Global Campus Europe

UNIVERSITY OF GRAZ

European Master's Programme in Human Rights and Democratisation
A.Y. 2022/2023

Genocidal rape: *unum crimen sine lege*

Recognising rape as an act of genocide

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Word Count Declaration: 27.202

Abstract

Genocidal rape, defined as *"a physical invasion of a sexual nature, committed on a person under circumstances which are coercive with intent to destroy, in whole or in part, a national, ethnical, racial or religious group",* has been part of various genocidal campaigns throughout history. It has had profound and irreparable effects on targeted groups, breaking their cohesion, negatively impacting their reproduction ability by attacking mainly the female population, and jeopardising the perpetuation of the group identity. Genocidal rape, in its most aggressive form, can cause death or permanent physical or mental harm to the victims. Yet the experiences of those victims do not fit within the genocide framework. They are often considered isolated incidents or mislabelled as crimes against humanity or war crimes without acknowledging the intent to destroy the group in whole or in part. This discrepancy arises, inter alia, from the absence of recognition of rape as a distinct genocidal act in international law. This thesis provides a comprehensive understanding of genocidal rape and its conceptualisation within the international legal system. It seeks to differentiate genocidal rape from other forms of genocide-related violence and advocates for its proper recognition as a separate act of genocide by expanding the definition of the latter. The research explores the reasons behind the non-recognition of the crime within the current legal framework, considering the involvement of all actors in genocidal rape cases. By addressing these issues, this study contributes to the advancement of knowledge on genocidal rape and highlights the necessity of recognising it as a distinct genocidal act. Classifying rape within the framework of genocide transcends academic pursuits; it represents a crucial initial stride in paving the way for combating and preventing this crime in the future.

Acknowledgements

Firstly, I would like to express my sincere gratitude to my supervisor, Prof. Gerd Oberleitner. His guidance, invaluable insights and encouraging words have been instrumental in the progress of this thesis and my overall experience in Graz. Danke schön.

Secondly, I would like to thank my family for supporting every choice of mine without necessarily agreeing with it. Σας ευχαριστώ.

And last but certainly not least, special thanks to all of my friends, both the new and the old ones, for always being close no matter how far we are. Thank you. Grazie. Obrigada.

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List of Abbreviations

CEDAW	Convention on the Elimination of Discrimination against Women
ECHR	European Convention on Human Rights
GA	General Assembly
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
JCE	Joint Criminal Enterprise
NGO	Non-Governmental Organisation
OTP	Office of the Prosecutor
UN	United Nations
UNSC	United Nations Security Council

Introduction

i. Rationale

"Rape and sexual violence constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy in whole or in part a particular group targeted as such".[1]

Despite rape constituting a function of genocides since time immemorial, it was not until the 1990s that the international community began to acknowledge it as such. During that decade, territories of former Yugoslavia and Rwanda became the theatre of unbearable atrocities that left thousands of people killed, women and girls sexually assaulted, and civilians traumatised for life. In both cases, rape played a crucial role in the genocidal strategies. Even though Bosnia was the first case of rape being an essential part of genocide, the International Criminal Tribunal for the Former Yugoslavia (ICTY) failed to acknowledge the link between rape and genocide and to proceed to corresponding convictions.[2] It was only in 1998, in the pivotal case Prosecutor v. Jean-Paul Akayesu of the International Criminal Tribunal for Rwanda (ICTR), that the nexus between them became apparent and led to the first conviction of its kind against Bourgemestre Jean-Paul Akayesu for rape constituting an act of genocide.[3]

For the purpose of this thesis, rape is defined as "*a physical invasion of a sexual nature, committed on a person under circumstances which are coercive",* adopting the definition formulated by the Chamber in the Akayesu case.[4] Genocidal rape is the crime of rape, as defined above, "*committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".*[5]

The recognition of genocidal rape in international law has yet to be achieved. Major international legal instruments encompass rape solely as a crime against humanity or a war crime. This master's thesis contributes to a comprehensive understanding of genocidal rape, its unique characteristics, and the steps necessary to overcome the obstacles in its recognition and prosecution, aiming to underscore the

[1]The Prosecutor v. Akayesu (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998. Par. 731 [Hereinafter 'Akayesu'].
[2]Bailey Fairbanks, "Rape as an Act of Genocide: Definitions and Prosecutions as Established in Bosnia and Rwanda" Historical Perspectives: Santa Clara University Undergraduate Journal of History, Series II 23, (2019): 109.
[3]Daniela De Vito, Aisha Gill, and Damien Short. "Rape Characterised as Genocide." International Journal on Human Rights, no. 10 (2009): 32.
[4]Akayesu, par. 688.
[5]UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Art. II. [Hereinafter 'Genocide Convention'].

significance of recognising genocidal rape as a sixth category of genocidal acts. The explicit enumeration of rape under the historical definition of genocide represents a crucial first step in the fight against the perpetration of genocidal rape and establishes a robust legal foundation for prosecutions to take place. In the author's view, the legal recognition of genocidal rape establishes a conceptual and legal foundation for combatting genocidal rape effectively. Until then, genocidal rape will continue being a crime committed but not legally acknowledged: *unum crimen sine lege.*

ii. Outline of the thesis

In order to comprehend genocidal rape and the characteristics distinguishing it from other crimes, it is imperative to start with an overview of three historical events, i.e., the Holocaust, the Bosnian, and the Rwandan genocide. The first chapter delves into the historical and socio-political background of the atrocities and proceeds to examine rape's part in the execution of the genocidal plan in each case. Moreover, it explores the judicial handling of rape during the trials in the aftermath of the atrocities. These three genocide examples reflect the evolution of the perception of rape in an international context: from its absolute disregard (Nuremberg) to its recognition as a crime against humanity (Bosnian genocide), and ultimately understanding it as a crime against humanity, a war crime and an act constituting genocide (Rwandan genocide).

The second chapter elaborates on the conceptualisation of rape in international law by beginning with the provisions of the Statute of the International Criminal Court on rape, clearly influenced by the Statutes of ICTY and ICTR. Then, the process of defining rape is examined. The absence of a consensually accepted definition of rape created ambiguity and burdened the judges of the international criminal tribunals with the task of defining the crime. The outcome of their endeavours was the creation of three main definitions of rape. In the view of the author of this thesis, the definition formulated in the Akayesu case appears most suitable for capturing the essence of rape in an international context. The research continues on the perception of rape under international humanitarian law and its classification as a grave violation of women's rights in conflict under the provisions of international human rights law.

Chapter three examines how rape can be subsumed under each category of genocidal acts within the current genocide framework. By evaluating the elements and criteria of the existing categories, the chapter seeks to determine whether they effectively address the specific characteristics of genocidal rape

and whether they can serve as a suitable legal basis for its prosecution. The answer is negative. Furthermore, the last part distinguishes genocidal rape from opportunistic rape during genocide, as well as rape as a crime against humanity or a war crime. It clarifies the differences in intent, context, and scope between these forms of sexual violence and genocidal rape. By making these distinctions, the chapter aims to highlight the unique nature of genocidal rape and emphasise the need for its separate recognition within the legal framework.

By this stage, the dissertation aims to provide a comprehensive understanding of the unique nature of genocidal rape. The discourse then shifts to overviewing the challenges and the factors hindering the progress of recognising genocidal rape. Obstacles in this process are set by the victims and their respective communities affected by genocidal rape; the perpetrators; the prosecutors, investigators, and judges in charge of genocidal rape cases.

The final part of this thesis explores ways of overcoming these challenges. The primary and most significant step is argued to be a major legal transformation: the broadening of the definition of genocide to include rape as a sixth distinct category. Conforming rape to other existing genocidal acts does not seem appropriate in genocidal rape cases, which may explain why only one conviction on this legal ground has been achieved thus far. Subsequently, various measures will be suggested to transform the judicial system into an accessible and safe space for everyone engaging in legal proceedings. Multiple methods of enhancing the prosecutorial, investigative, and judicial efforts will be proposed in order to end perpetrators' impunity and ensure justice is served.

The thesis will conclude with some reflection on the discourse of the research, acknowledging the limitations of the thesis while recognising the complexity of genocidal rape, addressing the weaknesses of the current legal framework and proposing the broadening of the definition of genocide. It will also provide a few ideas for further discussion as well as clarify the objective of this thesis: the recognition of genocidal rape as a separate category of genocidal acts.

iii. Methodological approach

This thesis is the outcome of in-depth legal research on contextualising rape in genocide. The first chapter primarily focuses on the Holocaust, Bosnian, and Rwandan genocide, providing a narrative of their historical and socio-political background. It serves as a foundation for the study of the conceptualisation of genocidal rape in law, closely examining the process of its criminalisation. The second chapter analyses the incorporation of rape into the legal frameworks of international criminal law (ICL), international humanitarian law (IHL), and international human rights law (IHRL) through the application of legal research methods.

In the third chapter, the inclusion of rape within the existing legal framework of genocide is a result of a legal analysis of the existing definition of the international crime of genocide. The subsequent section underscores the distinctive features of genocidal rape, undertaking a comparative research approach to highlight the differences between genocidal rape and opportunistic rape, rape as a crime against humanity, and rape as a war crime. The following chapter addresses the challenges associated with identifying the crime of genocidal rape. It examines the obstacles posed by victims and affected communities and the legal challenges presented by prosecutors, investigators, and judges as legal authorities. This chapter adopts a legal perspective while also considering social, cultural, and psychological factors that impede the recognition of genocidal rape.

The final chapter solely stems from the legal research conducted during the composition of this thesis. The recommendations put forth are of a legal nature, drawing upon the author's legal academic background.

1. Rape in genocide

Rape has been present in various genocides throughout history, namely the Armenian, the Holocaust, the Bosnian, the Rwandan, the genocides in Sudan and the Democratic Republic of Congo, the Yazidi, and the ongoing campaign in Myanmar. It has been a weapon of war and a tool of oppression used to destroy a community, a culture, a society.[6] However, as every genocide has its unique characteristics, the role of rape, its intent and its impact appears to be different in each case. Therefore, it is essential to start this dissertation by examining a few, yet undoubtedly significant, genocides and the role of rape in their conduct to finally understand the distinctiveness of genocidal rape. As sexual violence in conflict, especially in the form of rape, goes back to ancient times, it is impossible to analyse or even name all the cases of rape used against civilians with genocidal intent, i.e. to destroy a specific group in whole or in part.[7] On account of this, the cases briefly analysed below reflect the evolution of the perception of rape in an international context until its recognition as an act constituting genocide. Slowly yet effectively, the genocides examined and the judicial handling of rape in the trials that followed set a precedent that paved the way to the momentous judgement of the International Criminal Tribunal for Rwanda, which finally put into words the unspeakable reality and fairly labelled for the first time, rape with genocidal intent.[8]

Why rape, though? Why did the perpetrators deliberately choose the "*physical invasion of a sexual nature, committed on a person under circumstances which are coercive"*[9], as the method was defined, to accomplish their coordinated genocidal campaigns? Why did they not use the technologically advanced war weapons available? The answer to these questions is neither singular nor simple. The events analysed below will attempt to give an answer and clear the ambiguities by explaining why and how rape has been used in genocides. As this chapter aims to explore the historical background of genocides and the part that rape had in their conduct in parallel with the legal development of genocidal rape, the starting point of this research will be the Holocaust and the Nuremberg trials. The examination

[6]Sarah Schwartz, "Wartime Sexual Violence as More than Collateral Damage: Classifying Sexual Violence as Part of a Common Criminal Plan in International Criminal Law" UNSW Law Journal 40(1), (2017): 60.
[7]Allison Ruby Reid- Cunningham, "Rape as a Weapon of Genocide" Genocide Studies and Prevention: An International Journal 3, no. 3 (2008): 281.
[8]Beth Van Shaack, "Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda" Human Rights Advocacy Stories, Foundation Press, Santa Clara Univ. Legal Studies Research Paper, (2008): 1.
[9]Akayesu, par. 688.

of genocidal rape in international law could only start with the creation of the first Tribunal in history that tried international crimes.

1.1. The Holocaust and the Nuremberg Trials

a) Historical Background

The rape of Jewish women during the Holocaust occurred all across the Third Reich. The type of sexual assault this dissertation examines is the rape of Jewish women by Nazi oppressors and the effect of the practice on the victims themselves and their community as a whole. Their traumatising experience during the Holocaust presents a number of similarities to other instances of rape in genocides.[10] The brutality of the acts, the physical violence, the various methods of rape and the powerlessness of the victims to end their suffering, are some of the shared characteristics. In addition, the impact of rape on the victims, the psychological effect, the shame, the terror, and the trauma are common to all women that have been sexually abused. Nevertheless, there appear to be some features that distinguish their experience from other cases and add more layers of complexity to an already highly complicated and horrendous event.[11]

First of all, the ultimate aim of the *Shoah*[12] was to exterminate the group through mass killing. Rape was not a premeditated part of the extermination plan; even more so, it was a forbidden practice. The existing regime did not allow any relations between so-called "members of the Aryan race" and the Jews. Any interracial sexual interaction, whether consensual or not, was prohibited by the law for "the Protection of German Blood and German honour".[13] However, in reality, the existence of this law did not prevent the perpetrators from raping.[14] In most cases, the victims of rape were brutally murdered afterwards. This way, the perpetrators secured their silence, excluded the possibility of unwanted pregnancies with ethnically mixed fetuses that violated the existing racial policy, and also participated in

[10]Steven T. Katz, "Thoughts on the Intersection of Rape and Rassenschande During the Holocaust" Modern Judaism Online, (2012): 293.
[11]Stacy Banwell, "Rassenschande, Genocide and the Reproductive Jewish Body: Examining the Use of Rape and Sexualized Violence against Jewish Women during the Holocaust?" Journal of Modern Jewish Studies, (2016): 208-227.
[12]Shoah: / (ˈʃɔɑː) / noun. (in secular Judaism) a Hebrew word for the Holocaust.
[13]Helene Sinnreich, "And It Was Something We Didn't Talk About: Rape of Jewish Women during the Holocaust." Holocaust Studies, (2008): 2.
[14]Katz, "Thoughts on the Intersection of Rape" (2012): 295.

fulfilling the ultimate goal of the Final Solution: the elimination of all Jews. It is important to mention that even though raping Jewish women was prohibited by law, their killing was not only allowed but encouraged.[15] Therefore, their rape was seen by the committers as a last chance to actualise their sadistic sexual urges just before enjoying the ultimate manifestation of dominance over them by turning their bodies into corpses.[16]

The illegal character of rape led to serious underreporting of its occurrence, especially compared to the exposure of other crimes committed under the Nazi regime. This lack of documented cases and evidence downplayed the role of rape in the Holocaust. It was not only the perpetrators that left the issue out of the discussion, but the victims themselves also reduced the significance of their experience. The wrongful belief that the mass killing of the male Jewish population mattered more than the experience of the female Jews, a major part of which was the sexual assault, discouraged the victims of rape from sharing their stories.[17] This was enhanced by the general idea that rape was an unfortunate, yet unavoidable, consequence of the war. It was still considered an issue taboo that would be better left unraised and, in the end, a private matter that did not meet the threshold to be a subject of public or, even further, international concern.[18] Therefore, rape during the Holocaust did not receive attention proportionate to its incidence.[19]

b) The Nuremberg Trials

The Nuremberg Trials, held between 1946 and 1949 to bring the Nazi leaders to justice, shed light on some of the events of one of the darkest periods in human history. The significance of the Trials in developing international criminal law is self-evident. Their contribution to the legal conceptualisation of crimes against peace, war crimes and crimes against humanity is unquestionable. Arguably, the most important legacy of the tribunal was introducing the concept of crimes against humanity along with their definition. [20] Despite their significant role in developing those aspects of international law, particularly

[15]Sinnreich, "And It Was Something" (2008): 16.
[16]Katz, "Thoughts on the Intersection of Rape" (2012): 311-312
[17]Sinnreich, "And It Was Something" (2008): 4.
[18]Arden B. Levy, "International Prosecution of Rape in Warfare: Non-discriminatory Recognition and Enforcement" UCLA Women's Law Journal 4, (1994): 262.
[19] Sita Balthazar, "Gender Crimes and the International Criminal Tribunals" Gonzaga Journal of International Law, (2006): 44.
[20]Hilly Moodrick-Even Khen, and Aloha Hagay-Frey. "Silence at the Nuremberg Trials: The International Military Tribunal at Nuremberg and Sexual Crimes against Women in the Holocaust." Women's Rights Law Reporter 35, (2014): 45, 51.

in international criminal law, the Nuremberg Charter deliberately avoided any reference to rape or any other form of sexual violence. More specifically, Article 6 of the Charter described all the acts constituting the crimes mentioned above and, particularly, defined crimes against humanity as *"murder, exterminations, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in the execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".*[21] The exclusion of rape and sexual offences, in general, is quite conspicuous.

In theory and practice, rape was an issue preferred to be unraised. A profound example of the reluctance to legally deal with crimes of sexual nature was the answer of the French Prosecutor when he was explicitly asked about the rape of *"54 women or young girls from 13 to 50 years of age [...] by maddened soldier" during the summer of 1944.* He simply responded: *"The tribunal will forgive me if I avoid citing the atrocious details [...]."*[22] Even though the difficulty of dealing with crimes of such an atrocious character and sensitive nature is undeniable, the importance of confronting and punishing the perpetrators adequately should overcome the supposed obstacles. The absolute male dominance in the positions of judges, prosecutors and even lawyers during the conduct of the Nuremberg trials constitutes an additional explanation of the ignorance of the impact of rape against Jewish women during the Holocaust and, as a consequence, the disregard of their experience. The absence of explicit criminalisation of this specific manifestation of sexual violence in the legal instruments of the Tribunal excluded the possibility of charging and prosecuting the perpetrators of rape. The outcome was the failure to issue judgements with specific mention of rape despite its enormous incidence.[23]

c) Genocide Convention

The recognition of genocide as an international crime by the General Assembly of the United Nations and the creation of the 1948 Genocide Convention came as a reaction to Nuremberg's failure to recognise atrocities committed in peacetime as international crimes. As William Schabas remarkably

[21]Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945.
[22]Moodrick, "Silence at the Nuremberg Trials" (2014): 64.
[23]Peggy Kuo, "Prosecuting Crimes of Sexual Violence in an International Tribunal" Case Western Reserve Journal of International Law 34, (2002): 307.

stated: *"Had Nuremberg recognised the reach of international criminal law into peacetime atrocities, we might never have seen a genocide convention."*[24]

In an effort to fairly label the atrocities of the Second World War, a lawyer of Polish – Jewish origin named Raphael Lemkin invented the term genocide, combining the ancient Greek word "genos" (: γένος) meaning race or tribe and the Latin word "cide", or killing.[25] In his words: *"By "genocide", we mean the destruction of a nation or an ethnic group[..]. Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation [..]. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group. It is intended to signify a coordinated plan of different actions aiming at destroying essential foundations of the life of the groups themselves".* [26]

The next step, following the naming of the practice, was the criminalisation of genocide by creating an international legal instrument. The classification of genocide as an international crime was a less controversial process than the conceptualisation of rape in international law. Entering the era of codification, in 1948, the UN Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide.[27] The definition of genocide incorporated in the Convention drew significantly from Lemkin's proposal. However, as a legal instrument, it was necessary to distance itself from the literal interpretation of the creator towards a more technical approach to the term.[28] The explicit enumeration of the acts constituting genocide would facilitate the criminalisation of the practice on a global level. Thus, according to the letter of the Convention:

"The Contracting Parties confirm that genocide, whether committed in peace or in war, is a crime under international law which they undertake to prey punish." (Article I).

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[24]William A. Schabas, "Origins of the Genocide Convention: From Nuremberg to Paris" Case Western Reserve Journal of International Law 40, no. 1 (2006): 36.
[25]Louis R. Beres, "Justice and Realpolitik: International Law and the Prevention of Genocide" American Journal of Jurisprudence, (1988): 123.
[26]Adam Jones, "Genocide: A Comprehensive Introduction." 1st ed. New York: Routledge (2006): 10.
[27]UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, p. 277. (hereinafter 'Genocide Convention').
[28]Jones, "Genocide: A Comprehensive Introduction" (2006): 12.

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group." (Article II).[29]

The concept of genocide, the definition of the term and most of its core elements incorporated in the Genocide Convention present a number of similarities to Lemkin's concept. Remarkably, the idea that genocide could be committed in times of war and in times of peace was common; both the inventor of the term and the drafters of the Convention agreed on this point, which is also the main characteristic distinguishing genocide from war crimes, as will be explained below. Additionally, the Convention adopted Lemkin's idea regarding the conduct of genocide through various methods that go far and beyond the mass killing of a certain group. The list of Article II of the Convention serves as an umbrella under which various acts can be classified as genocidal. The intentional killing under provision (a) is the most common and easily proven conduct of genocide. The death of the members of a particular group by the perpetrator establishes the actus reus of genocide, while the mens rea is established by proving the committer's intent to destroy the group in whole or in part.

The second element, (b) serious bodily or mental harm, is a more ambiguous concept. Torture and inhumane or degrading treatment fall under the scope of this provision, but bodily harm is not limited there. The threshold of torture is high, and thus, it would be unfair to exclude the criminalisation of other acts causing bodily harm, including health injuries affecting the external, internal organs or senses gravely.[30] This definition is inclusive enough to encompass all the potential offences without setting as high standards in proof and evidence as torture. However, not all harmful acts can constitute genocide; assessing the severity of the damage, whether bodily or mental, to conclude if it meets the threshold of

[29]Genocide Convention, Art. II.
[30]Prosecutor v. Kayishema et al., case no. ICTR-95-1-T, Judgement and Sentences, May 21, 1999, par. 109.

genocide is a hard yet necessary process.[31] The following methods under (c) *Inflicting conditions of life calculated to bring about the physical destruction of the group in whole or in part*, is an indirect way of leading a group to extinction. Element (d) *Imposing measures intended to prevent births within the grou*p, as well as element (e) *Forcibly transferring children of the group to another group*, attacks the group's perpetuation. By depriving the members of the group of their reproduction ability or transferring the next generations, the future of the community, away from the rest of the group, effectively results in the destruction of the specific group.

Key elements of genocide include the perpetrators, the victims, the scale, the methods employed, and the intent. Perpetrators can be both state and non-state actors, with the majority of genocide cases following a coordinated strategy devised by those in positions of power.[32] The existence of a plan is an important indicator of the conduct of genocide, and it can further facilitate the proof of the crime. Victims of genocide are identifiable groups sharing a distinct identity, which has evolved from Lemkin's initial focus on national or ethnic groups to include national, ethnic, racial, or religious minorities in the legal definition. The targeting of specific groups is a defining feature of genocide, distinguishing it from unplanned attacks on individuals lacking shared characteristics.[33] Genocidal methods encompass a range of acts aimed at the destruction of the targeted group, extending beyond mass killings to include any acts that seek the elimination of the group. The scale of violence, although not a critical requirement, may impact the severity of punishment for perpetrators. Genocidal campaigns seek to destroy groups partially or entirely. The intent to annihilate the targeted group is a fundamental element in all definitions of genocide. Acts lacking this specific intent may be classified as crimes against humanity or war crimes but do not meet the criteria for genocide. Intent plays a crucial role in establishing the mens rea of genocide.[34]

The term, as defined in the relevant Convention of 1948, was accepted and legally recognised on an international level with remarkable ease and without being subject to great controversy.[35] Ever since the adoption of the UN Convention, several international legal instruments have also incorporated the

[31]Nena Milaninia, "Understanding Serious Bodily or Mental Harm as an Act of Genocide." Vanderbilt Journal of Transnational Law 51, no. 5 (2018): 1399.
[32]Vahakn N. Dadrian, "A Typology of Genocide." International Journals 5, no. 2 (1975): 204.
[33]UN Office on Genocide Prevention and the Responsibility to Protect. "Genocide - Elements of the Crime" United Nations. https://doi.org/https://www.un.org/en/genocideprevention/genocide.shtml.
[34]Jones, "Genocide: A Comprehensive Introduction" (2006): 20-21.
[35]Jones, "Genocide: A Comprehensive Introduction" (2006): 12.

term with its respective definition, i.e., the Statute of the International Criminal Tribunal for the former Yugoslavia (Art. 4) and for Rwanda (Art. 2) as well as the more recent Statute of the International Criminal Court (Art. 6).[36] The inclusion of the crime genocide in the above-mentioned international instruments paved the way for the first verdicts on this ground.

1.2. The Bosnian genocide and the International Criminal Tribunal for the Former Yugoslavia (ICTY)

a) Historical Background

Almost half a century after the atrocities of the Second World War, a new conflict on European territory came to shock the international community: the war in the Former Yugoslavia. By 1991, the disintegration of Yugoslavia began as each region sought independence. Bosnia, with its diverse population of Croats, Serbs, and Bosniaks, i.e., Bosnian Muslims, had the potential to thrive as a federal state that fostered an environment of ethnic and religious tolerance.[37] But the reality was very different from the expectation. Bosnia found itself at the epicentre of the conflicting interests of Serbia and Croatia. The former envisioned the establishment of a Greater Serbia, which would occupy more than half of Bosnia's territory, while the latter aimed at consolidating Croatian dominance over the remaining Bosnian territories. Consequently, Bosnia became a target for these competing powers, as they aimed to redefine its borders and forcibly expel the Muslim population.[38]

When Bosnia declared independence from Yugoslavia in 1992, Serb nationalists launched a genocidal campaign against the Bosniak population. During the attack, several common methods of genocide were applied, including mass killings, sexual violence, forced displacement, torture, and forced labour. However, the most distinct feature of this campaign lies in the widespread and systematic use of rape as a cornerstone of the coordinated military strategy. For the first time, rape was not considered an

[36]William A. Schabas, "The "Odious Scourge": Evolving Interpretations of the Crime of Genocide." Genocide Studies and Prevention: An International Journal 1, no. 2 (2006): 97.
[37]Cindy Snyder, Gabbard Wesley, J. Dean May, and Nihada Zulcic. "On the Battleground of Women's Bodies Mass Rape in Bosnia-Herzegovina." Affilia: Journal of Women and Social Work 21, (2006): 189.
[38] Snyder et al., "On the Battleground" (2006): 189.

unfortunate yet predictable side-effect of the war or an opportune event in a climate of chaos and violence. The key role of rape in the plan to exterminate the population under attack was so clear that the international community could not ignore it.[39] Determining the exact number of women raped during the Yugoslav Wars of Succession is impossible. The serious underreporting of the crime is a consequence of the reluctance of many victims to engage in legal procedures and publicly describe their traumatic experiences. As this genocide was conducted in the context of a broader conflict, all sides of the war were committing grave human rights violations, including rape. However, the vast majority of rapes were committed by members of the Serb forces against women of Bosniak origin.[40] Conservative estimates place the number of female Bosniak victims between 25,000 and 50,000.[41]

Even though some cases of sexual violence were incidental, most rapes committed by the Serbs against Bosnian Muslim women and girls were a component of the genocide in progress. The methodological use of rape against the female Bosniak population was an integral part of the genocidal campaigns; it was not rape on the occasion of genocide but rape as genocide per se.[42] Women were raped in every place imaginable.[43] The crimes committed in public spaces, frequently in front of the eyes of their compatriots or even their loved ones, aggravated the shame of the Bosniak women and stigmatised them permanently. Other common places where innumerable rapes were committed and that most attracted the attention of the world, probably because they awakened terrible memories of the past, were the rape camps. This horrendous term described the concentration camps created by the Serbian forces, where female captives, mainly Bosnian Muslims of child-bearing age, were raped massively, repeatedly, and brutally.[44] Many of them were victims of forced impregnation, many were victims of murder, and many were victims of both; all of them were undeniably, profoundly, and irrevocably traumatised.

There is a plethora of reasons underlying the selection of rape as a prominent genocidal strategy. One of them lies in their understanding of the cultural role of women. Women constituted the vast majority of rape victims in the Bosnian Genocide. As child-bearers, they were burdened with the

[39]Larry May, "International Crime: The Case of Rape." Chapter. In Crimes against Humanity: A Normative Account, 98. Cambridge Studies in Philosophy and Law. Cambridge: Cambridge University Press, (2004).
[40] Tanja Altunjan, "Reproductive Violence and International Criminal Law" . Berlin, Germany: T.M.C. ASSER PRESS. (2021): 51.
[41]Snyder et al., "On the Battleground" (2006): 189.
[42]Snyder et al., "On the Battleground" (2006): 191.
[43]Inger Skjelsbaek, "Sexual Violence in Times of War: A New Challenge for Peace Operations?" International Peacekeeping, (1999): 77-78.
[44]Catharine A. MacKinnon "Crimes of War, Crimes of Peace." UCLA Women's Law Journal 4, no. 1 (1993): 62.

responsibility to reproduce and perpetuate the social identity they represented. Yet victims of rape would face extreme difficulties getting married and creating a family due to prevailing beliefs regarding the "harm" to their honour due to the loss of their virginity.[45] Furthermore, it was not uncommon for perpetrators to purposely harm women's reproductive abilities by forced mutilation, excluding every chance of giving birth in the future. Another type of sexual violence that accompanied a plethora of rape cases was forced impregnation. Back then, it was believed in Serbian society that children were inheriting their origin exclusively from their paternal side.[46] In an effort to increase the Serbian population and enhance the Serbian character of the area, the Serbs were purposely impregnating Bosniak women. Many of them were kept captivated until their pregnancy reached a stage where abortion was not an option anymore.[47] Both forced mutilation and forced impregnation that followed the rapes played a key role in facilitating the conduct of the genocide. As Inger Skjelsbaek insightfully stated: *"This 'genocidal rape' reduces the identity of the woman to her procreative abilities; the cultural identity of the woman is undermined".*[48]

In various instances, the survivors were ostracised by their own people.[49] There is a dual explanation for this. Firstly, in the eyes of the most conservative members of the community, these women "had lost their purity and their honour" and, thus, did not belong to their group anymore. Secondly, the inability of the Bosniak men to protect the women from the brutalities of the Serbian forces made them ashamed of themselves and created an atmosphere of hatred towards the female victims.[50] After all, the endeavour to heal would be easier by forgetting the atrocities they suffered and witnessed, and those survivors were a constant reminder of the tragedy. To better comprehend the impact of rape in this society, it is vital to consider the context within which those crimes were committed. The Balkan region in the 1990s had a long-standing patriarchal structure with deeply conservative ideas about women and their societal role. Hence, the unsurprising marginalisation of the female victims of rape by the community, whose role is essential in the reproduction and continuity of the group, led to the effective

[45]Siobhán K Fisher. "Occupation of the Womb: Forced Impregnation as Genocide." Duke Law Journal, (1996): 123-124.
[46]Anthony Marino, "Bosnia V. Serbia and the Status of Rape as Genocide under International Law." Boston University International Law Journal 27, (2009): 221.
[47]Skjelsbaek, "Sexual Violence in Times of War" (1999): 78.
[48]Skjelsbaek, "Sexual Violence in Times of War" (1999): 80.
[49]Lynda E. Boose, "Crossing the River Drina: Bosnian Rape Camps, Turkish Impalement, and Serb Cultural Memory." Signs - Journal of Women in Culture and Society, (2002): 74.
[50]Snyder et al., "On the Battleground" (2006): 191.

destabilisation of the Bosnian Muslim community and the steady reduction of the population. With the passage of time, these methods would result in the "destruction of the group as a whole".

b) Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)

On March 30, 1993, Bosnia and Herzegovina filed a lawsuit against the Federal Republic of Yugoslavia before the International Court of Justice (ICJ) concerning alleged violations of the Genocide Convention.[51] Rape and its catalytic role as an integral part of the genocidal process were explicitly mentioned in Bosnia's application to the International Court of Justice. According to Bosnia, the systematic rape carried out by the Serb forces against Muslim women was an act of genocide due to the "serious bodily or mental harm caused to the members of the protected group".[52] The Court accepted that the systematic massive mistreatment, beatings, rape, and torture could cause the aforementioned harm during a conflict and thus constitute genocide had there been the specific intent required for this crime. However, it found the presented evidence inefficient to prove the specific intent, i.e., to destroy the protected group in whole or in part. Hence, this allegation was rejected.[53]

It is noteworthy that the Court also failed to separate rape from the other forms of violence that the female victims had been exposed to. Paragraphs (d) and (e) of Art. II of the Genocide Convention constituted additional legal grounds for Bosnia's allegations as an explicit function of the genocidal campaigns. However, the Court held that the evidence provided could not qualify rape as being neither "an imposed measure intended to prevent births in the protected group [par. (d)] nor an act "forcibly transferring children of the group to another group" [par. (e)].[54] Hence, the arguments were rejected as the alleged acts could not be identified as actus reus of the crime of genocide.

The judgment was delivered on February 26, 2007, with the verdict of Serbia not being directly responsible for committing genocide, except for the case of Srebrenica.[55] Regarding the rest of the

[51]Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 91, 26 February 2007, par. 298, 315 & 373. [Hereinafter 'ICJ Judgement'].
[52]Genocide Convention, Art. II (b).
[53]ICJ Judgement, par. 319.
[54]ICJ Judgement, par. 36, 367.
[55]ICJ Judgement, par. 376.

accusations, Serbia was found not guilty of genocide; it had, however, breached its obligation to prevent genocide and proceed to the punishment of the people responsible.[56] The ICJ recognised that sexual violence could constitute genocide when it is used as a means of destroying a population, but it held that the evidence did not show that the use of rape was part of a plan to destroy the Bosnian population.

c) International Criminal Tribunal for the Former Yugoslavia (ICTY)

The magnitude of the genocide and the nature of the conflicts could not leave the international community apathetic. On May 25, 1993, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by the United Nations Security Council through Resolution 827 *'for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date determined by the Security Council upon the restoration of peace'*.[57] Genocide was one of the four types of offences that the Tribunal had power over prosecuting, along with grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, and crimes against humanity.[58]

The widespread and systematic attack in the form of rape against Bosnian women was not something the world had ever seen before. What was different this time was the attention that this facet of the atrocities received, as the crucial role of rape in the genocidal campaign was noticed and discussed publicly.[59] The reasons behind this shift in the way rape was viewed are several, namely, the publicity of the stories of the victims, the magnitude of the abuses and the general tendency to protect women's rights more adequately and address the grave gender-related human rights violations.[60]

One key factor was also the feminist movement towards a more inclusive and gender-sensitive international legal order. Leaders of this struggle can be found among feminist activists and scholars.[61]

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[56]ICJ Judgement, par. 432.
[57]UN Security Council, Security Council resolution 827 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)], 25 May 1993, S/RES/827 (1993).
[58]UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993.
[59]Snyder "On the Battleground of Women's Bodies" (2006): 186.
[60]Karen Eagle, "Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina." Cambridge University Press 99, no. 4 (2005): 778-816.
[61]Eagle, "Feminism and Its (Dis)Contents" (2005): 778.

They were advocating in favour of the creation of the ICTY Statute that would pay appropriate attention to the feminine experience of the atrocities, a huge part of which was, sadly, the mass rape. Their main argument was that international law was created "by men, for men," and women were traditionally marginalised and left out of its scope of protection.[62] And against all expectations, their voices were finally heard.[63] The incorporation of rape into a text of international criminal law, the ICTY Statute, was accomplished. The pioneering document establishing the ICTY explicitly mentioned rape as a punishable act. Article 5 (g) explicitly mentions rape as a crime against humanity.[64] This progressive provision, to some extent, transformed the perception of rape from an isolated incident or an affront to personal honour to a grave offence warranting international attention. This removed the burden of shame off of the victims and established a solid legal foundation for the prosecution of perpetrators of rape.

The ICTY statute adopted the definition of genocide of the 1949 Genocide Convention.[65] The non-mention of rape as an act constituting genocide, along with uncertainty around the issue of rape due to the absence of one internationally accepted definition of the term, the already difficult role of the ICTY. Fifty years after the ratification of the latter, there had been no attempts to recognise a more contemporary legal definition of genocide by explicitly enlisting rape as an act, leading to another missed opportunity for the law to be updated in light of present-day conditions.

Under these ambiguous circumstances, it was inevitable that rape cases would be dealt with differently, and the outcome would be conflicting judgments. ICTY undeniably wrote history by introducing new ways of perceiving and prosecuting rape in international criminal law. The legal legacy of the Court lies in its relevant landmark decisions. Prosecutor v. Tadić historic judgement was the first-ever trial for sexual violence against men. [66] In the case of Prosecutor v. Mucić et al., rape was considered torture.[67] The case against Furundžija was the first case of the Court to focus exclusively on sexual violence.[68] Another landmark ruling was against Kunarac et al., who were found guilty of sexual

[62]Hagay-Frey, "Sex and Gender Crimes" (2011): 11.
[63]Eagle, "Feminism and Its (Dis)Contents" (2005): 781.
[64]Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, UN Doc. S/RES/827.
[65]Genocide Convention, Art. II.
[66]Prosecutor v. Tadic (Judgement in Sentencing Appeals) IT-94-1-A (ICTY), 26 January 2000.
[67]Prosecutor v. Mucić et al. (Judgment in Sentencing Appeals) IT-96-21-T (ICTY), 16 November 1998.
[68]Prosecutor v. Furundžija (Judgment in Sentencing Appeals) IT-95-17/1-A (ICTY), 21 July 2000.

enslavement and rape as crimes against humanity. [69] Lastly, the case against Krstić linked rape with ethnic cleansing.[70]

This case law set an important precedent for future prosecutions on rape and, in general, sexual and gender-based crimes in conflict. However, without disregarding the triumphs of the Court, the Tribunal failed to acknowledge the connection between rape and genocide. The threshold of proven intent to destroy the specific, protected group in whole or in part was not met, and the dolus specialis of the crime of genocide was not established. The evidence presented in the Court was found, once again, inefficient. The inability of one of the most prestigious International Tribunals to proceed to convictions on the ground of genocidal rape in the case of Bosnia indicates the complexity of the issue and highlights the difficulties and limitations of international criminal procedures in atrocities of such a scale.

1.3. The Rwandan genocide and the International Criminal Tribunal for Rwanda (ICTR)

a) Historical Background

During the decade 1990-1999, the world witnessed two of the most atrocious genocides in modern human history: the Bosnian and the Rwandan Genocide. The first was analysed above. This subchapter is dedicated to the second. Starting by briefly explaining the historical background of the conflict and ending by elaborating on the international response to the atrocities with the founding of the international criminal tribunal, an overview of rape's role in the Rwanda genocide will be provided. The purpose of the ICTR was the prosecution of international crimes committed in Rwanda from January 1, 1994, to December 31, 1994. The genocidal attack on women's bodies in the form of rape shocked the local and international community. It is estimated that 250.000 – 500.000 Tutsi women and girls or Hutu women associated with Tutsi men fell victim to rape in the one hundred terrifying days of the conduct of the

[69]Prosecutor v. Kunarac et al. (Judgment in Sentencing Appeals) IT-96-23 & IT-96-23/1-A (ICTY), 12 June 2002.
[70]Prosecutor v. Krstić et al. (Judgment in Sentencing Appeals) IT-98-33-A (ICTY), 19 April 2004.

genocide (from April 7th, 1994, to July 15th, 1994).[71] The exact number of victims is still unknown, as a great number of survivors chose not to report the abuse they suffered out of fear of further traumatisation.

Rwanda's inhabitants were divided into three main ethnic groups: the Hutus, the majority; the Tutsis, the minority and the Twas, which constituted only a tiny percentage of the population.[72] The long-standing tensions between the two major ethnicities, which were escalating through the years and were aggravated by the Belgian administration's tactic favouring, at times, the Tutsi and, at times, the Hutu group, resulted in the genocide of 1994. The starting point was the killing of the country's president Juvénal Habyarimana on the 6th of April of the same year when his plane was shot down over Kigali Airport.[73] This tragic incident marked the beginning of a genocidal campaign without mercy. One essential part of the extermination process was the widespread rape of women belonging to the Tutsi minority by Hutu men. The intersectional attack against Tutsi women was based both on their gender and their ethnic identity. As Sherrie Russel-Brown observed: *"[...] these women were targeted both because of their ethnicity and because of the beliefs and opinions held by Hutus about Tutsi women as women."*[74]

As in every genocide, a variety of rape types took place and definitely, not all of them were integrated into the broader genocide program. A lot of cases were subsumed under the category of "opportunistic rapes".[75] These were isolated incidents where soldiers or everyday Hutu men took advantage of the generalised chaos to engage in the sexual abuse of Tutsi women. The social division of the ethnic groups in Rwanda created a hostile atmosphere amongst their members and intensified the feeling of inferiority of male Hutus, which was a result of their chronic marginalisation and exclusion from positions of power.[76] This lust for revenge turned into a lust for dominance, expressed in the most

[71]Special Rapporteur of the Commission on Human Rights Under Para. 20 of S.C. Res. S-3/1, Report on the Situation of Human Rights in Rwanda, para. 16, E/CN.4/1996/68 (Jan. 29, 1996), available at http://www1.umn.edu/humanrts/commission/country52/68-rwa.htm ("rape was the rule and its absence the exception").
[72]Van Shaack, "Engendering Genocide" (2008): 2.
[73]Lilian A. Barria, and Steven D. Roper. "How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR." The International Journal of Human Rights, (2006): 353.
[74]Sherrie L. Russell-Brown, "Rape as an Act of Genocide." Berkeley Journal of International Law, no 21 (2003): 352.
[75]Christopher W. Mullins, "'WE ARE GOING TO RAPE YOU AND TASTE TUTSI WOMEN': Rape during the 1994 Rwandan Genocide." The British Journal of Criminology 49, (2009): 729.
[76]Mullins, "WE ARE GOING TO RAPE YOU" (2009): 731.

hideous form of sexual violence: rape.[77] For the first time, Hutu men could conquer the unapproachable, in their eyes, Tutsi women.[78] The opportunistic character of those rapes excludes their categorisation as genocidal acts.

However, opportunistic rapes appeared to be the exception; the vast majority of the rapes served, one way or another, the conduct of the genocide.[79] An indicator that the majority of rapes were an orchestrated tactic of genocide is the fact that Hutu leaders encouraged, ordered, or even participated in their commission.[80] A plethora of testimonies during the landmark cases of the ICTR confirmed their involvement in the conduct of rapes, revealing a pattern of acts of sexual violence against Tutsi women.[81] Another sign is the way a lot of those rapes were committed. The implications of public rape, for example, the shame and the stigma they inflicted on the victims, had a devastating effect on the individuals and their community as a whole. The cohesion of the group was being harmed irreversibly.[82] As a result of the brutal way the public or not, rape occurred, many survivors were left with physical and psychological wounds. In many instances, women were afterwards sexually mutilated and forcibly sterilised, which also facilitated the conduct of the genocidal campaigns by depriving them of their right to have children and jeopardising the future of their ethnic group.[83] Others were murdered, after being violently and repeatedly raped. Killing the victims after or even during the sexual assault was the most effective way of facilitating the genocide. From the ones who survived, a lot decided to distance themselves from their community or faced the rejection of their families and loved ones as a consequence of the humiliation they experienced through the public rapes. Once again, the exclusion of the female members of the group unavoidably led to the inability of the group to reproduce and pass their unique cultural identity to the next generations.[84]

[77]Yuyun Sri Wahnyuni, "Rape as a Weapon in Genocide and Wars: Enquiring the Problems of Women's Witnessing Rape." Journal of Social Studies 16, (2020): 128.
[78]Mullins "WE ARE GOING TO RAPE YOU" (2009): 733.
[79]Mullins "WE ARE GOING TO RAPE YOU" (2009): 726.
[80]Mullins "WE ARE GOING TO RAPE YOU" (2009): 722, 730.
[81]Akayesu, par. 416-448.
[82]Mullins "WE ARE GOING TO RAPE YOU" (2009): 722.
[83]Rejoice Nharaunda-Makawa, and Jeffrey Kurebwa. "Sexual Violence against Women during the Rwandan Genocide: A Narrative Review." International Journal of Peace and Development Studies 12, no. 2 (2021): 73.
[84]Van Shaack, "Engendering Genocide" (2008): 17.

b) International Criminal Tribunal for Rwanda (ICTR)

The mass breaches of human rights and international law, especially international criminal law, were ignored for a long time. It was only when the number of victims reached six figures that the international community decided to intervene. In 1994, the United Nations Security Council, through Resolution 955, founded the International Criminal Tribunal for Rwanda (ICTR) with the purpose of prosecuting persons responsible for grave international law violations committed from January 1, 1994, to December 31, 1994.

The court's ratione materiae covers the crimes of genocide, crimes against humanity and certain war crimes. The Statute of the ICTR, which drew significantly from the ICTY Statute, also enlisted rape as a crime against humanity under Article 3 (g).[85] Furthermore, rape was enlisted in the acts constituting serious breaches of Article 3 of the Geneva Conventions and Protocol II. Thus, the legal instrument under Art. 4 provided an additional legal ground for the prosecution of persons committing rape, contributing to a more proper conceptualisation of rape in international law.[86] However, embracing the link between rape and women's honour, as was perceived in the 1949 Geneva Conventions, is problematic. Viewing rape as an aggravated form of outrage upon personal dignity is a return to outdated notions, perpetuating misconceptions regarding rape. This provision negatively affects victims as it is an indirect insult to them instead of a weapon of defence. The fact that victims should accept that their personal honour has been harmed in order for the legal process to proceed and for justice to be done is unfair and wrong. The expectation for victims to accept that their honor has been violated due to rape is not only profoundly challenging but also entirely unnecessary. Rape should be regarded for what it truly is: a heinous act of violence.

In Article 2 of the Statute of the Tribunal, the definition of genocide from the Genocide Convention, which does not explicitly include the acts constituting genocide, was incorporated verbatim.[87] Nonetheless, the non-classification of rape as a genocidal act in the Statute of the Tribunal did not set an obstacle in prosecuting it as such.[88] Rape as a part of the genocidal campaign was found to

[85]Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, UN Doc. S/ RES/955.
[86]UN Security Council, Statute of the International Criminal Tribunal for Rwanda
[87]UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, S/RES/ 955 (1994).
[88]Chile Eboe-Osuji, "Rape as Genocide: Some Questions Arising." Journal of Genocide Research, (2004): 252.

be a way of "causing serious bodily or mental harm in the group" and was, thus, successfully subsumed under Article 2 of the Statute, i.e. the international crime of genocide. In 1998, the ICTR achieved what the other Courts and Tribunals were reluctant or unable to do: characterise rape as a predicate act of genocide and, for the first and, thus far, the only time in history to prosecute a person for genocidal rape.[89] The verdict against Akayesu was a promising exception to the rule of disregarding rape's catalytic role in the genocidal plan. Jean-Paul Akayesu was a bourgmestre in Taba Commune before and during the conduct of the 1994 genocide. During the most intense time of violence, his office was seen as a refuge where women and children, mainly Tutsi, would flee, seeking protection. Unfortunately, for a lot of them, this supposedly safe space turned into a nightmare. Many women fell victim to rape inside and around the administrative building by Hutu men.

Victims and witnesses testified in front of the Court, and despite the defendant not being accused of committing the rapes himself, he was accused of aiding and abetting their commission. Furthermore, he failed to comply with his obligation as a person of authority to prevent the atrocities from happening. In this ground-breaking ruling, the Court held the defendant accountable for rape as *"[..] the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, [..], constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such."*[90] In this pioneering case, the judges found the evidence presented efficient. The two testimonies of witnesses J and H played a key role in emphasising the interrelatedness of rape and genocide.[91] The Chamber was convinced that the rapes of Tutsi women were committed with the intent to destroy the group as a whole. The judicial prerequisites of the crime of genocide, both the actus reus and the mens rea, were fulfilled. Hence, JP Akayesu was convicted of genocidal rape in *"the most important decision rendered thus far in the history of women's jurisprudence".*[92]

However, it is important to mention that such a notable success was an exception rather than the norm. In the rest of the cases, rape was prosecuted solely as a crime against humanity without establishing

[89] Nharaunda-Makawa, and Kurebwa. "Sexual Violence against Women" (2021): 75
[90] Akayesu, par. 731
[91] Van Shaack, "Engendering Genocide." (2008): 10
[92] Kelly Askin, "Women's Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC", in International Crimes, Peace and Human Rights: The Role of the International Criminal Court (Dinah Shelton ed., 2000): 52.

a clear link between the perpetration of rape and the commission of genocide, even when perpetrators were convicted for both offences.

A glaring example of the Court's failure to acknowledge the nexus between genocide and rape is the case against Pauline Nyriamasuhuko, the only ICTR's female accused. The defendant was the former Minister of Women and Family Affairs. During the active phase of the conflict, she and her son set barricades on a road in order to block the passage of Tutsi people to safer areas. When a number of women and children were gathered, she ordered the Hutu men under her command to rape them.[93] For this act, Nyriamasuhuko was found guilty of genocide and rape as a crime against humanity due to her encouragement of sexual acts through using her political influence.[94] The two crimes, however, were not considered linked and constituted two separate grounds for conviction.

Another example is the case against Musema, who held a prominent position within the Hutu extremist movement. On May 13, 1994, while leading a group of Hutus nationalists, he found a group of women hiding in the bushes. After driving them out of their hideout, he selected and raped one of them and afterwards encouraged his subordinates to follow his example, quoting, *"The young men should take the Tutsi women and see how they are made".*[95] For these acts, the Court found that the actus reus and the mens rea of genocide and rape as a crime against humanity were fulfilled and, thus, held Musema accountable for participating in and inciting rape against Tutsi women.[96]

Examining the historical context and judicial handling of three of the most brutal genocides in human history is essential for comprehending the progression towards the conceptualisation of rape within the realm of international law. The Nuremberg trials marked the inception of contemporary international law; thus, it is fitting to start with this pivotal historical event that brought mass atrocities to the forefront of international legal discourse. The absence of conviction on the legal grounds of rape further reflects the general disregard for the crime during the era in which the trials occurred. Bosnian genocide played a major role in conceptualising rape under international criminal law by recognising rape as a crime against humanity in the judgments of the ICTY. Lastly, the Rwandan genocide, as well

[93] Prosecutor v. Nyiramasuhuko (Judgement and Sentence) ICTR-97-21-I, (ICTR), 26 May 1997, para 627.
[94] Hagay-Frey, "Sex and Gender Crimes." (2011): 100.
[95] Christopher W. Mullins, ""He Would Kill Me with His Penis": Genocidal Rape in Rwanda as a State Crime." Critical Criminology: An International Journal 17, (2009): 17.
[96] Prosecutor v. Musema (Judgement and Sentence), ICTR-96-13-T, (ICTR), 27 January 2000.

as the judicial handling of rape in the trials of ICTR in the aftermath of the atrocities, finally recognised rape as a crime against humanity, a war crime and most importantly, as an act constituting genocide.

2. Rape in international law

This part of the dissertation is dedicated to exploring the progress of conceptualising and defining rape within various branches of international law. Starting with an exploration of rape in the context of international criminal law, the study will focus on the conceptualisation of rape as delineated in the Statute of the International Criminal Court (ICC), the culmination of the efforts for international criminal justice. Afterwards, this chapter will delve into the different definitions of rape in an international context presented by the ICTR Chamber in seminal cases such as Akayesu (1998), Furundžija (1998), and Kunarac (2001). By critically evaluating the merits and drawbacks of each version, the research will identify the most appropriate definition, particularly in relation to the recognition of genocidal rape.

After providing an overview of the process of defining rape, the discussion will expand on contextualising rape under international humanitarian law, which initially introduced rape to the legal world. Notably, the provisions of the Geneva Conventions represent the earliest international instruments that explicitly prohibit rape, albeit without establishing a direct connection to genocide. The final segment of this analysis is dedicated to the examination of rape within the framework of international human rights law (IHRL), including an exploration of how rape is addressed within the United Nations regime. The study seeks to shed light on the treatment and considerations given to rape as a human rights violation according to the provisions of the most important IHRL instruments.

2.1. Rape in international criminal law (ICL)

2.1.1. Rape within the Statute of the International Criminal Court

From the continuous occurrence of mass atrocities all around the world emerged the need to establish a permanent International Criminal Court (ICC) to fight impunity by holding perpetrators of international crimes accountable. After being under discussion for years, on July 17, 1998, the ICC was founded through the adoption of the Rome Statute. It was the result of multilateral negotiations and received widespread support from the international community. The ICC was created as a complementary institution to national criminal justice systems, with the goal of stepping in when states are unable or unwilling to prosecute those responsible for the most serious crimes. The crimes falling under the

jurisdiction of the court are four: genocide, crimes against humanity, war crimes and, for the first time, the crime of aggression.

The definition of genocide, as stated in the Genocide Convention, was replicated verbatim within the provisions of the Rome Statute, thereby excluding rape from the crime of genocide. Following the example of the ad hoc tribunals, ICTY and ICTR, the Statute of ICC enumerates rape as a crime against humanity. More specifically, Article 7 (1)(g) of the Statute explicitly includes rape as a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population.[97] This provision recognises the gravity of rape as a form of violence and its impact on individuals and communities during times of conflict or systematic abuse. Furthermore, the Rome Statute criminalises rape and other forms of sexual violence as war crimes under Article 8 (2)(b)(xxii). It specifies that rape or any other form of sexual violence of comparable gravity can constitute war crimes when committed as part of a plan or policy or in a systematic manner against a civilian population or in armed conflict.[98]

In addition to the criminalisation of rape, the Statute also draws attention to prosecution procedures in cases of sexual violence, including rape. Article 54 (b) stresses the importance of taking appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, respecting the interests and personal circumstances of the victims and witnesses, in particular where it involves sexual or gender violence.[99] In previous instances, in the ICTY and the ICTR, the lack of efficiency in presenting evidence has resulted in a failure to secure convictions for sexual violence and rape. The inclusion of this concept in the Rome Statute reflects substantial procedural and evidentiary advancements that prioritise the protection of victims' rights and enhance the effectiveness of the Court's proceedings.

The specific mention rape in the statutes of the ad hoc tribunals and the ICC is a milestone in the progress of the criminalisation of rape in an international context. However, the drafters of the instruments missed the opportunity to provide a proper and adequate definition of rape. Hence, the judges

[97]UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6 [Hereinafter 'Rome Statute']: Art. 7 (g).
[98]Rome Statute, Art. 8 (b)(xxii).
[99]Rome Statute, Art. 54 (b).

of both International Criminal Tribunals were placed in the challenging position of filling this legal lacuna by defining the method of rape considering the specific context and unique characteristics of every case. This led to a variety of definitions in order to enable proceeding to convictions on this legal ground.

2.1.2. Defining rape in international criminal law

In contrast to the customary approach of establishing legal terms through initial definition in international documents followed by subsequent case law development, the definition of rape in international law underwent a distinctive trajectory, originating from the progressive evolution of jurisprudence in the field during the 1990s. The main definitions that emerged from both international criminal tribunals' efforts are three.

The first historical definition of rape in international criminal law was formulated by the ICTR Chamber of the case against Akayesu on September 2, 1998, as follows: *"The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."*[100] In view of the events that occurred in Rwanda, the judges had to define the term in a way it would appropriately describe the aggression of the sexual crime, emphasise the violence and not focus on the body parts or the consent.[101] The definition took a different approach from the national jurisdictions that traditionally describe rape as "non-consensual sexual intercourse" towards a broader idea that includes the insertion of objects in the genital areas.[102] This tactic was frequently used in the Rwanda Genocide.[103] According to the Trial Chamber, rape could be subsumed under all three international crimes; as *"other inhumane act"* under crimes against humanity, as an *"outrage upon personal dignity"* under war crimes, and as an act causing *"serious bodily or mental harm"* under the crime of genocide.[104] For the first time, the linkage between rape and genocide was highlighted. In Par. 731, the Chamber claimed that: *"Rape and sexual violence constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy in whole or in part a particular group targeted as such".*[105]

[100]Akayesu, par. 688.
[101]Eboe-Osuji, "Rape as Genocide" (2004): 253.
[102]Akayesu, par. 596.
[103]Akayesu, par. 686.
[104]Akayesu, par. 688.
[105]Akayesu, Par. 731.

A second attempt to define rape in an international context came on December 10, 1998, by the ICTY Trial Chamber in the case against Furundžija. According to the definition formulated, the core elements of the crime of rape in an international context are: *"(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person."*[106] The Chamber of this case did not accept the formerly formulated definition in the case against Akayesu. Distancing themselves from the "vague" definition of the ICTR, the judges took a more "mechanical" and "detailed" approach, focusing on specific body parts and objects.[107] As clarified in the body of the decision, that definition drew inspiration from major legal systems of the world, including influence from national legislation.[108] However, the incorporation of the element of consent was refused. They acknowledged that the environment of generalised violence prevailing in the areas affected by the conflict as well as "any form of captivity, vitiates consent."[109] The most important aspect of this approach was the explicit mention of forced oral sex. This progressive notion endorsed the legal conceptualisation of rape in a broader and more contemporary manner. [110]

The last endeavour of the ad hoc tribunals to define rape can be seen in the ruling of ICTY against Kunarac. In this case, the judges did not start from scratch but built the definition on the basis of the previously mentioned Akayesu and Furundžija definitions.[111] The main distinct point was the inclusion of the element of consent. In the opinion of this Chamber, the issue of consent should be included in the definition of the term, a position that was clearly influenced by national jurisprudence. According to the letter of the ruling: *"The actus reus of the crime of rape in international law is constituted by: 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; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the*

[106]Prosecutor v. Furundžija (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998. Par. 185 (hereinafter 'Furundžija').
[107]Werner Hofs, "Kunarac: Defining Rape under International Criminal Law." E-International Relations, (2014): 3.
[108]Furundžija, par. 177-178.
[109]Furundžija, par. 271.
[110]Furundžija, par. 184.
[111]Hofs "Kunarac: Defining Rape under International Criminal Law" (2014): 2.

surrounding circumstances. The mens rea is the intention to effect this sexual penetration and the knowledge that it occurs without the consent of the victim." [112]

All three definitions possess certain advantages and weaknesses. The Akayesu definition has been criticised for its perceived broadness, as the absence of specific technical elements may allow for potential abuse of the term. Nevertheless, this definition takes a conceptual approach, aiming to encompass all potential cases of rape, both past and future. Furundžija definition adopts a more technical approach enumerating certain acts and body parts, but it fails to capture the essence of rape, which transcends mere technicalities. The violation of one's integrity through different forms of rape cannot be confined to a rigid list. While this approach may have been suitable for the specific circumstances of the Furundžija case, it lacks applicability to a broader range of situations.

The main argument against the Kunarac definition is the inclusion of the element of consent, which was drawn intense criticism from human rights society. It is argued that viewing rape in the same manner as under national laws in situations where international criminal law applies is inappropriate.[113] In the context of genocide, uncontrolled violence, chaos, and anomie prevail. These circumstances make it difficult for genuine consent to be given, even if the victim initiated the sexual act as a means to escape death or other horrors. Another shortcoming is the potential insulting tone of the definition, implying that victims might have agreed to the forced sexual acts. This further hinders survivors and witnesses from coming forward and sharing their stories due to the mistrust in the legal approach and the misconception that their experiences do not fall within this definition of rape.[114] A potential solution would be to shift the burden of proof from the victim to the perpetrator. That way, the committers of rape themselves should prove the existence of consent. By requiring the perpetrators to prove the existence of consent, the burden is removed from the victims, who would otherwise have to prove that they did not consent to the acts perpetrated against them.

Considering all these, the definition formulated in the Akayesu case is argued to be the most suitable and fitting approach to rape in situations where international criminal law is applied. The supposed broadness of the definition can be narrowed down through judicial interpretation and

[112] Prosecutor v. Kunarac, Radomir Kovač and Zoran Vuković (Trial Judgment), IT-96-23-T & IT-96-23/1-T, ICTY, 22 February 2001. Par. 460 (hereinafter: 'Kunarac').
[113] Hofs "Kunarac: Defining Rape under International Criminal Law" (2014): 3.
[114] Hofs "Kunarac: Defining Rape under International Criminal Law" (2014): 3-5.

application. Many chambers endorsed the Akayesu definition and proceeded to corresponding convictions according to it. The most remarkable examples are the cases of Mucić et al.[115], Musema[116], and Niyitegeka [117]. It is more beneficial to have a definition that encompasses the concept of rape and covers all the potential cases of rape in an international context rather than risking leaving certain rape cases unpunished because they do not meet the technical criteria of narrow definitions. Notably, it was this exact definition that enabled the Chamber to characterise rape as genocide, leading to the prosecution of the accused on this ground. This connection between the formulated definition and the subsequent prosecution cannot be dismissed as coincidental.

2.2. Rape in international humanitarian law (IHL)

Sporadic mentions of rape and its prohibition according to the norms on the customs of war in texts date back to the 1300s.[118] The most important documents are probably the 1863 Lieber Code, which prohibits rape of persons in an invaded country[119] and the 1907 Hague Convention, which does not explicitly mention rape but it implicitly considers it as an offence to family's honour.[120] Nonetheless, these texts did not enjoy wide acceptance and recognition and, as a result, did not bring any ground-breaking changes in international law. A definition of rape did not accompany the mentions and, as a consequence, were not able to clarify the ambiguity of what rape means.

The era of silence, when rape and other forms of sexual violence were simply left outside of the international legal order, lasted until 1949, the year of the crystallisation of the long-standing and well-established customs of war into norms of international humanitarian law. The primary objective of this

[115] Prosecutor v. Mucić aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Trial Judgement), IT-96-21-T, (ICTY), 16 November 1998.
[116]Prosecutor v. Musema (Judgement and Sentence), ICTR-96-13-T, (ICTR), 27 January 2000.
[117]Prosecutor v. Niyitegeka (Judgement and Sentence), ICTR-96-14-T, (ICTR), 16 May 2003.
[118]Kelly D. Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles" Berkeley Journal of International Law 21, no. 2 (2002): 288-349.
[119]U.S. Dep't of Army, Gen. Orders No. 100, art. 44 (1863), available at http://www.civilwarhome.com/liebercode.htm. Accessed May 30, 2023.
Art. 44 states: "All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence. A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior."
[120]Hague Convention with Respect to the Laws and Customs of War on Land, (October 18, 1907), art 46, 36, Stat. 2277, T.S. No. 539 ("Family honours and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.").

branch of law is to mitigate and prevent human suffering during armed conflicts. These rules are applicable not only to governments and their armed forces but also to armed opposition groups and any other parties involved in a conflict. The key instruments of humanitarian law are the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, provide protection for victims of war and set rules for the treatment of prisoners of war, civilians, and other non-combatants. While international humanitarian law has consistently provided women with general protection equivalent to that of men, it also recognises the necessity of affording women additional special protection based on their specific needs.

The creation of the 1949 Geneva Conventions marked the beginning of the so-called era of honour regarding sexual violence.[121] Sexual crimes were framed as offences against women's honour under Article 27 of the Fourth Geneva Convention.[122] More specifically, Art. 27 protects civilians in times of war and occupation and prohibits violence to life and person, including rape, sexual slavery, and forced prostitution.[123] The Convention also prohibits acts of violence or threats of violence against the dignity of women. These provisions are applied to all persons, regardless of their nationality, who are in the hands of a party to the conflict or under its control. This approach is problematic on many levels. Firstly, it aggravates the victims' shame and sets their virginity as a criterion for their value. It reduces their whole human identity to their reproductive abilities and the "purity" that derives from the absence of any sexual activity.[124]

The Third Geneva Convention, which applies to prisoners of war, also provides protection against rape and other forms of sexual violence. Article 14 of the Convention prohibits physical or mental torture, as well as any form of coercion that undermines the free will of prisoners of war.[125] This includes sexual violence, which is considered a form of coercion. Lastly, the 1977 Additional Protocols to the Geneva Conventions strengthen the protection of civilians and other non-combatants in armed conflicts. Protocol

[121]Aloha Hagay-Frey, "Sex and Gender Crimes in the New International Law - Past, Present, Future." Leiden - Boston: Martinus Nijhoff Publishers. (2011): 69.
[122]International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.
[123]International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.
[124]Hilary Charlesworth, "Feminist Methods in International Law" The American Journal of International Law 93, no. 2 (1999): 386-387.
[125]International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135.

I is applied to international armed conflicts[126], while Protocol II is applied to non-international armed conflicts.[127] Both Protocols prohibit acts of violence against the dignity of women, including rape, sexual slavery, and forced prostitution.

The concept of genocide is not explicitly mentioned or criminalised within the framework of the Geneva Conventions. As a result, rape is not specifically contextualised within the crime of genocide under International Humanitarian Law (IHL) instruments. However, it is noteworthy that a concise overview of the provisions pertaining to rape and sexual violence in IHL instruments, as some of the initial legal instruments to prohibit such acts explicitly, contributes to outlining the progress of the legal conceptualisation of rape.

2.3. Rape in international human rights law (IHRL)

International human rights law (IHRL) lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, protect and fulfil human rights.[128] The following paragraph will provide a concise overview of the perception of the concept of rape under international human rights law in the most important relevant instruments. In most IHRL instruments, rape is not explicitly mentioned but it is implied as a type of the broader category of sexual violence.

The first instruments of international human rights law, which constitute the cornerstone of this branch of international law, failed to incorporate rape into their provisions. Neither the UN Charter, the UN Declaration of human rights, nor any other UN Convention specifically mentions rape. This omission echoes the prevailing disregard for rape and sexual violence in the era of drafting the documents. Even the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[129],

[126]International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125, UNTS 3.
[127]International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125, UNTS 609.
[128]UN Human Rights - Office of the High Commissioner for Human Rights Commissioner Office. "International Human Rights Law" United Nations. Accessed July 10, 2023. https://www.ohchr.org
[129]UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249.

often referred to as the "Women's Bill of Rights", does not mention violence against women in its provisions and under its protection net. This legal lacuna was filled in 1992 by the adoption of General Recommendation 19, which addresses the issue of violence against women, including domestic violence, sexual assault, and harmful traditional practices.[130] It highlights the obligations of states to prevent, investigate, and punish such violence and to provide support and remedies to victims.

Following the example of the Recommendation, the 1993 Vienna Declaration mentions systematic rape and considers it a violation of the human rights of women under Art. 38.[131] This progress was further solidified with the adoption of the "Beijing Declaration and Plan of Action" in 1995, during the ten-year review of the UN Decade for Women. Chapter D[132], which is dedicated to violence against women, also recognises systematic rape as a violation of human rights (Art. 114), adopting the same idea as the processor, the Vienna Declaration. Furthermore, chapter E[133] of the Beijing Platform, which is dedicated to women and armed conflict, reaffirms that rape constitutes a massive violation of human rights (Art. 131)[134]. In the following articles, this plan outlined specific targets that the international community was required to achieve concerning women and international security, most importantly, the increased participation of women in decision-making positions (Art. 142)[135].

The international women's rights movement, along with civil society organisations, played a crucial role in advocating for more attention to be given to sexual violence as a human rights violation in conflict.[136] They highlighted the structural and systematic nature of this violence, recognising that it is not merely an unfortunate consequence of war but a deliberate strategy employed to terrorise and subjugate communities.[137] This struggle culminated in the development of Resolution 1325, which was the result of the increasing recognition that women are disproportionately affected by sexual violence

[130]UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992, par. 5-7.
[131]UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, Art. 38.
[132]United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995, Art. 112-130. [Hereinafter 'Beijing Declaration'].
[133]Beijing Declaration, Art. 131-149.
[134]Beijing Declaration, Art. 131.
[135]Beijing Declaration, Art. 142.
[136]Pratt Nicola, "Reconceptualizing Gender, Reinscribing Racial–Sexual Boundaries in International Security: The Case of UN Security Council Resolution 1325 on ''Women, Peace and Security''." International Studies Quarterly 57, (2013): 772.
[137]Pearl Karuhanga Atuhaire, Nicole Gerring, Laura Huber, Mirgul Kuhns, and Grace Ngirangu. Special Report: "The Elusive Peace: Ending Sexual Violence during and after Conflict." US Institute of Peace, (2018): 3.

during armed conflicts. [138] The issue of women's status and gender equality became increasingly intertwined with international peace and security concerns. This one-of-a-kind Resolution is dedicated to Women, Peace, and Security. These three factors were put together for the first time under the UN regime, highlighting their interrelation.[139] The key goals of this Resolution are three, the participation of women in peacekeeping missions and decision-making bodies, the protection of women in conflict zones and the gender mainstreaming of the UN system. Sexual violence, unfortunately, constitutes a major part of the female experience of mass atrocities. Thus, under the provisions of this Resolution, women should be protected from rape, and other forms of sexual violence, occurring in conflict situations. Article 10 specifically *"calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape […]"*.[140]

While progress has been made, the full impact of Resolution 1325 on women's protection from sexual violence in conflict is yet to be realised.[141] This instrument was not proven efficient enough to protect women and change the scenery in international and internal conflicts. In an endeavour to reassert the significance of safeguarding women against sexual violence and the imperative to prevent such crimes in the context of armed conflict, the United Nations Security Council proceeded to adopt Resolution 1820 in 2008.[142] This Resolution reaffirms most of the principles delineated in its predecessor, UNSCR 1325. However, its scope is confined to a solitary segment of its antecedent, focusing exclusively on the protection and prevention of sexual abuse.

This document marks the first explicit recognition of sexual violence as a tactic of war and, subsequently, as a threat to international peace and security.[143] It further demands the complete cessation of the conduct of conflict-related sexual violence in conflict[144] as well as calls all the actors involved to take appropriate measures for the protection of civilians from this type of violence.[145] Paragraph 4 is pioneering for recognising sexual violence as *"a war crime, a crime against humanity and, a constitutive*

[138]UN Security Council, Resolution 1325 [on women and peace and security], 31 October 2000, S/RES/1325. [Hereinafter 'UNSCR 1325'].
[139]Carol Cohn, Helen Kinsella, and Sheri Gibbings. "Women, Peace and Security Resolution 1325." International Feminist Journal of Politics, (2001): 130.
[140]UNSCR 1325, par. 10.
[141]Christina Binder, Katrin Lukas, and Romana Schweiger. "Empty Words or Real Achievement? The Impact of Security Council Resolution 1325 on Women in Armed Conflicts." Radical History Review, (2008): 34.
[142]UN Security Council, Resolution 1820 [on acts of sexual violence against civilians in armed conflicts], 19 June 2008, S/RES/1820. [Hereinafter 'UNSCR 1820'].
[143]UNSCR 1820, par. 1.
[144]UNSCR 1820, par. 2.
[145]UNSCR 1820, par. 3.

act with respect to genocide". It emphasises the imperative to criminalise all types of sexual violence, including its most aggressive form: rape. It, also, reaffirms a policy of zero tolerance towards such practices, calling for an immediate end to the impunity enjoyed by perpetrators.[146] This is particularly crucial considering the prolonged period of disregard and underestimation of this facet of atrocities, which has perpetuated a culture of concealing crimes and allowing perpetrators to evade punishment. The grace period for perpetrators who unjustly enjoyed impunity at the expense of their victims is not only necessary but overdue. In the end, it stresses the importance of the collaboration of all factors involved and the international community to take appropriate measures in combatting conflict-related sexual violence.[147]

Rape, as the most profound type of conflict-related sexual violence, is a multidimensional and complex crime interconnecting international human rights law, international humanitarian law, and international criminal law.

[146]UNSCR 1820, par. 4.
[147]UNSCR 1820, par. 13-14.

3. Rape as genocide

3.1. Rape subsumed under the current framework of genocide

Throughout the evolution of genocidal practices, encompassing diverse modalities and techniques, the core definition of genocide has remained unchanged. However, a notable gap persists within the conceptual framework of genocide, specifically pertaining to the recognition and incorporation of rape as an integral component of the crime. This omission disregards the profound connection between rape and genocide, as rape often serves as a systematic tool for the destruction, subjugation, and elimination of targeted groups, thereby necessitating an urgent re-evaluation of the existing legal framework.

In the relevant international criminal instruments, rape is exclusively subsumed under other crimes of international character, either as a crime against humanity or a war crime. The crucial linkage between rape and the international crime of genocide emerged primarily through judicial proceedings and jurisprudential developments within the ad hoc international tribunals. The landmark Akayesu case, as discussed previously, significantly transformed the understanding and conceptualisation of genocidal rape within the realm of international law. Nevertheless, the explicit inclusion of rape as a distinct category of genocidal acts has yet to be accomplished in legal texts, as no international instrument expressly designates rape as an enumerated act of genocide. Notwithstanding this explicit classification absence, a contemporary interpretation of the genocide definition in the 1948 Convention, which has been adopted verbatim in subsequent legal instruments, indicates that rape fulfils all five components essential to establish the crime of genocide.[148]

More specifically, the first element of genocide under Art. II (a) of the Genocide Convention is "*killing members of the group".* A great number of genocidal rape cases throughout history ended up in the murder of the victim. The perpetrators, for various reasons, committed sexual acts on the bodies of the victims with such violence that eventually became lethal. As examined above, the motive of the killing could be the shame of the rapist for the unlawful act, or it could be the finale of the genocidal act.

[148]Reid- Cunningham "Rape as a Weapon of Genocide" (2008): 280.

They start by taking advantage of the vulnerability of the victims to actualise their sadistic fantasies before killing them, accomplishing their extermination mission better and more efficiently. Nonetheless, this case of rape with genocidal intent must not be mistaken to be the only one.

Rape could also fall under category (b) as a genocidal act "*causing serious bodily or mental harm to members of the group".* The physical damage suffered by the survivors of a vicious attack against their genitalia after or during the rape is hardly ever completely treated. But it is not only the visible impairment; the mental harm is equally painful and traumatising.[149] The constant fear of falling victim to similar attacks in the future, the unbearable "stain on their honour", the shame and the absolute lack of control over their bodies are not easily overcome.[150] In several cases of rape, the line between physical and mental harm is extremely blurred.[151]

Under provision *(c), "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"* could be categorised all cases of the intentional transmission of lethal Sexually Transmitted Diseases. In the case of Rwanda, a lot of HIV-positive men purposefully proceeded to unprotected sexual acts on women of the group under attack to infect them.[152] This is a horrible tactic that, unfortunately, was frequently used during the genocide. Paul Kagame, former President of Rwanda, stated that *"hundreds of AIDS patients were released from hospitals during the genocide and became an instrument of war, targeted at women".*[153] Consequently, the destruction of the targeted group would persist even after the cessation of the active phase of the genocide, as the afflicted individuals would continue to perish due to the transmission of the disease.

Case *(d) Imposing measures intended to prevent births within the group* was also broadly used in all of the genocides mentioned. The ostracism of female victims is a catalyst in the reproduction and continuity of the group as a whole. It is not only about the women who left or were forced to leave; the women who stayed were not eligible for marriage according to the conservative and regressive yet

[149]Reid- Cunningham "Rape as a Weapon of Genocide." (2008): 279.
[150]Christine Chinkin, "Rape and Sexual Abuse of Women in International Law." European Journal of International Law 5, no. 3 (1994): 329.
[151]Milaninia, "Understanding Serious Bodily" (2018): 1395.
[152]Mullins "He Would Kill Me with His Penis" (2009): 5.
[153]Louise Bouet, "AIDS As a Weapon of War: The Trauma Of The Rwandan Genocide." Human Rights Pulse. July 25, 2021. https://www.humanrightspulse.com/mastercontentblog/aids-as-a-weapon-of-war-the-trauma-of-the-rwandan-genocide. Accessed July 9, 2023.

dominant ideas supporting their irreversible harm to their honour and dignity.[154] Thus, the group was deprived of its right to reproduce, and the number of members was reduced steadily.

The last element *(e) forcibly transferring children of the group to another group",* at first sight, appears to be the least relevant and the most difficult to connect to rape; yet the children-products of rape and so-called "children of bad memories" that inherited the origin of their paternal side, the rapist's side, appear to fall within this category. In the case of Yugoslavia, this was more apparent. Perpetrators were forcibly impregnating women to enhance the Serbian character and increase the Serbian population of the area. Even if those children were not literally transferred to another group, according to their origin, they did not belong to the group of their mothers' and thus were refused a place within the community.[155]

The new developments at the global level gave rise to a number of legal practitioners and academics to address the link between rape and genocide as well their intersection with gender. In one such effort, the term gendercide was coined. Gendercide is a recently invented term used to examine genocide through a gender lens and observe the position of a certain sex in genocidal campaigns. It was created by analogy to genocide and could be defined as *"the deliberate extermination of persons of a particular sex or gender".*[156] According to Adam Jones, the mass rape of women in conflict, which is usually followed by their killing, as in many instances in Yugoslavia and Rwanda, constitutes a bright example of gendercide.[157] Women were targeted due to their dual identity as members of the group under attack and as women. Even though the term has not been legally recognised yet, it perfectly describes the situation of genocidal acts that excessively affect a certain gender.[158]

Nevertheless, the incorporation of rape within the existing categories does not consistently capture the essence of genocidal rape. The criteria for each category were not originally conceived with rape in mind, as at the time of formulating the definition of genocide, rape was a disregarded and marginalised phenomenon that received little attention (as exemplified by the Nuremberg proceedings).[159] Furthermore, it is not always unequivocally apparent how each instance of genocidal rape could be precisely categorised under the existing categories of genocidal acts. As will be discussed

[154]Nharaunda-Makawa, "Sexual Violence against Women" (2021): 75.
[155]Marino "Bosnia V. Serbia" (2009): 222-223.
[156]Adam Jones "Gendercide and Genocide" Journal of Genocide Research, (2000): 166.
[157]Jones "Gendercide and Genocide" (2000): 173
[158]Jones "Gendercide and Genocide" (2000): 189.
[159]Chapter 2.1. (b) of this dissertation.

later, the most appropriate approach for genocidal rape is its distinct classification as a separate act, designated as the sixth category (f) under genocide. This necessitates a modification in the letter of the law and an expansion of the definition of genocide.[160]

3.2. The distinctiveness of genocidal rape

3.2.1. Genocidal rape vs "ordinary" and opportunistic rape

The differentiation of genocidal rape from "ordinary" rape is the intent behind its occurrence.[161] In the case being examined in this dissertation, the method is used as one of the functions of a genocidal campaign, usually against the female members of the group attacked. As analysed above, the specific motive behind this method differs in every case; what is common, though, is the very core of the purpose: the total extermination of the group. In order to better comprehend the effect of genocidal rape and categorise it adequately in an international context, emphasis should be given to the intent.

Rape under national legislation is usually defined as "non-consensual sexual intercourse".[162] The occurrence of this crime, even if in some areas during a specific era, was frequent, does not qualify as genocide. It must be seen as isolated incidents that happen and are not part of a coordinated strategy. But even in the case of an ongoing genocide, not all rapes are strategically planned.[163] In some instances, the prevailing anomy gives the idea that crimes could go unnoticed, and the perpetrators could remain under immunity. And sadly, this has been the case in the past. Another important notion is the lack of a quantitative criterion for rape as a method of genocide. Hence, even only one rape that was committed with the intent to destroy the group in whole or in part can constitute genocide.[164] Rape is, at the same time, both a vicious attack on the person individually and a criminal offence on the entire group.[165] Notwithstanding the impact of the forced sexual act in every case and without disregarding the pain and

[160]Chapter 5.1. of this dissertation.
[161] Nharaunda-Makawa "Sexual Violence against Women" (2021): 73.
[162]Furundžija, par. 178-181.
[163]Masengesho Kamuzinzi, "Understanding the Innermost Nature of Genocidal Rape: A Community-based Approach." Rwanda Journal, Series B: Social Sciences 4, no. 1 (2017): 74.
[164]Van Shaack "Engendering Genocide" (2008): 19.
[165]De Vito "Rape Characterised as Genocide" (2009): 29.

horror of the opportunistic rape victims, the two cases should be separated in a legal analysis so that justice is being served in the most adequate way.[166]

The differentiation of genocidal rape from "ordinary" rape is an issue that has been intensively debated within the circles of legal practitioners and scholars.[167] A part of the feminist community expressed the opinion that subsuming this type of rape under genocide would underestimate the rest of rape cases.[168] Thus, victims of non-genocidal rape could unconsciously reduce the gravity of their experience, which could potentially lead to avoiding engaging in legal procedures in fear of not being trusted or taken seriously. Raising the threshold of severity in rape in order to elevate it to the threshold of genocide could result in leaving plenty of rape cases untold and, therefore, unpunished. However, this cannot be fully accepted. The two crimes are not the same, and thus, the legal order should not treat them in a similar way. Fairly labelling and properly prosecuting genocidal rape according to the relevant provisions of international criminal law should not affect the way opportunistic rape during conflict or "ordinary" rape during peacetime is being punished.[169] Each type of rape is conceptualised differently in law due to the particularities it presents; this does not mean in any way that the cases are ranked on a scale of importance. They are all equally devastating for the individual victims, and no rape experience should be ignored and diminished. It is the particular character of genocidal rape, the intent of the committers, and the effect on the survivors and the communities that distinguish it from other types of assault, and it should be recognised as such.[170]

3.2.2. Genocidal rape vs rape as a crime against humanity

Rape has been categorised as a crime against humanity in all important instruments of international criminal law, i.e., the Statutes of ICTY, ICTR and ICC. However, it should not be exclusively perceived as such, even if it is still not explicitly subsumed under the crime of genocide in any international legal instrument. The condition of widespread and systematic attack necessary in recognising a crime against humanity is not always present in the case of genocidal rape. The magnitude of violence, which is a key factor in the recognition of a crime against humanity, does not play a crucial

[166]De Vito, "Rape Characterised as Genocide" (2009): 38.
[167]Eagle, "Feminism and Its (Dis)Contents" (2005): 779.
[168]Van Shaack, "Engendering Genocide" (2008): 18.
[169]Schwartz, "Wartime Sexual Violence as More than Collateral Damage" (2017): 72.
[170]Catharine A. MacKinnon, "Crimes of War, Crimes of Peace." UCLA Women's Law Journal 4, no. 1 (1993): 65.

role in genocides. This contextual element appears to be the first difference between the two crimes.[171] The second one, and probably the core distinct point, is the intent behind rape as a crime against humanity and genocidal rape. In the first case, the purpose might be only to terrorise society, oppress civilians and express dominance and power. This is not translated into a less tragic reality; it is just different from a legal perspective. The dolus specialis of genocide that constitutes the very core of the crime itself is *"to destroy, in whole or in part, the targeted group"* is not necessarily present in the commission of a crime against humanity. Every action, no matter how lethal it may be, that is not conducted with this intent cannot be considered genocidal. [172] The events, the context, the strategy, and a potential pattern of acts are some of the factors that could help identify this specific intent required in genocide.

As the concept of crime against humanity is broader than the crime of genocide, according to some authors, genocide constitutes another crime against humanity.[173] This stance was more accepted before the official recognition of genocide as a distinct crime of international character. However, it is important to note that in the cases where the threshold of rape as genocide cannot be met and proving the specific intention is extremely hard, many Chambers, through the years, have turned to convict rape as a crime against humanity. This, albeit not correct as it takes something away from the very essence of the crime, seems to be the only way of serving justice and not letting the method go unpunishable.

3.2.3. Genocidal rape vs rape as a war crime

The prerequisite of war crimes of the linkage to an armed conflict, whether international or domestic, is not needed in the case of genocidal rape.[174] Genocidal campaigns are carried out *"in time of peace or time of war."*[175] The tensions and the violence during an ongoing genocide do not always meet the threshold of being considered an armed conflict. According to the 1949 Geneva Conventions, common Article 2, armed conflict is defined as: *"all cases of declared war or of any other armed conflict*

[171]Andrew Altman, "Genocide and Crimes against Humanity: Dispelling the Conceptual Fog." Social Philosophy and Policy 29, no. 1 (2012): 285.

[172]Genocide Convention, Art. II.
[173]Altman "Genocide and Crimes against Humanity" (2012): 288-289.
[174]UN Office on Genocide Prevention and the Responsibility to Protect. "War Crimes - Elements of the Crime." United Nations. Accessed May 13,2023. https://www.un.org/en/genocideprevention/war-crimes.shtml
[175]Genocide Convention, Art. I.

which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them." Genocides are conducted by a more powerful, usually, party towards a more vulnerable group and are not always a conflict between equal opponents. Another element of distinction is the victims; in the case of war crimes, people victims must be protected persons. This excludes the people participating in the hostilities, the combatants from both sides of the war, as humans qualifying to be protected under the provisions of international humanitarian law. On the other hand, victims of genocide are persons belonging to all groups that share some common characteristics, as mentioned in the relevant convention. This element of shared identity is not a requirement for protection in the case of war crimes.

4. Challenges in the recognition of genocidal rape

The first chapter offered an insight into how rape has been used throughout history in different genocides and its subsequent handling by legal and judicial institutions. Then, the discussion expanded on the process of defining and conceptualising rape under different branches of international law, the connection between rape and genocide, as well as the unique character of genocidal rape. Despite its evident differentiation from other forms of rape or sexual violence in situations falling under international criminal law, genocidal rape is yet to receive formal recognition within the current international legal framework.

The lack of a formal classification of rape as a function of genocide capturing the very essence of the crime in its international dimension stems from the confluence of all the factors involved in genocidal rape cases. These factors cannot be examined in isolation. Regarding victims, it is pointed out that fear, stigmatisation, and further traumatisation deter them from sharing their stories. Victims often downplay their experiences, comparing them to mass killings and undermines the gravity of rape as a genocidal act. Affected communities contribute to the problem by seeking healing through silence and repression, leading to a collective effort to conceal the narratives of victims. Ostracism of victims and their children born as a result of rape also hinders recognition of genocidal rape. Perpetrators of genocidal rape deny their actions and manipulate legal discourse to undermine the credibility of victims. The distinction between instigators and perpetrators complicates attributing criminal responsibility. The role of prosecutors and investigators is highlighted, with male dominance and lack of sensitivity affecting the proper handling of rape cases. Inadequate training and evidence collection challenges also hinder the classification of rape as genocide. Finally, the article discusses how judges have influenced the conceptualisation of rape in international law, with varying interpretations and challenges in proving the link between rape and genocide.

4.1. Victims

International law has made significant strides in addressing the issue of rape within the context of armed conflicts and humanitarian crises. However, the progress of the legal conceptualisation of genocidal rape is hindered by various factors. The first to be examined is the victims themselves; emphasis will be placed on their reluctance to share their stories due to fear, stigmatisation, and further traumatisation.[176] Additionally, the tendency of survivors to diminish their experiences instead of demanding the recognition of rape as a method of genocide, equally devastating as other acts, will be discussed.

Fear. Rape is a heinous crime that inflicts severe physical, emotional, and psychological trauma upon its victims. In cases of ongoing genocide, this psychological effect is intensified by the fear for their lives and those of their loved ones, the terror of the atrocities taking place, and the uncertainty for the future. For these reasons, it is evident that this type of rape has a worse and longer-standing impact on the victims.[177] By raping women, the perpetrators violently take control of their bodies and express their dominance hideously, leaving them vulnerable and helpless. Many times, sexual violence is accompanied by threats of retaliation in case they seek justice. Often, the committers are not the high officials of the genocide but the people next door, people well known to the victims.[178] This creates an environment of constant fear for the survivors of accidentally meeting their rapist without any guarantee for non-repetition of the act. Thus, many victims, to protect themselves and the people around them, choose to refrain from taking legal action as neither their safety nor the success of the proceedings can be ensured.[179]

Stigmatisation. In the context of genocide, rape is also used as a method of humiliating the victim and demoralising the community.[180] Without any intention of concealing, rapes are committed in plain sight, degrading the victim from a human being to an object, an instrument of genocide.[181] In many societies, even nowadays, virginity is considered a prerequisite for women to get married. By openly talking about

[176]Report of the Secretary-General, Rape and Abuse of Women in the Territory of the Former Yugoslavia, UN Doc. E/CN.4/1994/5 (1993) para. 13.
[177]Wahnyuni "Rape as a Weapon in Genocide and Wars" (2020): 122.
[178]Kamuzinzi "Understanding the Innermost Nature of Genocidal Rape" (2017): 72.
[179]Wahnyuni "Rape as a Weapon in Genocide and Wars" (2020): 128.
[180]Kamuzinzi "Understanding the Innermost Nature of Genocidal Rape" (2017): 65.
[181]Reid-Cunningham, "Rape as a Weapon of Genocide" (2008): 291.

their rape experiences, many women risk being considered inapt for marriage and creating a family.[182] Hence, many victims prefer to keep silent and live with the devastating consequences of what happened to them.

Further traumatisation. Another fear the rape survivors experience is being further traumatised. The shame of openly discussing the intimate details of their rape in front of unfamiliar faces, especially male prosecutors, investigators, and judges, discourages plenty of female victims from engaging with justice.[183] Bringing back memories and opening a wound that has not healed yet, is unimaginably hard. It is also not unusual for the survivors who publicly talk about the traumatising events to face victim-blaming and misbelief. In a male-dominant legal world, the lack of empathy and sensitivity, along with the ignorance of the effect of sexual violence, prevents many women from openly speaking about rape as a part of genocide. Thus, it is understandable how most victims prefer silence and slow healing by letting go of the past and moving forward instead of engaging in lengthy and dreadful legal proceedings without any guarantee of success.

Misconception about genocide and rape. For decades genocide was considered to be conducted exclusively through mass killing. Even the victims themselves could not fully comprehend the role of their experience in the broader genocidal campaign and underestimated the gravity of rape by comparing it to mass-scale homicides.[184] The testimonies focused mainly on the lethal genocidal methods and left out of the narrative rape cases as a "lesser" crime compared to other acts of genocidal violence, perpetuating an unjust hierarchy of crimes.[185] By underreporting the occurrence of rape and failing to collect comprehensive data on the incidents, the part of this method in genocides was degraded, limiting the understanding of rape's proper scope and impact.

[182]Reid-Cunningham, "Rape as a Weapon of Genocide" (2008): 290.
[183]Nharaunda-Makawa et al. "Sexual Violence against Women" (2021): 77.
[184]Kuo "Prosecuting Crimes of Sexual Violence" (2002): 316.
[185]Schwartz "Wartime Sexual Violence" (2017): 73

4.2. Affected communities

The victims of genocidal rape belong to communities targeted by the genocidal campaigns. These human units have negatively influenced the progress of classifying rape as genocide. This subchapter explores the part of the communities affected in impeding the recognition of genocidal rape. It primarily focuses on the communities' efforts to keep these incidents a secret as a means of healing, the subsequent ostracism of the victims and children born as a result of rape, and the general ignorance regarding the effects of the community's behaviour on the individual victims.

Collective trauma. The difference between genocidal rape from rape cases in domestic law falling in the narrative of the one victim – one or more perpetrators, is that the community as a whole is victimised.[186] Indisputably, the ones who suffer the most are the actual victims of rape. However, the rest of the members of the group under attack that witness the public rape whilst unable to help and save the victim are left with long-term psychological consequences.[187] The pain, the fear of repetition, the horror of the experience, the humiliation and the shame associated with genocidal rape leave an indelible scar on the memory of the entire group and cause severe mental harm.[188]

Healing through concealing. Each group that has been the target of a genocidal attack seeks ways to heal that would fit the particularities of its case. As a defence mechanism in the aftermath of the atrocities, many communities choose silence and repression of emotions, hoping that sooner or later, the terrifying memories will be forgotten. Thus, a collective effort to silence the narratives of the victims is encouraged within the community. Nonetheless, in this case, the victims are repressed and re-victimised while the crimes are covered up, and the rapists escape criminal responsibility.

Ostracism. Every society that has experienced genocidal rape has had to resort to different methods to overcome the trauma. Unfortunately, in many cases, the victims themselves were targeted and blamed for allegedly cooperating with the enemy, resulting in their social rejection and removal from the group.[189] Moreover, children resulting from rape are not well accepted in the community. The main

[186]Schwartz, "Wartime Sexual Violence" (2017): 61.
[187]De Vito et al. "Rape Characterised as Genocide" (2009): 37.
[188]Wahnyuni "Rape as a Weapon in Genocide and Wars" (2020): 127.
[189]Nharaunda-Makawa et al. "Sexual Violence against Women" (2021): 75.

reason is the belief that ancestry is inherited from the paternal side; therefore, these embryos are not welcome. Another reason is that they are a constant memory of tragedy. Thus, women who were raped and forcibly impregnated are faced with a complicated dilemma; either to abandon the children they have carried in their wombs for nine months or to raise their rapist's child alone and excluded from their former social circle. In both cases, the reproduction of the group is at risk: either due to the rejection or even murder of an entire generation that even partially shares the same genes and characteristics or the removal of the female population and the subsequent reduction of potential child-bearers.[190] This subconscious and indirect transference of responsibility, or at least part of it, from the perpetrators to the victims, leads to the social punishment and exclusion of the very people who suffered the most, the same victims of genocidal rape.[191] Without the support of their own community, the socially isolated victims are afraid to pursue justice on their own under a legal system influenced by gender biases that perpetuate injustice.

4.3. Perpetrators

The attitude of perpetrators of genocidal rape during historic international trials significantly hampers the conceptualisation of rape in international law. Through their strategies of denial and manipulation, perpetrators undermine the credibility of victims, distort legal discourse, and influence judicial interpretation.

Denial. Over the years, the perpetrators of genocidal rape have taken advantage of the absence of rape from the list of acts constituting genocide. The denial of the facts by the perpetrators halted the attempts of the judicial system to link rape to genocide. By pleading guilty on other counts but denying the commission of rape or the existence of dolus specialis of genocidal rape, the offenders managed to get these charges dropped.[192] A typical example, yet not the only one, is the ICTR case Prosecutor v Serushago. More specifically, the Prosecutor indicted the accused for one count of genocide, with rape as a contributing factor in the conduct. Additionally, he was accused of four counts of crimes against humanity: assassination, extermination, torture and rape. Finally, the accused pleaded guilty to the first four charges and not guilty to the charge of rape as a crime against humanity. The Prosecutor

[190]Reid-Cunningham, "Rape as a Weapon of Genocide" (2008): 291.
[191]Levy "International Prosecution of Rape in Warfare" (1994): 266.
[192]Beth Van Schaack, "Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson." Journal of Gender, Social Policy & the Law 17, no. 2 (2009): 394-395.

subsequently withdrew this charge.[193] He further denied all allegations related to rape as genocide. The Chamber found the accused guilty of the four charges and sentenced him to 15 years. Although the legal process proceeded more quickly, it cannot be argued that this solution was fair. Survivors who bravely overcame their fear and testified were left with the bitterness of injustice and a reasonable fear of retaliation from the perpetrators. The system seemed inadequate to protect victims and continued a vicious cycle of impunity.

Legal defence and misleading rhetoric. The general devaluation of rape in comparison to murder, an idea prevailing in victims' circles, is also present in the minds of the perpetrators. Considering rape as an unavoidable by-product of every conflict, the committers undermined rape's role in the conduct of the genocidal campaigns.[194] So even if some rapes were admitted and not denied, as in the first case, they were viewed as isolated incidents, not an integral part of genocide. In another effort to manipulate the public perception of their crimes, the rapist denied the genocidal character of their acts and claimed that rapes were, in reality, consensual intercourse. An illustrative example is the Kunarac case. The accused claimed that the 19-year-old Bosnian female victim, who had already been raped by Serbian soldiers and threatened for her life, seduced him and initiated the sexual act.[195] Fortunately, the claims did not convince the Chamber that sentenced the accused to 28 years of imprisonment. Under conditions of coercion, such as those prevailing during the conduct of genocide, genuine consent is excluded.[196] These tactics of the legal team of the perpetrators, however, have often disoriented judges, resulting in mislabelling genocidal rape as a crime against humanity or a war crime, or even worse, as a wrongful act yet not punishable under international criminal law.

Instigators versus perpetrators. The instigators are responsible for developing the genocidal plan, which includes the commission of genocidal rape, whilst the perpetrators are the executors of the plan. Usually, the architects of a genocidal campaign hold high priestly positions and enjoy power and privilege. Their involvement in the genocide includes offering instruction and guidance without always participating in the genocidal acts.[197] The case of bourgemestre Akayesu, who was found guilty of genocidal rape without

[193]Prosecutor v. Serushago, (Sentence) ICTR-98-39-S (ICTR), 5 February 1999.
[194]MacKinnon, "Crimes of War, Crimes of Peace." (1993): 65.
[195]Nicola Henry, "The Fixation on Wartime Rape: Feminist Critique and International Criminal Law" Social & Legal Studies 23, no. 1 (2014): 102.
[196]Balthazar "Gender Crimes" (2006): 44.
[197]Schwartz, "Wartime Sexual Violence" (2017): 65.

having committed the crime himself, but because of aiding and abetting the perpetrators and permitting the commission of rape in places under his effective control, is a typical example.[198] The physical perpetrators of the rapes do not necessarily contribute to forming the genocidal plan; they may be soldiers, supporters of the genocidal campaign or random men taking advantage of the chaos and lawlessness. This gap between instigators who have the mens rea and dolus specialis, i.e. the intention to exterminate the group but lack the actus reus, and perpetrators who commit the crime without necessarily the required for the crime of genocide intention, hinders the process of attributing criminal responsibility.[199] The concept of joint criminal enterprise liability, a form of holding people accountable for participating in a common plan, as a suggested solution will be analysed in a subsequent chapter dealing with proposals for improvement in law and praxis.

4.4. Prosecutors and investigators

The unique character and the diverse opinions on the core elements of the crime of rape have, for a really long time, blocked its conceptualisation under the international legal framework.[200] The dominance of male prosecutors in relevant trials left no room for the proper handling of rape in an international context, a crime that disproportionately targets women as victims.[201] This subchapter critically examines the role played by prosecutors and investigators in charge of genocidal rape cases in impeding the classification of rape as a genocidal act. The primary focus is placed on the lack of sensitivity, the inadequate training and knowledge on gender issues, and the inefficient evidence presented by the prosecution and investigation in relevant trials and its implications.

Lack of sensitivity. The real impact of rape is very difficult to understand for people who have not experienced it. It is a violation of the inner parts of a human being, leaving indelible scars on the body and soul. Since the vast majority of rape victims are women, most men find it difficult to understand the extent and impact of genocidal rape completely. Hence, frequently male prosecutors and investigators in charge of genocidal rape cases appear ignorant of the situation and unable to show empathy when dealing

[198]Akayesu, par. 692-694.
[199]Nharaunda-Makawa et al. "Sexual Violence against Women" (2021): 75.
[200]Eboe-Osuji "Rape as Genocide" (2004): 252.
[201]Van Schaack "Engendering Genocide" (2008): 26

with such a sensitive issue.[202] Thus too often, upsetting questions and inappropriate behaviours by investigators and prosecutors lead to humiliating experiences for the victims and prevent them from initiating or continuing to engage in legal proceedings.[203]

Inadequate training and lack of expertise. In the past, training on gender issues for people working in the justice sector was not considered necessary. Thus, many members of the team of prosecutors and investigators of the ICTY and ICTR in charge of genocidal rape lacked the training, knowledge, and skills to deal with these cases adequately.[204] For example, the prosecutorial team of ICTR has been criticised for lacking a common strategy in investigating genocidal rape cases. This resulted in neglecting the prosecution on this legal ground, which aggravated the already undermined role of rape in genocide.[205] Consequently, many trials did not proceed to convictions on the legal basis of genocidal rape.

Inefficient evidence. The justified reluctance of the victims to open up to male members of the prosecution and investigation team created difficulties in collecting evidence that would efficiently prove the conduct of genocide through rape. The difficulty of proving the specific intent required for the crime of genocide in the cases of genocidal rape has resulted in the delivery of only one conviction on this ground: the well-known case of Akayesu. In the rest cases, the evidence presented did not seem efficient to meet the threshold of genocide and rape was considered either a crime against humanity, a war crime or the relevant charges were dropped.[206] And this is a paradox considering the number of cases that the alleged perpetrators were accused of both genocide and rape.

Logistical challenges. The cost of the function of the courts is disproportionate to the number of trials held by the two International Criminal Tribunals. Indicatively, the budget of the ICTY for the ten years of its operation was 762,000,000 euros, while the respective amount for ICTR was 635,000,000 euros.[207] The cost of criminally trying each accused is estimated at 6,4-9,5 million euros.[208] The examination of

[202]Valerie Oosterveld, "Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court" New England Journal of International and Comparative Law, (2005): 125.
[203]Christine Chinkin, "Rape and Sexual Abuse of Women in International Law" (1994): 339.
[204]Oosterveld, "Gender-Sensitive Justice" (2005): 128.
[205]Van Schaack, "Obstacles on the Road to Gender Justice" (2009): 368-369.
[206]Oosterveld, "Gender-Sensitive Justice" (2005): 128.
[207]David Wippman, "The Costs of International Justice" The American Journal of International Law 100, no. 4 (2006): 861.
[208]Rupert Skilbeck, "Funding Justice: The Price of War Crimes Trials" Human Rights Brief 3, (2008): 6.

thousands of incidents, the involvement of hundreds of people, the hardship of finding and preserving physical evidence in remote and, often, hostile areas, and the linguistic barrier are only a few of the challenges that prosecutors and investigators are dealing with. The number of cases brought before the two international criminal tribunals was disproportionate to the resources and the human capacity of the Courts.[209] Considering the cost of the legal proceedings and the complexity of the cases, the prioritisation of certain aspects of the atrocities was deemed necessary. Prosecution of mass killings was always a top priority, whilst there was a tendency to overlook rape and other forms of sexual violence in genocide. The particularities of rape and the high threshold of proving the link between rape to genocide made these charges the easiest to withdraw. This, unfortunately, perpetuated social beliefs regarding the subordinate role of rape within the context of genocide.

4.5. Judges

Judges have played a significant role in the conceptualisation of rape in international law. Noteworthily, the definition of rape in the international context derived from the jurisdiction of the international criminal tribunals of the 1990s. However, the judiciary's influence has not always been positive; the judges have also contributed to halting the process of recognising genocidal rape. The lack of sensitivity, the inadequate training and knowledge on gender issues and the logistical challenges regarding prosecutors and investigators are also present in the judiciary. As a consequence, the crime has been underreported, and the conviction rates of genocidal rape are extremely low. The latter discouraged further the victims from engaging in legal proceedings. Below, the gender inequality, the lack of fair labelling, along with the role of inconsistent legal interpretation and sentencing will be discussed.

Underrepresentation of female judges. In all international institutions dealing with genocidal rape, there is a serious underrepresentation of women.[210] Indicatively, of a total number of 21 past and present judges of the ICTY, only 6 were women, whilst out of 43 judges in the ICTY, only 9 were females.[211] This male dominance in every sector and every step of the procedure had a negative effect on the proceedings. Female judges have shown more interest in the investigation and prosecution of sexual violence. As

[209]Oosterveld, "Gender-Sensitive Justice" (2005): 126.
[210]Chinkin "Rape and Sexual Abuse of Women in International Law" (1994): 339.
[211]Milena Sterio, "Women as Judges at International Criminal Tribunals" Law Faculty Articles and Essays 29, no. 2 (2020): 229.

Grossman, a prominent legal scholar, aptly observed: "Judge Navanethem Pillay, the only female judge on the ICTR panel trying Jean-Paul Akayesu, is credited with taking the initiative to question witnesses about evidence of sexual violence."[212] One, therefore, wonders if only one woman had the determination and power to make a decisive contribution to this historic genocidal rape trial what would be the indictment of the rest of ICTY and ICTR cases had women been equally represented in the Chambers of the Criminal Tribunals.

Lack of accurate labelling. As analysed in the previous chapter, within the context of genocide, different types of rape can occur. Not all of them fall within the category of genocidal rape, mainly due to the non-establishment of the specific intent required. The line between rape as genocide, as a crime against humanity and as a war crime is blurred, and the legal framework is inefficient in distinguishing the cases. As a result, the judges are burdened with the task of distinguishing the crimes. The reluctance of the victim to trust the institutions and participate in the legal procedures, partly due to the malpractice of the prosecutors and investigators, has caused difficulties in collecting evidence and survivors' testimonies.[213] Consequently, this lack of comprehensive documentation complicates the mission of the judges to address and fairly label rape as genocide and to formally classify it as such. As a consequence, there appears to be an inefficiency in acknowledging genocidal rape.

Inconsistent legal interpretations and sentencing. The lack of a consensually recognised definition of rape and the non-inclusion of rape in the acts constituting genocide has lowered the number of relevant convictions. Due to personal biases, the particularities of each case and the lack of an internationally recognised definition of rape, the matter of genocidal rape is left to the interpretation of each chamber, which causes further ambiguity to an already highly complicated issue. Rape is a highly contextualised topic that needs to be understood under the lens of situational, social, and cultural factors. This has created a variety of interpretations across different jurisdictions. Furthermore, it has caused discrepancies in sentencing for genocidal rape cases. Perhaps the inconsistencies of the decisions regarding genocide and rape would be reduced had there been a clear and precise legal framework recognising genocidal rape would reduce the delivery of inconsistent decisions.

[212]Nienke Grossman, "Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?" Chicago Journal of International Law 12, no. 2 (2012): 656.
[213]Wahnyuni "Rape as a Weapon in Genocide and Wars" (2020): 129.

In conclusion, all the aforementioned reasons have led to significant underreporting of rape cases in genocide, which underestimates its occurrence and diminishes its impact. Thus, the conceptualisation of rape in international law has not been deemed of primary importance. The first step to be taken is the proper recognition of genocidal rape under the existing legal framework. Classifying rape as a separate genocide act will clear the ambiguities around the nature of the crime; this would contribute to removing the stigma of the victims, enhancing the cohesion of the communities affected by releasing the gravity of the crime and strengthening the prosecutorial and judicial efforts.

To address these challenges, it is essential to empower rape victims by guaranteeing their safety, reducing stigmatisation, and creating a support system. In parallel, it is crucial to encourage the affected communities to overcome gender taboos and anachronistic notions and adopt a collective solidarity approach embracing, defending, and supporting the victims instead of marginalising and oppressing them. The grace period for perpetrators who unjustly enjoyed impunity at the expense of their victims is not only necessary but overdue. The prosecution process and investigation methods need to be restructured by putting the victims, their needs and safety at the centre of attention. Last but not least, the major factors of the judicial system should be adequately trained on gender issues to keep pace with recent developments. Only through comprehensive efforts can the recognition of genocidal rape advance within international law, resulting in strengthening the international legal framework. The next chapter is devoted to reflections on improvements and proposals to overcome the abovementioned challenges.

5. Overcoming the challenges

Genocidal rape, characterised by the deliberate targeting of individuals based on their gender with the intent to destroy, in whole or in part, a particular group, has been a prevalent and devastating aspect of numerous genocidal campaigns throughout history, as discussed in the first chapter. However, despite its severity, genocidal rape has been marginalised and inadequately addressed in international law. The general objective of this chapter is to provide insights into the necessary strategies and actions required to overcome the challenges hindering proper recognition. The first subchapter endeavours to shed light on the necessary legal and conceptual foundations for addressing genocidal rape effectively. The primary and most essential step would be a transformation of the current legal framework by broadening the definition of genocide to encompass rape. This section will examine the reasons why such an expansion deems necessary.

The discussion will then expand on legal and non-legal reforms as a key step in the progress of acknowledging genocidal rape and achieving accountability for the perpetrators. Proposals will be presented, including guaranteeing equal gender distribution in key positions along with providing comprehensive training on gender issues, especially genocidal rape, to every actor involved in the judicial procedure. Additionally, the need to enhance witness protection measures will be emphasised to facilitate the progress of recognising and criminalising rape as genocide, along with suggesting the application of Joint Criminal Enterprise as an appropriate form of liability to ensure accountability for those planning or perpetrating genocidal rape. Lastly, the chapter will underline the importance of consistency in handling genocidal rape cases through sharing of best practice. By fostering cooperation and exchanging knowledge, a more comprehensive and effective approach can be developed to address genocidal rape within the international legal system and the various national systems.

5.1. Rape as a sixth category of genocidal acts

As examined in chapter 1.1. (c), the definition of genocide under the Genocide Convention does not explicitly encompass rape. This definition was verbatim incorporated in the Statutes of ICTY, ICTR and ICC; thus, rape as genocide was also excluded from the current legal framework. Consequently, the absence of formal recognition of rape resulted in the lack of prosecution of the perpetrators of genocidal rape, with the sole exception of the well-known Akayesu case. The significant scale of genocidal rape witnessed in the Bosnian and Rwandan genocide, resulting in the victimisation of hundreds of thousands of individuals, underscores the urgent need for a transformative shift in the legal landscape.[214] The persistence of genocidal rape and the prevailing impunity enjoyed by perpetrators are indicative of the inadequacy of the existing legal framework.[215] The challenges in the recognition of genocidal rape were analysed in chapter 4. Hence, this part of the dissertation will delve into ways of overcoming these obstacles, starting with a fundamental legal change by broadening the definition of genocide to include rape as a sixth and separate category. The condemnation of an atrocity necessitates its proper identification, and in the case of genocidal rape, this initial crucial step is yet to be undertaken.

The explicit subsumption of rape under genocide plays a pivotal role in facilitating the recognition of genocidal rape and combating this crime effectively. Expanding genocide's definition by classifying rape as a genocidal act represents a significant advancement in acknowledging the unique nature of genocidal rape as a distinct form of violence.[216] The application of the clear criteria of genocide in the cases of genocidal rape facilitates the distinction of the latter from other forms of rape in an international context, i.e. as a crime against humanity or as a war crime.[217] Not every rape during genocides is genocidal; only rapes that are committed with the specific intent to destroy the specific group fall under this category. Thus, it is essential to distinguish them from other types of rape and address and prosecute them accordingly. The inclusion of rape as a sixth category of acts constituting genocide acknowledges its significance and catastrophic impact and elevates it to the same level as other genocidal offences. Genocidal rape inflicts severe devastation upon victims and communities and can effectively contribute

[214]Chapters 2.2. and 2.3. of this dissertation.
[215]Wahyuni, "Rape as a Weapon" (2020): 123, 126.
[216]De Vito, "Rape Characterised as Genocide" (2009): 37.
[217]Van Shaack, "Engendering Genocide" (2008): 27.

to the destruction of a group, either in whole or in part.[218] The above-analysed cases of Yugoslavia and Rwanda are bright examples of this dark reality.[219]

Furthermore, the explicit classification of rape as a genocidal act would facilitate distinguishing the crime from other methods of genocidal conduct, particularly in cases involving a combination of acts, as frequently observed in genocides.[220] As mentioned in chapter 3.1., rape can be subsumed under all existing categories of genocidal acts.[221] However, this necessitates prosecutors to undertake the task of first examining whether rape meets the criteria of any act under the recognised categories and classify it accordingly, i.e. as *(a) Killing members of the group;(b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group;(e) Forcibly transferring children of the group to another group.*[222] Subsequently, the prosecutors would need to scrutinise whether rape fulfils the specific criteria of genocide, including the specific targeted group and, most importantly, the dolus specialis, *the intent to destroy in whole or in part*.[223] This additional first stage in the already lengthy prosecution process would deem unnecessary if rape was designated appropriately as a distinct category of genocidal acts. It would also have a positive impact on the logistical aspects of the legal procedures, resulting in resource, time, and energy savings for the prosecution team. Additionally, the gravity of the crime would not be diminished by attempting to conform to the criteria and definition of the other existing acts. Consequently, its criminalisation and recognition as an offence of international concern would not be subject to doubt.

The subsumption also underscores the importance of addressing genocidal rape within the framework of international criminal justice. Acknowledging the suffering of genocidal rape victims as an integral part of the genocide perpetrated against their respective groups would contribute to mitigating the stigma associated with the crime. This, in turn, has the potential to enhance the willingness of survivors to engage in legal proceedings, as they would find solace and validation in the recognition of their experiences as an essential component of the broader genocidal campaign. The commitment and

[218]De Vito, "Rape Characterised as Genocide" (2009): 38.
[219]Chapters 2.2. and 2.3. of this dissertation.
[220]Chinkin, "Rape and Sexual Abuse" (1994): 337.
[221]Chapter 3.33 of this dissertation.
[222]Genocide Convention, Art. II.
[223]Genocide Convention, Art. II.

participation of the victims could serve as an impetus for robust investigation, prosecution, and punishment of perpetrators. Recognising rape as an integral part of the crime of genocide strengthens the legal tools available for holding accountable those responsible for planning, organising, and perpetrating such acts. The subsumption of rape under genocide, due to the universal jurisdiction of the latter, burdens states with the duty to prevent and respond to genocidal rape. It further enhances the efforts to take appropriate measures to protect vulnerable populations, especially women, and provide support and reparations to survivors. It would also play a crucial role in removing the shame of the victims of genocidal rape.

Nonetheless, it is crucial to acknowledge the historical significance of the genocide definition and the profound emotional burden of the crime. As studied above [chapter 1.1 (c)], the term genocide was coined to label the atrocities of the Nazi regime fairly. Thus, ever since, genocide and its definition have not been subject to critical examination of contemporary relevance or proposals for modifications or interventions in a definition that was formulated over seventy years ago. However, given the considerable passage of time since the adoption of the Genocide Convention and its respective definition, coupled with the existence of millions of victims of genocidal rape worldwide, it is worth considering whether it is time to revitalise a definition that has remained dormant. The inclusion of rape within the definition of genocide does not diminish the gravity or significance of genocide itself. Rather, it contributes to a more comprehensive and contemporary understanding of rape as a genocidal act, acknowledging its inherent connection to the broader genocidal campaign. The explicit recognition and criminalisation of this crime reflect the reality that rape is already being perpetrated as a method of genocide.

It could be argued that such a major legal reform deems unnecessary considering the existence of the living instruments doctrine. According to this doctrine, legal instruments should be interpreted in a dynamic manner that identifies contemporary needs, challenges, and human rights concerns.[224] This dogma has played a crucial role in the evolution of international law by enabling interpretations that do not require altering the literal text of the instruments. However, in the case of genocidal rape, the application of the living instrument doctrine may not be efficient. Dealing with atrocities of such magnitude and horror should not be subject to the individual interpretations of judges. Members of the

[224]George Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy." Chapter in Constituting Europe: The European Court of Human Rights in a National, European and Global Context, Cambridge: Cambridge University Press. (2013): 106.

judiciary, being only humans, especially because most have traditionally come from social groups and countries not affected by genocidal rape, are susceptible to personal, cultural, and social biases.[225] However, their potentially influenced interpretations should not affect the proper handling of genocidal rape cases. They could jeopardise the fair administration of justice and add unnecessary complexity to an already challenging task.

Ronda Capelon, a prominent legal scholar, has expressed concerns regarding the potential consequences of an excessive emphasis on genocidal rape and its potential impact on the broader understanding of sexual violence. Specifically, she expressed her fear that by "overemphasising" genocidal rape, the gendered nature of the crime of rape would be overshadowed.[226] Despite these concerns being valid, it is crucial to comprehend the very essence of genocidal rape that distinguishes it from other types of rape and sexual violence during the conduct of genocide. Genocidal rape is not solely a gendered crime against every woman; it is a crime that targets certain women, based not only on their gender but also on their ethnicity.[227] For instance, the estimated 250.000 – 500.000 female victims during the Rwandan genocides were either Tutsis or Hutu women associated with Tutsi men.[228] Similarly, the estimated 25.000-50.000 victims of genocidal rape during the Bosnian genocide were women of Bosniak origin.[229] It is crucial to recognise the intersectionality at play in these instances, as it served as a criterion for perpetrators in selecting their victims.[230] This acknowledgement does not diminish the gendered aspect of the crime but it highlights the difference of genocidal rape from other types of rape.

The following part is dedicated in proposing further measures of overcoming the challenges. However, all of the following measures would seem unnecessary and irrelevant in lack of a solid legal ground justifying their existence. The recognition of rape as a sixth category of acts constituting genocide would provide such a ground. It would also contribute to the substantial reduction of the ambiguities surrounding this complex issue. Consequently, the international legal framework would become clearer and stronger.

[225]Grossman "Sex on the Bench" (2012): 664.
[226]Russell-Brown, "Rape as an Act of Genocide" (2003): 351.
[227]Russell-Brown, "Rape as an Act of Genocide" (2003): 351.
[228]Special Rapporteur of the Commission on Human Rights Under Para. 20 of S.C. Res. S-3/1, Report on the Situation of Human Rights in Rwanda, para. 16, E/CN.4/1996/68 (Jan. 29, 1996).
[229]Altunjan, "Reproductive Violence" (2021): 51.
[230]Akayesu case, par. 452 ("Never ask me again what a Tutsi woman tastes like.").

5.2. Equal gender representation in law

The significance of female representation, as discussed in the previous section [4.1 (i)], necessitates its incorporation into legally binding instruments by including gender quotas in the statutes of judicial institutions responsible for dealing with genocidal rape cases.[231] Regrettably, the Statues of the ICTY and the ICTR lacked a provision for equal gender representation. Consequently, the appointment of female judges to their Chamber was an exception rather than the norm. Fortunately, the Rome Statute of the International Criminal Court (ICC) demonstrated progressiveness by including clauses on "a fair representation of female and male judges"[232] and " include judges with legal expertise on specific issues, including, but not limited to, violence against women or children."[233] Had rape been subsumed under the crime of genocide and considering the universal jurisdiction over the latter, it would become essential for national legislations to align with this direction. Consequently, relevant provisions should be integrated into domestic laws to ensure gender equality in the allocation of key positions in the national courts. This would enhance the likelihood of proper handling and adjudicating genocidal rape cases during domestic procedures.

5.3. Equal gender representation in practice

In an effort to address the issue of sexual and gender-based crimes, the Office of the Prosecutor (OTP) of the International Criminal Court released a policy paper in 2014.[234] This emerged as a response to the shortcomings of the pre-existing legal processes. The recommendations outlined in the OTP policy paper should be applied to genocidal rape cases, aiming at initiating a more effective approach in the prosecution and judicial handling of these particular cases. As stated in Art. 2, a gender perspective is adopted, which involves recognising the disparities in status, power, roles, and needs between males and females, as well as understanding the influence of gender on individuals' opportunities and interactions.[235] This perspective is one way to transform legal proceedings. However, it is not the sole

[231]Grossman "Sex on the Bench" (2012): 669.
[232]UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), ISBN No. 92-9227-227-6. (17 July 1998): 18, Art. 36 (8) (a) [Hereinafter 'Rome Statute'].
[233]Rome Statute (1998): 18, Art. 36 (8) (b).
[234]International Criminal Court, Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes (June 2014). [Hereinafter 'OTP Policy Paper'].
[235]OTP Policy Paper, par. 2.

approach that can be taken. Alternative approaches include adopting a feminist lens or focusing specifically on the ethnic dimension of the victims. The distinct characteristics of genocidal rape, particularly the intersectionality of the victims as a criterion in their selection, allow for different approaches to be considered and applied. While it would be intriguing to explore and analyse various approaches in the proposed procedural reforms, such an endeavour exceeds the academic scope of this study. Moreover, time constraints and limited availability of sources restrict the possibility of conducting an in-depth examination of each approach. Therefore, this study acknowledges the existence of alternative perspectives but does not extensively delve into their application.

Judge Pillay has rightly stated, *"Who interprets the law is at least as important as who makes the law, if not more so... I cannot stress how critical I consider it to be that women are represented, and a gender perspective integrated at all levels of the investigation, prosecution, defence, witness protection and judiciary."*[236] Women, as discussed in chapter 4.5. (i), have traditionally been marginalised in the international law arena. The percentage of key positions occupied by female prosecutors, investigators and judges has been extremely low.[237] However, as also mentioned in the same chapter, it only took one woman to contribute effectively in serving justice in the famous Akayesu case, which led to the very first, and so far only, conviction for genocidal rape.[238] On the other hand, the ICTR prosecutor Carla De Ponte has been criticised for disregarding sexual violence crimes and for her lack of sensitivity and support towards genocidal rape survivors.[239] Thus, it is far-fetched to assume that a judicial body completely staffed by women would serve justice properly.

It is rather suggested to ensure gender parity among the key actors involved in criminal procedures, including investigators, prosecutors, and judges.[240] Promoting gender inclusivity in prosecution is crucial to address the unique challenges faced by survivors of genocidal rape, who are predominantly women.[241] Encouraging the recruitment and retention of female prosecutors ensures a diverse and representative prosecutorial force that can better understand and empathise with the

[236]UN Division for the Advancement of Women and Centre for Refugee Studies, York University, Canada, Gender-Based Persecution: Report of the Expert Group Meeting, at 33, EGM/GBP/1997, (Nov. 9-12, 1997)
[237]Sterio, "Women as Judges" (2020): 229.
[238]Grossman "Sex on the Bench" (2012): 656.
[239]Rosemary Grey, "Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court: Practice, Progress and Potential", Cambridge Studies in International and Comparative Law. Cambridge: Cambridge University Press, (2019): 85.
[240]Chinkin, "Rape and Sexual Abuse" (1994): 337.
[241]Chinkin, "Rape and Sexual Abuse" (1994): 337.

experiences of survivors.[242] Judges and prosecutors bear the responsibility of diligently seeking the truth behind the perpetrator's statements, especially their denial, carefully scrutinising their alibis, and assessing the details of testimonies presented by both parties. Balancing the conflicting interests and rights of witnesses, victims, and perpetrators is a challenging endeavour in any criminal trial.[243] This challenge becomes particularly pronounced in genocidal rape cases due to the intimidating nature of the crime and its associated circumstances.

The inclusion of female legal practitioners is necessary to counteract historical imbalances and systemic barriers faced by women and to amplify their voices.[244] This necessity arises not only due to their representation of a significant majority of victims of genocidal rape, a crime also that disproportionately affects women, or because females constitute half of the global population.[245] Their voices should be heard because they possess valuable insights, unique perspectives, and alternative ideas that have the potential to revolutionise the delivery of equitable and impartial judgments. By promoting judicial equality and sensitivity, the legal system can inspire trust and confidence in survivors, empowering them to come forward and seek justice.

5.4. Training

Article 15 of the OTP Policy states that *"Staff training on an ongoing basis is an essential component towards ensuring the effective investigation and prosecution of sexual and gender-based crimes."*[246] Indeed nature of work in the field of international law requires continuous training to remain abreast of the latest developments. The inclusion of gender-issue training has become imperative across all sectors and fields, and it was also stressed in the Beijing Declaration as a vital measure.[247] Given the attention this aspect of the atrocities has received in the past thirty years, numerous organisations and specialised divisions within international organisations have emerged to address sexual violence in general and rape specifically. It is the duty of experts in this field to initiate and oversee the development

[242]Van Shaack, "Engendering Genocide" (2008): 26.
[243]Chinkin, "Rape and Sexual Abuse" (1994): 339.
[244]Oosterveld, "Gender-Sensitive Justice" (2005): 128.
[245]Grossman, "Sex on the Bench" (2012): 648.
[246]OTP Policy Paper, Art. 15.
[247]Beijing Declaration, Art. 142 (c).

of educational programs. The contribution of international organisations and experts by sharing their specialised knowledge with judges, investigators and prosecutors in improving the legal process, it not only recommended but required. The crucial role of civil society is even recognised within the policy paper under Art. 14.[248]

The lack of knowledge and expertise has impeded the recognition of genocidal rape within international law, thereby diminishing its impact.[249] It is, therefore, essential that all judicial actors involved in genocidal rape cases receive comprehensive education beforehand regarding this specific type of violence by delving into the distinct characteristics and nuances of this crime.[250] The particularity of genocidal rape lies with the intersectionality of victims' experiences. Hence it should be acknowledged properly that the victims of genocidal rape were targeted both because of their gender, as females, and as members of this specific group that was under genocidal attack.[251] Firstly, judges should be well-informed about the unique aspects of genocidal rape to facilitate its appropriate addressing and accurate labelling, ultimately reducing inconsistencies in decisions and sentencing. Recognise the distinct challenges faced by women and girls and apply a gender lens when analysing evidence and determining appropriate legal remedies. Thus, the judges with expertise in gender-based crimes would be qualified and well-equipped to adjudicate genocidal rape cases, considering the complexities involved effectively.

Secondly, prosecutors must also undergo training to learn how to handle genocidal rape cases with competence and respect. The policy paper further highlights the importance of ensuring that the evidence presented is efficient in proving the accusations.[252] It is unfortunately true that most of the allegations in the ICTY and ICTR on sexual violence in general and rape specifically ended up withdrawn due to the inefficiency of the evidence gathered. Especially proving the establishment of the dolus specialis of genocide: the intent to destroy, is particularly hard. Thus, they should ensure the appropriate application of the relevant provisions, be more careful in the collection of evidence and refrain from presenting evidence inefficiently to prove the conduct of genocidal rape.[253] This involves utilising forensic documentation techniques to gather and preserve evidence substantiating the nature and extent

[248]OTP Policy Paper, Art. 14.
[249]Oosterveld, “Gender-Sensitive Justice”, (2005): 126.
[250]Chinkin, “Rape and Sexual Abuse” (1994): 339.
[251]MacKinnon “Crimes of War” (1993): 64-65.
[252]OTP Policy Paper, Art. 7.
[253]Oosterveld, “Gender-Sensitive Justice” (2005): 127-128.

of the crimes committed, ensuring its admissibility in court.[254] This may prove challenging in the aftermath of atrocities of such magnitude.

As mentioned already above, the testimonies of the witness in the case against Akayesu played the most important role in this conviction. [255] Thus, prosecutors and investigators should pay extra attention to the conduct of interviews with survivors and witnesses of genocidal rape cases as invaluable evidence of proof. However, these interviews should be conducted with absolute attention and respect. Prioritising the best interests of victims in every endeavour, prosecutors should focus on avoiding past mistakes and being more delicate and respectful while engaging with people affected, directly or not, by an atrocity of such horrendous as genocidal rape.[256] As the practice has shown, it was those testimonies that played the most important role in addressing and therefore prosecuting the perpetrators of genocidal rape. It is highly recommended that prosecutors and investigators refrain from employing questioning and investigation methods that could re-traumatise victims and witnesses.[257] They should approach victims with sensitivity and empathy, validating their experiences and emotions.[258]

5.5. Witness protection

Witness protection plays a crucial role in the recognition of genocidal rape within the legal framework. This is stated under the Article 68 (1) of the International Criminal Court Statute and further reaffirmed under Art. 5 of the more recent OTP Policy Paper.[259] Given the traumatising effect of genocidal rape cases, witnesses of genocidal rape may face significant risks, including intimidation, retaliation, and further harm, and as a consequence, the measures of their protection should be really strict and effective.[260] Witness protection measures are essential to ensure the safety and security of individuals who come forward to testify or provide evidence regarding genocidal rape incidents.[261] Enhancing witness protection is crucial for bolstering the willingness of victims and survivors to participate in legal procedures actively. Moreover, witness protection safeguards the integrity of the legal

[254]Schwartz, "Wartime Sexual Violence" (2017): 86.
[255]Van Shaack, "Engendering Genocide" (2008): 7.
[256]Chinkin, "Rape and Sexual Abuse" (1994): 339.
[257]Altunjan, "Reproductive Violence and International Criminal Law" (2021): 885.
[258]Kuo, "Prosecuting Crimes of Sexual Violence" (2002): 316.
[259]OTP Policy Paper, Art. 5.
[260]Nharaunda-Makawa et al., "Sexual Violence against Women" (2021): 77.
[261]Wahyuni, "Rape as a Weapon" (2020): 129.

process by countering potential attempts to silence or intimidate witnesses, ensuring their testimonies are not influenced or distorted. It is essential to safeguard their privacy, shield their personal information, and ensure their safety throughout all stages of the proceedings, including before, during, and particularly after the trial.[262] As discussed earlier in chapter 4.1. (i) survivors of genocidal rape who come forward are putting in danger their lives and the lives of their loved ones. Considering the uncertain outcome of the proceedings for the victims, the judicial actors involved must, at the very least, guarantee their safety and protection at all costs.

In the same vein, it is crucial to establish an accessible judicial system that provides a secure environment for witnesses to come forward and testify candidly. The inclusion of psychologists or individuals from the victims' families or close support networks during interviews may assist in creating a more familiar and conducive atmosphere for witnesses to express themselves openly.[263] However, this approach may not be suitable for all witnesses, as their individual needs and feelings should be duly considered. Witnesses should be allowed to express their preferences regarding the conduct of the interview process with the aim of ensuring their comfort and facilitating a more conducive environment for effective testimonial evidence. By acknowledging the significance of witness protection and implementing comprehensive measures, the recognition of genocidal rape within the legal system can be completed, leading to justice for survivors and contributing to the prevention and deterrence of future genocidal acts.

5.6. Joint Criminal Enterprise

Holding leaders accountable has been one of the most challenging tasks the Chambers of the International Criminal Tribunals were called to execute.[264] This is acknowledged in Art. 9 of the Policy paper, which recommends the consideration of the full range of modes of liability in selecting the most appropriate to apply in each case based on the evidence available.[265]

[262]Wahyuni, “Rape as a Weapon” (2020): 129.
[263]Oosterveld, “Gender-Sensitive Justice” (2005): 129.
[264]Schwartz, “Wartime Sexual Violence” (2017): 65
[265]OTP Policy Paper, Art. 9.

Many already known forms of liability were deemed incapable of bringing the architects of the genocidal campaigns to justice. Thus, in 2001 the ICTY Appeals Chamber, in the case of Duško Tadić, applied the Joint Criminal Enterprise (JCE) doctrine as a means to capture the collective nature of mass atrocities and assign individual responsibility to those orchestrating rather than physically perpetrating the crimes.[266] JCE liability is an individual form of responsibility in international criminal law that holds persons accountable for their involvement in a collective plan to commit international crimes.[267] The Tadić Chamber outlined three categories of JCE liability: JCE I, where the accused participates in a common plan and shares the intention to commit the crimes; JCE II, where the accused actively participates in an organised system of repression and intends to further the system; and JCE III, where the accused contribute to a criminal plan and the act committed outside the plan is a natural and foreseeable consequence, and the accused willingly took that risk by continuing to participate.[268]

Regarding the actus reus of the perpetrator, JCE III accepts a lower level of intent, known as dolus eventualis, or advertent recklessness.[269] This mean that the accused will be held accountable for any *"act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose"*[270] as well as in case *"(i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk."*[271] As previously discussed in chapter 4.3. (iii) one of the most important factors hindering the recognition and, therefore, the prosecution of genocidal rape is the disconnect between instigators and actual perpetrators of the crime. Through this type of liability, the courts can pursue the prosecution of the designers of the genocidal campaign even if they did not personally commit genocidal rape. Their culpability arises from their contribution to the development of the genocidal plan and from allowing acts committed by their subordinates or acts committed under their effective control.[272] The application of JCE III in most genocidal rape trials is highly recommended as it would facilitate the administration of justice by overcoming the obstacles arising in many cases from the existence of multiple committers and the differentiation of physical and moral perpetrators.

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[266] Prosecutor v. Tadic (Appeals Judgement) IT-94-1 (ICTY) 15 July 1999, par. 185 et seq. [Hereinafter 'Tadic Appeals Judgement'].
[267]Kai Ambos, "Joint Criminal Enterprise and Command Responsibility" Journal of International Criminal Justice 5, (2007): 159.
[268]Tadic Appeals Judgment, par. 220.
[269]Schwartz, "Wartime Sexual Violence" (2017): 64.
[270]Tadic Appeals Judgment, par. 204.
[271]Tadic Appeals Judgment, par. 228.
[272]Schwartz, "Wartime Sexual Violence" (2017): 88.

5.7. Consistency by sharing best practices

Consistency in handling genocidal rape cases by sharing best practices play a crucial role in facilitating the recognition of genocidal rape and combating this heinous crime. International cooperation and sharing best practices among states, judicial institutions, and organisations is essential in addressing the unique judicial challenges associated with genocidal rape cases. This entails exchanging knowledge and experiences related to the investigation, prosecution, and adjudication of such crimes. By learning from successful models and lessons learned from previous cases, judicial practitioners can enhance their understanding of the specific legal, evidentiary, and procedural considerations inherent in genocidal rape cases.[273] This accumulation of knowledge and experience can contribute to the advancement of national courts' efforts to establish consistency and coherence within their domestic legal systems. It is important to note that national courts bear the primary responsibility for adjudicating cases involving international crimes, and the International Criminal Court (ICC) plays a complementary role in situations where national courts are unable or unwilling to address such crimes.[274] Therefore, it is crucial to enhance national systems by promoting the exchange of best practices and providing genuine support to their endeavours, as this is vital in the fight against genocidal rape.

The judicial handling of the Akayesu case established a significant precedent for the future prosecution of genocidal rape cases. Despite the verbatim incorporation of the definition of genocide in the ICTR Statute[275], which does not explicitly include rape as an enumerated act, the Chamber successfully convicted Akayesu of genocidal rape. This outcome can be largely attributed to the invaluable testimonies provided by witnesses JJ and HH.[276] The remarkable courage demonstrated by survivors of genocidal rape, coupled with the diligent efforts of the judiciary, collectively contributed to this historic verdict. By conducting interviews with meticulous questioning techniques and exercising due care, sensitivity, and respect for the victims' situation, the Chamber was able to elicit accusations that substantiated the guilt of the accused and supported his conviction.

[273]Reid-Cunningham, “Rape as a Weapon” (2008): 280.
[274]OTP Policy Paper, Art. 13.
[275]ICTR Statute, Art. 2.
[276]Van Shaack, “Engendering Genocide” (2008): 10.

Sharing such practices amongst national and international courts can foster consistency and coherence within their respective legal systems and contribute to the harmonisation of legal standards. That would lead to improving judicial decision-making and enhancing the overall effectiveness of the legal response to genocidal rape. Furthermore, collaboration and the sharing of best practices can contribute to capacity-building efforts in jurisdictions that may face significant challenges in addressing genocidal rape. Developing countries or regions with limited resources and expertise can benefit from the experiences of more established judicial systems. By providing technical assistance, training programs, and mentoring initiatives, experienced jurisdictions can support the development of effective legal frameworks and institutions that can better address genocidal rape cases.

In conclusion, this chapter proposed several key measures to realise the full potential of the OTP policy paper and further transform the legal proceedings related to genocidal rape cases, starting by stressing the importance of equal gender distribution in key positions within the legal system. Promoting gender inclusivity among prosecutors, investigators, and judges is essential to address the unique challenges faced by survivors of genocidal rape, who are predominantly women. Furthermore, comprehensive training programs were proposed to equip judicial actors with the necessary knowledge and expertise to handle genocidal rape cases effectively. Special attention should be given to the intersectionality of victims' experiences and the specific aspects of genocidal rape. Witness protection was identified as a crucial factor in the recognition of genocidal rape within the legal framework. Robust measures should be implemented to ensure the safety and security of witnesses who come forward to testify or provide evidence. The application of the Joint Criminal Enterprise (JCE) doctrine was discussed as a means to hold leaders accountable for the crime of genocidal rape, even if they did not personally commit the acts. Collaboration and the sharing of best practices among states, judicial institutions, and organisations were identified as crucial for addressing the unique challenges associated with genocidal rape cases. By learning from successful models and experiences, national and international courts can enhance their understanding and response to genocidal rape.

6. Conclusion

This thesis underscores the importance of recognising rape as a distinct category of genocidal acts under the current legal framework. Through this research, the multidimensionality of the crime of genocidal rape emerged. Untangling the different layers of complexity of genocidal rape in an attempt to outline its unique nature has been a particularly challenging task. By analysing the historical and socio-political context of the genocides, the occurrence of the crime was proved, and its role was acknowledged. Subsequently, the examination of the progressive conceptualisation of rape in international law was necessary in order to address the limitations of the perception of rape under the existing legal framework. Currently, rape is not a distinct category of genocidal acts but is linked to genocide only through its categorisation in one of the already existing categories, i.e., accompanying the killing of members of the group, proving the cause of physical or mental harm, used as a method of inflicting conditions of life calculated to bring physical destruction, considered as a measure imposed to prevent births or as a strategy of forcibly transferring children of the group to another group.

However, this thesis provided a comprehensive understanding of the crime, explaining that rape as an act alone is efficient in meeting the threshold of genocide. It can fracture the cohesion of the group and detrimentally affect their reproductive capacity. This occurs through the forced displacement of female victims and the resulting stigmatisation that hinders their chances of marriage and family creation. Additionally, the killings of victims during or after instances of rape further diminish the group's population. The range of ways in which rape can function as an effective method of genocidal conduct is extensive. These are only a few yet indicative examples of how genocidal rape can lead a targeted group to destruction. And *"genocide means any […] act[s] committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".*[277]

Through an examination of the Holocaust, the Bosnian genocide, and the Rwandan genocide, it has become evident that rape has been present in genocides with different intents and roles in the execution of genocidal plans. The evolution of the international community's perception of rape, from its disregard to its recognition as a crime against humanity and an act constituting genocide, has been traced.

[277]Genocide Convention, Art. II.

Furthermore, the conceptualisation of rape in international law was explored, highlighting the progressive incorporation of rape in international criminal law instruments. Noteworthily, the absence of a universally accepted definition of rape has created ambiguity, leading to the formulation of multiple definitions. The author argues that the definition established in the Akayesu case is the most suitable for capturing the essence of rape in an international context. Additionally, the conceptualisation of rape under international humanitarian law and its classification as a grave violation of women's rights in conflict under the relevant IHRL instruments was presented and discussed.

The evaluation of the existing categories of genocidal acts determined that they do not effectively address the specific characteristics of genocidal rape. Subsuming rape within the existing categories of genocidal acts rather perpetuates the dependency relationship of genocidal rape to other crimes. The unique nature of genocidal rape was emphasised, stressing the need for its separate recognition within the legal framework. Distinctions were made between genocidal rape and opportunistic rape during genocide, as well as rape as a crime against humanity or a war crime. Then, this thesis identified various challenges in recognising and prosecuting genocidal rape, including the perspectives and experiences of victims, perpetrators, prosecutors, investigators, and judges involved in such cases. These obstacles must be overcome to ensure justice for the survivors and accountability for the perpetrators. In order to tackle these challenges, the last part of this study proposes a major legal transformation: the expansion of the definition of genocide to include rape as a sixth distinct category. Because the truth is that rape already meets the criteria for constituting genocide, the only remaining step is its formal recognition as such.

With the proper recognition of genocidal rape as a prerequisite and a conceptual foundation, this thesis expanded on proposing measures and reforms to enhance the effectiveness of the existing legal system. The realisation of the full potential of the 2014 OTP policy paper, along with the implementation of the recommendations proposed, would contribute to the accountability of perpetrators, the provision of justice for survivors, and the prevention of future genocidal acts. This would transform the legal proceedings and engender substantial change in dealing with genocidal rape cases.

In the end, this dissertation serves as a starting point for further exploration of deeper issues that are beyond its academic scope. It can constitute a stimulus for further discussions around the relativity of definitions and terminology created in previous eras by people far from the core of events. A trigger for questioning the adequacy of adopting laws created by white Western men that influence and define

the experiences of women belonging to ethnic minorities, whether Bosniaks or Tutsis. But it is not exclusively for those women, or those ethnicities or those genocides. It is for all genders, all ethnicities and all cases of genocidal rape that have occurred, are occurring and will occur in the future. Because the list of victims will keep on growing in a system that has repeatedly shown itself to be inferior to the circumstances and incapable of assigning responsibility, punishment, and, even more so, putting a definitive end to the commission of the crime. Classifying rape as a distinct genocidal act transcends academic pursuits; it represents a crucial initial stride in paving the way for combating and preventing such atrocities in the future.

No matter how it is named, acknowledged, handled, or ignored, rape "*committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group"* is not a by-product of conflict. It is not an opportunistic and isolated incident. It is not a crime against humanity. It is not a war crime. It is genocide.

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