict: 'Russian soldiers raped me and killed my husband'*.

BBC News, Kyiv, Ukraine (11 April 2022). (additional reporting by Imogen Anderson, Anastasiia Levchenko, Daria Sipigina and Sanjay Ganguly) <https://www.bbc.com/news/world-europe-61071243> (Last accessed: 9 November 2023.).

concluded from the fact that sexual violence was used as a form of torture, which was committed on a large scale against civilian and military personnel, too. It has to be mentioned, that the paper has examined cases of sexual violence committed against Ukrainian women by Russians, but the Ukrainian forces have also been accused of using threats of sexual violence.¹³⁰ The number of the sexual violence offences committed during the conflict is high, but an essential part of the data is missing, as well as the established '*dolus specialis*'. These two factors would be needed to state that genocide has happened with the commission of the rapes in the territory of Ukraine. So far, as the active hostilities continue, neither factor were satisfied.¹³¹

3.3.3. Difficulties of the research

Crimes related to sexual violence and gender-based crimes are hard to investigate. The security situation in parts of Ukraine, stigma and trauma associated with sexual violence, lack of victims' access to services (including sexual and reproductive health services) and breakdown in referral pathways are all factors contributing to the continued underreporting of such cases.¹³² Victims are usually scared to report what has happened to them, and they fear the stigmatisation of their society for what they had to endure. They blame themselves for being spotted by the perpetrators.¹³³

Moreover, it is not always a possibility to forensically document the existence of rape and the victims' trauma fully. Autopsy reports tend to focus on the immediate cause of death, and not the entire trauma suffered. There are different reasons, like the lack of resources, or that the family of the victim do not wish to have the post-mortem examination carried out or the condition of the remains no longer in a state where the examinations could bring results.¹³⁴

The security of the victims is another aspect complicating the collection of data. The basic human rights of the victims, such as right to private life should be respected, even when the data is being collected during criminal investigation or scientific purposes. Even if agencies

¹³⁰ United Nations Human Rights Monitoring Mission in Ukraine: Update on the Human Rights Situation in Ukraine. Reporting period: from 1 February to 30 April 2023, page 2.

¹³¹ United Nations Human Rights Council: 54th session – Oral Update of the Independent International Commission of Inquiry on Ukraine (25 September 2023), pp 1-2.

¹³² United Nations Human Rights Monitoring Mission in Ukraine: Report on The Human Rights Situation in Ukraine, 1 August 2022 to 31 January 2023. (24 March 2023) note 24.

¹³³ United Nations Office of the High Commissioner for Human Rights (2023): Report A/77/533: Independent International Commission of Inquiry on Ukraine - Note by the Secretary-General (18 October 2022) para 98.

¹³⁴ United Nations Office of the High Commissioner for Human Rights (2023): Report A/77/533: Independent International Commission of Inquiry on Ukraine - Note by the Secretary-General (18 October 2022) para 93.

make some of their data public, as in the reports the paper have examined in the former sub-chapters, usually, the data itself is falsified for the protection of the victim. This protection is provided to victims, so the stigmatisation of their community would not harden the victim's life, and for the fact that if the victim made a report of the sexual violence happened to them after hostilities have ended in their area, but the perpetrators came back, they would not harm the victim, or associates of the perpetrator would not take retribution on the victim.

Another problematic aspect is the complementarian nature of ICC prosecution. The ICC mechanisms allow crimes committed during the conflict to be tried as 'ordinary crimes' in front of domestic courts. This might result in the perceived seriousness of the sexual violence committed to decline, as the important contextual element of the systematic nature of it might be disregarded.

3.4. Women in the context of the conflict

The Government of Ukraine has joined the Istanbul Convention, namely the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, and it has been in force since 1st November 2022. CRSV does not only concern women during the times of war, however, they are ought to be more vulnerable to gender-based violence, than men. Sex in societies is a powerful communicative act: it deepens relationships and creates families, but also shows hierarchies. Sexual violence has always been one of the most powerful tools of power invaders could use. In patriarchal societies, the ethnicity or nationality of the father is inherited by the children, so the rape of women belonging to the other ethnicity or nationality was an obvious way of exercising power, and proving dominance over the men of the invaded territory. Rape can be used as a method of torture, intimidation or punishment, or with the sex-specific function it naturally serves, impregnation.¹³⁵ When using sexual violence as a weapon of war, the invader shows that they would like to be the new patriarchal power in the region.¹³⁶ Sexual violence and rape as a strategical instrument can effectively undermine the cohesion of society, by attacking the source of the cohesion: women.

¹³⁵ Thomas, Dorothy Q. and Regan E. Ralph. Rape in War (1994): Challenging the Tradition of Impunity. SAIS Review (Vol) (1994), 82-99. The Johns Hopkins University Press. Reprinted by permission of the Johns Hopkins University Press. line before note 26.

¹³⁶ Block, Sharon (2022): The rape of Ukraine. NBC News, Think-Opinion, Analysis, Essays. <https://www.nbcnews.com/think/opinion/ukraine-russia-war-crimes-spotlight-soldier-rape-strategy-rcna25903>. (Last accessed: 9 November 2023.).

Women are usually seen as the keepers of traditions, as the backbone of the family in modern and old societies too.¹³⁷ With targeting women, the perpetrators are not only inflicting the feeling of shame on the victim, but extend it to the family and the community as well. The victims suffer stigmatisation and isolation even, for their honour, the honour of their husband and their family was broken. In religious communities, the purity of the community derives from the purity of their female members, and an attack against the chastity of women can, and will break the communities' own understanding of themselves, and their sense of control over the community, and the members of the community. Children born of rape are either rejected or embraced by the community, but the stigmatisation of their 'heritage' is inevitable.

The concept of '*Rodjina Matj*' or Motherland comes from the allegory of a maternal figure being the earth-nurse on many people's mythology. Therefore, in several Slavic countries, this allegory manifested itself in the expressions of 'Mother Russia' or 'Mother Ukraine'. Citizens, in this allegory, are the children of the Motherland, whom are called to protect their mother in danger.¹³⁸ In Ukraine, the social status of women was different from the status of European women. In the prehistorical past, on the territory of Ukraine, tribes were matriarchal. Later, during the Cossack period, during which many wars and uprisings took place, emerged the woman, who participated in the economy and defended her home and family, while her husband was away at war.¹³⁹ With the arrival of Christianity, the matriarchal society transformed into a patriarchal one, yet the importance of women in the society, in the case of Ukraine, have not faltered. The dissolution of the Cossack society under the Russian rule led to a decrease in the leadership role of women, and to the 'russification' of the society. National identity was preserved mostly among the peasantry, between women and their children, who, through folklore and songs of Ukrainian history, kept the culture alive.

In the history of Ukraine, particularly one woman became a well-known figure, still playing a very important role during the conflict. That is the patron saint of Kyiv, Grand Princess Olga of Kyiv, who was the first sovereign to be baptized in the region, advocating for the acceptance

¹³⁷ Ellis, Mark (2007): *Breaking the Silence: Rape as an International Crime*. Case Western Reserve Journal of International Law 2006/2. pp. 232–233.

¹³⁸ Azarenkova, A. D. (2022): The image of a woman - mother as a symbol of the Motherland in painting of the war period. Stroganov University, Scientific Regiment 2022. para 1-3. <https://xn----7sbabalfgj4as1arld1aqs8v.xn--p1ai/1102/?fbclid=IwAR09PH1iuNja94mzRjKmSLiKNJajdmGjCqmY5S5IiuekkP8Po5cahIP8iLY> (Last accessed: 9 November 2023.).

¹³⁹ Kobrynska, M., Pavlychko S., Polonska-Vasylenko, N., Trofymovska, O. (1993): Women. Internet Encyclopedia of Ukraine. This article originally appeared in the Encyclopedia of Ukraine, vol. 5. para 7. <https://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CW%5CO%5CWomen.htm> (Last accessed: 9 November 2023.).

of Christianity.¹⁴⁰ To this day, Saint Olga of Kyiv is honoured as ‘*equal-to-the-apostles*’ in the Eastern Orthodox Churches¹⁴¹. According to the translated medieval chronicles, she was wiser, than all men, with a warrior spirit, and she defended Kyiv during the siege in 968.¹⁴² She can symbolize to the Ukrainians the fighting for their freedom and sovereignty, and defiance against the invaders.

Today, Ukrainian women are actively participating in the hostilities. They defend their homeland, harvest the crucial Ukrainian grain under the Russian missiles, they rescue the wounded. On the other hand, many of them became widowed, lost their home, or became internally displaced, abused during the conflict. Katerina Levchenko, the Commissioner of the Government of Ukraine for Gender Policy stated that ‘*Ukrainian women today ensure security not only in Ukraine, but throughout the world, including countries in Africa, Latin America and Asia that import Ukrainian grain*’.¹⁴³ In the aftermath of the conflict, the importance of women will be even more significant in the rebuilding of the country. Surely, women’s organisations and societies will participate actively in the re-establishment of the sovereign Ukraine state, such as they fight for their country.

3.5. Conclusion

The answer to the first research question, as in ‘Can we understand rape as a form of committing genocide in the context of Russo-Ukrainian War?’ is yes, theoretically. However, the evidence supporting the affirmative answer is not yet available. To be able to collect evidence, the active hostilities should stop, so the HRMMU and the OTP officers would have an undisturbed passage to conclude their work. Another important step, which would bring more solid facts to the table, is to help victims open up about their trauma, and make witness statements under oath. These statements would let the agencies take action against the perpetrators and start more official investigations in relation SGBV-s during the conflict. Based on the former ICTR and

¹⁴⁰ Britannica, The Editors of Encyclopaedia (2023): St. Olga. Encyclopaedia Britannica, 18 Aug. 2023, <https://www.britannica.com/biography/Saint-Olga>. (Last accessed: 9 November 2023.)

¹⁴¹ Olga is venerated as saint in East Slavic-speaking countries where churches uses the Byzantine Rite: Eastern Orthodox Church (especially in Russian Orthodox Church), Greek Catholic Church (especially in the Ukrainian Greek Catholic Church), in churches with Byzantine Rite Lutheranism, and among Western Catholics in Russia.

¹⁴² Cross, S. H. & Sherbowitz-Wetzor, O. P, eds. & transl. (1953): *The Russian Primary Chronicle*. Laurentian Text, Cambridge, MA/The Medieval Academy of America. and Toporov, V. N. (1961): ‘Фрагмент славянской мифологии’ [‘A fragment from Slavic mythology’], *Akademiya Nauk SSSR, Institut Slavyanovedeniya, Kratkiye soobshcheniya* 30. pp. 14-32.

¹⁴³ United Nations News, Global view of huma destinies: War in Ukraine: women are on the front line - both at the front and in the rear (March 7, 2023) para 8. <https://news.un.org/ru/story/2023/03/1438392> (Last accessed: 9 November 2023.)

ICTY court decisions, the ICC would be able to prosecute rape as genocide in the Russo-Ukrainian conflict, but the research was concluded during a period during which the collection of evidence was extremely retrieved, and the conflict has not yet ended. The resources are mostly forwarded towards helping the people in need, towards the front, and not to the criminal investigations. However, it could be established that the sexual violence offences already registered or investigated can be interpreted as war crimes, or crimes against humanity even.

The answer to the second research question, as in 'Is it true that Russia uses rape as a weapon of war systematically?' is that it is still in the unclear. The patterns of sexual violence since the beginning of the conflict was observed as systematic, but this is only one component of the many needed to establish a final statement. Due to the lack of public evidence, and the active conflict which does not let agencies collect evidence to support their investigations, no official answer has been recorded. There are allegations based on half-sentences, and witness reports, but they are questionable sources to build a scientific research question's answer on. It has been stated that torture was used systematically during the conflict, and sexual violence was used as a tool of torture. This pathway to understand sexual violence, and rape as a form of torture, might lead the interpreters to prosecute the sexual violence committed during the conflict as not only war crimes, but crimes against humanity, or even as genocide, if the '*dolus specialis*' can be established.

The United Nations Security Council, in Resolution 1820 of 2008¹⁴⁴, noted that civilians are the majority of those affected by an armed conflict; that women and girls are in particular targeted by the use of sexual violence as a weapon of war intended to humiliate, dominate the members of the affected community, to inspire fear, to affect the reproduction statistics in the community, and in some cases, sexual violence committed in this way can persist after the end of hostilities. These facts still apply, even though the international community had 15 years to re-evaluate their efforts and create the protectional network, which would be applied when needed. The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)¹⁴⁵ was ratified by Ukraine on 1 November 2022, but Ukraine declared reservation in relation to Article 30 and 78, the former related to victims' compensation. The article reads as '*Adequate State compensation shall be awarded to those who have sustained serious bodily injury or impairment of health, to the extent that the*

¹⁴⁴ United Nations Security Council Res. 1820, 7, U.N. Doc. S/RES/1820 (June 19, 2008).

¹⁴⁵ Council of Europe Convention on preventing and combating violence against women and domestic violence CETS No. 210.

damage is not covered by other sources such as the perpetrator, insurance or State-funded health and social provisions.' The author's opinion is that it would be necessary for Ukraine to compensate their victims who made reports and gave statements, to create an incentive. This way, citizens might be more willing to cooperate with the investigations, and help end impunity in relation to war-time sexual violence. In the aftermath of the conflict, with the rehabilitation of the victims and the rebuilding of the Ukrainian state, the Ukrainian Government must include civil society and non-governmental organisations, to not only rebuild the life of people, but to include new perspectives in the new system. The same way Ukrainian women are currently bleeding for their freedom and their *Rodjina Matj*, the future governance and the international community should fight for justice for all victims of sexual violence.

4. Final Conclusions

With examining the definition of rape and genocide under international law, it is clear, that the definitions should be upgraded, and re-interpreted. When it comes to the definition of rape under the Rome Statute, it has been pointed out, that the definition still does not represent the victim-centred approach the ICC aims for. It rather represents how sexual crimes are still understood as crimes against either the honour of the victim, or as a part of a bigger crime against a community, and are associated with crimes against women, and not both genders.¹⁴⁶ It does not mirror the cultural sensitivity of the Akayesu-definition the ICTR created. The current definition makes it harder for victims to give testimonies, as they ought to give exact descriptions of their trauma. Rape in peace and rape in war are rooted from the same problem: the unequal relationship between men and women. SGBV comes from the very phenomenon of the unfair power-play between men and women, of the fact that patriarchal societies are built on the exploitation of women. It has been the same ever since the beginning of history: the stronger one gets the right to procreate. Therefore, using sexual violence, and having an influence over the procreation of a community, is a strong weapon to use in times of war. The inequality between the genders was also manifested in the lawmaking process, which did not involve as many mandates for women as it should have. The ICC negotiations needed consensus on the wording of the Statute, resulting in that progressive minorities were silenced together with conservative ones.¹⁴⁷ As in the Rome Statute discussions, national influences of more

¹⁴⁶The term 'both genders' is used because the ICL terminology uses it. The author of this paper does not intend to exclude any other genders of the gender theory.

¹⁴⁷ Baumeister, Hannah (2018): *Sexualised Crimes, Armed Conflict and the Law: The International Criminal Court and the Definitions of Rape and Forced Marriage* (1st ed.). Routledge. p. 229.

conservative and religious states will always collide with parties advocating for equality and women's rights. The way SGBV is seen under international law will most likely develop in the near future, as discussions emerge around the topic with a new Policy Paper of the OTP. As the struggles of women have more and more media coverage, hopefully women will have more influence over international and national lawmaking, and the male-centred law interpretation in relation to sexual crimes will transform. As international law evolves, national jurisdictions with a conservative approach towards women's rights and sexual crimes may hopefully reconsider their position, and end blaming the victims for the crimes they had to suffer.

Victims' protection should include psychological and rehabilitation services provided for all citizens, funded by both the Government of Ukraine, and of international funds. It is a resource intensive field, but the successful re-establishment of the victims into the society would be a rewarding success for the future. Justice must be served to all victims, and a safe network of encouragement should be organised to support the reporting of sexual violence.

The CRSV committed in Ukraine by Russians offer the international community a developmental chance. The sexual violence committed in relation to the conflict must undergo a multi-level analysis, to understand all the historical, societal, national identity and gender dimensions it holds. The paper could not entirely explore all these dimensions, but offered a grasp on the complexity of the phenomenon. It might be worth looking into the way '*denazification*' is used as justifying term to the execution of the ethnic cleansing policy-resembling movement Russia implements on the territory of Ukraine, as the author have not touched this particular topic. Even though no clear answer to the research questions could be reached during the research, the paper can provide some guidance on how sexual violence will be prosecuted after the war has ended.

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Appendix:

Table No. 1.: Sexual violence as international crimes. The spreadsheet was edited by the author of the paper.

Name and date of the case	<i>Mens rea</i> (The mental intent to commit the act)	<i>Actus reus</i> (The criminal act)	Which crime of the four grave crimes?	Under which article?	Under which sub-elements of crime?	How the case was important in developing the interpretation of rape?
The Prosecutor v. Akayesu (1988)	Direct and public incitement to commit genocide Targeting of individuals belonging to the Tutsi group	Extermination, murder, torture, rape, other inhumane acts	Genocide Crimes against humanity	Art. 2(2)(b) Art. 3 (i) of the ICTR Statute	Serious bodily or mental harm Other inhumane acts	First case to prosecute rape as genocide; basic definition of rape developed.
The Prosecutor v. Gatumbi tsi (2004)	Instigation the rape of Tutsi women and girls	murder, extermination, rape (through command responsibility)	genocide crimes against humanity	Art. 2(3)(a) and (b); Art. 6(1) and (3) of the ICTR Statute	Killing members of the group; Causing serious bodily or mental harm to members of the group (through rape)	The lack of consent can be derived from the coercive circumstances; the OTP does not need to prove non-consent.
The Prosecutor v. Nyiramasuhuko et al. (2016)	Targeting individuals belonging to the ethnic group of Tutsis; ordering of murders and rapes of Tutsis	abduction, murder, extermination, rape (through command responsibility for Nyiramasuhuko and direct for Nhatobali)	Crimes Against Humanity and War Crimes Nyiramasuhuko: indirect responsibility for committing; direct for ordering, aiding and abetting -Nhatobali: direct responsibility for committing, ordering, aiding and abetting	Art. 3 (g) Art. 4 (e) of ICTR Statute	Rape and Outrages upon Personal Dignity	The perpetrator was guilty of aiding and abetting genocide, through the ordering of rape.

The Prosecut or v. Ntaganda (2019)	Contribution to the crimes in the execution of the common plan; targeting the Lendu civilians	Rape and sexual slavery of civilians and children under the age of 15;	Crimes against humanity and War crimes	Article 7(1)(g) and Article 8(2)(e)(v i) of the Rome Statute	Rape	It was possible to establish how rape was used to influence the mental state of men in the society.
The Prosecut or v. Ongwen (2021)	Constructing a system of distributing abducted women and girls; forced marriage with seven women between 2002-2005	Abduction of girls; forced marriage; enforced pregnancy; forcing them to wed soldiers; enslavement; rape through direct and command responsibility	Crimes against humanity and War crimes	Article 7(1)(g) and Article 8(2)(e)(v i) of the Rome Statute	Rape	First declaration of crime of forced marriage as a distinct crime; interpretation of forced pregnancy and forced marriage as a separate crime under crimes against humanity.
The Prosecut or v. Al Hassan (2019)	Implementation of the 'common plan' during a systematic attack against civilians, resulting in sexual violence; Participation in and organisation of a program of forced marriages	Rape, sexual enslavement, forced marriages	Crimes against humanity; war crime crime against humanity war crime	Article 7(1)(g) and Article 8(2)(e)(v i) of the Rome Statute	Rape and Sexual violence Forced marriage Sexual slavery	Possibility to expand the definition of protected groups to women, as a protected group.