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Federica Lombardi

From Myanmar to The Hague

A Feminist Perspective on the Search for Gender Justice by Rohingya Women before the International Criminal Court

EMA, The European Master's Programme in Human Rights and Democratisation

FEDERICA LOMBARDI

FROM MYANMAR TO THE HAGUE A FEMINIST PERSPECTIVE ON THE SEARCH FOR GENDER JUSTICE BY ROHINGYA WOMEN BEFORE THE INTERNATIONAL CRIMINAL COURT

FOREWORD

The European Master's Degree in Human Rights and Democratisation (EMA) is a one-year intensive programme launched in 1997 as a joint initiative of universities in all EU Member States with support from the European Commission. Based on an action- and policy-oriented approach to learning, it combines legal, political, historical, anthropological and philosophical perspectives on the study of human rights and democracy with targeted skills-building activities. The aim from the outset was to prepare young professionals to respond to the requirements and challenges of work in international organisations, field operations, governmental and non-governmental bodies, and academia. As a measure of its success, EMA has served as a model of inspiration for the establishment of six other EU-sponsored regional master's programmes in the area of human rights and democratisation in different parts of the world. Today these programmes cooperate closely in the framework of the Global Campus of Human Rights, which is based in Venice, Italy.

Up to 90 students are admitted to the EMA programme each year. During the first semester in Venice, they have the opportunity to meet and learn from leading academics, experts and representatives of international and non-governmental organisations. During the second semester, they relocate to one of the 42 participating universities to follow additional courses in an area of specialisation of their own choice and to conduct research under the supervision of the resident EMA Director or other academic staff. After successfully passing assessments and completing a master's thesis, students are awarded the European Master's Degree in Human Rights and Democratisation, which is jointly conferred by a group of EMA universities.

Each year the EMA Council of Directors selects five theses, which stand out not only for their formal academic qualities but also for the originality of topic, innovative character of methodology and approach, potential usefulness in raising awareness about neglected issues, and capacity for contributing to the promotion of the values underlying human rights and democracy.

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• Heinrici, Agnes, *Handle with Care. How to Improve Access to Healthcare for Deaf People in a Pandemic.* Supervisors: Kalliope Agapiou-Josephides, Aristotelis Constantinides, University of Cyprus.

• Lombardi, Federica, *From Myanmar to The Hague. A Feminist Perspective on the Search for Gender Justice by Rohingya Women before the International Criminal Court.* Supervisor: Dolores Morondo Taramundi, University of Deusto, Bilbao.

• McCall Magan, Ríon, *Idir Eatarthu is Achrann. The Framing of Women's Agency in Northern Ireland's Counterterrorism Legislative Discourse during the Troubles (1968-1998).* Supervisor: Martin Kahl, University of Hamburg.

The selected theses demonstrate the breadth, depth and reach of the EMA programme and the passion and talent of its students. We are particularly proud of EMA's 2020/21 students: as teachers and students across the world can testify, the COVID-19 pandemic brought many different challenges for teaching and learning. It is fair to say that our students researched and wrote their theses in turbulent times. On behalf of the Governing Bodies of EMA and of all participating universities, we applaud and congratulate them.

Prof. Manfred NOWAK
Global Campus Secretary General

Prof. Thérèse MURPHY
EMA Chairperson

Dr Orla Ní Cheallacháin
EMA Programme Director

This publication includes the thesis *From Myanmar to The Hague. A Feminist Perspective on the Search for Gender Justice by Rohingya Women before the International Criminal Court* written by Federica Lombardi and supervised by Dolores Morondo Taramundi, University of Deusto, Bilbao.

BIOGRAPHY

Federica Lombardi is a graduate from the Global Campus of Human Rights Europe and from the European Law School at Maastricht University. Passionate about gender justice, she is an advocate for the rights of conflict-related sexual violence survivors.

ABSTRACT

Sexual and gender-based violence during conflict remains a widespread issue, with women and girls being particularly vulnerable. Since its establishment, the International Criminal Court has prioritised the prosecution of sexual violence through some successful ground-breaking judgments. However, it has also received harsh criticism due its failure to incorporate an intersectional perspective into its jurisprudence. While the Office of the Prosecutor has committed itself to incorporating intersectionality in its prosecutions in its 2014 Policy Paper, it has yet to deliver an intersectional analysis in one of its rulings. The recent authorisation from the Pre-Trial Chamber to proceed with an investigation for the alleged crimes perpetrated against the Rohingya community in Myanmar could provide such an occasion. While the ethnic minority is suffering from gross human rights violations, rape is being used systematically against Rohingya women. In light of these considerations, this thesis seeks to analyse how an intersectional approach could assist the International Criminal Court in analysing and addressing the sexual violence suffered by Rohingya women. To achieve this, an historical overview of the prosecution of sexual violence before international criminal tribunals was provided, together with the main criticisms regarding their track records. Secondly, the theory of intersectionality was presented and analysed in the context of anti-discrimination law, international human rights law and international criminal law. Finally, the theory of intersectionality was applied to the case study of Rohingya women in light of the possible claims of genocide and crimes against humanity they could bring before the court. On one hand, the analysis has demonstrated that an intersectional approach can indeed help the International Criminal Court put emphasis on the gravity of the violence suffered by the victims as well as the systematic and organised nature of such attacks. On the other hand, there is a risk that Rohingya women will be further stereotyped or that the violence suffered by those who do not fit within the victim model will be left unpunished.

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Thank you to everyone who has accompanied me during this journey, I hope I made you proud.

TABLE OF ABBREVIATIONS

ARSA	Arakan Rohingya Salvation Army
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
FPLC	Forces Patriotiques pour La Libération du Congo
ICJ	International Court of Justice
ICC	International Criminal Court
ICL	International criminal law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHRL	International human rights law
MFA	Mayu Frontier Administration
NLD	National League for Democracy
NGOs	Non-governmental organisations
OTP	Office of the Prosecutor
SGBC Policy	OTP's Policy Paper on Sexual and Gender Based Crimes
WCGJ	Women's Caucasus for Gender Justice

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INTRODUCTION

'A strain in our common humanity' is how the Secretary General of the United Nations defined the use of sexual violence during conflict on the Day for the Elimination of Sexual Violence in Conflict in June 2018.[1] According to the Secretary-General on conflict-related sexual violence, conflict-related sexual violence can be defined as 'rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict'.[2] This is not a new phenomenon, but rather one deeply rooted in the history of conflicts and wars.[3] However, despite its widespread nature, sexual and gender-based crimes have been at the centre of rather few prosecutions at both the international and national level. The earliest documented prosecution of sexual violence crimes before an international criminal court dates back to 1474 with the trial of Sir Hagenbach, who was convicted for rapes committed by his troops. However, this prosecution was an exception to the rule, as the rapes were considered illegal only due to the lack of a formal declaration of war.[4]

While conflict-related violence brings about pain and destruction for all parties and victims involved, it is undeniable that sexual violence crimes have a disproportionate impact on women and girls. This is even

[1] United Nations, 'It's time to "eliminate the scourge of conflict-related sexual violence", urges UN chief' (*UN News,* 19 June 2018) <https://news.un.org/en/story/2018/06/1012472> accessed 15 June 2021.

[2] United Nations Security Council, 'Report of the Secretary-General on conflict-related sexual violence' (23 March 2018) UN Doc S/2018/250 para 2.

[3] Kelly D Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff Publishers 1997) 49.

[4] ibid 28-29.

more so the case for women and girls belonging to ethnic, religious or sexual minorities, who are often targeted due to their vulnerable position. The victimisation of women and girls belonging to minorities can be seeing repeatedly throughout history, with the most notable examples being the Rwandan genocide and the Yugoslav wars. The former saw between 250,000 and 500,000 women being subjected to systematic rape, while during the latter 60,000 women suffered from sexual violence.[5] In response to the concerning outbreak of violence and horrific human rights violations in Rwanda and Yugoslavia, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) were set up. As these international criminal tribunals were given limited powers and jurisdiction, the International Criminal Court (ICC) was established in 2002 at the end of their mandates. The need for a permanent criminal court became urgent as more and more conflicts broke out around the globe, and gross human rights violations started being committed systematically.[6]

The Rohingya conflict is the latest crisis that has sparked outrage around the globe, as what were once ethnic tensions of national concern translated into a full-fledged humanitarian emergency. One of the most concerning aspects of the Rohingya crisis is the systematic use of sexual violence by the Burmese security and military forces against women and girls from the Muslim minority.[7] The situation reached such gravity that in November 2019, the ICC judges authorised the opening of an investigation into the situation in Myanmar, following the request submitted by the prosecutor to look into the alleged crimes committed against the Rohingya population.[8] Since its creation, the ICC has managed to bring about some successful prosecutions of sexual violence crimes. However, it has also received harsh criticism due its failure to incorporate an intersectional perspective into its jurisprudence. Mostly applied in the field of social sciences, the theory of intersectionality has

[5] Kristen T Hagen and Sophie C Yohani, 'The Nature and Psychological Consequences of War Rape for Individuals and Communities' (2010) 2 International Journal of Psychological Studies 1, 15.

[6] Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 McGill Law Journal 217, 233.

[7] Joshua Kurlantzick, 'Myanmar's spiraling Humanitarian Crisis' (*Council on Foreign Relations,* 6 May 2021) <https://cfr.org/blog/myanmars-spiraling-humanitarian-crisis> accessed 15 June 2021.

[8] International Criminal Court, 'ICC judges authorize opening of an investigation into the situation in Bangladesh/Myanmar' (*International Criminal Court,* 14 November 2019) <https://icc-cpi.int/Pages/item.aspx?name=pr1495#> accessed 15 June 2021.

been used increasingly in the field of anti-discrimination law. Instead, it has been scarcely incorporated in the field of international criminal law (ICL).[9]

Building from this gap in the literature, this thesis seeks to answer the following research question: how can the theory of intersectionality assist the ICC in analysing the sexual and gender-based violence suffered by Rohingya women in Myanmar?

In order to answer the research question, a historical overview of the prosecution of sexual and gender-based violence before international criminal tribunals will be provided in the first chapter. The work carried out by the Nuremberg and Tokyo Tribunals will be addressed first, followed by an analysis of the leading judgments from the ICTR and the ICTY. The second section will look into the main criticisms moved by feminist scholars against the work carried out by the various international tribunals and their concerns regarding ICL's capacity to prosecute sexual violence crimes. In the second chapter, the theory of intersectionality will be introduced. Firstly, it will be analysed from the perspective of anti-discrimination law. Secondly, its recognition under international human rights law (IHRL) will be discussed through the jurisprudence of the Committee on the Elimination of Discrimination against Women (CEDAW Committee). Finally, the benefits and the risks of its possible implementation in ICL will be addressed. The third chapter will concern the chosen case study, namely that of Rohingya women in Myanmar. At first, a brief historical background on the Rohingya minority in Myanmar will be presented. An analysis of the claims that Rohingya women could possibly bring before the ICC will then be provided, with a focus on the crime of genocide and crimes against humanity. The final section will assess how the theory of intersectionality could help the ICC properly address the claims brought forward by Rohingya women, as well as the issues that could arise from its inclusion in the ICC's approach. It must be noted that the aim of the third chapter is not to construct a concrete case for the prosecution of the sexual violence suffered by Rohingya women, as this would not be possible due to the lack of access to victims' testimonies. Instead, it seeks to propose an intersectional perspective on fictional claims that could be brought forward by the victims.

[9] Ana Martin Beringola, 'Intersectionality: A Tool for the Gender Analysis of Sexual Violence at the ICC' (2017) 9 Amsterdam Law Forum 84.

1.

PROSECUTING SEXUAL AND GENDER-BASED VIOLENCE BEFORE INTERNATIONAL CRIMINAL TRIBUNALS – A BLESSING OR A CURSE?

This chapter will provide an historical overview of the prosecution of gender and sexual-based violence throughout international criminal tribunals with the aim of observing its developments. In the first section, a brief summary of the work carried out by the Nuremberg and the Tokyo Tribunals, the ICTR, the ICTY and the ICC will be provided. In the second section, a critical discussion of the prosecution of sexual violence before international tribunals and ICL's capacity to address such crimes will be developed.

1.1 The prosecution of sexual violence crimes before international tribunals through history

1.1.1 The Nuremberg Trials and the Tokyo Tribunal

The International Military Tribunal was set up following the horrors committed by the Nazi regime during World War II to prosecute Nazi officials. The Charter of the Nuremberg Trial lacked any explicit reference to sexual violence.[10] While there are no transcripts of the negotiations leading to its adoption, feminist scholars argue that the lack of inclusion of sexual violence crimes can be attributed to their consideration as less serious offences not deserving to be considered self-standing crimes.[11]

[10] Diane Lupig, 'Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court' (2009) 17(2) Journal of Gender, Social Policy and the Law 1, 9.

[11] Fionnuala Ní Aoláin, Dina F Haynes and Naomi Cahn (eds), *On The Frontlines: Gender, War and the Post-Conflict Process* (OUP 2011) 156.

Despite their exclusion, other provisions as the crime against humanity of inhumane acts and the war crime of ill treatment were interpreted to implicitly cover sexual violence crimes.[12] However, concerning the crime of persecution, the Charter of the Nuremberg Tribunal (the Charter) excluded the ground of gender. While its inclusion was initially taken into consideration by the drafters of the Charter, they concluded that it did not have the same weight and thus deserve the same legal penalties.[13] The lack of gender perspective in the Charter was reflected in the proceedings before the Nuremberg Tribunal. Initially, evidence of the rape and sexual enslavement perpetrated by German soldiers against Soviet women and the rape, sexual enslavement, forced nudity and forced sterilisation of women in concentration camps were presented. However, the Nuremberg Tribunal failed to refer to such sexual violence crimes in its final judgment.[14] Furthermore, the prosecutors did not address or analyse any of the prosecuted crimes from a gender or intersectional perspective. This caused the prosecutor to ignore not only how the sexual violence suffered by women could amount to persecution on the grounds of gender and ethnicity, but also the role played by culturally constructed gender hierarchies and ideas about men's entitlement to women's bodies. Similarly, the Nuremberg Tribunal failed to provide a gender analysis of the heteronormative ideology behind the crimes perpetrated against homosexual men in concentration camps, who were subject to pseudo-experiments involving sexual hormones.[15]

It follows that women were rendered invisible by the Nuremberg Tribunal, as it completely failed to properly address and prosecute the sexual violence crimes committed during the Holocaust. However, it must be mentioned that an improvement in the recognition of sexual violence was made in Control Council Law No 10, which formed the basis for later prosecutions of German military and civilian personnel at Nuremberg and elsewhere.[16] This piece of legislation finally recognised

[12] Kelly D Askin, 'A Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward', in Anne-Marie De Brouwer and others (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 33.

[13] Rosemary Grey, 'Prosecuting sexual and gender violence crimes in the International Criminal Court – Historical legacies and new opportunities' (DPhil thesis, University of New South Wales 2015) 79.

[14] ibid 97.

[15] ibid 80.

[16] Lupig (n 10) 12.

rape as a crime against humanity. Furthermore, it outlined three important considerations on sexual violence. Firstly, it recognised that, when perpetrated on a large scale, rape could be prosecuted as a war crime. Secondly, it acknowledged that sexual violence crimes could constitute crimes against humanity even when committed during peacetime. Thirdly, concerning accountability, it outlined that responsibility for such crimes could be extended to persons occupying other key positions. However, no prosecutions were brought for rape on this basis.[17]

While the Tokyo Tribunal did not include explicit reference to rape, charges on sexual violence crimes as war crimes were still brought against Japanese defendants following the widespread sexual assaults perpetrated by Japanese soldiers against civilians in Nanking in 1937. For instance, the rapes committed against civilian women and female personnel were prosecuted under the categories of inhumane treatment, ill-treatment and failure to respect family honour and rights. Furthermore, Foreign Minister Hirota, Admiral Toyota and General Matsui were charged with command responsibility due to the violations of the laws or customs of war perpetrated by their soldiers in Nanking. In the end, Hirota and Matsu were convicted.[18]

While the prosecution of the express charges of rape represented a positive development, the trials before the Tokyo Tribunal were not free from controversy. Firstly, none of the female victims were invited to testify. Secondly, rape was prosecuted as an ancillary to other war crimes rather than as a violation of its own. Thirdly, the Tokyo Tribunal ignored the sexual slavery and forced prostitution to which thousands of comfort women were subjected. During World War II, the Japanese army forced around 200,000 women, mostly from Korea, into comfort stations, where they were forced to provide sexual services to Japanese soldiers.[19] While being detained in these camps, women were beaten, underfed, denied any medical assistance, subjected to forced abortions and raped by an average of ten to thirty soldiers per day. Such violence caused the death of many women, but it also left thousands to live with lifelong physical and psychological trauma and the stigmatisation

[17] Lupig (n 10) 15.
[18] ibid 6-7.
[19] Kelly D Askin, 'Comfort Women – Shifting Stigma and Shame from Victims to Victimizers' (2001) 1(5) International Criminal Law Review 5, 12-13.

attached to sexual violence.[20] Various Japanese officials and multiple government officials, families, villagers as well as allied soldiers, prisoners and war crime investigators were aware of the existence of these camps. However, the available evidence on the violence perpetrated against comfort women was completely disregarded during the Tokyo Trial: the system was only referred to twice in the judgment and no charges were brought against the perpetrators.[21]

Disappointed with the outcome of the proceedings, several women's non-governmental organisations (NGOs) came together to set up the Tokyo Women's Tribunal. The purpose of the initiative was to fill the void left by the lack of governmental action and accountability. The Tokyo Women's Tribunal assessed the accountability of both high-ranking Japanese military and political officials, as well as the liability of Japan as a state, for rape and sexual slavery as crimes against humanity. In its 250-page long judgment, the panel of experts concluded that late Emperor Hirohito and nine other defendants were guilty.[22]

The disappointing outcome of the prosecution carried out by the Tokyo Tribunal remains hard to justify. Some point out the prosecutors might have lacked the necessary evidence, as the Japanese army destroyed the records after the end of the war. However, the existence of such proof has been demonstrated by the archival research carried out by the Women's Tribunal and the findings contained in its final judgment. Others refer to the fact that many comfort women only started to come forward with their testimonies in the 1990s, almost 50 years after the proceedings. However, this only raises questions about the quality of the investigations carried out by the prosecution and their capacity to carry out gender-sensitive fact-finding.[23] Others highlight the perception of women as the booty of war and the entitlement of soldiers to exploit women's bodies as a possible explanation to the lack of sexual slavery charges. Thus, prosecutors might not have found it of relevance to further investigate and eventually prosecute such crimes.[24]

[20] Ní Aoláin, Haynes and Cahn (n 11) 157.
[21] Karen Knop and Annelise Riles, 'Space, Time, and Historical Injustice: A Feminist Conflict-of-Laws Approach to the 'Comfort Women' Agreement' (2017) 102(4) Cornell Law Review 853, 872.
[22] Christine Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery' (2001) 95(2) American Journal of International Law 335, 339; ibid 904.
[23] Grey (n 13) 82.
[24] Copelon (n 6) 223.

It can be concluded that during the early 1900s, sexual violence crimes were rather ignored and underrepresented in the prosecution of crimes against humanity and war crimes. However, the conflict in the Former Yugoslavia and the genocide in Rwanda represented a turn in the recognition and prosecution of sexual violence under ICL.

1.1.2 The ICTY and the ICTR

The ICTY was set up in May 1993 by the UN Security Council following the continuous reports of mass killings, ethnic cleansing, destruction of property and sexual violence against women taking place during the conflict in the Former Yugoslavia.[25] The Security Council Resolution 827/1993, through which the ICTY was established, specifically referred to rape and emphasised that the focus of the ICTY would be the investigation and prosecution of sexual violence crimes. Despite this commitment, sexual violence crimes were mostly left out of the ICTY Statute, which referred only to rape as a crime against humanity.[26] In this regard, the ICTR went slightly further by not only recognising rape as a crime against humanity, but also including outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault as constituting war crimes in a non-international armed conflict.[27] As explained in a report by the UN Secretary-General in 1995, the differences between the two statutes were due to the inherently different nature of the conflicts. With the conflict in Rwanda being of a non-international nature, the Security Council found it more appropriate to limit the jurisdiction of the ICTR to violations constituting war crimes under customary international law. For this reason, the ICTR was given the power to prosecute violations of the Second Additional Protocol to the 1949 Geneva Conventions protecting persons not taking part in hostilities from rape, enforced prostitution and any form of indecent assault during a non-international armed conflict. However, neither

[25] Kelly D Askin, 'Prosecuting Wartime Rape and Other Gender-related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 Berkley Journal of International Law 228, 305.

[26] Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993) UN Doc S/RES/827.

[27] Statute of the International Criminal Tribunal for Rwanda (8 November 1994) UN Doc S/RES/955.

the ICTY nor the ICTR managed to include gender persecution as a crime against humanity. Through their jurisprudence on rape and sexual violence, the tribunals were able to clarify international norms prohibiting rape and other forms of sexual violence and develop definitions of sexual violence crimes.[28]

Due to the lack of a commonly accepted definition of such offence under international law, the ICTR was soon tasked with clarifying the definition of rape and sexual violence in 1998 in the case of *Prosecutor v Akayesu*. In its landmark judgment, the ICTR further elaborated on the definitions of rape and sexual violence under international law and it recognised forced nudity as a form of sexual violence constituting inhumane acts as crimes against humanity.[29] More importantly, the case is considered a milestone in the recognition and prosecution of sexual violence under ICL: the ICTR recognised that rape and other forms of sexual violence were used as instruments of genocide and that they constituted crimes against humanity, as they formed part of widespread and systematic attacks against civilians.[30] The case concerned Jean-Paul Akayesu, a top-ranking official of the Taba commune in Rwanda, who was initially indicted with twelve counts of genocide, crimes against humanity and war crimes for murder, extermination, torture and cruel treatment committed throughout Taba.

While women's and human rights organisations had presented solid evidence of rape and other forms of sexual violence perpetrated throughout Rwanda, including Taba, no charges for gender-related crimes were initially included. However, the Office of the Prosecutor (OTP) was quickly forced to amend the charges, as a witness on the stand started recounting the gang rape of her six-year-old daughter at the hands of three Interahamwe soldiers. Such testimony was followed by that of another witness, who had been both a victim of sexual violence and a witness to other rapes in Taba perpetrated by Hutu soldiers. The new evidence acquired by the prosecution, together with

[28] Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (8 June 1977) 1125 UNTS 609 (entered into force 7 December 1978), art 4(2)(e); United Nations Security Council, 'Report of the Secretary-General pursuant to Paragraph 5 of Security Council Resolution 955 (S/1995/134)' (United Nations 1995).

[29] *Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4 (2 September 1998).

[30] Askin, 'Prosecuting Wartime Rape and Other Gender-related Crimes under International Law' (n 25) 318.

the international mobilisation for the inclusion of charges of sexual violence, caused the proceedings to be halted.[31] This would give the OTP the opportunity to further investigate the alleged crimes of sexual violence and, in case of enough evidence to attribute these crimes to Akayesu, to amend the charges. Following the investigation, which brought to light the widespread use of sexual violence by Hutu men against Tutsi women, the prosecution amended the indictment to charge Akayesu with rape and other inhumane acts as crimes against humanity and war crimes. This achievement was mainly attributed to the presence on the bench and consequent efforts of Judge Navanethem Pillay of South Africa, an expert in IHRL and gender-related crimes.[32]

In its judgment, the ICTR defines rape as 'a physical invasion of a sexual nature, committed on a person under circumstances, which are coercive', a conceptual definition inspired by the UN Convention against Torture (CAT).[33] In providing this definition, the ICTR went even beyond the definitions provided by national jurisdictions, which have historically defined rape as a non-consensual sexual intercourse, and included 'acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual'.[34] Furthermore, it drew a distinction between rape and sexual violence, with the former being defined as 'any act of a sexual nature which is committed on a person under circumstances which are coercive'.[35] This way, sexual violence was not limited to the physical invasion of the human body, but it also included acts, not involving penetration or even physical contact. Furthermore, the ICTR emphasised that coercion did not have the use of physical force as a prerequisite, as threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion as well.[36]

In recognising that sexual violence could fall within the scope of 'other inhuman acts' as crimes against humanity, outrages upon

[31] Askin, 'Prosecuting Wartime Rape and Other Gender-related Crimes under International Law' (n 25) 288.
[32] ibid 319.
[33] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT); *Prosecutor v Jean-Paul Akayesu* (n 29) para 688.
[34] ibid.
[35] ibid.
[36] Askin, 'Prosecuting Wartime Rape and Other Gender-related Crimes under International Law' (n 25) 288.

personal dignity of the war crime provisions of the ICTR Statute and serious bodily or mental harm of the genocide prescriptions, the ICTR also made a great advancement in the recognition of sexual violence. In fact, some analogies were made between the crime of rape and torture, noting that 'like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitute torture when all of the elements of torture are satisfied'.[37] Most importantly, the ICTR further explored the connection between sexual violence and genocide, an unprecedented development in international law. In its judgment, the ICTR recognised that sexual violence could be done with the intent of killing members of a group, could constitute serious bodily or mental harm, could be comprised of measures intended to prevent births within the group and could amount to forcibly transferring children of the group to another group. It stated that the rapes in question 'resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole'.[38] With this statement, the ICTR acknowledged that sexual violence, especially rape, could be used with genocidal intent, as a means to overpower and erase an enemy community, and that its effects could extend beyond the individual.

The ICTY also made a significant contribution to the prosecution of sexual violence under ICL in a number of ground-breaking cases.

In the Č*elebići* case, the ICTY recognised that sexual violence could amount to torture.[39] The judgment is notable due to the various gender-related aspects it dealt with, going from the implications of superior responsibility and its treatment of various forms of sexual violence committed against male detainees. The case involved Delalić, a person with alleged authority over the Čelebići camp; Mucić, the defacto commander of the camp; Hazim Delić, a person who worked in the camp; and Esad Landzo, a guard at the camp. Three out of the four

[37] *Prosecutor v Jean-Paul Akayesu* (n 29) para 730.
[38] ibid para 371.
[39] *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landzo* (Judgment) IT-96-21-A (20 February 2001).

accused were charged with individual or superior responsibility for sex crimes together with other crimes. Delalić, Mucić and Delić, who were the superiors in the camp, were charged with superior responsibility for the war crimes of wilfully causing great suffering and inhuman treatment as grave breaches, or for cruel treatment as a violation of the laws or customs of war, when subordinates committed sexual abuses on male detainees.[40] According to the indictment, their subordinates had forced two brothers in the camp to perform oral sex on each other and tied a burning fuse cord around the genitals of another detainee in the camp. In this regard, the ICTY recognised that the forced fellatio 'could constitute rape for which liability could have been found if pleaded in the appropriate manner'.[41] Furthermore, the ICTY clarified that superior responsibility for crimes committed by subordinates could also be used as a tool to hold military and civilian leaders accountable for crimes of sexual violence committed by subordinates that the superior negligently failed to prevent or punish. While Delalić was acquitted due to the lack of sufficient evidence against him, the ICTY found Mucić guilty. Being the de facto commander of the camp, he was in a superior-subordinate relationship and thus either had or should have had knowledge about the sexual violence, meaning he failed to take the necessary steps to prevent the crime or punish the perpetrator.[42]

Delić was also charged with individual responsibility for raping on his own and participating in gang rapes committed against various women held prisoners in the camp. When addressing the torture charges for the sexual violence, the Trial Chamber concluded that, when any form of sexual violence meets the elements of torture outlined in the CAT,[43] it will amount to torture. The Court applied this line of reasoning to assess the rapes perpetrated by Delić against one of the female prisoners in the camp and found that it fulfilled the criteria to amount to torture. The sexual violence caused severe pain and suffering and it was perpetrated with the purpose of obtaining information as to the whereabouts of her husband, to punish her for the acts of her husband and to force her to cooperate. Furthermore, the rapes represented a form of discrimination,

[40] Askin, 'Prosecuting Wartime Rape and Other Gender-related Crimes under International Law' (n 25) 321.

[41] *Prosecutor v Delalić et al* (n 39) para 1066.

[42] Askin, 'Prosecuting Wartime Rape and Other Gender-related Crimes under International Law' (n 25) 323.

[43] CAT, art 1.

which constituted a prohibited purpose for the offence of torture, as Delić's choice to rape continuously the victims was motivated by her sex. This was an important acknowledgment on behalf of the Tribunal, as women were often victims of rape due to their gender or sex. The ICTY also highlighted that Delić often used rape as a means of terror and subordination not only against the victims, but also against the other inmates.[44]

Another important judgment for gender justice was delivered soon after in the *Prosecutor v Furundžija* case, as the ICTY further developed its jurisprudence on sexual violence amounting to torture. The case concerned a civilian woman who had been repeatedly subjected to sexual violence while being detained in the headquarters of a special military police unit of the Croatian Defense Council. Furundžija, a sub-commander of the special unit, was present in the multiple occasions the victim was sexually assaulted by other commanders. He was charged with torture and outrages upon personal dignity, including rape.[45] Upon reviewing the trends in national legislation and in its own jurisprudence, the ICTY classified rape as 'the sexual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator, by coercion or force or threat of force against the victim or a third person'.[46]

The Chamber found that the sexual violence suffered by the victim amounted to rape and that the accused was to be held responsible for it, as the rape was committed under his supervision. Further elaborating on the 'state actor' requirement provided by the definition of torture in the CAT, the ICTY clarified that anyone taking part into torture, regardless of how minor their role is, can be held liable. Moreover, the list of prohibited purposes behind the CAT's definition of torture was expanded to include humiliation. In relation to the rape suffered by the victim, it was found that the rape's purpose was to degrade and humiliate her and that Furundžija's interrogation formed an integral part of the torture and that, together with the sexual violence, it became one process causing severe physical and mental suffering to the victim.

[44] Askin, 'Prosecuting Wartime Rape and Other Gender-related Crimes under International Law' (n 25) 325-26.
[45] ibid 327.
[46] *Prosecutor v Anto Furundžija* (Judgment) IT-95-17/1-T (10 December 1998) para 185.

In relation to the charge of outrages upon personal dignity including rape, the Chamber concluded that while the accused did not physically participate in the rape, his presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him.[47]

Furundžija was thus found guilty of torture and of outrages upon personal dignity. During the appeal, the ICTY Appeals Chamber further dealt with some key issues in the prosecution of sexual violence. Firstly, it rejected the defence's claim that the presiding judge in the case, Florence Mumba, should be disqualified due to her bias, as she had previously worked for the UN's Commission on the Status of Women where she had condemned rape as a war crime and advocated for its prosecution. Secondly, it rejected the argument that the evidence of sexual violence presented at trial was insufficient to constitute torture. This was an important remark, as the ICTY recognised that sexual violence perpetrated against one victim consisted a violation of international law worthy of prosecution as much as the systematic use of rape.[48]

The judgment in the case *Prosecutor v Kunarac* is also notable, as the ICTY further developed its jurisprudence on sexual violence crimes. The judgment was particularly ground-breaking as for the first time rape was classified as a crime against humanity and sexual slavery was addressed in conjunction with rape. The case concerned a series of gender-based crimes that had been committed in the town of Foča during the war. Upon being separated from Muslim and Croatian men, women and children were held in detention facilities, where the forces routinely raped and gang raped them.[49] While the original indictment concerned eight individuals, the ICTY decided to go to trial against the three individuals it had managed to get a hold of on charges of rape, enslavement, torture and outrages upon personal dignity.

The judges concluded that Kunarac and Kovać used to hold women and girls from the detention centres for their own personal sexual gratification.[50] The victims were usually forced to provide sexual

[47] Kelly D Askin, 'A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003' (2004) 3 Human Rights Brief 1, 3.
[48] ibid.
[49] ibid 4.
[50] Askin, 'Prosecuting Wartime Rape and Other Gender-related Crimes under International Law' (n 25) 334.

services, such as dancing naked before the accused, and were at times also loaned, traded or sold to others as sexual slaves. These women were often taken hostage for months on end, during which they were forced to cook and clean during the day and were then raped during the night.[51] The ICTY convicted Kunarac and Kovać of rape and enslavement as crimes against humanity, as it found that the victims had been raped, enslaved and treated as their personal property. Furthermore, Kovać was also convicted of outrages upon personal dignity for humiliating the victims by forcing them to dance naked on a table. Together with Kunarac, Vuković was found guilty of torture as a war crime and crime against humanity for the sexualised torture inflicted on women and girls. In particular, Kunarac was convicted for both personally raping them and for aiding and abetting the sexual violence as he took the victims to places where he knew they would be raped by others.[52]

In its judgment, the ICTY further developed its definition of rape under international law by adding the element of consent. It stated that while force, threat thereof or coercion are relevant, they are not exhaustive factors and thus the focus should be on violations of sexual autonomy, which occur whenever the victim has not freely agreed to the sexual act or is otherwise not a voluntary participant.[53] Furthermore, the ICTY further elaborated on the elements of rape it provided in its previous judgment, as it found they consisted of the:

> sexual penetration, however slight (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator or (b) of the mouth of the victim by the penis of the perpetrator; by coercion or force or threat of force against the victim or a third person, including where such sexual penetration occurs without the consent of the victim.[54]

When addressing the sexualised torture perpetrated by Kunarac and Vuković, the ICTY recognised that victims had been targeted due to their identity as Muslim women, which constituted one of the prohibited purposes of torture. However, it also stressed that torture could be committed for a number of reasons beyond the prohibited

[51] Askin, 'Prosecuting Wartime Rape and Other Gender-related Crimes under International Law' (n 25) 336.
[52] ibid 338.
[53] ibid 340.
[54] *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Vuković, Zoran* (Trial Judgment) IT-96-23 & IT-96-23/1-A (12 June 2002) para 185.

grounds and that the prohibited ground in question did not necessarily need to be the main motivation behind the torture.

The ICTY also recognised that rape was one of the worst sufferings a human being could inflict upon another.[55] Moreover, when addressing the charge of outrages against personal dignity against Kovać, the ICTY stated that the harm was caused regardless of whether it was for his own gratification, for the entertainment of soldiers, or was actually intended to humiliate and degrade the victims. One of the ground-breaking aspects of the *Kunarac* judgment was the ICTY's development of the crime of enslavement, as it found it to include sex, prostitution, trafficking in persons, assertion of exclusivity, subjection to cruel treatment and abuse, and control of sexuality.[56]

1.1.3 The ICC and the Rome Statute

The important advancements made by the ad hoc tribunals, together with the continuous outbreaks of wars, called for the need to create a permanent international criminal tribunal. While the proposal for its creation dated back to 1937, it was taken under serious consideration only in the early 1990s. The Rome Statute of the ICC was adopted in Rome in 1998 and the ICC came into being in 2002.[57]

Feminist scholars and advocates took this as an opportunity to advocate for the inclusion of a gender perspective in the ICC Statute. The Women's Caucasus for Gender Justice (WCGJ) was particularly active at the 1998 Rome Conference and the subsequent preparatory conferences, where it played a key role in drafting both the Rome Statute itself and the two subsidiary documents, the Elements of Crime and the Rules of Procedure and Evidence.[58] When it comes to the content of the ICC Statute, the influence exercised by feminist activism is visible in article 7 on crimes against humanity and article 8 on war crimes, with both making reference to sexual violence acts. Not only do these

[55] Askin, 'Prosecuting Wartime Rape and Other Gender-related Crimes under International Law' (n 25) 339.

[56] ibid 340.

[57] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF.183/9; Copelon (n 6) 233. Rome Statute and ICC Statute are used interchangeably to refer to the Rome Statute of the International Criminal Court.

[58] Louise Chappell, 'Women, Gender and International Institutions: Exploring New Opportunities at the International Criminal Court' (2003) 22 Policy and Society 3, 14.

provisions lack the moral element linking sexual violence crimes to the victim's honour present in previous international law instruments, but they also recognise them as serious breaches of international law.[59] Furthermore, they managed to include broad definitions of the various types of sexual violence constituting such crimes. For instance, for the first time sexual slavery and forced pregnancy were recognised as an element of war crimes and crimes against humanity. The inclusion of the latter is a particularly remarkable achievement, as women's rights advocates had to face the stark opposition of lobbyists from the Vatican, Islamic representatives and American anti-abortion groups due to the fear that such provision would influence national anti-abortion legislation. Another important accomplishment was the inclusion of gender as one of the grounds for persecution under article 7(h), although the definition of gender is narrower than the one initially proposed due to the resistance of the above-mentioned groups.[60] The WCGJ also managed to advocate successfully for the inclusion of gender in article 21(3) on the prohibited forms of discrimination in the interpretation and application of the statute.[61]

Important gender-sensitive measures were also included in the mandate of the OTP. According to article 54(1)(b), the ICC Prosecutor is under the duty to investigate crimes of sexual and gender violence. Genuine gender-awareness should be at the basis of investigations into gender-based crimes, meaning the interests and personal circumstances of victims and witnesses, including the gender, together with the gender aspect of sexual violence and gender-based crimes should always be taken into account and respected throughout the investigative and trial stages.[62] The OTP itself has also undertaken a number of steps to ensure that it is well-equipped to address sexual and gender-based violence. For instance, it has set up a Gender and Children Unit, tasked with advising the Prosecutor on sexual and gender violence, and violence against children.[63] It has also appointed a Special Gender Advisor, who is to provide additional expertise on gender violence and advice on gender related policies, practices and legal submissions. The Rome

[59] Chappell (n 58) 14.
[60] ibid 15.
[61] Copelon (n 6) 236.
[62] Solange Mouthaan, 'The prosecution of gender crimes at the ICC: Challenges and Opportunities' (2010) 11 International Criminal Law Review 1, 13.
[63] ibid 14.

Statute also acknowledges the central role played by victims in the proceedings before the ICC by recognising their right to participate and intervene, either directly or through legal representatives. Building on the advancements made by the ICTY and ICTR, the ICC Statute also provides a number of procedural safeguards to protect and assist victims with the painful process of recounting their trauma.[64] These go from controlling the manner of questioning of witnesses and victims to allowing them to provide part of the evidence by electronic means.[65]

The gender sensitivity of the Rome Statute is also reflected in its structure. Not only does there need to be a fair representation of female and male judges,[66] but when nominating judges, state parties must include judges with legal expertise on specific issues such as violence against women and children.[67]

Feminist activists received the Rome Statute with contrasting emotions. On one hand, some were sceptical about the role that a criminal mechanism could play in advancing women's rights.[68] While acknowledging that its adoption indeed represented a step forward in the recognition and prosecution of sexual violence against women, they questioned ICL's ability to change effectively the structural subordination of women across the world.[69] Many were particularly critical of the definition of gender, which only included the two sexes, male and female. Some have been critical about the interchangeability of the terms gender and sex, meaning gender is not understood as the socially constructed roles of males and females. Moreover, by solely focusing on the two biological sexes, the definition leaves little room to consider the social and cultural aspect of gender roles and stereotypes.[70] Some have also criticised how the phrase 'within the context of society' significantly limits the ICC's capacity to understand what gender means and to grasp all the factors influencing its social construction.[71] Other scholars also

[64] Mouthaan (n 62) 15.
[65] ibid 16.
[66] Rome Statute (n 57), art 36(8)(a)(iii).
[67] ibid art 36(8)(b).
[68] Janet Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' (2008) 30 Michigan Journal of International Law 3, 123.
[69] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester UP 2000) 335.
[70] ibid 394.
[71] Valerie Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' (2005) 18 Harvard Human Rights Journal 56, 74.

expressed concerns as to how such definition of gender would preclude the ICC from taking into consideration sexual orientation.[72] The lack of definitions of other important terms also worried some that gender-related issues would not constitute a priority for the ICC.[73]

Throughout the years, the OTP has strengthened its commitment to the prosecution of sexual and gender-based violence. In its first Strategic Plan for 2012-2015, it made the integration of a gender perspective in all areas of its work and the continuous attention to sexual and gender-based crimes and crimes against children key strategic goals.[74] The finalisation of a Sexual and Gender Based Crimes Policy by 2013 also constituted a priority. Such goal was achieved eventually in 2014 with the publication by Prosecutor Bensouda of the OTP's Policy Paper on Sexual and Gender Based Crimes (SGBC Policy),[75] which represented the first document outlining the prosecutorial strategy of sexual and gender-based crimes of an international criminal tribunal. The Prosecutor also reaffirmed the commitment of the OTP to paying particular attention to sexual and gender-based crimes in line with statutory provisions.[76]

The positive impact of the SGBC Policy is visible in the achievements reached by the ICC in recent cases. In the *Prosecutor v Ntaganda* case, the ICC charged the first senior military figure for rape and sexual slavery committed against child soldiers within its own militia. The case concerned the deputy chief of staff and commander of operations of the rebel group Forces Patriotiques pour La Libération du Congo (FPLC) and various war crimes and crimes against humanity committed during an internal armed conflict in the Ituri region of eastern Democratic Republic of the Congo.[77] While the initial arrest warrant lacked any charges on sexual and gender-based crimes, nine charges including rape and sexual slavery as war crimes and crimes against humanity were

[72] Oosterveld (n 71) 76.
[73] ibid 80.
[74] The Office of the Prosecutor, 'Strategic plan June 2012-2015' (International Criminal Court, 11 October 2013) 27.
[75] The Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes' (International Criminal Court, June 2014).
[76] International Federation of Human Rights and Women's Initiatives for Gender Justice, 'Accountability for Sexual and Gender-Based Crimes at the ICC: An Analysis of Prosecutor Bensouda's Legacy' (FIDH and WIGJ June 2021) 6 <https://fidh.org/en/issues/international-justice/international-criminal-court-icc/accountability-for-sexual-and-gender-based-crimes-at-the-icc-an> accessed 20 April 2021.
[77] Open Society Foundation, 'The Trial of Bosco Ntaganda at the ICC: Sentencing' (Briefing Paper 2019) 1.

incorporated in the application for an additional arrest warrant. Upon his surrender and transfer to the ICC, further sexual violence charges for the war crimes of rape and sexual slavery against FPLC child soldiers were also included.[78]

According to the prosecution, Ntaganda had both personally perpetrated such crimes and played a crucial role in planning operations carried out by his militia against the non-Hema community. For instance, he had been particularly involved in coercing women into sexual slavery and in using child soldiers during the attacks against civilians. The defendant denied all charges, specifying that the FPLC's aim was to maintain peace rather than fuel the ethnic conflict. The defence also argued that by mainly building its case on anonymous sources and the testimony of a deceased witness, Ntaganda's right to fair trial had been violated.[79] The Pre-Trial Chamber confirmed all the charges against the defendant.[80] However, right before the start of the trial, the defence challenged the ICC's jurisdiction over crimes of sexual violence against child soldiers forming part of the same armed group as the accused. In an unprecedented decision, the Trial Chamber sided with the position of the OTP thus confirming that indeed sexual slavery and rape committed against members of one's own armed group did amount to war crimes.[81] Ntaganda was in the end found guilty as a direct perpetrator of murder as a war crime, murder as a crime against humanity, and persecution as a crime against humanity, and was found guilty as an indirect co-perpetrator on the remaining counts,[82] a conviction which the Appeals Chamber confirmed in March 2021.[83]

This judgment was particularly significant as it represented the first conviction for sexual slavery as a war crime and the first final conviction for sexual and gender-based crimes.

[78] International Federation of Human Rights and Women's Initiatives for Gender Justice (n 76) 11.

[79] Open Society Foundation (n 77) 6-7.

[80] *Prosecutor v Bosco Ntaganda* (Pre-Trial Chamber II Decision) ICC-01/04-02/06 (9 June 2014).

[81] *Prosecutor v Bosco Ntaganda* (Trial Chamber VI Decision) ICC-01/04-02/06 (4 January 2017).

[82] *Prosecutor v Bosco Ntaganda* (Judgment) ICC-01/04-02/06 (8 July 2019).

[83] *Prosecutor v Bosco Ntaganda* (Appeals Judgment) ICC-01/04-02/06 A A2 (30 March 2021); Africanews, 'Ntaganda case: International Criminal Court (ICC) Appeals Chamber confirms conviction and sentencing decisions' (*Africanews,* 30 March 2021) <https://africanews.it/english/ntaganda-case-international-criminal-court-icc-appeals-chamber-confirms-conviction-and-sentencing-decisions/> accessed 15 April 2021.

Another important achievement was reached in the *Prosecutor v Ongwen* case, where the Prosecutor advanced accountability for victims of forced marriage and forced pregnancy. After being kidnapped by the armed group at age 13, Ongwen had worked its way through its hierarchy until he became one of the leaders of the Lord's Resistance Army. He was charged with crimes against humanity and war crimes for attacks perpetrated against four camps of internally displaced people in Northern Uganda and for the conscription and use of child soldiers.[84] Out of the 70 counts, 19 were under the category of sexual and gender-based crimes, including rape, sexual slavery, forced pregnancy, forced marriage as an inhumane act, enslavement, outrages upon personal dignity and torture as war crimes and crimes against humanity. This was the highest number of sexual and gender-based crimes confirmed by an ICC Pre-Trial Chamber.[85]

In February 2021, Ongwen was found guilty of 61 counts of war crimes and crimes against humanity, including all count of sexual and gender-based crimes.[86] This outcome represented an important development for gender justice for three reasons. First, it marked the first time a charge on forced marriage was brought before the ICC and confirmed. Second, it was the first time that an international criminal tribunal prosecuted an individual for the crime of forced pregnancy. Finally, this constitutes the second final conviction for sexual and gender-based crimes at the ICC.[87]

1.2 The prosecution of sexual and gender-based violence before international criminal tribunals between criticism and praise

2.1.1 Criticism of the ICTR and ICTY

Most scholars agree that both the ICTY and the ICTR have led to important developments in the prosecution of crimes of sexual and gender-based violence. However, their work is not free from criticism.

[84] Open Society Foundation, 'The Trial of Dominic Ongwen at the ICC: The Judgment' (Briefing Paper 2021) 2.
[85] ibid 3.
[86] *Prosecutor v Dominic Ongwen* (Judgment) ICC-02/04-01/15 (4 February 2021).
[87] Open Society Foundation (n 84) 6.

Feminist scholars argue that the tribunals largely overlooked the notion of gender violence. While recognising its widespread use against women and girls, both prosecutors and judges often failed to properly analyse and thus address why these women were the main targets of such violence when compared to men of their same racial or ethnic background. By failing to consider how the intersection of gender and ethnicity shaped the persecution and consequent brutal violence suffered by these women, the ICTY and ICTR ended up completely erasing gender from the war narrative.[88]

While recognising its role in bringing to light crucial evidence about the 1994 genocide that would otherwise have been lost, various scholars have been particularly critical of the ICTR's record on prosecuting rape.

Initially disregarded as the poor second cousin of the Yugoslav Tribunal, it soon became the leading forum for the prosecution of sexual violence during armed conflict following the judgment in the *Akayesu* case.[89] However, the prosecutorial record following this ground-breaking judgment was deemed rather disappointing; with the ICTR often failing to charge individuals accused of sexual violence crimes and the OTP either deciding to not pursue sexual violence charges at trial or doing so unsuccessfully. Both feminist scholars and tribunal watchers have identified various institutional failings of the ICTR, together with some difficulties in connecting individual acts of rape to senior military and government members.[90]

Nowrojee and Oosterveld are particularly critical of the lack of political will[91] and the lack of a consistent charging strategy[92] among the four prosecutors who held office between 1994 and 2008. Despite his commitment to prosecute gender and sexual-based violence, the first prosecutor Richard Goldstone mostly failed to put his words in action. Due to the lack of a comprehensive prosecutorial strategy ensuring the consistent inclusion of sexual violence charges, rape was lacking from

[88] Doris Buss, 'Learning Our Lessons? The Rwanda Tribunal Record on Prosecuting Rape' in Clare McGlynn and Vanessa E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge-Cavendish 2010).

[89] ibid 61.

[90] ibid 63-64.

[91] Binaifer Nowrojee, '"Your Justice is Too Slow" Will the ICTR Fail Rwanda's Rape Victims?' (2005) 10 United Nations Research Institute for Social Development 1, 8.

[92] Valerie Oosterveld, 'Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court' (2005) 12 New England Journal of International and Comparative Law 119, 127.

most of the early indictments. However, the public criticism sparked by the poor outcome of his mandate led to the creation of a sexual assaults investigators team.[93] The prosecution of sexual violence became more of a priority with his successor Louise Arbour, who increasingly included sexual violence charges in the new indictments.[94] Nowrojee is particularly critical of the work of the third prosecutor Carla del Ponte, as she argues during her mandate 'there was no demonstrable commitment to the prosecution of gender crimes and the most lasting damage to gender justice'. Sexual violence investigations and prosecutions took a hit during Del Ponte's time in the office, as even cases where there was strong evidence of sexual violence would go to trial without rape charges. She also dismantled the sexual assault investigations team and included fewer sexual violence charges in new indictments.[95]

A number of problems with the investigations exacerbated the already detrimental effect of such lack of political commitment to the prosecution of sexual violence. The lack of diversity and specialised training for investigators is another problematic aspect denounced by scholars. Rwandans started being included in investigation staff very late and most of the investigators were men who lacked the means to understand the importance of prosecuting sexual violence and how to do so appropriately.[96] Furthermore, the internal policies of the OTP making investigators' pay dependent on the region where the interviews would be conducted were criticised, as it caused certain areas of the country with high levels of sexual violence to be neglected.

Similarly, Buss criticises the impact that such poor investigations had on the prosecution of sexual violence before the ICTR. In multiple instances, the Trial Chambers struck out indictments due to their vagueness or the lack of comprehensive information on the incidents. Defects in the indictments had a disastrous effect on sexual violence charges, as they meant strong evidence of rape did not lead to a conviction due to the lack of a full or correct pleading in the indictment.[97] She denounces 'the combined effect of these various institutional problems – lack of political will, flawed investigations,

[93] Nowrojee (n 91) 9.
[94] ibid 10.
[95] ibid 10-11.
[96] ibid 12-13.
[97] Buss, 'Learning Our Lessons? The Rwanda Tribunal Record on Prosecuting Rape' (n 88) 65.

poor indictments, inadequate evidence – is to gradually, step by step, erode the charges and evidence of sexual violence until few convictions can result'.[98] However, Buss still manages to see the positive impact of the work of the ICTR. While the proceedings did not lead to many convictions, the existence of widespread sexual violence against Tutsi women and the use of rape as an instrument of genocide is recognised throughout its jurisprudence.[99]

To assess the successful prosecution of sexual violence, the focus should not only be on the number of rape convictions, but also on how rape is prosecuted.[100] In this regard, she is particularly critical of the narrative on sexual violence, which the ICTR shapes through its jurisprudence. While multiple judgments recognised that sexual violence against women was widespread and systematic and some acknowledged that rape was part of the overall violence perpetrated against the Tutsi community, not much attention was paid to the rape of individual women.[101] While the ICTR's continuous acknowledgment of sexual violence as a generalised pattern of genocide was important, it also ended up overshadowing individualised accounts of rape and sexual violence.[102] This is problematic because, being a record of the Rwandan genocide, the Rwanda's Tribunal judgments end up producing their own narrative of harm and their own language of the witnesses' testimonies, through which the identities of victim and perpetrator emerge. By narrating the use of rape as a weapon of either genocide/conflict/war, rape becomes an inevitable part of ethnic and nationalistic conflicts and follows from the very existence of conflicts between two counterparts.

Furthermore, through its jurisprudence, the ICTR fixed the identities of the various parties involved and assigned them with particular positions within its script: Hutu men rape Tutsi women as a means to attack/destroy the Tutsi community. This narrative of the Rwandan genocide is harmful for two reasons. Firstly, it reduces all the experiences of sexual violence to that perpetrated by Hutu men

[98] Buss, 'Learning Our Lessons? The Rwanda Tribunal Record on Prosecuting Rape' (n 88) 67.
[99] ibid 69.
[100] ibid 71.
[101] Doris Buss, 'Rethinking "Rape as a Weapon of War"' (2009) 17 Feminist Legal Studies 145, 153.
[102] ibid 154.

against Tutsi women. Secondly, it essentialises the experience of sexual violence as a homogeneous and uniform one. Due to the emphasis being on shared patterns of violence against Tutsi women and its everlasting impact on the Tutsi community, the experiences of those who do not fit the 'Tutsi woman' model are completely silenced.[103] 'The rape script that explains the mass rape of Tutsi women as the gendered component of a genocide against the Tutsi people almost requires the erasure of raped men and Hutu women who undermine the narrative coherence of the script.'[104] For instance, many Hutu women were also raped, however when their experiences are addressed by the ICTR, their victimhood is solely shaped around their marriage with a Tutsi man.

Furthermore, the experience of male sexual violence is completely ignored. Despite there being evidence of how male sexual violence was part of the genocide, nobody has been tried or indicted for sexual violence against men.[105]

Other than the harmful narrative developed throughout the jurisprudence of the ICTR, Buss is also critical of its disappointing analysis of the intersection of gender and ethnicity in the context of sexual violence in the Rwandan genocide. In classifying the conflict as an inter-ethnic one, the ICTR assumes that ethnicities are established entities instead of exploring how sexual violence serves to shape these identities.[106] By reducing the narrative around rape to a weapon of the genocide, the ICTR failed to investigate and address the patterns of inequality that caused some women and men to be more vulnerable to sexual violence. This is because it becomes difficult to see sexual violence as a complex social problem when it is placed in the context of an ethnic conflict, as the focus lies on the ethnic aspect of the violence in question.[107] By analysing the *Prosecutor v Gacumbitsi* case, Buss shows how the ICTR over-determines the ethnic contours of the conflict to make all violence fit within the framework of inter-group conflict according to which Rwanda Hutu seek to erase Rwandan Tutsi.[108] Other

[103] Buss, 'Rethinking "Rape as a Weapon of War"' (n 101) 155.
[104] ibid 160.
[105] ibid 157-59.
[106] D Buss, 'Sexual violence ethnicity, and intersectionality in international criminal law' in Emily Grabham and Davina Cooper (eds), *Intersectionality and beyond: law, power and the politics of location* (Routledge-Cavendish 2009) 106.
[107] ibid 114.
[108] ibid 114-15.

than restricting rape to another layer of the ethnic conflict, this over-determination of ethnicity also limits the types of sexual violence, and thus victims, that the ICTR is able to see. The jurisprudence of the ICTR thus fails to understand the complexity of both sexualised violence and identity categories.[109]

Another criticism brought forward by Sivakumaran and Lewis concerns the complete erasure of men's experience of sexual violence. Despite the extensive documentation of the various forms of sexual violence perpetrated against boys and men in the conflicts in the former Yugoslavia and Rwanda, their appearance in the jurisprudence of the ICTY and ICTR is limited.

However, problematic aspects characterise even its investigation and prosecution. For instance, even when sexual violence against men and boys is mentioned, it is not addressed as such but rather under the offences of torture, beatings and similar. A concrete example is provided by the *Prosecutor v Simić et al* case before the ICTY, in which the President of the Crisis Staff of the Serbian Municipality of Bosanski Šamac and his co-accused were prosecuted for crimes against humanity due to the persecution of non-Serb civilians. The ICTY was presented with evidence of the sexual assaults suffered by detainees, with witnesses recounting incidents such as the ramming of a police truncheon in the anus of a prisoner and the forced performance on oral sex between male detainees, as well as on other officials. However, the Trial Chamber characterised such findings just as torture instead of sexual violence.[110]

In other cases, sexual violence against men is mentioned but without being followed up by any consequences for the accused. An example is provided by the *Bagosora et al* case before the ICTR, where various army officials were charged with genocide, crimes against humanity and war crimes for facilitating the commission of massacres and other atrocities by the Rwandan military. Despite the evidence of male sexual violence, the witnesses' testimonies on the matter were only used as background of the case with no consequences.[111] Something similar occurred in

[109] Grabham and Cooper (n 106) 118.

[110] *Prosecutor v Blagoje Simić, Miroslav Tadić and Simo Zarić* (Judgment) IT-95-9-T (17 October 2003); Sandesh Sivakumaran, 'Lost in translation: UN responses to sexual violence against men and boys in situations of armed conflict' (2010) 92 International Review of the Red Cross 259, 273.

[111] *Prosecutor v Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva* (Judgment) ICTR-98-41-T (18 December 2008); ibid 273.

Prosecutor v Muhimana, where the accused was charged with genocide, rape as a crime against humanity and murder as a crime against humanity. The Trial Chamber of the ICTR mentioned that several witnesses had recounted seeing a certain Kabanda's 'private parts had been severed' and that his genitals had been hung on a spike. However, in the findings the Trial Chamber simply referred to the episode as a killing, rather than an instance of male sexual violence.[112]

Some scholars have also argued that sexual violence prosecutions before international tribunals have reproduced a stereotype of the woman victim of large-scale conflict and violence. For instance, in the *Prosecutor v Kristic* case the ICTY ended up reproducing a misleading experience of sexual violence through its insistent portrayal of patriarchy as the governing feature of Bosnian Muslim women's lives before and after the conflict.[113] Throughout the judgment, the ICTY misrepresents these women's experience of sexual violence by only analysing it through the lenses of patriarchy. Their experience as victims of sexual violence is overshadowed by their experience as women living in a patriarchal society, with the focus being on their Muslim identity being more relevant than their experience as women.[114] There is also the risk that, by focusing on the harm suffered by the victim's sexed body, the tribunal will depict her as lacking voice or subjectivity.[115] By taking away the focus from the victim of the sexual violence, her experience and testimony can easily be appropriated and become the centre of political, specifically nationalistic, discourses. International criminal tribunals have also been criticised for having a very limited understanding of women by focusing on their sexual and reproductive identities. By considering women's identities in light of their relationship with men and children, they are constructed as the other. Furthermore, women suffering from sexual violence during conflict are often perceived and treated by international criminal courts as passive victims rather than survivors or actors of change.[116]

[112] *Prosecutor v Mika Muhimana* (Judgment) ICTR-95-1B-T (28 April 2005); Sivakumaran (n 110) 274.

[113] *Prosecutor v Radislav Kristic* (Judgment) IT-98-33-T (02 August 2011); Doris Buss, 'Knowing Women: Translating Patriarchy in International Criminal Law' (2014) 23 Social & Legal Studies 74, 88.

[114] ibid 79.

[115] Erin Baines, *Buried in the Heart Women, Complex Victimhood and the War in Northern Uganda* (CUP 2017) 4-5.

[116] Charlesworth and Chinkin (n 69) 229.

2.2.2 Criticism of ICL

ICL's capacity to tackle sexual violence has also been questioned. One of feminist scholars' main concerns regards the incompatibility between the structure of criminal law and the main goals of feminist activism: while the former is focused on prosecuting and punishing individuals, the latter is more concerned with tackling structural issues. While feminist activists are interested in how to improve rape prosecutions as a way to address systemic violence against women, rape trials solely focus on the circumstances of the specific case in question. This means that violence against women is reduced to a single isolated incident, rather than a larger social phenomenon – an aspect of fundamental importance to understand the implications of sexual violence. While international criminal tribunals have been more active in recognising patterns of rape, they have failed to approach sexual violence as a crime against women as individuals rather than a crime against a community.[117] Furthermore, the criminal trial model reduces all complexity to binaries of innocent/guilt, good/bad where the perpetrator is either guilty or not and the victim is either believed or not.

Other scholars have been particularly concerned with criminal prosecutions' focus on punishment, which consequently leads to a complete erasure of forgiveness, victim healing, elimination of socio-economic predicates of crime and victim social services.[118] Another concern regards how punishment has disproportionately targeted poor, marginal and radicalised communities who tend to be the targets of over-incarceration and surveillance. In the case of international criminal tribunals, their prosecutions have mainly targeted perpetrators from Africa and racialised countries such as Cambodia, Lebanon and the Former Yugoslavia.[119] Furthermore, some feminist scholars question whether the punishment provided by the criminal justice system can be of any benefit to their cause. Backhouse expresses her concern about the dangers of locking up a large number of violent sex offenders in institutions that are deeply rooted in sexism, racism and homophobia.[120]

[117] Doris Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' (2011) 11 International Criminal Law 409, 418.

[118] ibid 419.

[119] Aya Gruber, 'Rape, Feminism and the War on Crime' (2009) 84 Washington Law Review 581, 614.

[120] Constance Backhouse, 'A Feminist Remedy for Sexual Assault: A Quest for Answers' in Elizabeth Sheehy (ed), *Sexual Assault Law in a Post-Jane Doe Period* (University of Ottawa Press 2011).

The incarceration of perpetrators is not only a limited response to a larger issue of sexual violence, but it also might end up distracting international attention from the larger, systematic failures that underpin conflict.[121]

Feminist scholars also question whether ICL is capable of addressing sexual violence as it mainly reflects a male perspective and thus risks excluding women and LGBTQI+ persons. For instance, when addressing women's experiences of sexual violence during armed conflict, article 27 of the Fourth Geneva Convention provides that states are under an obligation to protect women against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.[122] This provision's focus lies on the effect that sexual violence crimes have on men, whose honour suffers from the violence to which their women are subjected, rather than the real victims.[123]

While recognising the improvements made by international tribunals in recognising and addressing sexual violence, Charlesworth is still critical of its limitations. For instance, sexual violence crimes are included in the three categories of international crimes in the ICTY and the ICC statutes only to the extent that they form part of a widespread, systematic or large-scale attack. Furthermore, both the jurisprudence of the ICTR and ICTY perpetrate an image of women as cultural objects or bodies on which and through which war can be waged. Rape is prosecuted and condemned because it constitutes an assault against a community defined only by its racial, religious, national or ethnic composition, rather because it is a violation against women. The focus on the humiliating and degrading effects the attack has on the community overshadows the violation of the woman's body. She is also particularly critical of the dichotomy of public/private promoted by ICL, as it solely operates in the collective public sphere. Considering that the collectivity in question is shaped around men, this distinction has consequences on women.[124]

The exclusive focus on sexual violence, specifically rape perpetrated against women and girls, has also raised concerns among feminist scholars. By focusing on wartime rape, other gender-related harms

[121] Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' (n 117) 419.

[122] Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention).

[123] Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93 The American Journal of International Law 379, 386.

[124] ibid 387.

are overlooked in investigations and prosecutions before international criminal tribunals. Firstly, it causes other human rights violations occurring during an armed conflict to be overlooked.[125] Secondly, it has led to the construction of a rape hierarchy within the international criminal justice system in which the sexual violence perpetrated by a stranger is given more attention and prosecuted more harshly than rape perpetrated by an acquaintance.[126] Thirdly, the characterisation of rape by international criminal tribunals has been criticised, as by focusing on investigating and prosecuting systematic or genocidal forms of sexual violence, random, individual or isolated rapes have been ignored.[127]

Another key criticism particularly present among feminist scholars is that throughout their jurisprudence, the ICTR and ICTY have promoted an unrealistic and wrong separation between rape in conflict and rape in peace. By making such distinction, the tribunals fail to recognise the connection between these two phenomena, as the inequalities and discrimination against women present in peacetime, such as the perception of women's bodies as sexually available and vulnerable, have an influence on the sexual violence that occurs during war.[128] This criticism was brought forward by Buss in her analysis of the *Prosecutor v Gacumbitsi* case,[129] which she finds to be the prime justification to the concerns expressed by feminist scholars as the ICTR addressed the mass rape of women in Rwanda as disconnected from everyday violence against women.[130] Charlesworth and Chinkin have also criticised ICL's lack of recognition of the nexus between violence against women in armed peacetime and in armed conflict, as they are part of the same spectrum of behaviour. By focusing solely on this aspect, ICL fails to challenge the acceptability of violence and the private order of the domination of women at other times.[131]

[125] Charlesworth (n 123) 388.
[126] Nicola Henry, 'The Fixation on Wartime Rape: Feminist Critique and International Criminal Law' (2014) 23 Social and Legal Studies 1, 7.
[127] ibid 9.
[128] Kiran Grewal, 'Rape in Conflict, Rape in Peace: Questioning the Revolutionary Potential of International Criminal Justice for Women's Human Rights' (2010) 33 Australian Feminist Law Review 57, 75.
[129] *Prosecutor v Sylvestre Gacumbitsi* (Judgment) ICTR-2001-64-T (17 June 2004).
[130] Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' (n 117) 114.
[131] Charlesworth and Chinkin (n 69) 334.

2.2.3 Praise of ICL

Despite the steep criticism, some scholars also recognise the positive developments in the prosecution of sexual violence that ICL has brought about. Proponents of ICL have argued that the prosecution of sexual violence crimes through international tribunals fosters deterrence from the future commission of such crimes.[132] While some believe the continuous perpetration of systemic violence against women shows otherwise, scholars like Eaton believe in the long-term effect international tribunals' rulings will have on IHRL norms and in perpetrating the idea that crimes against women's bodies are serious and will thus be punished. Taking part in proceedings before the tribunals gives women the opportunity to take control over the narrative of sexual violence and victimhood, by going from passive bodies to legal subjects with rights.[133] Some scholars have also attributed international prosecutions the potential of advancing women's rights. Scholars like Spees see potential in the work of the ICC, as they believe that the gender provisions contained in the Rome Statute could help strengthen the capacity to address violence against women at the national level through the inclusion of sexual violence crimes in the national legislation and more gender-sensitive procedures for the trial of these offenses.[134] Furthermore, prosecutions carried out by these international tribunals can also help address existing stereotypes about sexual violence, as the circumstances in which they occur leave no doubt on the consent of the victims.[135]

Scholars have identified a number of challenges that can interfere with the successful prosecution of sexual violence before international criminal tribunals. There are many misconceptions about sexual violence that can impede accountability. For instance, rape is often misconceived as a crime of honour rather than a violent crime. With rape involving the penetration of bodily parts and being committed on a large scale during conflict, the sexual nature of the act overshadows the fact that any non-consensual bodily invasion is inherently a violent assault. This

[132] Richard Goldstone, 'The Quest for Justice: The Challenges facing the International Tribunals' in Elenor Richter-Lyonette (ed), *In the Aftermath of Rape, Women's Rights, War Crimes and Genocide* (Coordination of Women's Advocacy 1997) 69.

[133] Shana Eaton, 'Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime' (2004) 35 Georgetown Journal of International Law 873, 904-06.

[134] Pam Spees, 'Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power' in Alexander Karen and Mary Hawkesworth (eds), *War and Terror: Feminist Perspectives* (University of Chicago Press 2008) 198.

[135] Grewal, 'Rape in Conflict, Rape in Peace' (n 128) 69.

misconception is not new to international law. For instance, the Fourth Geneva Convention considers acts such as rape and enforced prostitution as attacks on honour that are incompatible with the modesty and dignity of women.[136] By classifying rape in wartime as a crime of honour rather than a violent physical assault, conflict-related sexual violence is not considered such a serious crime and thus is not given priority. The OTP of the ICC itself has also been victim of such misconception, as it has at times created a hierarchy of crimes with murder at the top and sexual violence at the very bottom. In the early days, the staff of the OTP was also victim of this misconception, as many considered sexual violence cases less prestigious assignments.[137] Furthermore, by focusing merely on the sexual aspect of the crime at hand, sexual violence crimes are often considered opportunistic and personally motivated. This means that connections between these individual crimes and wider patterns of violent crimes are ignored, which is particularly problematic when trying to link crimes to senior political or military leaders.[138] The perception of sexual violence as an isolated crime solely motivated by the perpetrator's sexual desire consequently leads to the assumption that international criminal tribunals should prosecute conflict-related sexual violence only when it is systematic and committed in accordance with orders. While rape might constitute a smaller percentage of the overall offences perpetrated against a community, they can still very well form part of the overall strategy aimed at the erasure of the targeted group.[139]

There are also a number of procedural barriers, which can interfere with successful sexual violence prosecutions. For instance, victims and witnesses may be reluctant to come forward with evidence of sexual violence because of the social stigma and repercussions that might come with it. Victims often fear the reaction that their communities will have and how that will impact their safety and that of their family. Furthermore, they might be scared of the effect that recounting such traumatic experiences will have on their wellbeing, even more so before international tribunals that are often located in foreign countries and whose procedures they are not particularly familiar with.[140]

[136] Fourth Geneva Convention, art 27; Michelle Jarvis and Kate Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases' in Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (OUP 2016) 35-36.

[137] Peggy Kuo, 'Prosecuting Crimes of Sexual Violence in an International Tribunal' (2002) 34(3) Case Western Reserve Journal of International Law 305, 310-11.

[138] Brammertz and Jarvis (n 136) 37-39.

[139] ibid 40.

[140] ibid 42-43.

2.2.4 Criticism of the ICC

Despite its contribution to the advancement of gender justice, the ICC has also been subject to criticism, with some going as far as stating 'the ICC is far from achieving true gender justice or from serving as a deterrent against sexual and gender-based violence crimes'.[141] Since its establishment in 1998, charges on sexual violence crimes have reached the trial stage before the ICC only eight times and only two of them have led to convictions. In light of these scarce results, the ICC has been criticised for both its structural issues, such as its slow trials and the prosecution of few perpetrators, as well as its lack of gender-sensitivity in building strong prosecutions of sexual violence crimes with the necessary evidence.[142] In this regard, the OTP has often been criticised for undertaking investigations without much planning and an effective strategy. This often results in missed opportunities, with sexual violence charges being overlooked to pursue others that are deemed easier to substantiate and prosecute. This streamlined investigate strategy is particularly problematic as it leads to the silencing of some victims' experiences and thus denies alternative accounts of events and narratives of victimisation. Prosecutions promoting efficient and selective justice rather than gender justice are ultimately extremely hurtful, as not only do they contribute to the perpetration of stereotypes but they also deny female victims' right to justice and the opportunity to tell their stories.

Another important criticism moved against the ICC and more specifically the OTP is the misuse of its discretion. Charges are particularly important in cases of sexual violence, as they have both a psychological and symbolic effect on victims. Thus, when the prosecutor decides either not to press charges or bring ones that do not reflect the experiences of the victims, they might feel ignored or unrepresented.[143] Furthermore, even when such charges are brought forward, the risk is that they will be dropped over the course of the investigation,

[141] Laurie Green, 'First-Class Crimes, Second-Class Justice: Cumulative Charges for Gender-Based Crimes at the International Criminal Court' (2011) 11 International Criminal Law Review 529, 529.

[142] Louise Chappell, 'The Role of the ICC in Transitional Gender Justice: Capacity and Limitations' in Susanne Buckley-Zistel and Ruth Stanley (eds), *Gender in Transitional Justice* (Palgrave Macmillan 2012) 54.

[143] Rita Shackel, 'International Criminal Court Prosecutions of Sexual and Gender-Based Violence: Challenges and Successes' in Rita Shackel and Lucy Fiske (eds), *Rethinking Transitional Gender Justice – Transformative Approaches in Post-Conflict Settings* (Palagrave Macmillan 2019) 202-03.

prosecution or trial. Between 2002 and 2014, the prosecution presented 57 charges of sexual and gender-based violence in the 20 cases in which applications for arrest warrants or summons were made, however only 51 where included by the Pre-Trial Chamber. Furthermore, when applying for the confirmation of 35 sexual and gender-based violence charges in the 11 cases in which the PTC issued a decision on confirmation of charges, the Pre-Trial Chamber only confirmed 20.[144] The OTP failed to achieve any convictions for sexual and gender-based violence crimes in the three cases for which the Trial Chamber had issued a judgment by July 2014.

What is also problematic is that, even when charges on sexual violence crimes are brought, they solely focus on rape thus leaving out other violations that are just as striking.[145] Scholars have also been particularly critical of the fact that the prosecutors solely focus on prosecuting high-ranking commanders or individuals who have some level of command-responsibility in the conflict. However, this means that those perpetrators who are lower ranking officials or soldiers will not be prosecuted. Furthermore, the prosecution of high-ranking officials remains difficult due to the high evidentiary standards and the need to establish a nexus between the authorities and the individual acts. The task of attributing responsibility for sexual and gender-based violence is rendered more challenging by the reluctance to use circumstantial or pattern evidence to prove the ordering of rape and sexual violence. For instance, in the case of Prosecutor v Katanga, the Trial Chamber acquitted the accused of all charges of sexual and gender-based crimes and the war crime of using child soldiers due to the lack of evidence linking the crimes committed by his militia's combatants to the common purpose of the group and thus him.[146] Such difficulty was acknowledged by the OTP himself, who in 2014 committed itself to prosecuting senior officials failing to take preventative measures under article 28 of the Rome Statute. While this strategy resulted in the first successful prosecution for command-responsibility in the Bemba case, the Appeals Chamber soon overturned the conviction in 2018.[147]

[144] Kiran Grewal, 'International Criminal Law as a Site for Enhancing Women's Rights? Challenges, Possibilities, Strategies' (2015) 23 Feminist Legal Studies 149, 149.

[145] Louise Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (OUP 2016) 104-06.

[146] *Prosecutor v Germain Katanga* (Judgment) ICC-01/04-01/07 (7 March 2014).

[147] Shackel and Fiske (n 143) 204-06.

The Prosecutor v Lubanga case displays many of these problematic aspects.[148] Lubanga was identified as a senior official in the militias involved in the conflict in the Democratic Republic of Congo and was thus charged with war crimes relating to the enlistment and conscription of children under the age of 15 years and using children to participate actively in hostilities.[149] When pressing charges, the Prosecutor decided to pursue child soldier charges over those on sexual violence crimes as substantiating the latter would be difficult evidence-wise and lengthy. The Prosecutor thought there was not enough evidence to connect Lubanga to the sexual violence crimes in question and to meet the threshold necessary to classify them as crimes against humanity. Time was particularly crucial, as there was a risk the accused might be released from custody and the ICC would lose support by failing to process its first cases quickly. While at the time of Lubanga's indictment the Prosecutor committed itself to continuing the investigation into other crimes, this promise was soon broken when in June 2006 further investigation in additional charges was suspended without the intention of amending the charges.

Both academics and NGOs have been particularly critical of the Prosecutor's decision not to add charges concerning the sexual violence crimes. Not only had the OTP had three years to investigate such crimes, but it also had access to documentation gathered by the UN Secretary General and many NGOs on the systematic nature of the sexual violence and the involvement of Lubanga's militia in such crimes.[150] Furthermore, in light of the lack of inclusion of sexual violence charges, the Women's Initiatives for Gender Justice attempted to file an amicus curiae status to advocate for their inclusion but failed to do so.

The widespread nature of sexual violence soon became visible during the trial stage, when witnesses started to recount the difference of treatment of boy and girl soldiers in the Democratic Republic of Congo conflict. These testimonies brought to light not only that the sexual slavery of female soldiers was a widespread phenomenon, but also that boys were trained specifically to commit rape and other sexual crimes. Despite the refusal to amend the indictment to include such

[148] *Prosecutor v Thomas Lubanga Dyilo* (Judgment) ICC-01/04-01/06 (14 March 2012).
[149] Louise Chappell, 'Conflicting Institutions and the Search for Gender Justice at the International Criminal Court' (2014) 67 Political Research Quarterly 183, 186.
[150] ibid 187.

crimes, the prosecution heavily relied on sexual violence against girl soldiers to build the case. However, when the legal representatives for victims attempted to tackle such lack of specific charges by asking the Trial Chamber to re-characterise the legal facts of the case, the Chamber had to reject the request in light of the Prosecutor's charging strategy.[151] The judgment was reflective of the prosecution's disastrous charging strategy. While the judges did recognise that girl soldiers had been subject to sexual violence and rape, it concluded that the prosecution had failed to demonstrate the widespread nature of such violence and that the accused's awareness of such crimes.[152]

Through this chapter, we have been able to see how the prosecutions of sexual and gender-based violence has developed through the jurisprudence of the various international tribunals. Furthermore, the literature review on the main criticisms and praises concerning the ICTR, ICTY and ICC's prosecutions and ICL's capacity to address sexual violence has brought to light the main challenges posed by addressing sexual violence crimes before international tribunals. This will be relevant for the third chapter.

[151] Chappell (n 149) 188.
[152] ibid 189-91.

2.

AN INQUIRY INTO THE THEORY OF INTERSECTIONALITY

This chapter will provide an overview of the theory of intersectionality. The first section will concern the historical background of the theory and its development by the American scholar Kimberlé Crenshaw. In the second section, intersectionality will be analysed in the context of anti-discrimination law. The third section will provide an outlook on the inclusion of intersectionality in the IHRL framework. Finally, the potential use of the theory in ICL, with its positives and negatives, will be addressed.

2.1 The origins of intersectionality

When discussing the origins of intersectionality, Sojourner Truth's 1851 speech 'Aren't I a women' is often mentioned as the starting point.[153] However, it must be noted that Sojourner most likely never pronounced the speech as reported, as it was written years later by one of her abolitionist fellows, a white woman. Furthermore, as she was using her experience as a black enslaved woman to claim for votes for all women, she never made a distinction between the experiences of white and black women.[154] It follows that the theory of intersectionality as known today was coined by the American legal scholar Kimberlé Crenshaw in the late 1980s to showcase how race and gender intersect

[153] Charlotte H Skeet, 'Intersectionality as theory and method: Human rights adjudication by the European Court of Human Rights' in Naomi Creutzfeldr, Marc Mason and Kirsten McConnachie (eds), *The Routledge Handbook of Socio-Legal Theory and Method* (Routledge 2019) 274.

[154] Dolores Morondo Taramundi, 'Un caffè da Starbucks – Intersezionalità e disgregazione del soggetto nella sfida al diritto antidiscriminatorio' (2011) 2 Ragion Pratica 365, 366.

to shape the multiple dimensions of black women's experiences.[155] In her piece 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color', Crenshaw analyses the experiences of black women with domestic violence from three aspects: (i) structural intersectionality, (ii) political intersectionality and (iii) representational intersectionality.[156]

Structural intersectionality concerns how race and gender shape the position of black women. As an example, Crenshaw uses her experience in battered women's shelters located in minority communities in Los Angeles. Many of the victims seeking for help at these shelters were poor women of colour who often had child care responsibilities and were unemployed due to the lack of job skills. These burdens were not only the consequence of gender and class oppression, but they were also enhanced by the racially discriminatory employment and housing practices women of colour often face, as well as by the disproportionately high unemployment among people of colour making it particularly hard for women of colour to rely on friends and relatives for temporary shelter.[157]

Political intersectionality highlights how women of colour are often left out of anti-racist and feminist activism due to their identity as black women. With both movements centring their advocacy on the needs of black men and white women respectively, the experiences of women of colour are neglected as they are forced to choose between advocating for their struggle as women or as black people.[158] Such failure to include women of colour in anti-racist and feminist discourse often leads to the reinforcement of harmful stereotypes, with the anti-racist discourse fuelling racism and the anti-sexist discourse furthering sexism.[159] Crenshaw showcases the detrimental impact of anti-racist strategies lacking intersectionality through her experience requesting the Los Angeles Police Department (LAPD) to review statistics on the rate of domestic violence interventions by precinct. LAPD refused to release such information as representatives from minority communities worried the data would further stereotypes depicting black communities as

[155] Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43(6) Stanford Law Review 1241, 1244.
[156] ibid 1245.
[157] ibid 1245-46.
[158] ibid 1251-52.
[159] ibid 1252.

violent and barbaric. The harmful effect of feminist discourse against domestic violence is proved by how awareness campaigns within white communities often use the abuse suffered by women of colour to showcase how domestic violence is limited to minority communities, but rather affects all races.[160]

Representational intersectionality concerns the cultural construction of black women and how gender and race reinforce harmful representations of black women in the media.[161]

Since then, the use of the theory of intersectionality has expanded beyond the legal field[162] and beyond the categories of race, gender and class.[163] Its value has been widely recognised among scholars, to the point of being defined one of the most important contributions from women's studies.[164]

On one hand, intersectional analysis has been praised for its many benefits. By recognising multiple factors shape one's identity, intersectionality helps tackle the discrimination and exclusion suffered by those at the intersection of those different factors. Thus, it provides representation and protection to those that are often neglected.[165] Such ability is demonstrated by its adaptability to new categories beyond gender and race. Furthermore, intersectional analysis can bring up new issues reflective of the experiences of marginalised groups, thus leading to a more comprehensive understanding of how oppression and privilege work.[166]

On the other hand, the limits of the concept and the criticism received must also be addressed. The lack of a commonly accepted definition of intersectionality has made its acceptance rather difficult, with some finding the concept to lack substantive content of its own.[167]

[160] Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (n 155) 1252-59.

[161] ibid 1282.

[162] Aisha N Davis, 'Intersectionality and International Human Rights Law: Recognizing Complex Identities on the Global Stage' (2015) 28 Harvard Human Rights Law Journal 205, 212.

[163] Ahir Gopaldas, 'Intersectionality 101' (2013) 32 Journal of Public Policy and Marketing 90, 91.

[164] Leslie McCall, 'The Complexity of Intersectionality' (2005) 30 Signs 1771, 1771.

[165] Maria Caterina La Barbera, 'Interseccionalidad (Intersectionality)' (2017) 12 Eunomía: revista en Cultural de la Legalidad 191, 194.

[166] Ann Garry, 'Intersectionality, Metaphors, and the Multiplicity of Gender' (2011) 26(4) Hypatia 826, 850.

[167] Ben Smith, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective' (2016) 12 The Equal Rights Review 73, 76.

The appropriateness of the concept as a tool to understand and tackle structures has been put into question due to its vagueness. Some have gone as far as stating that 'intersectionality has reached the limits of its potential'.[168] This is because the core purpose of intersectionality is in direct conflict with the legal roots of the theory: while the former aims at going beyond categories to highlight the complex experiences of those within a given group, the latter instead seeks to compartmentalise them and thus leads to the fragmentation of identity.[169] Due to its basis in law, which only recognises selected grounds of discrimination, intersectionality has a rigid framework which lacks the necessary flexibility to properly address the experiences of those it was meant to represent. Some are also concerned that an unconstrained use of intersectionality could result in a never-ending creation of categories and subcategories.[170]

2.2 The difficult relationship between intersectionality and anti-discrimination law

Despite intersectionality being one of the leading theories in feminist legal theory, it is only in recent years that academics have become interested in its possible contribution to the legal field, more specifically anti-discrimination law.[171] In her article 'Demarginalising the intersection of race and sex: a black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', Kimberlé Crenshaw developed the legal concept of intersectional discrimination while criticising anti-discrimination law for failing to address the experiences of those suffering from discrimination on more than one ground. With its single-axis approach,[172] anti-discrimination law erases the experiences of black women as race and gender discrimination are analysed individually

[168] Joanne Conaghan, 'Intersectionality and the Feminist Project in Law' in E Grabham and others (eds), *Intersectionality and beyond: law, power and the politics of location* (Routledge-Cavendish 2009) 21.
[169] ibid 22-23.
[170] ibid 24.
[171] Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.4, 'Tackling Multiple Discrimination: Practices, policies and laws' (European Commission September 2007) 15 <https://op.europa.eu/en/publication-detail/-/publication/f1f6da3a-2c36-4ef7-a7c2-b906349220b4> accessed 15 May 2021.
[172] Also known as single ground approach.

rather than intersecting factors.[173] In her article, Crenshaw delivers such critique through the analysis of three prominent discrimination cases at the time: *DeGraffenreid v General Motors, Moore v Hughes Helicopter* and *Payne v Travenol*.[174]

The first case concerned a claim brought against General Motors, alleging that the employer's seniority system discriminated against black women. Not only were black women not hired before 1964, but all those employed after 1970 lost their jobs in a seniority-based layoff. The district court stopped the plaintiff from bringing a claim on behalf of black women as they did not classify as a special class to be protected from discrimination.[175] Considering that white women had long been employed by the company prior to 1964, the court found there was no sex discrimination, all while simultaneously dismissing the race discrimination complaint.[176] According to Crenshaw, the judgment highlights anti-discrimination's failure to address intersectional discrimination: Black women are protected only as far as their experiences align with those of black men and white women.

In the second case, the claimant (Moore) accused the employer Hughes Helicopter of practicing race and gender discrimination in promotion to higher positions. The US court refused to recognise Moore as the class representative for all women working at Hughes as she had only claimed to be discriminated against as a black woman, not as a woman. The claimant was thus not allowed to use the statistics demonstrating a significant disparity between men and women employed at the company, which could have enhanced the success of the claim. The judgment does not only showcase inability of the courts to embrace and apply intersectionality, but also the centrality of the experience of white women in the conceptualisation of gender discrimination.[177]

In the third case, the two black female plaintiffs attempted to bring a class action against race discrimination on behalf of all black employees at Travenol. However, the court did not allow the claimants to represent

[173] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 139, 140.

[174] *Emma DeGraffenreid et al v General Motors* 413 F Supp 142 (E D Mo 1976); *Tommie Moore v Hughes Helicopter* 708 F2d 475 (9th Cir 1983); *Willie Mae Payne v Travenol* 673 F2d 798 (5th Cir 1982).

[175] Crenshaw, 'Demarginalizing the Intersection of Race and Sex' (n 173) 141.

[176] ibid 142.

[177] ibid 144.

black men but rather only black women. When the court found there had been extensive racial discrimination at the plant, it did not extend the remedy to black men as it feared their conflicting interests would not be properly addressed.[178] With her analysis, Crenshaw managed to denounce how anti-discrimination law neglects black women's subjection to intersectional discrimination by setting black men's experience of race discrimination and white women's experience of gender discrimination as the yardstick.[179]

Crenshaw's criticism of anti-discrimination law is not isolated, but it has rather taken up more and more space among legal professionals in the last decade. One of the main concerns brought forward by the majority of scholars refers to anti-discrimination law's traditional single-axis approach, working under the belief that there is one and only ground causing discrimination in a particular instance.[180] Such approach leads to a complete erasure of the experiences of those at the intersection of two or more grounds, as the very essence of the discrimination they suffer, together with their intersectional identity, are completely lost.

This approach is also problematic due to its tendency to essentialise the experience of identity groups. Working under the assumption that all individuals belonging to a certain group experience discrimination in the same way obscures intra-group differences, such as race, sexuality, class or disability, and neglects those with complex identities.[181] The greatest risk of this approach is thus the misrepresentation of the lived experiences of those suffering from intersectional discrimination. The uni-sectoral approach characteristic of anti-discrimination law is also deemed inefficient for addressing structural inequalities and the underlying causes of discrimination. This is because traditional equality analysis does not account for the socio-economic determinants or effects of discrimination, thus failing to account for the role played by power-dynamics in constructing discrimination and identity categories.[182]

[178] Crenshaw, 'Demarginalizing the Intersection of Race and Sex' (n 173) 147.
[179] ibid 147-51.
[180] Shreya Atrey, *Intersectional Discrimination* (OUP 2019) 82.
[181] Gerard Quinn, 'Reflections on the Value of Intersectionality to the Development of Non-Discrimination Law' (2016) 16 The Equal Rights Review 63, 69.
[182] Sandra Fredman, *Intersectional Discrimination in EU gender equality and non-discrimination law* (European Commission Directorate General for Justice 2016) 30 <https://op.europa.eu/en/publication-detail/-/publication/d73a9221-b7c3-40f6-8414-8a48a2157a2f#> accessed 15 May 2021.

Many scholars also criticise the framework used in anti-discrimination law, more specifically the use of selected grounds and the comparator approach. The rigid categorisation of the protected grounds is problematic as they are treated as mutually exclusive and individually standing. With each discriminatory ground being analysed individually, the experiences of those at the intersection of two categories are then neglected.[183] To be successful, claimants must then base their claim on a single ground, meaning they must fit the discrimination they suffered in a category, which does not reflect their experience and their identity.[184] Furthermore, such compartmentalisation often furthers predominant stereotypes and assumptions about a certain group, thus reinforcing essentialism.[185] The use of a comparator is another feature often commented on. Anti-discrimination law often requires the claimant to prove the existence of a discriminatory element through comparison with an individual in a similar position. Finding a suitable comparator in cases of multiple discrimination is one of the major challenges faced by equality bodies due to the complex identity of the defendant.[186] Often times, finding a comparator might not even be possible or desirable, as it could lead to a further misrepresentation of the claimant's discriminatory experience.[187]

According to some, intersectionality would help address and solve many issues of the single-axis model of anti-discrimination law. Applying intersectionality to legal analysis would lead to more self-conscious application of the law by achieving a more realistic outcome, which better reflects the reality of the diverse and complex society we live.[188] Such an approach would also allow anti-discrimination law to recognise and address intersectional discrimination through the analysis of two or more grounds of discrimination as intersecting.[189]

Intersectionality can also serve as a tool to mitigate the totalising

[183] Sarah Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23 Oxford Journal of Legal Studies 65, 70-71.
[184] Paola Uccellari, 'Multiple Discrimination: How Law can Reflect Reality' (2008) 1 The Equal Rights Review 24, 27.
[185] Maria Y Lee, 'Being Wary of Categories: Is it Possible To Move Away From Categorization In Anti-Discrimination Law? (2017) 1 University of Vienna Law Review 107, 112.
[186] Merel Jonker, 'Comparators in multiple discrimination cases: a real problem or just a theory?' in Marjolein van den Brink, Susanne Burry and Jenny Goldschmidt (eds), *Equality and human rights: nothing but trouble?* (Utrecht University 2015) 212.
[187] Hannett (n 183) 82.
[188] La Barbera (n 165) 140.
[189] ibid 141-42.

effects of rigid categorisations by recognising how intersecting factors come together to construct one's identity. Due to its anti-essentialist tendency, intersectionality can help recognise how discrimination can be experienced differently within the same group and thus distinguish new forms of oppression.[190] By acknowledging the role played by power systems and social factors in constructing identities, an intersectional approach can help tackle structural inequality and achieve substantive equality. However, some question whether the inclusion of intersectionality in anti-discrimination law could do more harm than good. The concept is too complex to be used in the legal field as it would require legal analysis to go beyond the anti-discrimination framework and look at the various social factors causing discrimination.[191] Furthermore, intersectional approaches to discrimination could create a hierarchy of inequality, with some groups being considered more oppressed than others. There is also the risk of inducing a never-ending sub-categorisations within subgroups and thus compartmentalising the experience of discrimination.[192]

2.3 Intersectionality in the IHRL framework

Despite originally being developed in the context of the American legal framework, in the last few years the concept of intersectionality has been gaining recognition in the international legal framework, especially in the context of provisions on non-discrimination. While intersectional discrimination is not explicitly mentioned in any of the UN treaties, it has been addressed in various general comments. Among the various UN human rights treaty bodies, the CEDAW Committee has been particularly forward looking in recognising the existence of intersectional discrimination. Through its complaints mechanism, the CEDAW Committee has tackled the issue of intersectional discrimination in four individual complaints: *AS v Hungary, Kell v Canada, RPB v the Philippines* and *ES and SC v Tanzania.*

[190] Jess Bullock and Annick Masselot, 'Multiple Discrimination and Intersectional Disadvantages: Challenges and Opportunities in the European Union Framework' (2012) 19 Columbia Journal of European Law 55, 66.
[191] ibid 64.
[192] ibid 65.

The issue of intersectional discrimination was first addressed in AS v Hungary.[193] *AS v Hungary* concerned the forced sterilisation of a Romani woman residing in Hungary, who argued that her right to health information (article 10(h)), right to non-discrimination in the health sector (article 12) and right to freely decide on the number and spacing of children (article 16(1)(e)) had been violated. In her pleading, the applicant highlighted the vulnerable situation she found herself in, as a woman belonging to an ethnic minority such as the Roma, in which having children constitutes a key value.[194] Furthermore, she reiterated that, due to her strict Catholic beliefs prohibiting the use of any contraception, she would have never agreed to the medical procedure.[195] On one hand, this was a ground-breaking case, as it represented the first time the CEDAW Committee indirectly addressed the systematic discrimination suffered by the Roma community and especially Romani women in Hungary. Furthermore, the CEDAW Committee emphasised Hungary's positive obligation to eliminate discrimination and provide accessible and understandable reproductive and sexual health information for all.[196] On the other hand, the CEDAW Committee's approach to the case was criticised as it failed to tackle the intersectional forms of oppression the victim had suffered from. In fact, the CEDAW Committee did not take into account how the applicant's identity as a Roma mother could have shaped the discrimination she had suffered. The CEDAW Committee missed the opportunity to address such an issue while analysing the victim's claim of a violation of article 12, as it only mentioned its General Recommendation No 24 in relation to need for informed consent.[197] It follows that the CEDAW Committee failed to acknowledge how the experience of Romani women substantially differed from that women not belonging to the minority.[198] The remedies provided by the CEDAW Committee are reflective of its inaccurate

[193] UN Committee on the Elimination of Violence against Women, 'Individual Communication No 4/2004 to the Optional Protocol to the Convention on the Elimination of Discrimination against Women AS v Hungary' (2004) UN Doc CEDAW/C/36/D/4/2004.

[194] ibid para 9.4.

[195] ibid para 2.4.

[196] Ivona Truscan and Joanna Bourke-Martignoni, 'Intersectional Human Rights Law and Intersectional Discrimination' (2016) 16 The Equal Rights Review 103, 111.

[197] UN Committee on the Elimination of Discrimination against Women, 'General Recommendation No 24: Article 12 of the Convention (Women and Health)' (1999) UN Doc A/54/38/Rev.1.

[198] Truscan and Bourke-Martignoni (n 196) 112.

framing of the victim's experience as they merely focus on the gender aspect of the discrimination suffered. Firstly, it only recommended Hungary to take measures to raise the awareness among the personnel in the sexual and reproductive healthcare sector regarding the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)[199] and the CEDAW Committee's general recommendations on women's reproductive health. Secondly, the Hungarian government was recommended to better safeguard the respect of the principle of informed consent in all cases of sterilisation.[200]

The CEDAW Committee managed to carry out a better analysis of intersectional discrimination in Kell v Canada,[201] concerning an aboriginal woman from the Canadian Northwest Territories. Following a scheme making local housing available to indigenous people, the applicant obtained a home with herself and her partner as co-owners.[202] Over the next few years, Kell was continuously abused by her husband, who ended up forcibly removing her from the Assignment Lease without her consent or knowledge. Over the next ten years, she attempted to regain property rights over the house but failed to do so, as she lost the three suits she brought before Canadian courts.[203] Following the little success gained before the Canadian legal system, she brought a complaint before the CEDAW Committee alleging the Canadian government had failed to protect the victim from any act or practice of discrimination against women and to guarantee her equal right to ownership, acquisition, management, administration and enjoyment of her property.[204] In claiming she had been discriminated by both the lawyers assigned to her case and the officials involved in removing her from the lease agreement, she argued she was a victim of racism as an aboriginal person and of sexism as a woman.[205] The CEDAW Committee took a first important step in recognising intersectional

[199] United Nations Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

[200] Truscan and Bourke-Martignoni (n 196) 113.

[201] UN Committee on the Elimination of Violence against Women, 'Individual Communication No 19/2008 to the Optional Protocol to the Convention on the Elimination of Discrimination against Women Cecilia Kell v Canada' (2012) UN Doc CE DAW/C/51/D/19/2008 (2012).

[202] ibid para 2.3.

[203] ibid para 2.11.

[204] ibid para 3.2.

[205] ibid para 9.3.

discrimination, as it acknowledged that her property rights had been violated by the public authorities and that she had been discriminated due to her identity as a woman from the indigenous community and a victim of domestic violence.[206] Furthermore, the CEDAW Committee reiterated that states' obligations provided by article 2 of CEDAW had to be interpreted in light of intersecting forms of discrimination. The CEDAW Committee also found the state to be obliged to ensure the effective elimination of intersectional discrimination. Regarding the remedies, the CEDAW Committee took a progressive approach, as it required the Canadian government to ensure effective access to justice for all aboriginal women by training indigenous women to provide legal aid to fellow women in their communities, especially regarding domestic violence and property rights.[207]

The CEDAW Committee continued to develop such progressive approach by recognising the existence of several symptoms of oppression based on age, gender and disabilities in *RPB v The Philippines*, which concerned the rape suffered by a 17-years old mute and deaf girl at the hands of her neighbour.[208] The applicant faced many difficulties throughout the reporting and the judicial process. She could not understand the affidavit drawn up after her interview as it was in Filipino and she was not provided an interpreter.[209] Furthermore, she argued that she was discriminated by the judiciary, which used gender stereotypes on Filipina women and failed to take into consideration the vulnerable situation as a disabled minor. Thus, she claimed the Filipino government failed to end discrimination in the legal process.[210] Moreover, she alleged a violation of her rights under article 21(b) of the Convention on the Rights of Persons with Disabilities due to the lack of a sign language interpreter at both the investigative and trial stage.[211] The CEDAW Committee recognised that the applicant had suffered moral and material damages due to 'the excessive duration of

[206] Truscan and Bourke-Martignoni (n 196) 116.
[207] ibid 117.
[208] UN Committee on the Elimination of Violence against Women, 'Individual Communication No 34/2011 to the Optional Protocol to the Convention on the Elimination of Discrimination against Women RPB v The Philippines' (2014) UN Doc CEDAW/C/57/D/34/2011.
[209] ibid para 3.9.
[210] United Nations Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, arts 1, 2(c), 2(d) and 2(f).
[211] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD), art 21(b).

the trial proceedings, by the court's failure to provide her with the free assistance of sign language interpreters and by the use of the stereotypes and gender-based myths and disregard for her specific situation as a mute and deaf girl in the judgment'.[212] Furthermore, it recommended the CEDAW Committee to provide free and adequate sign language interpretation at all stages of proceedings, to review rape legislation and to conduct criminal proceedings in an impartial and fair manner free from prejudices and stereotypes on the victim's gender, age and disability. The case is particularly relevant as for the first time the CEDAW Committee assessed the state's obligations enshrined in CEDAW in relation to the situation of women and girls with disabilities.[213]

Unfortunately, the approach the CEDAW Committee has taken in the last few years has been rather disappointing, as shown by the analysis provided in its most recent individual communication *ES and SC v Tanzania*.[214] In the ES and SC v Tanzania case, two widows with minor children were forced out of their homes after their husbands died, with the male family members being granted the right to administer and dispose of the estate in line with customary law provisions.[215] The High Court of Tanzania agreed with the applicants on the discriminatory nature of the provisions at hand, but stated they could not be changed by judicial pronouncements, as it would 'open the Pandora's box, with all the seemingly discriminative customs from our 120 tribes plus following the same path'.[216] In its assessment, the CEDAW Committee highlighted the vulnerable position of widows and how their forced dependency on male relatives violated their right to economic independence. The CEDAW Committee also found breaches of articles 2(c), 2(f), 5(a), 15(1), 15(2), 16(1)(c) and 16 (1)(h) of CEDAW. Furthermore, it recommended the Tanzanian government to ensure that the rights enshrined in the CEDAW have precedence over inconsistent national legislations and to amend or replace those laws with a view to providing women and girls with equal administration and inheritance rights upon the dissolution of marriage by death, irrespective of their ethnicity or religion. While

[212] *RPB v The Philippines* (n 208) para 8.11.
[213] Truscan and Bourke-Martignoni (n 196) 119.
[214] UN Committee on the Elimination of Violence against Women, 'Individual Communication No 48/2013 to the Optional Protocol to the Convention on the Elimination of Discrimination against Women ES & SC v United Republic of Tanzania' (2013) UN Doc CEDAW/C/60/D/48/2013.
[215] ibid paras 2.5-2.6.
[216] ibid para 2.8.

here the CEDAW Committee partly acknowledged the difficulties encountered by widows, it failed to carry out a comprehensive analysis of the intersectional discrimination suffered by the victims due to their gender, marital status, ethnicity and geographical location.[217]

While this analysis shows the CEDAW Committee is aware of the existence of intersectional discrimination and the effects it has on women's lives, it also shows that it has yet to develop a comprehensive and linear approach to address intersectional discrimination in its individual communications.

2.4 Intersectionality and ICL

While being used more and more in IHRL, intersectionality remains a rather new concept in the field of ICL However, in recent years there has been an increasing discussion around the contribution the theory of intersectionality could bring to the criminal justice system, especially the ICC.

Some scholars have argued that the inclusion of intersectionality could help the ICC in the various stages of its proceedings, going from the preliminary examination to the prosecution. During the preliminary examination stage, intersectionality could be particularly useful to undercover the multidimensional nature of discrimination in the context of violence and thus bring to light some factors of gravity, such as discrimination, vulnerability, patterns of crimes, the harm inflicted by them and their impact.[218] For instance, through intersectionality it is possible to undercover pre-existing factors that facilitate the commission of sexual and gender-based violence. This is particularly important as the sexual violence crimes committed during conflict-time are often rooted in the discrimination and violence that women suffer during peacetime. Thus, intersectionality could serve to highlight how pre-existing gender norms and stereotypes contribute to the commission of sexual violence crimes as they are exacerbated during a time of conflict or wide spread violence.[219]

[217] Truscan and Bourke-Martignoni (n 196) 122.
[218] Ana Martin Beringola, 'Intersectionality: A Tool for the Gender Analysis of Sexual Violence at the ICC' (2017) 9 Amsterdam Law Forum 84, 91-92.
[219] ibid 92.

Other than for establishing the gravity of such offences, intersectionality can also help explain why women are disproportionately affected by sexual violence in conflict and to identify and address the discrimination underlying sexual and gender-based violence as well as victims' vulnerabilities. By looking at how different groups of people are more or less targets of violence due to some of their inherent characteristics, intersectionality can highlight how these factors drive perpetrators to commit such crimes and thus cause the victims to be discriminated. Recognising the intersectional discrimination that comes into play when specific groups are victimised is fundamental to properly address the mass atrocities perpetrated against them: the experience of a minority group suffering multiple and aggravated forms of discrimination is inherently different from that suffered by a group that does not share such characteristics.[220]

Another benefit brought by the use of intersectionality is that it can help in explaining the gravity of patterns of crimes. By taking into consideration the various factors and power dynamics driving the discrimination suffered by the targeted victims, it reveals the perpetrators are following a systemic pattern of violence rather than a random one.[221]

The use of intersectionality can also be beneficial in the investigation stage, as it can connect sexual and gender-based violence to the context of discrimination. Analysing sexual violence in the context where it actually takes place can help see its connection with other crimes. To see such connection, it is important to address sexual violence from multiple points of view beyond the legal one. For instance, using social approaches can assist in explaining the role played by gender and its interaction with other factors in shaping the context of crimes. This is particularly relevant when analysing the violence suffered by minorities who have been historically marginalised.[222]

Finally, intersectionality can bring an important contribution in the prosecutorial stage as well by reflecting the full nature of sexual and gender-based violence in the charges. Intersectionality can be useful in identifying the nature of criminal discrimination and in deciding how to classify the crimes in question. Furthermore, by analysing the intersecting factors causing the discrimination in question, it helps

[220] Martin Beringola (n 218) 92.
[221] ibid 93.
[222] ibid 95-97.

better understand the scope of the crimes in question and how to charge them appropriately.[223] In this regard, intersectionality can also be of help in drafting the charges in question. Firstly, it can highlight the discriminatory element underlying the commission of the crimes in question. It follows that it can help in explaining the discriminatory nature of sexual and gender-based violence. Secondly, it can promote the inclusion of gender harms among the charges as it focuses on the gendered aspect of crimes, rather than only on their physical element.[224]

However, some scholars have also been warning of the problems that the use of intersectionality in criminal law could bring. A clear example is brought by the disappointing and problematic results obtained through the application of an intersectional analysis in the sentencing of Aboriginal women in Canada through the 1996 amendments to the Criminal Code. This reform was originally triggered by the overrepresentation of the Aboriginal population in the prison system. Such exaggeration was particularly problematic in light of the ongoing decline in police-recorded crimes and criminally charged adults.[225] Among the indigenous population, women were being the victims of over incarceration, as they accounted for one in ten federally incarcerated women and nearly half of the women admitted to provincial prisons.[226] The 1996 amendments sought to address these issues by providing judges with more sanctioning options and by reforming their decision-making procedures. Concerning the sanctions, the reforms enabled the diversion of adult defenders, in order to reduce the risk of imprisonment by default it changed the rules on the use of the fine and they instituted the new sanction of conditional sentence. The most relevant change concerned the factors the judges should consider when making decisions, the most controversial one being section 718.2(e), stating that 'all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders'.[227]

[223] Martin Beringola (n 218) 102.
[224] ibid 104.
[225] Toni Williams, 'Intersectionality analysis in the sentencing of Aboriginal women in Canada: what difference does it make?' in Emily Grabham and Davina Cooper (eds), *Intersectionality and beyond: law, power and the politics of location* (Routledge-Cavendish 2009) 83.
[226] ibid 84.
[227] Toni Williams, 'Punishing Women: The Promise and Perils of Contextualized Sentencing for Aboriginal Women in Canada' (2007) 3 Cleveland State Law Review 269, 275-76.

The provision was interpreted for the first time in *R v Gladue*, where an Aboriginal woman lodged an appeal from a three-year prison term she had received upon killing her abusive partner.[228] While the judge took into consideration various mitigating factors, it concluded that no special circumstances triggered the use of section 718.2(e) because the applicant and the victim did not form part of the Aboriginal community, as they lived in an urban setting.[229] The Supreme Court interpreted the section in question widely as it applied to 'all Aboriginal persons wherever they reside, whether on or off reserve, in a large city or in a rural area'. Furthermore, it clarified that the purpose of the section was to establish as general norm that imprisonment should be the last resort and to reduce the incarceration of the indigenous community. When determining a sentence, the section should guide judges to inquire into the causes of the over incarceration of Aboriginal people and find the most appropriate judicial remedy to address it. More specifically, judges must consider 'the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts and what types of sentencing procedures are appropriate for the offender in light of her particular Aboriginal heritage or connection'.[230]

In practice, section 718.2(e) worked under the assumption that by considering the social context and the various factors leading an Aboriginal woman to offend, the judge would be less likely to give the offender a prison sentence.[231] However, the sentencing reforms had the opposite effect. While the adult incarceration rate dropped by 20%, the presence of Aboriginal women in the incarceration system increased: since 1996, the population of incarcerated Aboriginal women doubled, with indigenous women representing one in three federal female prisoners.[232] This is due to the difficulties judges found in applying the so-called 'Gladue factors'. While the social context and the specific identity characteristics of indigenous women worked as reasons for them to not be incarcerated, they still constructed them as a risk/threat that needed to be limited through prison sentences. While the judges

[228] *R v Jamie Tanis Gladue* (1999) 1 SCR 688.
[229] Williams, 'Punishing Women' (n 227) 276.
[230] ibid 277.
[231] ibid 278.
[232] ibid 279.

did indeed attempt to give sentences in line with the guidance enshrined in the provision, they ended up further stereotyping and discriminating indigenous women.[233] By analysing the law-breaking attitude of indigenous women as inherently linked to their identity, ancestry and circumstances, stereotypes on their compromised moral agency and their affinity to criminality are strengthened. Furthermore, Aboriginal families and Aboriginal communities are framed as incubators of risk, whose members must then find healing in the prison system.

Despite the many doubts and challenges, the ICC has been taking an increasingly intersectional approach as well.[234] In its 2014 Policy Paper on Sexual and Gender-Based Crimes, the OTP developed a gender analysis meant to work as guidance for its prosecutorial work. The policy aims at understanding gender as a social construct as well as the multi-layered nature of sexual and gender-based violence, more specifically the intersection of factors of discrimination in relation to the crimes enshrined in the Rome Statute.[235] This is an important first step towards the recognition of intersectionality as a tool to address sexual and gender-based crimes and the underlying factors of discrimination.

This chapter provided a thorough overview of the theory of intersectionality, from its development by Kimberlé Crenshaw to its inclusion in anti-discrimination and IHRL. Furthermore, the positive and negative aspects that the inclusion of an intersectional approach in ICL could bring have been discussed.

[233] Williams, 'Intersectionality analysis in the sentencing of Aboriginal women in Canada' (n 225) 94.

[234] ibid 95.

[235] International Criminal Court (ICC) Office of the Prosecutor (OTP), 'Policy Paper on Sexual and Gender-Based Crimes' (ICC OTP June 2014).

3.

ROHINGYA WOMEN BEFORE THE ICC: WHAT ROLE FOR INTERSECTIONALITY?

The third chapter sees the application of the concepts elaborated on in the previous chapters to the case study of Rohingya women. Firstly, a brief introduction to the historical background of the Rohingya minority in Myanmar is provided. Secondly, the claims that Rohingya women could possibly bring before the ICC will be analysed, with a focus on genocidal rape and crimes against humanity. Finally, an analysis is carried out to assess how the use of an intersectional approach could help the ICC better understand and frame the crimes suffered by women and girls from the Muslim minority.

3.1 The Rohingya minority in Myanmar: A history of discrimination

While the recent refugee crisis has shed a light on the discrimination and persecution suffered by the Rohingya minority in Myanmar, this is not a new phenomenon but rather one that finds its roots in decades of repression and intolerance. In fact, the Rohingya minority has been defined by the UN as 'the most persecuted minority in the world'.[236]

With Myanmar being a predominantly Buddhist country, the Rohingya form part of a Muslim minority, with its majority living in Rakhine State, especially in the north. Out of the 2.1 million Muslims living in Rakhine State, the Rohingya amount to around 1 million of them (an approximate number due to their exclusion from the

[236] United Nations Human Rights Office of the High Commissioner, 'Human Rights Council opens special session on the situation of the Rohingya and other minorities in Rakhine State in Myanmar' (*UN News,* 5 December 2017) <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22491> accessed 30 June 2021.

Burmese's government most recent census in 2014). Despite the lack of recognition from the government, the Rohingya community has been present in Myanmar for centuries, with their presence in the state of Rakhine being widely documented by historians.[237]

Arakan State (what is now called Rakhine State) remained a sovereign and independent state until 1784, when it was conquered by Burman King Bowdawpaya and thus annexed to the Burman Kingdom. The history of the Rohingya's persecution and discrimination dates back to the colonisation of Rakhine State by the British Empire, a time when many drastic changes were brought to the region.[238] Being in need of labour to exploit, the colonisers invited the religious communities who had fled during the Burman conquest to come back and encouraged Bengalis to migrate to the Rakhine. Another destabilising change was brought by the erasure of traditional patron-client ties through various administrative changes, the figure of religious leaders started to gain more and more importance. Due to the considerable inflow of migrants, a competition for resources started among the new communities, the returning ones and the locals who had remained during Burman rule.[239] As the dispute became increasingly interconnected with religion, two dominating religious identities came about: Arakan Buddhists and Muslims. The continuous flow of immigrants from the Bengal region into Rakhine played a major role in further shaping distinct religious identities in the state and had even a greater impact on Buddhist-Muslim relations. Such division was further fuelled by various British policies that favoured the Bengali community: being skilled cultivators, they were given incentives to move near rice fields to farm them, meaning Muslim migrants became the predominant population in certain areas.[240] It is important to note that the culture and traditions of Bengali Muslims had little in common with those of the previous Muslim communities, who instead shared some commonalities with the Buddhist. Due to these cultural differences, Bengali Muslims hardly

[237] AKM Ahsan Ullah and Diotima Chattoraj, 'Roots of Discrimination against Rohingya Minorities: Society, Ethnicity and International Relations' (2018) 26 Intellectual Discourse 541, 542.

[238] Haradhan Kumar Mohajan, 'History of Rakhine State and the Origin of the Rohingya Muslims' (2018) 2 The Indonesian Journal of Southeast Asian Studies 19, 28.

[239] Michael W Charney, *Where Jambudipa and Islamdom converged: Religious change and the emergence of Buddhist communalism in early modern Arakan (fifteenth to nineteenth centuries)* (University of Michigan 1999) 284-85.

[240] ibid.

integrated with the rest of society but instead developed their own religious networks and institutions.[241] These divisions and disruptions among religious communities paved the way for future conflict and for tensions.

The possibility of a peaceful coexistence among these religious groups vanished with Japan's invasion of Myanmar. Both groups were subject to grave violations and brutalisation: the Buddhists had to flee the British-controlled Northern part of Rakhine State, while Muslims were forced out of the Southern part by the Japanese and the Buddhists. However, the Muslim community was subject to more violence as the British got out of the Northern area of Rakhine and left an open door for both the Japanese and the Buddhists to brutalise the Rohingya. During the decolonisation period, tensions between the religious minorities worsened.[242] With the Buddhist-led government's rejection to create a separate zone for the predominantly Muslim areas of Arakan and to allow them to annex to the new East Pakistan, the community rebelled against the government with the aim of gaining the independence for the Muslim-dominated northern areas of the country. However, the unrest only lasted a few years as it was largely defeated by 1954. In the southern areas of Myanmar, Buddhist nationalists made the same request, also with little success.

The first independence period post-colonialism also saw efforts to establish a separate Muslim zone or obtain an autonomous area similar to those of other minorities. However, this was not possible due to their lack of recognition as a legitimate ethnic minority.[243] During this time, the Arakan Muslims advocating for an independent Muslim area started being referred to as 'Rohingya'.[244]

During the early 1960s, the political differences between Buddhists and Muslims in Rakhine remained consistent. While Buddhists kept pushing for the establishment of a separate autonomous Muslim area under the control of the Burmese government, the Muslim community

[241] Stephen C Druce, 'Myanmar's Unwanted Ethnic Minority: A History and Analysis of the Rohingya Crisis' in Mikio Oishi (ed), *Managing Conflicts in a Globalizing ASEAN: Incompatibility Management Through Good Governance* (Springer Singapore 2020) 24.

[242] Moshe Yegar, *Between integration and secession: The Muslim communities of the Southern Philippines, Southern Thailand, and Western Burma/Myanmar* (Lexington Books 2002) 33.

[243] ibid 35.

[244] Druce (n 241) 26.

opposed to the Prime Minister's proposal to render Arakan a separate state in itself. In 1961, Prime Minister U Nu created the Muslim Mayu Frontier Administration (MFA), a military-administered zone comprising the Muslim-majority areas of Arakan State.[245] However, following the 1961 coup by General Ne Win, ethnic tensions in Myanmar reached a new high. Not only were minority groups advocating for greater independence subjected to a violent crackdown, but the government openly campaigned against the inclusion of foreigners and questioned the origins of some ethnic groups. Furthermore, a number of discriminatory measures were adopted. In this hostile climate to minorities' rights, the MFA quickly came to an end together with any plans to render Arakan an independent state. The government took a further step in erasing the Rakhine Muslims by classifying them as illegal immigrants from Bangladesh and instead acknowledging the Buddhists as the rightful inhabitants of the state. The government's new approach to the tensions in Arakan became one of discrimination, segregation and exclusion against the Rohingya population, with many having to flee due to violent military actions.[246] According to Ne Win's view, peace would only be possible through a racially and religiously homogenous society in which all ethnic minority groups would be assimilated into the majority. Due to their religious beliefs and their allegiance with the British Empire during WWII, the Rohingya were perceived as a threat to the state project and as ungrateful and troublesome foreigners.

Relying on the rest of the population's fear of a Muslim takeover, following the military coup the government enacted a number of repressive measures against the Rohingya. One of the most dangerous measures was the 1982 Citizenship Law, according to which citizenship could only be granted to individuals whose parents came from one of the 135 recognised ethnic groups in Myanmar or who could demonstrate their ancestors were living in the country before the first Anglo-Burmese war. Otherwise, people who had applied for citizenship under the 1948 Union Citizenship Act and lived in Myanmar before then could obtain associate citizenship, while naturalised citizenship could be granted to

[245] Jacques P Leider, 'Competing identities and the hybridized history of the Rohingyas' in Renaud Egreteau and Francois Robinne (eds), *Metamorphosis: Studies in social and political change in Myanmar* (NUS Press 2015) 8.

[246] Norman G Owen (ed), *The Emergence of modern Southeast Asian: A new history* (University of Hawai'i Press 2005) 498.

those whose ancestors lived in the country prior to independence and could demonstrate fluency in one of the national languages. It follows that the majority of the Rohingya were basically stripped of their citizenship due to the lack of documentation and the lack of recognition of the ethnic group and thus became stateless.[247]

Other restrictive and discriminatory measures included needing a permit to leave their villages, arbitrary taxation, excessive registration demands and fees, limited access to education for their children, needing the authorities' permission to marry, a limit of two children per married couple and exclusion from civil service positions.[248] On top of these discriminatory legislations, the Rohingya were also the targets of various military operations from the 1970s onwards. While being described as interventions against illegal immigrants and insurgents, the Muslim population in Arakan was the primary target. In 1978, Operation Naga Min aimed at checking identity papers and clear out foreign residents caused 200,000 Rohingya to flee to Bangladesh, with most forcibly repatriated following international pressures. In 1991 and 1992, further military operations were launched with the aim of driving the Muslim community out of Rakhine. Following the arbitrary destruction of Muslim villages and mosques, arbitrary violence, killings, rape and land confiscation, 260,000 Rohingya fled to Bangladesh.[249]

The early 2000s saw an increase in anti-Muslim sentiment across Myanmar following the 9/11 terrorist attacks and the fear of a takeover of the government by the Muslim minority. The fear of international Islamic terrorism translated into a fear that Rakhine State could become a gateway for Islamisation and radicalisation in Myanmar. During this period, the perception of Rohingya as a threat to Arakan and the country as a whole became a central element to the conflict. Despite the lack of evidence linking the Rohingya community living in Myanmar to terrorist organisations such as al-Qaeda, a growing fear regarding their possible membership to Islamic terrorist group led to the implementation of more stringent and repressive measures.[250] In June

[247] Druce (n 241) 29-30.

[248] Human Rights Watch, '"All you can do is pray": Crimes against humanity and ethnic cleansing of Rohingya Muslims in Burma's Arakan State' (Human Rights Watch 2013) <https://hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims> accessed 5 July 2021.

[249] Druce (n 241) 31-32.

[250] ibid 33-34.

2012, the rape of a Rakhine Buddhist woman by Rohingya men sparked violent riots, which eventually escalated in mass violence and led to the deaths of members of both communities. Later that year, a new wave of violence was initiated by political and religious leaders in Rakhine with the aim of forcing Rohingya out of the region. As a result, by the end of October 150,000 people, mostly from the Muslim minority, had become internally displaced people living in various camps across Arakan. During this time, the Rohingya issue became one of national concern and attention, as the violent attacks of 2012 strengthened the already widespread anti-Muslim sentiment.[251]

In the following years, the Muslim minority in Myanmar became increasingly marginalised and excluded from the democratic transition Myanmar was going through. In 2014, they were excluded from the census and in 2015 from the national elections. However, the opposition parties used the fears of a Muslim takeover to criticise the National League for Democracy (NLD)'s soft approach to the Rohingya problem. Despite the NLD's election win, Myanmar remained far from a democracy as Aung San Suu Kyi's party still had to share power with the military, who were entitled to 25% of parliamentary seats according to the 2008 Constitution they redacted. Furthermore, the military retained power over key ministries and their budgets.[252]

In 2016, the newly NLD-led government established an International Advisory Commission on Rakhine State (the Commission), with former UN Secretary General Kofi Annan, with the task of 'examining the complex challenges facing Rakhine State and to propose answers to those challenges'.[253] Shortly after the beginning of the Commission's mandate, the Arakan Rohingya Salvation Army (ARSA) carried out multiple attacks against the Myanmar security forces, which responded with violence of such intensity that it could have possibly amounted to crimes against humanity and eventually caused 87,000 Rohingya to flee to Bangladesh.[254] In its 2017 report, the Commission rejected such a

[251] Druce (n 241) 35.
[252] ibid 37-38.
[253] Advisory Commission on Rakhine State, 'Towards a peaceful, fair and prosperous future for the people of Rakhine' (Final Report of the Advisory Commission on Rakhine State 2017) 6 <https://rakhinecommission.org/the-final-report/> accessed 5 July 2021.
[254] Human Rights Watch, 'Burma: Satellite data indicate burnings in Rakhine State' (*Human Rights Watch,* 29 August 2017) <https://hrw.org/news/2017/08/30/burma-satellite-data-indicate-burnings-rakhine-state> accessed 5 July 2021.

militarised response as it would hardly bring to any peace and instead recommended an approach centred on politics, development, security and human rights.[255] A few hours after the presentation of the report, the ARSA launched various attacks against 30 police posts and an army base around various townships in northern Rakhine, which resulted in the death of 12 security personnel. These events not only left the government with little opportunity to implement the recommendations issues by the Commission, but it also caused the focus to shift from an NLD-led political solution to a military-led intervention. In the clearance operations that followed the attacks, the army targeted both insurgents and ordinary people by burning thousands of Rohingya homes and driving an unprecedented number of Rohingya out of Myanmar. To ensure they would not return to Rakhine, the military bulldozed multiple villages and replaced some of them with military infrastructures.[256]

Since the 2017 military crackdown, the violence and discrimination suffered by the Rohingya went from being a national issue to a full-fledged international crisis. From August 2017 to July 2019, over 742,000 Rohingya refugees fled to Bangladesh. Furthermore, the Muslim community in Rakhine has been subjected to continuous grave human rights violations, ranging from arbitrary killings to sexual violence against Rohingya women and girls.[257] The situation has become so grave that in November 2019, Gambia filed a case against Myanmar before the International Court of Justice (ICJ), alleging a violation of the Genocide Convention due to the ongoing genocide against the Rohingya minority in Rakhine State.[258] With this claim, Gambia hoped the ICJ would issue provisional measures aimed at protecting the Muslim minority against further irreparable harm. Such request was met only a few months later, when the ICJ ordered the Burmese government to prevent genocidal acts generally, more specifically to ensure military and police forces would not commit such violations, as well as to preserve all evidence of genocidal acts and report back to the ICJ on the implementation of

[255] Advisory Commission on Rakhine State (n 253).
[256] Druce (n 241) 41-42.
[257] The United Nations High Commissioner for Refugees, 'Rohingya emergency' <https://unhcr.org/rohingya-emergency.html> accessed 5 July 2021.
[258] *Application on the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Request for the indication of provisional measures) General List No 178 [2019].

such measures every six months.[259] Since then, Myanmar has undergone further political turmoil, the most recent one being the military coup of February 2021 following the NLD's landslide win in the elections.[260]

3.2 Seeking gender justice before the ICC: Assessing possible claims on behalf of Rohingya women

3.2.1 Genocidal rape

While the ICC has made great progress in prosecuting rape, it has failed to properly acknowledge and prosecute genocidal rape. The ICC's incapacity to adequately prosecute such grave crime was made obvious during the *Prosecutor v Al-Bashir* case, which concerned the President of Sudan's responsibility as either indirect perpetrator or indirect co-perpetrator in the commission of war crimes, crimes against humanity and genocide by the army and militia groups under his control.[261] Finding strong evidence of the systematic use of sexual violence, the Prosecutor decided to use it to substantiate the charges of genocide through causing serious bodily or mental harm, the crime against humanity of extermination, the crime against humanity of rape and the war crime of attacking the civilian population. Women and girls were almost the exclusive victims of sexual violence crimes, with thousands of them being gang-raped, raped at gunpoint, raped with forced nudity, raped while physically restrained and raped in front of their family members. Evidence of non-sexual gender-based crimes was also presented.

Upon issuing the arrest warrant in March 2009, the Pre-Trial Chamber did find that there was enough evidence pointing to Al-Bashir's responsibility as either an indirect perpetrator or an indirect co-perpetrator for the alleged war crimes and crimes against humanity. In

[259] Nadira Kourt, 'The Rohingya Genocide and the ICJ: The Role of the International Community' (*Just Security,* 28 July 2020) <https://justsecurity.org/71552/the-rohingya-genocide-and-the-icj-the-role-of-the-international-community/> accessed 5 July 2021.

[260] Alice Cuddy, 'Myanmar coup: What is happening and why?' (*BBC News,* 1 April 2021) <https://burmalibrary.org/sites/burmalibrary.org/files/obl/2021-04-01-Myanmar-coup-BBC-en-red.pdf> accessed 5 July 2021.

[261] *Prosecutor v Omar Hassan Ahmad Al Bashir* (Arrest Warrant) ICC-02/05-01/09 (04 March 2009).

the context of the charge of genocide, while agreeing with the Prosecutor's claim that Fur, Masalit and Zaghawa groups were ethnic groups in line with the definition provided by the 1948 Genocide Convention, the majority of the judges on the Pre-Trial Chamber disagreed that the evidence demonstrated Al-Bashir acted with the intent of destroying them. It follows that the crime of genocide was not included in the arrest warrant. The Prosecutor attempted to appeal, claiming that the wrong standard of proof was applied to assess the genocidal intent. As the Appeals Chamber agreed, it directed the Pre-Trial Chamber to review their assessment of Al-Bashir's genocidal intent.

In 2010, a second arrest warrant was issued, this time including the genocide charge.[262] With the issuance of this warrant, Al-Bashir became the first person ever charged with genocidal rape. While this was a ground-breaking development, it showcases that for far too long the occurrence of systematic, ethnically-motivated rape has been historically ignored. The uniqueness of such an arrest warrant is demonstrated by the fact that so far Al-Bashir has been the only person ever charged with the crimes of genocidal rape by the ICC. Furthermore, so far nobody has ever been charged with such crime, as Sudan's ex-President remains at large.[263]

The definition of rape adopted by the ICC draws on those developed by the ICTY and the ICTR, as it mainly draws from the *Akayesu*, *Furundžija* and *Kunarac* judgments. While it follows the mechanical approach adopted in *Furundžija,* focusing on the aspect of penetration, it does not do so in a restrictive manner. A test focused on coercion is adopted, as reference is made to force, threat thereof or coercion like in the *Furundžija* and *Akayesu* judgments. The element of force is framed broadly as to include nonphysical coercive circumstances that victims often endure during armed conflict. Concerning the *mens rea*, there must be the intention to penetrate the victim's body being aware the sexual act was being committed either through force, threat of force, by taking advantage of a coercive environment or against a person incapable of giving genuine consent.[264]

[262] Rosemary Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court: Practice, Progress and Potential* (CUP 2019) 184-85.

[263] Cassie Powell, '"You Have No God": An Analysis of the Prosecution of Genocidal Rape in International Criminal Law' (2017) 20 Richmond Public Interest Law Review 26, 27.

[264] ibid 36.

Most recently, the ICC employed such definition in the case of *Prosecutor v Bemba,* concerning the former Congolese vice-President's failure to control the Movement for the Liberation of Congo troops, who committed multiple sexual violence crimes while deployed in the Central African Republic.[265] In the judgment, it was acknowledged that the circumstances under which rape occurs are coercive and inherent in certain scenarios such as armed conflict or military presence. Furthermore, concerning the actus reus of such offence, the ICC stated that 'rape under the Statute did not require proof of a victim's lack of consent' due to the procedural complications the inclusion of such requirement would bring. The ICC further stated 'proving a victim's lack of consent is unnecessary if the prosecution proves the elements regarding force, coercion, or taking advantage of coercive circumstances'.[266]

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'.[267] The crime of genocidal rape was first acknowledged in the ICTR'S *Akayesu* judgment, as further elaborated in the first chapter. In this context, the ICC acknowledged the intersectional nature of such crime, as the victims were targeted primarily due to their ethnicity. While the provision of genocide does not directly cover rape, some of the acts listed in it can be committed through rape.

Firstly, rape does indeed cause serious bodily and mental harm to not only the victim, but also the family and the larger community. While the harm suffered must not need to be permanent or irremediable, it does need to be serious as in posing a threat of destruction against the group either in its entirety or in part. Furthermore, the injury must result in a grave and long-term disadvantage to a person's capacity to conduct a normal life. By definition, rape does cause long-lasting detrimental effects on the livelihood of the victim. At the physical level, victims usually suffer from severe internal and external injuries, such as internal bleeding and abdominal cramps, as well as complications in their reproductive health. At the mental level, victims often suffer from mental health issues, such as post-traumatic stress disorder (PTSD), depression, anxiety and such.

[265] *Prosecutor v Jean-Pierre Bemba Gombo* (Judgment) ICC-01/05-01/08 (21 March 2016).

[266] Paula Castellano San José, 'The rapes committed against the Yazidi women: a genocide? A study of the crime of rape as a form of genocide in International Criminal Law' (2020) 18 Comillas Journal of International Relations 18, 52-53.

[267] Convention on the Prevention and Punishment of the Crime of Genocide (adopted on 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art 13.

Secondly, rape can also be used as a mean to inflict on the group conditions of life calculated to bring about its physical destruction. Such conditions do not need to be inflicted with a method leading to immediate death.[268]

Thirdly, rape can also be used as a means of imposing measures to prevent births within the group and forcibly transferring children of the group to another group. In this context, the transferred children must belong to the protected group and must be under 18. Furthermore, the forcible manner through which the transfer can be perpetrated encompass physical force as well as threats. The *mens rea* element of the crime of genocide has been subject to debate. While it is normally required for the perpetrator to have the goal of destroying the group in question, it is sufficient for the perpetrator to be aware that his actions will lead to the destruction of the group in question. Furthermore, it must affect a significant part of the group. The victim in question must form part of the national, ethnical, racial or religious group that the perpetrator is intending to destroy[269]

It follows that genocide can be committed through rape when it is perpetrated with a genocidal intent. As explained in the previous section, the Rohingya are one of the ethnic minorities present in Myanmar and Rohingya women from a significant part of such group.

Concerning the use of rape to cause serious bodily or mental harm, Rohingya women have been enduring horrifying mental and physical harm due to the systematic use of rape against them and their communities. Having witnessed and subsequently lost family members to sexual violence and other forms of violence, many women from the Muslim minority suffer from serious mental harms. There have been multiple reports of mothers witnessing their daughters and vice-versa being raped or gang raped by military forces while being assaulted themselves. The same has happened with sisters and other female relatives. Furthermore, victims were often subject to further humiliation and cruelty both during and after their assaults.[270] While some women were brutally beaten during the assault, others had to witness their husbands and children

[268] Castellano San José (n 266) 58.
[269] ibid 59.
[270] Larissa Peltola, 'Rape and Sexual Violence Used as a Weapon of War and Genocide: An Examination of Historical and Contemporary Cases of Genocidal Rape and Prosecution of Rape in International Courts' (2018) Claremont Colleges Scholarship 1, 137.

being slaughtered and cruelly killed. Furthermore, during gang rapes, victims were often laughed at, abused verbally and threatened with a gun at their head.[271] As one of the perpetrators was assaulting the victim, the other soldiers would punch them, kick them in the face and beat them with rifle butts on their breasts, stomachs and their vaginas. As the victims regained consciousness after the attacks, they found themselves stripped of their clothes in public spaces and either had to flee to other nearby villages or had to return home naked from the place where the assault had occurred.[272]

These traumatic experiences have caused Rohingya women to endure long-lasting physical and emotional trauma. Many rape survivors continue to suffer from serious health issues, such as bleeding, vaginal tears and infections resulting from rape. These injuries were often worsened as victims were raped either on multiple occasions or by multiple soldiers as the same time. Furthermore, PTSD and other psychological disabilities are particularly common among rape survivors. Various survivors also reported suffering from poor sleep, loss of appetite, and depressed mood and thoughts.[273] Dealing with the health issues stemming from such traumatic experiences is made particularly hard by the lack of access to post-rape care in Myanmar as well as the refugee camps in Bangladesh. The lack of privacy and the poor equipment and organisation of the health facilities present there discourage victims from seeking healthcare. Accessing medical care is rendered even more difficult by the stigmatisation and segregation victims of sexual violence suffer from both their families and their communities, with some survivors having to go as far as abandoning their villages.[274] From these experiences, it follows that the systematic use of rape against Rohingya women does indeed cause them serious bodily and mental harm.

[271] Human Rights Watch and Fortify Rights, 'Submission to CEDAW regarding Myanmar's Exceptional Report on the Situation of Women and Girls from Northern Rakhine State' (*Human Rights Watch*, May 2018) 3 <https://hrw.org/news/2018/05/24/joint-submission-cedaw-myanmar> accessed 5 July 2021.

[272] United Nations Human Rights Office of the High Commissioner, 'Report of OHCHR mission to Bangladesh – Interviews with Rohingyas fleeing from Myanmar since 9 October 2016' Flash report (*OHCHR*, 2 February 2017) 22 <https://ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf> accessed 10 July 2021.

[273] Human Rights Watch, *'All of My Body Was Pain' – Sexual Violence against Rohingya Women and Girls in Burma* (Human Rights Watch 2017) 32 <https://hrw.org/sites/default/files/report_pdf/burma1117_web_1.pdf> accessed 10 July 2021.

[274] Peltola (n 270) 34.

Concerning the deliberate infliction of conditions of life meant to bring about the group's physical destruction, there is evidence pointing to the systematic use of rape or the threat thereof against Rohingya women as a means to forcibly evict the Muslim minority from Rakhine. Many of the sexual assaults suffered by women from the Muslim minority are committed during attacks on their houses and their communities, usually carried out by burning down entire villages. However, sexual violence was also used as a tactic of intimidation during searches operations meant to undercover revolutionaries and terrorists from the ARSA.[275]

Since the 1990s, Myanmar's security forces have had a tradition of forcibly removing Rohingya from their homes claiming they had no ownership rights over their properties. During the attacks carried out against Rohingya villages, soldiers would threaten girls and women from the minority with rape in case they would not leave their houses and the country all together.[276] To further discourage them to return to Myanmar, soldiers would often follow women and girls as they were fleeing to assault them or would rape them in the homes where they were taking shelter. Those who attempted to return home were then met by horrific violence, with women and girls specifically being subject to sexual assault. Gang rape was often adopted as a method to intimidate the Rohingya community and convince them to flee, as multiple soldiers often assaulted women from the community before their husbands and children. Underage girls from the Rohingya minority were also the prime targets of soldiers from both the military and the security forces, who would rape them right in front of their parents. The perpetrators' fixation on Rohingya girls caused families to live in fear that their children might be either raped before their eyes or gang raped in military barracks.[277] There were even instances where women and girls from the minority were abducted, taken to unknown locations to be raped and either never returned or were found dead.[278] Such constant worry was the main reason behind the Rohingya families' decision to flee their villages and consequently leave their properties.

[275] Amnesty International, '"We will destroy everything" – military responsibility for crimes against humanity in Rakhine State, Myanmar' (*Amnesty International*, 2018) 94 <https://amnesty.org/en/documents/asa16/8630/2018/en/> accessed 15 July 2021.
[276] Peltola (n 270) 139.
[277] ibid 139.
[278] Amnesty International (n 275) 95.

The military targeted young Rohingya girls due to their virginity, an extremely important value among the Muslim minority in Myanmar.[279]

These elements all point to the fact that the Rohingya military was systematically using sexual violence against Rohingya women and girls to force the Muslim minority to leave their properties and flee Myanmar. The constant threat of rape against the community's women and young girls made remaining in Myanmar impossible for the Rohingya, with the widespread use and consequent fear of sexual violence becoming the leading cause behind their decision to abandon their properties and never return. By having Rohingya women live in constant fear of sexual violence, the Burmese army has practically forced women and their communities to flee. It follows that the Burmese army and security forces used sexual violence as a means to inflict conditions of life leading to the Rohingya's physical destruction.

Concerning the use of rape as a means to prevent births within the group, Burmese military engaged in such use of sexual violence by mutilating the reproductive organs of women and girls after assaulting them. While carrying out their attacks on Rohingya villages, the military and security forces' strategy consisted in separating pregnant women from other women and children to assault them and then hit their stomachs with clubs. During the assault, the soldiers would further brutalise the victims by beating them up, slitting their stomachs open or penetrating them with objects such as rifles or bamboo sticks.[280] As they would go unconscious, soldiers shot them and abandoned their bodies into burning homes. In some occasions, breastfeeding women had their breasts slashed after being raped.[281] To prevent the Rohingya minority from reproducing, the Burmese military extended their systemic use of sexual violence to Rohingya girls, with children as young as ten being assaulted.[282] This was done with the intent of stopping them from reproducing and thus continuing the Rohingya bloodline. Violent gang rapes were also commonly committed against both women and girls in an attempt to severely reduce their reproductive capacities. It follows that the Burmese army have used sexual violence to prevent

[279] Afroza Anwary, 'Sexual violence against women as a weapon of Rohingya genocide in Myanmar' (2021) The International Journal of Human Rights 1, 9-10.
[280] United Nations Human Rights Office of the High Commissioner (n 272) 21.
[281] Anwary (n 279) 11-12.
[282] Peltola (n 270) 141-42.

Rohingya women from procreating by assaulting pregnant women as well as young girls.

Concerning the *mens rea* element, it can be assumed that the perpetrators are aware that their actions will lead to the destruction of the Rohingya community. Using sexual violence against women and girls from the Muslim minority is a conscious choice motivated by their intention to erase the community. By systematically using rape against Muslim women, the Burmese military is inflicting irreparable and long-lasting harm on the victims themselves and the wider community. Furthermore, the military and security forces are actively using rape as a tool to spread terror among the Rohingya community and practically force them to flee their villages with the end goal of eradicating and erasing the Muslim minority. Finally, targeting pregnant women and raping women and young girls so gravely as to cause them life-long damage to their reproductive organs shows a clear intention to prevent the Muslim minority from procreating and thus eliminate their bloodline from Burma. The Burmese army's genocidal intent can further be stemmed from the derogatory language used by the perpetrators during the attacks: while some referred to the victims as 'Bengali bitch' or 'Muslim bitch', others threatened them with statements such as 'we are going to kill you this way, by raping. We are going to kill Rohingya. We will rape you. This is not your country'.[283]

3.2.2 Crimes against humanity

The Rome Statute recognises rape as a crime against humanity in article 7(1)(g)(1), where a number of elements are provided. First, there must be a penetration of the victim's body by the perpetrator with his/her sexual organ, any object or any other part of the body. Secondly, the invasion must be committed by force, by threat of force or coercion, by taking advantage of a coercive environment or against an individual who could not give consent. Thirdly, the conduct must be committed as part of a widespread or systematic attack directed against a civilian population. An attack is defined in article 7(2)(a) as 'course of conduct involving the multiple commission of acts referred to in paragraph

[283] Human Rights Watch, 'Burma: Security Forces Raped Rohingya Women, Girls' (*Human Rights Watch*, 6 February 2017) <https://hrw.org/news/2017/02/06/burma-security-forces-raped-rohingya-women-girls> accessed 15 July 2021.

1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'. The focus here is on the widespread and systematic nature of the overall attack itself rather than the individual acts forming it. Furthermore, the act must have been committed on multiple occasions; it cannot be an isolated occurrence. For an attack to exist there must be a connection with a state or organisation policy. However, the existence of such policy does not depend on an explicit or formal recognition, as it can be deduced from the overall circumstances.[284] Concerning the systematic or widespread aspect of the attack, the ICC has built on the interpretation provided in the *Akayesu* judgment and stated the attack should be 'massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims'. In practice, the attacks cannot be random or isolated. Fourthly, the perpetrator must knew his/her conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. It is sufficient that the perpetrator intended to contribute to furthering this attack, as there is no need to prove he/she was aware of all the characteristics of the attack.[285]

The ICC has dealt with the prosecution of rape as a crime against humanity on multiple occasions with both praised and highly criticised outcomes. It first dealt with sexual violence as a crime against humanity in the *Katanga* case, where the Prosecutor struggled to establish the systematic and widespread nature of the use of rape and sexual enslavement against civilian women and to find Katanga had made a significant contribution to the commission of such crimes.[286] However, an important progress towards gender justice was made through cases such as *Prosecutor v Bemba,* concerning the systematic use of rape against the civilian population in the Central African Republic. This represented the first time a commander was held accountable and convicted for sexual violence crimes, as the ICC found he was aware that the Movement for the Liberation of Congo was committing such atrocities.[287]

[284] Christine Byron, *War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court* (Manchester UP 2009) 195.
[285] Elements of Crimes of the International Criminal Court (9 September 2002) ICC-ASP/1/3 3.
[286] Caterina E Arrabal Ward, *Wartime Sexual Violence at the International Level: A Legal Perspective* (Brill Nijhoff 2018) 102-03.
[287] ibid 105-06.

The widespread and systematic nature of sexual violence against Rohingya women has been recognised by multiple international organisations. Multiple UN organs have expressed their concern over the safety and well-being of Rohingya women since 1995, when the Special Rapporteur on the human rights situation in Myanmar stated that Burmese soldiers, often encouraged by their officials, perceived the perpetration of sexual violence as a right.[288]

The Independent International Fact-Finding Mission on Myanmar found a pattern of Burmese security and military forces abducting Rohingya women and girls to rape and gang rape them in either military bases or nearby forests.[289] Furthermore, many victims reported being assaulted in their own homes by individual soldiers and groups of them, whom they were able to recognise by their army uniforms.[290] The systematic nature of the sexual violence perpetrated against women from the Muslim minority is further demonstrated by the fact that superiors would often help their soldiers find the women who had managed to escape sexual violence and go as far as accompanying them to the victim's location to carry out the sexual assault.[291]

While Rohingya women have been the main victims of sexual violence crimes for decades, the use of rape has become systematic since the government-supported clearance operations of 2016 and 2017. During this time, sexual violence started to be perpetrated on a massive scale. More specifically, mass gang rapes, where multiple perpetrators would assault multiple victims at the same time, became a popular strategy among the security and military forces. Such widespread use of rape is reflected in the numbers reported by the UN Independent Fact-Finding Mission: gang rape constituted 80% of the corroborated incidents of rape, with 82% of these being committed by the Burmese army. In some of these instances, up to ten soldiers participated in a gang rape.[292] The use of similar methods and tactics to perpetrate sexual violence across the entirety of Rakhine State further highlights the organised and systematic nature of the sexual violence crimes carried out during these

[288] Human Rights Council, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar' (17 September 2018) UN Doc A/HRC/39/CRP.2 para 1373.
[289] ibid para 194.
[290] ibid para 202.
[291] ibid para 215.
[292] ibid para 1372.

operations.[293] As discussed in the previous section, the perpetration of rape by security and military forces forms part of a systematic use of sexual violence against Rohingya women. The widespread use of rape has been confirmed by various international organisations and NGOs, such as Human Rights Watch and the Burmese Rohingya Organization UK.[294] The Independent Fact-Finding Mission concluded 'the scale, brutality and systematic nature of these violations, over this period of time, indicate that rape and sexual violence are part of a deliberate strategy to intimidate, terrorize or punish a civilian population, and are used as a tactic of war'.[295] The United Nations Human Rights Office of the High Commissioner shared such a conclusion.[296] It follows that rape is committed as part of a widespread or systematic attack on Rohingya women.

The lack of accountability for the perpetrators of such violence and the government's support for the operations during which the most brutal forms of sexual assault have been committed are indicative of the fact that rape is perpetrated to further a state policy. The Burmese government has been targeting the Rohingya community for decades in an attempt to permanently eliminate them from the territory of Myanmar through various military operations. The clearance operations perpetrated between 2016 and 2017, during which the most gross sexual violence crimes were perpetrated and gang rape started being carried out in mass, were fully organised and supported by the government of Myanmar. In fact, rape played such a central role in the strategy applied during such operations that its systematic use had become normalised. Such violence could only be committed in a climate of long-standing impunity, as soldiers knew they would suffer no consequences for their abuses.[297]

[293] Human Rights Council, 'Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts' (22 August 2019) UN Doc A/HRC/42/CRP.4 para 72.

[294] Burmese Rohingya Organization UK, '"I thought I would die" Physical evidence of atrocities against the Rohingya' (Burmese Rohingya Organization UK November 2017) <https://burmacampaign.org.uk/media/I-THOUGHT-I-WOULD-DIE-BROUK-Report.pdf> accessed 16 July 2021.

[295] ibid para 1374.

[296] United Nations Human Rights Office of the High Commissioner, 'Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh' (OHCHR 13-24 September 2017) <https://ohchr.org/Documents/Countries/MM/CXBMissionSummaryFindingsOctober2017.pdf> accessed 16 July 2021.

[297] Human Rights Council (n 288) para 1374.

Furthermore, throughout the years, government officials, military and security forces senior officials as well as religious figures have been vocal about their support towards the gross human rights violations suffered by the Rohingya. Some have openly supported the slaughtering and persecution of the Muslim minority.[298] The involvement of senior officials in the commission of sexual violence crimes, as either perpetrators or witnesses, further demonstrates the widespread use of rape formed part of a consolidated policy.[299] It follows that while the Burmese government never formally accepted the systemic use of sexual violence against Rohingya women, it did so implicitly by failing to take the necessary measures to hold perpetrators accountable and by encouraging such abuses through military operations. The enabling behaviour of senior officials and the statements of leading figures from the government and religious groups further prove that the state's approval of the widespread perpetration of sexual violence can be derived from such circumstances.

The perpetrators' awareness that their conduct contributed to such systematic attack is visible from various elements. The degrading language used against the victims highlights their understanding of the objective behind the sexual assaults against Rohingya women: eradicating the Muslim minority from Myanmar. They were aware that raping women from the minority was the key to forcing the community to leave the country and never return. Furthermore, the fact that they often targeted pregnant women and young girls highlights their awareness of the end goal to eliminating the Rohingya bloodline by preventing them from reproducing. As their superiors in committing sexual violence crimes often accompanied soldiers, there is no way they could not be aware of their contribution to the overall goal to wipe out the Rohingya from Myanmar.

[298] Human Rights Council (n 288) para 1423.
[299] ibid para 216.

3.3 An intersectional perspective on the prosecution of these claims before the ICC

From the analysis above, it follows that Rohingya women could bring two strong claims before the ICC. However, this does not necessarily mean they will be successful in holding the perpetrators of such horrific sexual violence crimes accountable. In fact, cases that at first seemed to have good chances of success often had to deal with multiple obstacles before the ICC.

The ICTY and ICTR's prosecutions of sexual violence crimes committed against women from an ethnic minority have shown a tendency to focus on the effects such violence had on the community as a whole rather than on the actual victims themselves. It follows that rape is prosecuted mainly because of its consequences on the women's community as a whole, rather than because it is a gross violation of the victims' bodily integrity. Such approach was particularly common in the jurisprudence of the ICTR, which often conceptualised the systemic use of rape against Tutsi women as an attempt to erase the Tutsi community in its entirety.[300] The ICC runs the risk of committing the same mistake when analysing the claims brought forward by Rohingya women, as the Burmese military and security forces systematically perpetrated sexual violence against women from the Muslim minority with the aim of forcing the ethnic minority out of Myanmar. However, in this regard, the use of an intersectional approach could help the ICC focus on prosecuting the systemic use of rape as a crime perpetrated against Rohingya women rather than on the wider community. Understanding the ethnic dimension and the sexual nature of the crimes committed against women and girls from the Muslim minority is fundamental to comprehend why Rohingya women were the primary targets of sexual violence and why they were disproportionately affected by it in comparison to men from the community.

International criminal tribunals have also received criticism due to their tendency to consider sexual violence a less important crime to prosecute when compared with other gross human rights violations occurring at the same time. Such prioritisation of other crimes is further motivated by the difficulties prosecutors encounter in gathering evidence

[300] Doris Buss, 'Rethinking "Rape as a Weapon of War"' (2009) 17 Feminist Legal Studies 145, 154.

on sexual and gender-based violence and establishing the responsibility of senior officials.[301] This was the case for instance in the *Lubanga* case, where the OTP decided to give precedence to the prosecution of crimes relating to the enlistment and conscription of child soldiers, rather than the systemic use of sexual violence against young girls. There is a possibility the OTP could follow a similar line of thinking when analysing the claims brought by Rohingya women: while military and security forces have been systematically sexually assaulting women and girls from the Muslim minority, they have also committed gross human rights violations, such as arbitrary killings and incarceration, against the rest of the community. In this instance, the use of an intersectional approach could help the ICC in fully grasping the gravity of the sexual violence crimes being committed in Myanmar. Intersectionality would be helpful to highlight the discriminatory element at the very core of the systemic use of rape, as Rohingya's women ethnicity and gender are the driving forces behind the Burmese' military decision to target them.

Intersectionality can also be helpful to identify and consider the pre-existing factors that pre-determine the commission of sexual violence, as it serves to understand how the inequalities and discrimination existing during peacetime are exacerbated during a time of conflict.[302] In the case at hand, Rohingya women were already suffering from sexual harassment and sexual violence prior to the 2016 and 2017 clearance operations, although on a more sporadic and isolated manner. It follows that the systemic use of rape by military and security forces is not taking place in a vacuum, but rather in a social context where women from the Muslim minority have always been discriminated against due to their gender and their ethnicity by the military forces.

Another issue international criminal tribunals have had to deal with when prosecuting sexual and gender-based violence has been the difficulty in establishing its systematic and widespread nature and finding senior officials accountable. Through an intersectional approach, it is possible to explain the dynamics of discrimination underlying the violence that is being perpetrated and thus bring to light the organised and structured nature of the attack.[303] The rapes committed against

[301] Peggy Kuo, 'Prosecuting Crimes of Sexual Violence in an International Tribunal' (2002) 34(3) Case Western Reserve Journal of International Law 305, 310-11.
[302] Martin Beringola (n 218) 92.
[303] ibid 93.

Rohingya women are not being carried out randomly, but rather in an attempt to further perpetrate an overall system of discrimination meant to segregate and eliminate the Rohingya community.

While the use of an intersectional approach can bring many benefits and advantages to the prosecution of the sexual and gender-based violence perpetrated by the Rohingya, it can also bring unwanted and problematic results, as was discussed in the previous chapter. Focusing on the discrimination and violence suffered by a group of people with a specific set of characteristics can lead to the exclusion of those individuals who do not specifically fit within that description or do not share that experience. In the context of the violence suffered by Rohingya women, this could be the case for those victims who have been assaulted by individuals outside the security and military forces or those who have been subject to different types of gender harms. Furthermore, focusing on the ethnicity and the gender of the victims can lead to the creation of further harmful stereotypes, especially when dealing with minorities that are already subject to strong stigmatisation. This is a possible risk in this context as well, as the Rohingya are a Muslim minority.

CONCLUSION

This thesis has sought to analyse how the theory of intersectionality can assist the ICC in analysing the sexual and gender-based violence suffered by Rohingya women in Myanmar.

The first chapter illustrates the main problems that arise from prosecuting sexual violence before international criminal tribunals.

In the first section, through an analysis of the most relevant judgments issued by the various Tribunals, it has been possible to see how the recognition of rape and other forms of sexual violence, and with it the effective prosecution of the perpetrators, as serious criminal acts has exponentially increased. Such analysis has also brought to light the ICC's capacity to take a progressive approach in the prosecution of gender and sexual-based violence, by recognising sexual slavery as a war crime in *Ntaganda* and holding senior officials accountable.

The second section has illustrated both the strengths and weaknesses that come with prosecuting sexual and gender-based violence before international criminal tribunals. One of the main problematic aspects of the prosecutions carried out by both the ICTY and ICTR has certainly been their incapacity to correctly frame the sexual violence suffered by women from minority groups. When analysing the systematic use of rape, the main focus has been on the consequences of such attacks on the community as a whole rather than on the victims themselves, meaning the sexual aspect of the violence has been neglected. When instead focusing on the sexual nature of the violence, the tribunals have made the mistake of analysing the sexual violence experienced by the victims only in light of their role as mothers and wives. Other critical aspects were the wrongful separation between sexual violence during peace time and conflict, the fixation on systemic rape and the consequent neglect of other sexual violence crimes and isolated instances of violence. Despite

some successful prosecutions, the ICC has not been spared some heavy criticism due to its lack of a coherent prosecution policy. The lack of a gender-sensitive and intersectional approach has caused the ICC to both miss the opportunity to undercover the intersecting factors causing certain women from minorities to be the target of systematic sexual violence.

In the second chapter, a thorough analysis of the concept of intersectionality was provided. From discussing the advantages and disadvantages brought by the inclusion of such theory in anti-discrimination law, it is clear that it is difficult to apply such concept in a legal context. While it is indeed necessary to grasp the lived experiences of those whose identity is defined by the intersection of multiple factors, it can also lead to a non-stopping sub categorisation within subgroups. It follows that it is difficult to implement a theory based on identities and experiences in such a strict legal framework, which makes use of categories and comparator tests. However, its inclusion is not that utopic, as has been shown in the second section by the analysis of the approach taken by the CEDAW in some of its individual communications.

The third section reflected on similar aspects but in the context of ICL. On one hand, the use of an intersectional approach by ICC can bring various benefits throughout the various stages of the prosecution. By helping undercover the discriminatory nature of the violence under analysis, intersectionality can help highlight the gravity of the crime. Furthermore, it can assist with making a link between pre-existing inequalities and how their exacerbation results in sexual violence during conflict. At the investigative stage, it can serve to connect sexual and gender-based violence to the context of discrimination. Instead, at the prosecutorial stage it can be useful to frame criminal responsibility and undercover the systemic nature of the crimes in question. However, there is also a possibility that the implementation of such approach in criminal law will do more harm by further stigmatising the victims, as shown by the disastrous results obtained by Canadian courts.[304]

In the third chapter, it was finally possible to put the concepts and theories elaborated on in the previous chapters into practice in the case

[304] Section 718.2(e) of the Canadian Criminal Code worked under the assumption that by considering the social context and the various factors leading an Aboriginal woman to offend, the judge would be less likely to give the offender a prison sentence. However, the sentencing reforms had the opposite effect. While the adult incarceration rate dropped by 20%, the presence of Aboriginal women in the incarceration system increased: since 1996, the population of incarcerated Aboriginal women doubled.

study of Rohingya women. Through the historical background on the Rohingya minority, it was possible to observe how the discrimination and segregation they suffer from is deeply rooted in history. Such widespread violations were further reflected upon in the second section, where the claims Rohingya women could bring before the ICC were assessed.

Following the information gathered from various NGOs and international organisations' reports, it was concluded that victims of sexual violence had grounds to allege the perpetration of both genocidal rape and crimes against humanity. Concerning the former, the evidence does point to the fact that the widespread use of rape against Rohingya women did cause long-lasting physical and mental health issues. Furthermore, women and girls from the Muslim minority were systematically assaulted in an attempt to force the community to flee and to prevent them from reproducing. From these considerations, it stems that the perpetrators were aware of the impact their actions would have on the community and used sexual violence against Rohingya women with the aim of erasing the community. Concerning the latter, the gathered evidence also pointed to the existence of a systematic use of sexual violence reflective of the policy of Myanmar. Furthermore, the involvement of senior officials in the perpetration of such atrocities and the endorsement of such violence by various politicians and religious leaders.

Finally, the last section provided an analysis of how the use of an intersectional approach could help the ICC address such claims. Firstly, by ethnic dimension and the sexual nature of the crimes committed against women and girls from the Muslim minority, an intersectional approach will assist the ICC in analysing the systemic use of rape as a violation of the bodily integrity of the victims rather than a violation against the wider community. Furthermore, by highlighting the discriminatory nature of the violence perpetrated against Rohingya women, intersectionality could help the highlight the gravity of the crimes committed. Through the analysis, it was concluded that intersectionality could also be helpful in situating the widespread use of sexual assault in a social context where women from the Muslim minority have always been discriminated due to their gender and their ethnicity by the military forces. Finally, through highlighting the discriminatory factors driving the perpetrators to commit such crimes against women from the Muslim minority, intersectionality can assist in identifying the organised and structured nature of the attacks. However, including such theory in the approach of the ICC could also lead to the creation of further stereotypes on Rohingya women and to the exclusion

of those victims whose experiences do not fit within such framework. It can be concluded that the use of an intersectional approach can be quite helpful to the ICC when assessing the claims brought forward by Rohingya women. It will be interesting to see whether in the future an actual case before the ICC comes about and if so, what approach the ICC will take to analyse the violations suffered by Rohingya women specifically.

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