Exploring the Differences and Similarities in Sexual Violence as forms of Genocide and Crimes against Humanity

By

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Declaration

I, Lorenzo Mark Wakefield, hereby declare that "*Exploring the Differences and Similarities in Sexual Violence as forms of Genocide and Crimes against Humanity*" is my own work.

It has never been submitted for any degree or examination in any other university.

I further declare that all secondary sources used have been acknowledged accordingly by complete references.

Student

Signed:…….. Date:……..

Supervisor

Signed:…….. Date:…….

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Abstract

Even though sexual violence has always been a part and parcel of conflicts and atrocities throughout the ages, it never found any interpretation by subsequent tribunals who were responsible for prosecuting offenders.

The case of *The Prosecutor v Jean-Paul Akayesu* was the first of its kind to give jurisprudential recognition and interpretation to sexual violence as war crimes, crimes against humanity and genocide respectively. This case was important for the following reasons:

1. It acknowledged that sexual violence can amount to an act of genocide;
2. It acknowledged that sexual violence can amount to a crime against humanity; and
3. It was the first case to define rape within an international context.

Following the case of *The Prosecutor v Jean-Paul Akayesu* many tribunals gave recognition to the extent of which sexual violence takes place during atrocities by correctly convicting accused for either participating in sexual violence or aiding and abetting to sexual violence. Amidst the various interpretations on what constitutes sexual violence and how it is defined, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone all either conceptualised sexual violence as genocide, war crimes or/ and crimes against humanity.

At the same time, the development of sexual violence as either a crime against humanity or a war crime did not end with the courts. The case of *The Prosecutor v Jean-Paul Akayesu* sparked a fire in the international community, which led to it paying more attention to the place of sexual violence in treaty law. Taking into account that rape is listed as a crime against humanity in both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda statutes, the Special Court for Sierra Leone and the International Criminal Court statutes both list more than one form of sexual violence as a crime against humanity. It is interesting to note that the latter two treaty developments took place only after the International Criminal Tribunal conceptualised sexual violence as a crime against humanity.

Thus apart from merely listing rape as a crime against humanity, the Statute establishing the Special Court for Sierra Leone, states in article 2(g) that sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence constitutes a crime against humanity. The Statute establishing the International Criminal Court states in article 7(1)(g) that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity constitutes a crime against humanity. The interpretation of these acts is further guided by the 'Elements of Crimes' which are annexed to the International Criminal Court statute. Once again it is interesting to note that the 'Elements of Crimes' for these acts are similar to how the International Criminal Tribunals (both the former Yugoslavia and Rwanda tribunals) conceptualised various acts of sexual violence.

On the other hand, the definition of genocide remained the same as it was defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. This definition does not expressly mention any form of sexual violence as a form of genocide. However, once again, the trial chamber in the case of *The Prosecutor v Jean-Paul Akayesu* set the benchmark for sexual violence to constitute a form of genocide by way of interpretation. The definition of genocide did not subsequently change in the Statute establishing the International Criminal Court.

Based on these premises, this thesis attempts to investigate the similarities and differences in sexual violence as a form of both genocide and a crime against humanity, by addressing the following question:

What are the essential and practical differences between sexual violence as crimes against humanity and genocide and what is the legal effect of the differences, should there be any?

Chapter 1 highlights the historical overview and developments of sexual violence as genocide and crimes against humanity, while chapter 2 investigates how sexual violence can amount to a form of genocide. Chapter 3 assesses the advances made in sexual violence as a crime against humanity, while chapter 4 importantly draws a comparative analysis between sexual violence as genocide and a crime against humanity. Chapter 4 draws this comparison by weighing up four differences and four similarities in sexual violence as genocide and a crime against humanity.

Chapter 5 highlights the conclusion and provides an answer for the research question that is posed above. Here it is concluded that even though there exist multiple differences in sexual violence as crimes against humanity and genocide, there are also multiple similarities which could possibly amount to a better chance for conviction of an accused under a crime against humanity than genocide. Chapter 5 also provide possible recommendations for the consequences that might flow should sexual violence as a crime against humanity be fairly similar to sexual violence as genocide.

Keywords/ Phrases

International Criminal Law

Sexual Violence

Crimes against Humanity

Genocide

International Criminal Tribunal for the former Yugoslavia

International Criminal Tribunal for Rwanda

Comparative Analysis

International Criminal Court

Special Court for Sierra Leone

Treaties

Feminist Legal Opinion

Customary International Law

Opinio Juris

Jus Cogens

Abbreviations

CCL. 10	Control Council Law Number 10
DEVAW	Declaration on the Elimination of Violence against Human
DRC	Democratic Republic of the Congo
EoC	**'**Elements of Crimes' annexed to the International Criminal Court statute
FRPI	Force de Resistance Patriotique en Ituri
HIV	Human Immunodeficiency Virus
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
SCSL	Special Court for Sierra Leone
UN	United Nations
UNCAT	United Nations Convention against Torture and other Cruel Inhuman and Degrading Treatment or Punishment
UNSC	United Nations Security Council

Chapter 1:

Introduction, Historical Overview and Developments

1.1 Sexual violence during armed conflict

Although previously never regulated, sexual violence has always been a part of armed conflict and in most cases women and girls fell victim to this heinous crime. In her anthropological study into the use of sexual violence in warfare, stemming from ancient origins, Vikman argues that although armed conflicts have changed as far as weapons and arms are concerned, sexual violence has always been present during armed conflicts.[1]

She commences her study by investigating how the Israelites used rape during armed conflict as a weapon of war and for symbolic reasons. Moses, ordered the mass rape of 32 000 girls while waging war against the Midianites.[2] Symbolically, breaking into a city was manifested and re-enacted by raping its citizens.[3] In other words, not only just was the presence of the opposition known by the multiple rapes of women, but these rapes were also used as a method of war. Lastly, she states that Moses and the Israelites were not brought to justice for raping Midianite women and girls, because it was seen as a rightful act of vengeance for what the Midianites did to the Israelites.[4] The Bible thus serves as a good indication, documenting the modern day wrongs of the Israelites, which

[1] See Elisabeth Vikman 'Ancient Origins: Sexual Violence in Warfare' (2005) 12 *Anthropology & Medicine* 22.
[2] See E Vikman op cit note 1 at 23.
[3] Ibid.
[4] See E Vikman op cit note 1 at 24.

was justified by mere vengeance. Although vengeance was used to defend Moses and the Israelites, this story portrays a real image of how women are used as modern day means and methods of warfare.

The raping of women, during armed conflicts did not end at the time of the Israelites. During ancient Greek times, Persian soldiers also raped women, successively, which led to the deaths of the women.[5] The women were of Phocian origin and were caught near the mountains while being chased by the Persian soldiers.[6] With regards to Ancient Rome, legend has it that Roman society was founded on the rape of Sabine women.[7] Based on Vikman's study it is thus evident that raping women when used as a weapon during armed conflict was considered appropriate, as long as it was used on the enemy.

Against this backdrop rape and the sexual abuse of women became a frequent occurrence, during armed conflicts. Sexual violence started slowly but surely raising its head out during conflicts of the twentieth century.[8] Although sexual violence was not mentioned during the infamous Nuremburg trials, it was brought before the Tokyo Tribunal. However, the judge rejected this evidence, based on the difficulty of proving that women had not given their consent to sexual intercourse with the perpetrators.[9] The mere fact

[5] See E Vikman op cit note 1 at 25.
[6] Ibid.
[7] See E Vikman op cit note 1 at 27.
[8] For example, during the Rwandan, former Yugoslavia and Sierra Leone conflicts, sexual violence was a common practice.
[9] See Annette Lith 'The Development of the Legal Protection against Sexual Violence in Armed Conflicts – Advantages and Disadvantages (2001) unpublished 4.

that this was not mentioned during the Nuremburg trials or a conviction secured based on this in Tokyo, does not mean that sexual violence did not take place during the Second World War, as a means and a method of warfare. Groundbreaking developments in this area of the law arose, when the International Criminal Tribunals for the former Yugoslavia[10] and Rwanda[11] successfully prosecuted and convicted accused for committing sexual violence against women during these conflicts. Ward thus rightly states that:

> "A growing body of data from the wars of the last decade is finally bringing to light one of history's great silences: the sexual violation and torture of civilian women and girls during periods of armed conflict."[12]

Codifying sexual violence into international treaties', as part of the definition of the international crimes,[13] saw the light during the establishment of the International Criminal Tribunals for Yugoslavia and Rwanda, respectively. The statutes establishing these criminal tribunals included rape into the definition of a crime against humanity.[14] The Statute establishing the Special Court for Sierra Leone (hereinafter referred to as the SCSL statute) went further and also stated that sexual slavery, enforced prostitution, forced pregnancy and other forms of sexual violence, apart from just rape, constitutes a

[10] The Ad Hoc International Criminal Tribunal for the Prosecution of Persons Responsible for serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (hereinafter referred to as the ICTY). Further light will be shed on this tribunal at a later stage.
[11] The International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as the ICTR). Further light will be shed on this tribunal at a later stage.
[12] See Jeanne Ward, Christopher Horwood, Claire McEvoy, Pamela Shipman & Lauren Rumble *The Shame of War: Sexual Violence against Women and Girls in Conflict* (2007) 11.
[13] I.e. war crimes, crimes against humanity and genocide.
[14] See article 5 of the ICTY statute and Article 3 of the ICTR statute.

crime against humanity.[15] The latest development came about with the Statute establishing the International Criminal Court (hereinafter referred to as the ICC Statute). This statute incorporated sexual violence and rape into the definition of both a war crime[16] and a crime against humanity.[17] The definition of genocide, as contained within the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter referred to as the Genocide Convention) of 1948 is part of the *jus cogens* and enjoys customary international law status.[18] Therefore the definition contained within the Genocide Convention has been copied verbatim into the statutes establishing the ICTY, the ICTR and the ICC. Although this definition makes no mention of sexual violence or rape, both the ICTY and ICTR interpreted this definition to include rape and sexual violence as means and methods of these crimes.[19]

This study will only deal with the extension of sexual violence into the definitions of genocide and crimes against humanity. Therefore, I will only portray the historical developments of these two crimes and will not include war crimes and crimes of aggression in this study.

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[15] See article 2(g) of the SCSL statute.
[16] See article 8.
[17] See article 7.
[18] It enjoys customary international law status because it is currently ratified by 137 States, which includes South Africa. Please see www.preventgenocide.org (accessed on 10 March 2008) for further developments with regards to this convention. See also Gerhard Werle *Principles of International Criminal Law* (2005) 191.
[19] An example of this would be the groundbreaking judgment of *The Prosecutor v Akayesu* ICTR 96-4-T, 2 September 1998 (hereinafter referred to as the *Akayesu* trial judgment), where the ICTR convicted the accused of genocide, for raping and overseeing that women were raped in his commune. Further light will be shed on this case in chapter 2.

1.2 Crimes against humanity

The definition for crimes against humanity was first formulated in article 6 of the Nuremberg Charter.[20] This Charter was established following the attempted extermination of all the European Jews by the Nazi Government. Article 6(c) of the Nuremberg Charter defined crimes against humanity as:

> "Murder, extermination, 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 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."

This definition of crimes against humanity contains the following components: (a) the material acts, (b) the broad scope of the crimes and (c) discrimination. The material acts are quite narrow, because they do not expressly cover detaining people (which was prominent during the atrocities committed against the European Jews) or rape and sexual violence. These grounds have to be read in and interpreted as 'other inhumane acts'. On the area of applicability, this definition was quite broad, as it granted protection to all civilians and not just a specific group. However, this scope could have been narrowed, if it was shown that persecution took place on political, religious or racial grounds. From a feminist perspective it could be argued that the biggest flaw of this definition is that it is

[20] After its victory over the Nazi occupation of Europe, the allied forces established a charter to prosecute war criminal during the European counterpart of World War II. This charter was known as the 'Charter of the International Military Tribunal in Nuremberg" (Hereinafter referred to as the Nuremberg Charter). Article 1 of the Nuremberg Charter reads: "In pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, there shall established an International Military Tribunal… for the just and prompt trial and punishment of the major war criminals of the European Axis."

not gender sensitive, as it does not make provision for the protection of women, as a specific group or against crimes of a sexual nature.

The definition of crimes against humanity in the Tokyo Charter[21] was more specific than that of the Nuremberg Charter. The Tokyo Charter defined crimes against humanity as:

> "Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in 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. *Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.*"[22]

Although this definition is not *prima facie* gender sensitive, it is more specific in the sense that it includes 'leaders, organisers and instigators' under its scope of application. This definition also, expressly, criminalises conspiracy to commit crimes against humanity. Another interesting difference evident between these two definitions is that the Tokyo charter does not include religion, as a ground of persecution. Bassiouni here correctly argues that the reason for this difference is due to the fact that the Nazi crimes against the Jews did not have a counterpart in the Asian conflict.[23] Even though this is true, the difference in the formulation of these definitions is problematic. It violates the principles of legality and also creates confusion in the area of legal certainty.

[21] The establishment of the 'International Military Tribunal for the Far East' (hereinafter referred to as the Toyko Charter) took place 2 years after the Nuremberg Charter was established. For more on the establishement of the Toyko Charter you are welcome to read: Gerhard Werle op cite note 18 at 11 – 12.
[22] See article 5(c) of the Tokyo Charter. My emphasis added.
[23] See M. Cherif Bassiouni *Crimes against Humanity in International Law* 3ed (1999) 33.

After the allies took control of Germany, Control Council Law 10 was enacted. This law also contained a definition for crimes against humanity. It defined crimes against humanity as:

> "Crimes against Humanity: *Atrocities and offences, including but not limited to* murder, extermination, enslavement, deportation, *imprisonment*, torture, *rape*, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated."[24]

This was the first definition where rape was included as an *actus reus* of a crime against humanity. This definition was not entirely gender sensitive as it still ignored other forms of sexual violence which legally did not constitute rape.[25]

The definition of crimes against humanity came under scrutiny again when the United Nations Security Council (hereinafter referred to as the UNSC) had to enact resolutions to establish the statutes to create the ICTY and ICTR. These criminal tribunals were created to prosecute those persons who committed genocide, crimes against humanity and war crimes during the conflicts that arose in the former Yugoslavia and Rwanda, respectively. Although these statutes were created around a similar period in time, the definition of crimes against humanity in the ICTY statute is different, in relation to the one contained in the ICTR statute. Article 5 of the ICTY statute defines crimes against humanity as:

> "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
> a) murder;
> b) extermination;

[24] See article II(c) of Control Council Law 10 (hereinafter referred to as CCL. 10). My emphasis added.
[25] Examples of other forms of sexual violence would be sexual slavery, forced prostitution and enforced pregnancies.

c) enslavement;
d) deportation;
e) imprisonment;
f) torture;
g) rape;
h) persecutions on political, racial and religious grounds;
i) other inhumane acts."

On the other hand, article 3 of the ICTR statute defines crimes against humanity as:

> "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
> a) Murder;
> b) Extermination;
> c) Enslavement;
> d) Deportation;
> e) Imprisonment;
> f) Torture;
> g) Rape;
> h) Persecutions on political, racial and religious grounds;
> i) Other inhumane acts."

The first evident difference between these two definitions is that the ICTY statute requires that there be a conflict in order for a crime against humanity to be committed. The ICTR statute does not contain this requirement. The ICTR statute requires that a 'widespread or systematic' attack has to take place against the civilian population, while the ICTY statute does not require this. The ICTR statute is more specific in that it states that the crime must be committed against a civilian population because they belonged either to one of the five groups mentioned.[26] Article 5 of the ICTY statute is essentially quite broad and vague as any of those acts can also be a considered a grave violation of international humanitarian law. The reason why this definition can also be considered a grave violation of international humanitarian law is because there is no inherent, distinct requirement that would make any of the listed acts a crime against humanity. The

[26] National, political, ethnic, racial or religious.

inherent, distinct requirement contained within the ICTR statute is the fact that the acts has to be committed as part of a widespread or systematic attack.[27] Both these definitions include rape as an individual act which can be committed as a crime against humanity. Although these definitions do mention rape as an act punishable, it still comprises of a *lacuna* as it does not cover any other forms of sexual violence, as a crime against humanity.

On 14 August 2000, the UNSC adopted resolution 1315 which established the special court for Sierra Leone. This court is mandated to prosecute persons who committed crimes against humanity and war crimes during the conflict that took place in Sierra Leone. Article 2 of this statute provides the following definition for a crime against humanity:

> "The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:
> a. Murder;
> b. Extermination;
> c. Enslavement;
> d. Deportation;
> e. Imprisonment;
> f. Torture;
> g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
> h. Persecution on political, racial, ethnic or religious grounds;
> i. Other inhumane acts."

Although this definition also requires that there be a widespread or systematic attack (like that in the ICTR statute), this definition expressly goes beyond mere rape by including more forms of sexual violence as listed acts.

[27] This will be further analysed in chapter 3.

Crimes against humanity saw its penultimate development within the area of international treaties by the adoption and enactment of the ICC statute.[28] This statute creates a permanent international court which has the jurisdiction to prosecute four crimes of an international nature.[29] Article 7 of this statute contains a detailed definition and explanation of crimes against humanity. Article 7(1) states that:

> "For the purpose of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectively on political, racial national ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of this Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

Article 7(2) further explains what constitutes 'attacks directed against any civilian population, extermination, enslavement, deportation or forcible transfer of population, torture, forced pregnancy, the crime of apartheid and enforced disappearance.' Sub-article

[28] The SCSL statute as mentioned above contains the latest version for the definition of crimes against humanity, as it was promulgated after the ICC statute was drafted.
[29] These crimes are: genocide, crimes against humanity, war crimes and the crime of aggression.

3 clarifies what is meant by 'gender'.[30] Although the ICC statute gives such a detailed definition and explanation of crimes against humanity, no judgment has been delivered by this court (interpreting this definition). This, despite the fact that this court is running into its ninth year of existence. That said, I thus agree with Darryl Robinson when he states that "the ICC statute is more detailed than previous definition, [which] generally seems to reflect most of the positive developments identified in recent authorities."[31]

1.3 Genocide

Unlike the definition for crimes against humanity, the definition of genocide has not seen so many different versions, or even developments, within the international community. The crime of genocide was first formulated by a Polish lawyer of Jewish origin, Raphael Lemkin after he heard a broadcast by Winston Churchill (four years earlier)[32] who said that "we are in the presence of a crime without a name."[33] Winston Churchill made this statement in reply to the atrocities that the Nazi regime committed against the European Jews, Poles, Slovenes and Serbs. Lemkin went further and explained genocide[34] to mean the following:

[30] "For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above."
[31] See Darryl Robinson 'Defining "Crimes against Humanity" at the Rome Conference' (1999) 93 *The American Journal of International Law* 43.
[32] See John Quigley *The Genocide Convention: An International Law Analysis* (2006) 4. The radio broadcast by Churchill was made on 24 August 1941, which was 9 weeks after Germany invaded the Soviet Union.
[33] Ibid.
[34] See Raphael Lemkin *Axis Rule in Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944) 79. Lemkin derived the term 'genocide' from the Greek word '*genos*' (which means race and tribe) and the Latin suffix '*cide*' (which means killing).

> "Genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended, rather, to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective of such a plan would be the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups."[35]

This explanation given by Lemkin is very specific in that it only pertains to the destruction of national groups. It also requires that there be an intention to destroy the group. This intention is vital to establish whether an atrocity can be termed genocide. This explanation also does not state the methods of destroying the group. It only requires that the group's essential foundations be destroyed. Sexual violence destroys the liberty, health, dignity and lives of individuals of a group. If the required intention can be proved, then it can be argued that sexual violence constitutes a method of destroying the group. Lemkin thus left a back door open to establish the means and methods of how a group can be destroyed. He did this by not recognising only certain acts punishable as forms of genocide.

The first legal definition for genocide was later formulated in the Genocide Convention.[36] This convention defines genocide as:

> "... genocide means any of the following acts committed with the 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;
> (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 from the group to another group."[37]

[35] Ibid.
[36] United Nations Resolution 260(III), 9 December 1948.

This definition is quite specific as it narrows the groups down to only four, being national, ethnical, racial or religious. In the secretariat draft of the Genocide Convention, political groups were also considered as a protected group. In his book *Axis Rule in Occupied Europe, Analysis of Government, Proposals for Redress* Lemkin preferred to omit this group on the basis that it lacked permanence.[38] *Prima facie* it is evident that women are omitted as a protected group. However, within all these protected groups, women serve as an important foundation for its existence. This therefore makes women vulnerable as possible targets in destroying a group.

On the other hand, this definition is also quite broad in that it does not prescribe how the perpetrators can go about to commit the listed acts against a protected group. Although the conception of the transferring of children from one group to another is self-evident, there are multiple ways to cause serious bodily or mental harm. For example, in the case of *The Prosecutor v Maki Muhimana*,[39] the ICTR stated that by raping a witness (who belonged to the Tutsi ethnic group), during the 1994 Rwandan conflict, the accused caused serious bodily and mental harm to a member of that ethnic group, which was protected under the definition of genocide.[40] Another example of causing serious bodily or mental harm would be torture.[41]

[37] See article II of the Genocide Convention.
[38] See William A Schabas *Genocide in International Law* (2000) 53.
[39] ICTR-95-1B-T, 28 April 2005. (Hereinafter referred to as the *Muhimana* judgment).
[40] Para. 302 of the *Muhimana* judgment. The added requirements needed to commit genocide were also proved in this case.
[41] The ICTR gave this example in the *Akayesu* trial judgment at para. 504.

Unlike crimes against humanity, this definition of genocide remained constant within the development of subsequent international treaties'. Both the ICTY and ICTR statutes contain this definition, as well as the Rome statute.[42] The SCSL does not have the jurisdiction to deal with cases of genocide. It only has the competence to deal with cases involving the grave violation of international humanitarian law and crimes against humanity.[43]

1.4 Conceptual framework

Even though sexual violence is mostly perpetrated against women during atrocities where both crimes against humanity and genocide were committed, this study will attempt to be gender neutral. In other words, more focus will be placed on committing the crime of sexual violence, rather than the fact that it only takes place against women. That said, even though this study will not be a so called 'woman's study' I will investigate whether taking a gendered approach might serve as an effective response to the criminal prosecution of accused persons who commit crimes of a sexual nature during an atrocity. This would then justify why, at times, I will also refer to feminist critiques and approaches as recommendations, where it serves as a workable solution in conceptualising the differences and similarities of sexual violence as crimes against humanity and genocide. Please note that there will be times when I refer to a victim of

[42] See article 2(2) of the ICTR statute, article 4(2) of the ICTY statute and article 6 of the Rome statute, respectively.
[43] See articles 1, 2, 3 and 4 of the SCSL statute.

sexual violence as a woman and perpetrators of sexual violence as men. I do this because most of the victims of sexual violence during atrocities are women and most of the perpetrators are men. This does not necessarily mean that this study adopts a gendered perspective.

1.5 Research question

What are the essential and practical differences between sexual violence as crimes against humanity and genocide and what is the legal effect of the differences, should there be any?

1.6 Rationale of the study

The international community has seen countless sexual violence incidents committed against civilians during multiple conflicts and atrocities.[44] However, not until judgments delivered by the ICTY and the ICTR, during 1996, have the international community seen justice served for committing these acts.

This thesis is intended to draw a comparative analysis between sexual violence as a crime against humanity and genocide, respectively.[45] Even though the biggest difference

[44] See Ward et al op cit note 12 at 11.
[45] In other words, I will assess the differences and similarities of sexual violence as a crime against humanity and genocide, respectively.

between crimes against humanity and genocide is found within the burden of proof,[46] I wish to investigate whether practically and legally the similarities outweigh the huge burden of proof difference. In other words, when indicting an accused for sexual violence (either as a crime against humanity or genocide); would the similarities between these crimes make it easier for the prosecution to indict the accused for crimes against humanity, instead of genocide (bearing the huge burden of proof in mind for genocide)? If the answer to this question is a positive one, then I wish to make helpful recommendations to ensure that these two crimes remain different in its jurisprudential development. If the answer to the above question is a negative one, then this study would confirm the bold steps taken by the criminal tribunals to give jurisprudential recognition to sexual violence that takes place during atrocities.

1.7 Literature review

Since the first judgments - in both the ICTY and the ICTR - convicting accused persons for sexual violence as crimes against humanity and genocide, multiple authors analysed these judgments and constructively criticised it.

Apart from the debate by various authors around the various judgments where sexual violence was conceptualised as a crime against humanity and genocide, the ICTY and the ICTR also delivered opposing definitions for the crime of 'rape' in the international

[46] Proving that (1) crimes against humanity took place as part of a widespread and systematic attack against a civilian population, while (2) genocide took place against a certain listed group in its definition, by way of specially targeting that group.

sphere. In the *Akayesu* judgment the ICTR adopted a broad approach, which placed emphasis on sexual violence that takes place in coercive circumstances and discarded the notion of consent.[47] However, after this judgment, the ICTY in the case of *The Prosecutor v Anto Furundzija*[48] dismissed this broad definition of rape and conceptualised a more mechanical definition that focused on body parts of the perpetrator and his victims.[49] Authors such as De Brouwer correctly argues that the broader approach adopted by the ICTR serves as a better option as it does not require the victim to testify about body parts when she is called as a witness.[50] MacKinnon also correctly argues that the definition adopted by the ICTY takes us back step by step to the notion of non-consent.[51]

Authors like Carpenter, for example, conceptualised her own feminist theory of justice after the genocide in Rwanda.[52] Articles such as this one called for a more sex based approach when judging cases where sexual violence was one of the crimes for which an accused was indicted. In her article she criticises liberal feminism as "a strategy of assimilation of women to a standard set by men."[53] She does this because liberal feminism attempts to achieve equality between man and woman in the law.

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[47] Para. 688.
[48] IT-95-17/1-T, 10 December 1998. (Hereinafter referred to as the *Furundzija* judgment).
[49] Para. 185.
[50] See Anne-Marie LM De Brouwer *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005) 107.
[51] See Catharine A MacKinnon *Are Women Human? And Other International Dialogue* (2006) 239.
[52] See Megan Carpenter 'Bare Justice: A Feminist Theory of Justice and its Potential Application to Crimes of Sexual Violence in Post-Genocide Rwanda' (2008) 41 *Creighton Law Review* 595-661.
[53] See M Carpenter op cit note 52 at 604.

Apart from just criticising and analysing these decisions by the international tribunals, authors such as Askin[54] and Van der Poll[55] welcome them as giving recognition to one of the most heinous crimes committed during conflict, which never found recognition by tribunals or courts.

It was articles by authors such as Evans[56] and McAuliffe deGuzman[57] that led me to explore the differences and similarities between sexual violence as crimes against humanity and genocide. These authors investigate the inherent differences between crimes against humanity and genocide, broadly. This thesis, on the other hand, wish to investigate these differences, but only as far as they relate to sexual violence. One of the biggest differences between these two crimes is that the burden of proof for genocide is much higher than that for crimes against humanity. Sexual violence, as an individual act of both these crimes also requires that the prosecution prove that the perpetrator had the knowledge and intent to commit either a crime against humanity or genocide. Thus, this study, aims to use sexual violence as an example, when analysing the consequences that the similarities has on the differences between these crimes.

[54] See Kelly Dawn Askin 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status' (1999) 93 *American Journal of International Law* 97-123.
[55] See Letetia Van der Poll 'The Emerging Jurisprudence on Sexual Violence Perpetrated against Women during Armed Conflict' (2006) *African Yearbook on International Humanitarian Law* 1-38.
[56] See Gareth Evans 'Crimes against humanity: overcoming indifference' (2006) 8 *Journal of Genocide Research* 325-339.
[57] See Margaret McAuliffe deGuzman 'The Road from Rome: The Developing Law of Crimes against Humanity' (2000) 22 *Human Rights Quarterly* 335-403.

Apart from the plethora of research articles available around this topic, there exist multiple books written by prominent authors on international criminal law and sexual violence in armed conflict and international law.

1.8 Research methodology

This study will be of an academic nature, investigating the inherent similarities and differences of sexual violence as a crime against humanity and genocide. I will make use of feminist writings and thoughts, where it serves as a good recommendation for conceptualising the extent of the inherent differences. The primary sources will be, treaties, case law and legislation, where applicable. The secondary sources will be books, academic articles, journals and all related literature. In doing so, I will use both the library and the internet.

1.9 Chapter outline

Chapter 2 of this thesis will discuss how sexual violence can be committed as part of genocide, while chapter 3 will discuss how sexual violence has developed as a crime against humanity. These chapters are important to understand how sexual violence was and can be interpreted as the respective crimes. Chapter 4 will consist of a comparative analysis between sexual violence as genocide and a crime against humanity. In this chapter I thoroughly investigate the differences and similarities of sexual violence, as a crime against humanity and genocide. Chapter 5 contains the conclusion (which will also answer the research question) and recommendations and with that, it also addresses the

consequences of the similarities between sexual violence as genocide and crimes against humanity.

In the end an argument is made that there indeed exist multiple legal differences between genocide and crimes against humanity. However, the factual similarities between sexual violence as these two crimes, creates an easier route for the prosecution to indict an accused for committing sexual violence, as a crime against humanity, even though, it was intended by the perpetrator to be part of a genocide campaign.

Chapter 2:

Sexual Violence as a form of Genocide[1]

Article II of the Genocide Convention defines genocide as:

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

When comparing this definition to what Lemkin intended genocide to be,[2] one can certainly argue that the international community covered most of its bases in fulfilling his wishes.[3] Lemkin had the following two components of genocide in mind:

1. The objective component, being the destruction of the essential foundation of the life of a group; and

2. The subjective component, being the intention accompanied by a plan to annihilate a group.

[1] This chapter is based on a previous study by the author: Lorenzo Wakefield 'Where does Rape find itself within the Definition of Genocide?' (2007) unpublished research paper produced in partial fulfilment of the LL.B. Degree and also awarded the Butterworths Lexis-Nexis Prize for best LL.B dissertation written at the University of the Western Cape. Paper is on file with the author.

[2] See Raphael Lemkin *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944) 79: "[Genocide] is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. 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."

[3] See William A Schabas *Genocide in International Law* (2000) 104 – 106 for a summarised version of the debates which the international community entered into to establish the groups protected under the Genocide Convention.

Although the acts mentioned under Article II of the Genocide Convention are more specific, it does entail the destruction of the liberty, health, dignity and lives of individuals of a group.

The development of genocide as an international crime did not cease with the adoption of the Genocide Convention. The ICTY and ICTR statutes also made provision for the prosecution of genocide.[4] The most modern international statute that creates jurisdiction for the prosecution of genocide, is the one creating the ICC.[5] The substance of the definition of genocide is exactly the same in these statutes as in the Genocide Convention. Therefore, the development of genocide was within the territory of the international community. More *ad hoc* international criminal tribunals and the ICC now have the jurisdiction to prosecute the crime of genocide.

This chapter will investigate how sexual violence is used as a means and a method to commit genocide. Sexual violence is not specifically mentioned under the definition of genocide, but the ICTY and the ICTR has interpreted the definition of genocide to include sexual violence, under the listed acts. In order for the successful prosecution of sexual violence, as genocide, the prosecutor will first have to prove that the accused intended to annihilate or destroy a mentioned group.

[4] See articles 4(2) of the ICTY statute and 2(2) of the ICTR statute, respectively.
[5] See article 6 of the ICC statute.

It should be noted that both the ICTY and the ICTR have delivered judgments where it convicted accused persons of committing sexual violence, as a form of genocide. The end question thus remains: after the judgments delivered by the ICTY and the ICTR (convicting accused persons of committing sexual violence, as a form of genocide) has the international community taken cognises of the tribunals' indirect cries to expressly have sexual violence included as an act of genocide?

This chapter will cover the different groups protected by the Genocide Convention. It will investigate how the international criminal tribunals interpreted sexual violence into the actions listed under the definition of genocide. Lastly, this chapter will also evaluate the intention that needs to be established in order for an act of sexual violence to constitute genocide.

2.1 The listed groups protected by the definition of genocide

Genocide can only be committed against the following groups of people: national, ethnic, racial and/or religious. The definition of genocide does not leave any backdoor open for genocide to be committed against more groups mentioned.[6] The leading questions which this section tries to answer are why these groups were specifically chosen and why a group based on sex is also not mentioned as a listed group. In order to answer these questions the international criminal tribunals and academics sought to draw a distinction between objective and subjective factors which defines a listed group.

[6] See article II of the Genocide Convention as mentioned above.

Lemkin initially started off his chapter on genocide[7] by stating that the crime of genocide is intended to destroy the "essential foundations of the life of national groups".[8] In fact Lemkin made mention quite often of the destruction of national groups in this work. The term 'national' is quite broad as it can entail any group of people within a certain country. For example, it can include Jewish citizens living in Germany. These Jewish citizens might have German nationality, but they were persecuted in Europe by the Nazi government of Germany because of practising the Jewish religion. To give answer to such a problem, Lemkin stated that attack upon a national group, "must be upon the following elements of nationhood: Political, Social, Cultural, Economic, Biological, Physical, Religious and Moral".[9] In other words, if a national group is the subject of attack, based on the grounds mentioned above, then the perpetration can amount to genocide, provided that the other requirements for genocide are met.

Although the listed groups for genocide seems clear, there has been some dispute on what exactly constitutes a national, ethnic, racial and/ or religious group. The dispute lies in whether to call for an objective[10] or a subjective[11] interpretation.

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[7] In his book *Axis Occupied Europe.*
[8] See R Lemkin op cit note 2 at 79.
[9] See R Lemkin op cit note 2 at 82-90.
[10] See John Quigley *The Genocide Convention: An International Law Analysis* (2006) 155. An objective interpretation requires that the group need to exist as a fact and the attacker attacked this group, based on that fact. An example of this would be people who profess the Jewish religion, who were the subjects of attack, because they profess to the Jewish religion.
[11] See also WA Schabas op cit note 3 at 109. A subjective interpretation, on the other hand, requires that the attacker defines his or her victim, as a person falling within the definition of one of the groups mentioned in the Genocide Convention. A hypothetical example would be if a Tutsi was attacked, because the attacker believed that the Tutsi constituted an ethnic group. Whether the Tutsi is an ethnic group is irrelevant. What is relevant is the belief of the attacker that the Tutsi constitutes an ethnic group.

Quigley argues that *prima facie* the definition of genocide appears to list the groups with an objective interpretation.[12] In other words, the four groups listed seem to be interpreted as factual groups. This narrow interpretation of the groups thus adds to the high burden of proof which the prosecutor must establish from a factual point of view. In the case of *The Prosecutor v Akayesu,*[13] the court seemed to take an objective approach in defining what an ethnic group constitutes. They stated that: "an ethnic group is generally defined as a group whose members share a common language or culture."[14] In other words, if the Tutsi population did not share a common language or culture then they would not have constituted an ethnic group, objectively. Thus, the perpetrators would have to be charged with committing another offence and not genocide.

In the case of *The Prosecutor v Kayishema & Ruzindana,*[15] the court adopted a more subjective interpretation in deciding what constituted an ethnic group. The court explained that and ethnic group is "one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of crimes (identification of others)."[16] In this interpretation the court thus required that the group must have stable foundations, which is not just determined by the group itself, but also by the group's attackers. The

[12] See J Quigley op cit note 10 at 155.
[13] ICTR – 96 – 4 – T, 2 September 1998. (Hereinafter referred to as the *Akayesu* trial judgment).
[14] Para. 513.
[15] ICTR – 95 – 1 – T, 21 May 1999. (Hereinafter referred to as the *Kayishema and Ruzindana* judgment).
[16] Para. 98.

ICTY also seems to adopt a subjective approach to defining one of the groups. In the case of *The Prosecutor v Jelisic*[17] the court stated the following:

> "Although the objective determination of a religious group still remains possible, to attempt to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community. The Trial Chamber consequently elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators."[18]

Here too, the court seems to be of the opinion that national, ethnic, racial and religious groups should be interpreted as to the perpetrators' mindset. In other words, if the perpetrator genuinely believed that the victim is of a national, ethnic, racial or religious group that he or she want to destroy (even though the victim is not objectively), then he or she should be found guilty of committing genocide. A subjective interpretation of the groups, broadens the already narrowed application of genocide. Verdirame thus rightly argues that a subjective interpretation does not reinforce perilous claims to authenticity in the field of ethnic and racial identities.[19]

2.1.1 Additional groups?

To broaden the scope of genocide and to justify its narrow, objective interpretation of the listed groups, the trial chamber in the *Akayesu* judgment further stated that genocide can happen against any other "stable groups", apart from those mentioned under the

[17] IT – 95 – 10 – T, 14 December 1999. (Hereinafter referred to as the *Jelisic* judgment).
[18] Para. 70.
[19] See Guglielmo Verdirame 'The Genocide Definition in the Jurisprudence of the *ad hoc* Tribunals' (2000) 49 *The International and Comparative Law Quarterly* 594.

definition.[20] The added requirement must be that an individual's birth must have been established by this stable group.[21] In other words, the tribunal read words into the definition of genocide. Werle argues that this is a violation of the principle of legality, as it does not conform to the wording of article 6 of the ICC statute.[22] Schabas rightly argues that the intent of the drafters was only to allow protection to those four groups. He justifies his argument by stating that the drafters would have added 'and any other stable groups' into the definition if this was their intention.[23] By interpreting the groups for genocide so vaguely, the ICTR encroached on crimes against humanity, which deals with atrocities committed against the civilian population, as a whole. It was not Lemkin's intention for crimes against humanity and genocide to essentially be the same. Evidence of this can be found in the fact that he did not even want to include political groups into the definition of genocide.[24] If the ICTR, in the *Akayesu* case, used a subjective interpretation to establish whether the Tutsi was a protected group, it would not have needed to explore the option of adding other 'stable groups' to the definition of genocide. The subjective interpretation would thus have served as sufficient evidence that the perpetrators of the Rwandan genocide attempted to annihilate the Tutsi group.[25]

[20] Para 511: "On reading through the *travaux preparatoires* of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner."
[21] Ibid.
[22] See Gerhard Werle *Principles of International Criminal Law* (2005) 198 – 199.
[23] See WA Schabas op cite note 3 at 132.
[24] See WA Schabas op cit note 3 at 134.
[25] See 2.1. above for an explanation of what constitutes a subjective interpretation.

2.1.2 A group based on sex

Sex can be defined as the biological or physiological differences between men and women.[26]

The question which this section tries to answer is whether creating a group based on sex in the definition of genocide would do justice to what Lemkin intended genocide to be. More importantly, would a group called 'sex' do justice to women or men who are persecuted in a state of genocide?

It is a known fact that where there is war, mostly women are also raped and sexually mutilated at times. Or as MacKinnon puts it: "Every time there is war, there is rape."[27] In the same chapter MacKinnon argues that attacks on women cannot define attacks on people, because ethnic attacks cannot be gendered and *vice versa.*[28] However, she argues further and states that when rape is an act of genocide, then it destroys people.[29] Therefore her concluding question is, "aren't women people?"[30] What MacKinnon is asking in conclusion is why there is no group that would give women direct protection under the definition of genocide? MacKinnon is thus arguing for a development of the definition of genocide to a group based on sex. This is also evident in one of her often used quotes:

[26] See Cathy Albertyn and Elizabeth Bonthuys *Gender, Law & Justice* (2007) 21.
[27] See Catharine A MacKinnon in Alexandra Stiglmayer *Mass Rape: The War against Women in Bosnia-Herzegovina* (1994) 188.
[28] Ibid.
[29] Ibid.
[30] Ibid.

> "It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape not to be seen and head and be watched and told to others: rape as spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide."[31]

Many authors and the international criminal tribunals have rightly acknowledged that mostly women are being used as a weapon of atrocity. Brownmiller describes this as:

> "Sexual trespass on the enemy's women is one of the satisfactions of the conquest, like a boot in the face; for once he is handed a rifle and told to kill, the soldier becomes an adrenaline-rushed young man with permission to kick in the door, to grab, to steal, to give vent to his submerged rage against all women *who belong to other men.*"[32]

In other words, during an atrocity sexual violence cannot be condoned, or looked upon as a 'by-product' of the atrocity. However, does the mere fact that mostly women suffer from sexual violence during a conflict, give sufficient reason to extend a specific group to sex in the definition of genocide?

Van der Poll is of the view that the ICTR could have taken a more flexible and nuanced interpretation of the crime of genocide, by elaborating more on the specific instances where women were targeted, solely on the basis of their sex.[33] She concludes her argument for a specific ground based on sex (or possibly gender) by stating that "due appreciation of the involuntary and permanent nature of the membership of a particular sex (and/or designated gender) as well as a careful assessment of the specific political,

[31] See CA MacKinnon in A Stiglmayer op cit note 27 at 190.
[32] See Susan Brownmiller in A Stiglmayer op cit note 27 181.
[33] See Letetia Van der Poll 'The Emerging Jurisprudence on Sexual Violence Perpetrated against Women during Armed Conflict' (2007) *African Yearbook of International Humanitarian Law* 27.

social and cultural context in question may well justify the inclusion of this particular category within the definition of the crime of genocide."[34]

It should thus be noted that mostly women are the primary targets of sexual attacks during genocide. In other words, because of their sex, mostly women are essentially targeted for crimes of a sexual nature. Evidence of this fact came to light in the *Akayesu* judgment when a witness testified that the accused encouraged the rape of Tutsi women by telling his subordinates they "no longer needed to ask what a Tutsi woman tastes like."[35]

Although women are the easiest target to overcome during a situation of genocide, it still does not give us sufficient recognition to create a stable group for sex in the definition. Women are mostly targeted because they belong to a certain national, ethnic, racial or religious group. The fact that they are women is an important reason why they are targeted, but not the direct, primary and ultimate reason for them being targeted. The direct and ultimate reason for the attack on women, are because they fall into either one of the groups mentioned in the definition of genocide. Their status as women serves as an indirect and secondary classification to a direct and primary goal of annihilating a listed group under the definition of genocide. In the case of *The Prosecutor v Gacumbitsi*[36] the trial chamber of the ICTR shed light to this reality by stating that the accused instigated attacks on several women because of either their Tutsi ethnicity or their relationship with

[34] See L Van der Poll op cit note 33 at 28.
[35] Para 422.
[36] ICTR-2001-64, 3 April 2002. (Hereinafter referred to as the *Gacumbitsi* judgment).

a person of Tutsi ethnicity, and that the order to rape Tutsi women was discriminatory in character.[37]

2.2 The listed crimes mentioned under the definition of genocide

The listed crimes under the definition of genocide are also known as the material elements, or the *actus reus*, of the crime. Under this section of the chapter, I will investigate how the international criminal tribunals went about to develop genocide by committing an act of sexual violence or rape. I will also be studying the response of the *academia* in this field.

The definition of genocide allows only for the following five acts to be committed for genocide to take place:

a) "Killing members of the group;
b) Causing serious bodily 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; and
e) Forcibly transferring children of the group to another group."[38]

[37] Para 325.
[38] See article II of the Genocide Convention.

It should be remembered that all the *actus reus* of the crime of genocide must be accompanied with the necessary intention that is needed to commit genocide. The necessary intention will be explained later in this chapter.

2.2.1 Killing members of the group

This is the first act that is mentioned within the definition of genocide.[39] It should be noted that not the killing of the whole group is required for this section to find application. Werle states that article 6(a) of the ICC statute requires that the accused "must have caused the death of at least one member of the group".[40]

In the *Akayesu* judgment, the trial chamber found that many women who were subjected to sexual violence were murdered after such violence took place.[41] In addition to this, the trial chamber also stated that there must be an intention to cause the death of the victim.[42] In these same paragraphs the trial chamber stated that the death of the victim must be accompanied by the 'intent to destroy a group in whole or in part'. De Brouwer argues that this seems to imply that if there is no intention to destroy the group, then the subsequent death of the victim will be insignificant.[43] De Brouwer basis her argument on the viewpoint of the subsequent death of the victim. In other words, if it was not the

[39] See article 4(2)(a) of the ICTY statute; article 2(2)(a) of the ICTR statute; article 6(a) of the ICC statute and article II of the Genocide Convention.
[40] See G Werle op cit note 22 at 200.
[41] Para. 733. "… the rapes of Tutsi women in Taba were accompanied with the intent to kill those women. Many rapes were perpetrated near mass graves where the women were taken to be killed."
[42] Paras. 500 – 501.
[43] See Anne-Marie LM De Brouwer *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005) 50.

accused's intention to kill the victim, but she died nonetheless, should the accused be charged and prosecuted as (a) killing members of the group; or (b) causing serious bodily or mental harm to members of a group?[44]

In the *Gacumbitsi* judgment, the ICTR found that where an act of rape was committed by the insertion of a foreign object into the genital organs of a woman, such an act can be punishable as genocide, under this heading. However, the woman has to die as a result of this insertion.[45]

The *Kayishema and Ruzindana* judgment sparked an academic debate regarding the intention to kill a victim after raping her. The prosecutor argued that an accused should still be prosecuted under this paragraph, even if there was no intention to kill the victim, but the victim nonetheless died.[46] The trial chamber held that 'killing' should be interpreted in favour of the accused and therefore the accused will not be liable under this heading, but merely under the *actus reus* causing serious bodily or mental harm to members of the group.[47] De Brouwer argues that "article 6(a)-1 of the ICC's elements of a crime requires that the perpetrator kills one or more persons" and "the footnote to this article states that the term 'killed' is interchangeable with the term caused death".[48] She argues that "the term 'killing' is thus synonymous with causing the death and the victim

[44] Ibid.
[45] Paras. 200 – 204, 215 and 261.
[46] See AMLM De Brouwer op cit note 43 at 50.
[47] Paras. 102 – 103.
[48] See AMLM De Brouwer op cit note 43 at 50.

is in fact dead".[49] I agree with De Brouwer that a perpetrator should be prosecuted under the *actus reus* of 'killing members of the group', even if it was not his intention to kill the victim. Sexual violence, especially rape leads to the indirect killing of a victim, especially when it is committed during genocide or an armed conflict, because the ultimate intention of the perpetrator in this situation would be to destroy in whole or in part a group. Crimes of a sexual nature are in most instances also quite violent and even though the victim never dies, there is a great likelihood that she might. The perpetrator is normally aware of this possibility. I also seem to disagree with the trial chamber (in the *Kayishema and Ruzindana* judgment), as it seems like it is placing different grave substances on (a) killing members of the group and (b) causing serious bodily or mental harm. The end result is still that the accused should be found guilty of committing genocide. The *actus reus* of the crime should be interpreted to see whether the accused used any of these methods in committing genocide. The trial chamber's interpretation of these two sections seems to suggest that causing serious bodily or mental harm is less grave than killing members of the group. This should not be the situation, as establishing whether the accused actually committed genocide is of more importance.

[49] Ibid.

2.2.2 Causing serious bodily or mental harm to members of the group

Causing serious bodily or mental harm to members of the group is the second *actus reus* mentioned under the definition of genocide.[50] Werle states that causing serious mental harm does not require a physical attack or any physical effects of mental harm.[51] He argues further that "serious" harm does not require that the harm be permanent or irreversible.[52] He explains that the damage must "result in a grave and long term disadvantage to a person's ability to lead a normal and constructive life".[53]

Quenivet argues that "causing serious bodily or mental harm to members of the group is the most relevant provision to encompass sexual offences".[54] She states that the reason for this can be attributed to the fact that sexual offences are considered as causing serious bodily or mental harm to the victim.[55]

In the *Akayesu* judgment, the ICTR interpreted causing serious bodily or mental harm to mean torture.[56] In the *Kayishema and Ruzindana* judgment, the ICTR interpreted this act as "harm that seriously injures the health, causes disfigurement or causes any injury to the external organs and senses".[57] In the ICTY judgment of *The Prosecutor v Radislav*

[50] See article 4(2)(b) of the ICTY statute; article 2(2)(b) of the ICTR statute; article 6(b) of the ICC statute and article II of the Genocide Convention.
[51] See G Werle op cit note 22 at 200.
[52] See G Werle op cit note 22 at 201.
[53] Ibid.
[54] See Noelle NR Quenivet *Sexual Offenses in Armed Conflict & International Law* (2005) 160.
[55] Ibid.
[56] Para. 504.
[57] Para. 109.

Krstic,[58] the court held that the term 'serious' must be harm "that goes beyond temporary unhappiness, embarrassment or humiliation".[59] Based on these interpretations of causing serious bodily harm, De Brouwer rightly argues that "the harm suffered may be physical, mental or both".[60]

In the *Akayesu* judgment, it was acknowledged that rape and sexual violence were committed against Tutsi women. Of these women were raped in public places, while some of them were raped several times. The ICTR held that these rapes resulted in "physical and psychological destruction of Tutsi women, their families and their communities".[61] In the case of *The Prosecutor v Maki Muhimana*,[62] the accused was also convicted of committing rape as genocide, by causing serious bodily or mental harm to members of a group.[63]

The case law above portrays the fact that sexual violence committed against women during genocide is normally preferred to be prosecuted as causing serious bodily or mental harm. This does not necessarily mean that it is less grave than killing members of a group. It only means that the accused did commit a listed act of genocide. That still remains the ultimate question for which the prosecution should bear the onus. However,

[58] IT-98-33-T, 2 August 2001. (Hereinafter referred to as the *Krstic* judgment).
[59] Para. 513.
[60] See AMLM De Brouwer op cit note 43 at 51.
[61] Para 731.
[62] ICTR-95-1B-T, 28 April 2005. (Hereinafter referred to as the *Muhimana* judgment).
[63] Para. 302. The accused attacked and raped Tutsi women at a refugee camp. He was found guilty of this based on the testimony of one woman whom he raped.

this *actus reus* does not require the death of the victim, like with killing members of the group. This essentially makes it easier for the prosecution to prove that genocide took place, as they can call the victims of the crime as witnesses.

Sexually violent offences falling within the ambit of causing serious bodily or mental harm is currently entrenched within customary international law.[64] A reason for this could be attributed to the amount of jurisprudence that exists for sexual violence as causing serious bodily or mental harm.[65] The Elements of Crimes, annexed to the ICC statute also connects sexual violence to this *actus reus*.[66]

2.2.3 Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part

This provision prohibits so called slow death measures.[67] In the *Akayesu* judgment, the trial chamber stated that the following examples can constitute conditions of life calculated to bring about its physical destruction: "subsistence diets, reduction of essential medical services below minimum standards and systematic expulsion from their homes."[68]

[64] See NNR Quenivet op cit note 54 at 161.
[65] As examples one can read the following cases: *Akayesu, Kayishema and Ruzindana as well as Jelisic,* amongst other.
[66] I.e. causing serious bodily or mental harm.
[67] See G Werle op cit note 22 at 201. "Conduct that does not immediately kill, but that can bring about the death of a group of members over a long period."
[68] Para. 506.

Many authors have found it difficult to interpret sexual violence as a condition of life calculated to bring about its (a group's) physical destruction, when taking the above examples into account.[69] I respectfully disagree with these authors as the ICTR in the Aka*yesu* judgment merely gave examples of conditions of life calculated to bring about its physical destruction. The trial chamber did not limit this clause to these examples and therefore adding more examples to this list is not impossible. An example of where sexual violence can amount to conditions that are calculated to bring about a groups physical destruction would be where victims are held captive while being threatened and promised that she would be raped or sexual violated. Women are the foundation of a group and in many cultures women are seen upon as less worthy of procreating if they were raped before. This could constitute a calculated condition to bring about a group's physical destruction, as no more women would procreate after being raped. Surprisingly enough, Quenivet gives another example of where sexual violence can constitute a calculated condition to bring about a group's destruction, after she found it difficult to interpret sexual violence into this category after the examples given in the *Akayesu* judgment. She argues that "rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate".[70] In other words, after being raped or

[69] See G Werle op cit note 22 at 202. He argues that mass rapes can amount to inflicting destructive conditions of life, only if it is done systematically and repeatedly, in conjunction with any of the examples listed in paragraph 506 of the *Akayesu* judgment. Quenivet, on the other hand, outright argues that she does not see it possible how sexual offences could fit into this category, when looking at the examples given in the *Akayesu* judgment. See NNR Quenivet op cit note 54 at 163.
[70] See NNR Quenivet op cit note 54 at 164.

sexually violated, women who belong to one of the groups mentioned refuse to procreate and therefore the group will eradicate ultimately.

In the *Akayesu* judgment, the ICTR stated that this ground requires that the perpetrator does not inflict measures to bring the life of members of a group immediately to an end. However, it must ultimately seek their physical destruction.[71] In the *Kayishema and Ruzindana* judgment, the ICTR stated that "rape… and reducing required medical service below a minimum… constitutes conditions of life".[72] According to the ICC statute, "conditions of life" may include, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.[73]

Another example of a possible condition of life to bring about a group's destruction would be the intentional infliction of HIV, by means of rape.[74] In other words, where the perpetrator, knowing that he is HIV positive, countless times rapes the victim, knowing that he will transfer this deadly disease, which will subsequently be transferred to other men of the group.

I once again agree with De Brouwer when she argues that no actual destruction is needed, because the intentional infliction of the conditions is sufficient.[75] The destruction should

[71] Para. 505.
[72] Para. 116.
[73] See AMLM De Brouwer op cit note 43 at 56.
[74] See AMLM De Brouwer op cit note 43 at 57.
[75] Ibid.

only take place at a later stage. Therefore, if it takes place the ultimate goal of the perpetrator would have been reached. If it did not take place, then the perpetrator failed to reach his goal to annihilate the group.

Thus far, no charge for sexual violence has been laid under this *actus reus*.

2.2.4 Imposing measures intended to prevent births within the group

Preventing births within a group threatens the group's biological existence.[76] In the *Akayesu* judgment, the ICTR gave the following examples of measures intended to prevent births within a group: "sterilization, forced birth control, prohibition on marriages and segregation of the sexes".[77] In this same judgment the ICTR also stated that where woman are raped, with the intention that she becomes pregnant, so that the child can take on the identity of the father's group, within patrilineal societies can also amount to measures intended to prevent births within the group.[78] In other words, the ICTR was very progressive and liberal when interpreting this *actus reus.* They did just not limit it to measures that would not make women pregnant, but also measures that would make women pregnant and ensure that the offspring belong to the father's group.

The ICTR did not stop with those two examples of measures intended to prevent births within a group. The tribunal also went further and stated that these measures can be both

[76] See G Werle op cit note 22 at 202.
[77] Para. 507.
[78] Ibid.

physical and/ or mental.[79] They gave an example of where a woman who was sexually violated refuses to procreate in the future, because of the physical and mental trauma.[80] Quenivet adds to this by giving the following examples when sexual violence and rape, more specifically, can constitute measures intended to prevent births: (1) Mass rapes, where culturally women are abandoned because they were raped. This will lead to women not procreating and (2) women who are rejected by their husbands or partners, after being sexual violated will also not procreate.[81] In Rwanda, Tutsi women were culturally rejected after being raped or sexually violated. They were rejected not just by their husbands or partners, but also by the community, as a whole. Muslim women who suffered from sexual violence by the Serbs, in the Bosnia-Herzegovina conflict, were met with the same fate.

In *The Prosecutor v Radovan Karadzic and Ratko Mladic* rule 61,[82] the ICTY stated that "some camps were especially devoted to the raping of women, with the aim of forcing then birth of Serbian offspring. The women were held in captivity until it was too late for them to undergo an abortion".[83]

Thus far, no charge for rape has been laid under this *actus reus.* Just like as in the case of 'inflicting destructive conditions of life', so the result of 'imposing measures of birth is

[79] Para. 508.
[80] Ibid. See also NNR Quenivet op cit note 54 at 164.
[81] Ibid.
[82] IT-95-5-R61, 2 July 1996. (Hereinafter referred to as the *Karadzic and Mladic* rule 61 judgment).
[83] Para. 64.

not imperative. On the other hand, the intention that the perpetrator wanted to prevent births within a group is of paramount importance.[84]

2.2.5 Forcibly transferring children of the group to another group

Forcibly transferring children [just like all the other *actus reus* of genocide] should be done with the intention of destroying a group's existence.[85] Transferring children thus should be done with intending that the children adopt the identity of the group to whom they are being transferred.[86] Werle goes further and states that the transfer of the children must be forcible, which can be either psychological or physical, because this ground requires it.[87] The core intention behind this *actus reus* is to prevent the group's children from adopting the opposing group's identity and practices, at the cost of their original group being destroyed. Therefore, forcibly transferring children or just peacefully transferring children does not strike the core intention behind this *actus reus.* The fact that the accused did not forcibly transfer children should not thus serve as a defence against this *actus reus.*

In the *Akayesu* judgment, the ICTR held that "the objective is not only to sanction a direct act of forcible transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another".[88] The ICTR also adopted a

[84] See AMLM De Brouwer op cit note 43 at 59.
[85] See G Werle op cit note 22 at 203.
[86] Ibid.
[87] Ibid.
[88] Para. 509.

purposive interpretation to this *actus reus* by stating that the term 'forcible' is not restricted to physical force, but can include threat or coercion.[89] Therefore apart from non-forcible measures being used to transfer children, the ICTR also progressively stated that a threatened or a coerced transfer would give purpose to this *actus reus.*

De Brouwer argues that an example of rape or sexual violence under this ground would be, where a girl is abducted to serve as a sex slave or 'wife' for the soldiers, with the intention that the offspring of this 'relationship' belongs to the man's group.[90] Based on such an example, the prosecution would not only be limited to bringing such a case under this *actus reus*, but also the *actus reus* of causing serious bodily or mental harm to members of another group.

Thus far no charge for sexual violence has been laid under this *actus reus.*

2.3 The mental element of the crime of genocide

The mental element for the crime of genocide is essentially what causes this crime to be known as the 'crime of all crimes'. The definition of genocide states "… intent to destroy, in whole or in part…"[91] therefore, the mental element requires that the accused must have acted with intention. The mental element of genocide requires that the accused posses

[89] Ibid.
[90] See AMLM De Brouwer op cit note 43 at 60.
[91] See article 2 of the Genocide Convention.

'intent and knowledge'[92] and the intention must be in the form of *dolus specialis*.[93] The intention for genocide differs from other crimes, as for other crimes intention in the forms of *dolus directus*[94] or *dolus indirectus*[95] or *dolus eventualis*[96] or *dolus indeterminatus*[97] is required. The reason for a standard of *dolus specialis* for genocide can be attributed to the fact that genocide constitutes the crime of all crimes. The perpetrator must have special intention to annihilate a group mentioned under the definition of genocide.

This part of the chapter will examine the intention required to commit genocide and how this will have an influence on sexual violence committed as a form of genocide. It should be noted that a distinction has to be drawn between the intention needed to destroy a protected group and the *mens rea* needed to commit one of the five physical acts under the genocide definition.

[92] Intent and knowledge is only required in terms of article 30 of the ICC statute.
[93] See G Werle op cit note 22 at 207. The following terms are synonymous for *dolus specialis* and I intend to use them interchangeably: 'special intention', 'specific intention' and 'genocidal intention'. See Bettina Ulrike Schaefer *Genocidal Intent at the ICTR and ICTY – Problems to Indict for Genocide at the two ad hoc Tribunals* (2006) 13: "*Dolus specialis* requires that the accused clearly intends that the result happens, implying that there is a psychological link between the physical result and the mental state of the accused".
[94] See Jonathan Burchell *Principles of Criminal Law* (2005) 461: "This type of intention will be present where the accused's aim and object was to perpetrate the unlawful conduct or to cause the consequence even though the chance of it resulting was small".
[95] Ibid: "This form of intention exists where, although the unlawful conduct or consequence was not the accused's aim and object he or she foresaw the unlawful conduct or consequence as certain, or as substantially certain, or virtually certain".
[96] See J Burchell op cit note 94 at 462: "This form of intention exists where the accused does not 'mean' to bring about the unlawful circumstance or to cause the unlawful consequence which follows from his or her conduct, bur foresees the possibility of the circumstance existing or the consequence ensuing and proceeds with his or her conduct".
[97]See J Burchell op cit note 94 at 463: "Where a person throws a bomb into a crowd or derails a train, the fact that he has no particular intention to kill a particular individual in the crowd or upon the train does not mean that he lacks intention. Since he knows or foresees that someone will die he has what is called 'general' intention or *dolus indeterminatus. Dolus directus, indirectus* or *eventualis* may be general or indeterminate intention".

2.3.1 Article 30 of the ICC statute and the elements of a crime

Article 30 of the ICC statute stipulates the *mens rea* required for any of the crimes, covered by the statute. This article reads as follows:

> "1. Unless otherwise provided, a person shall be criminally responsible and liable for the punishment of a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
> 2. For the purposes of this article, a person shall have intent where:
> (a) In relation to conduct, that person means to engage in the conduct;
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
> 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and 'knowingly" shall be construed accordingly."

In other words, article 30 stipulates that when a crime is committed under the ICC statute, the accused person must have possessed 'knowledge' and 'intention' to commit the crime. It should also be noted that article 30 applies generally to all crimes committed under the ICC statute. Von Hebel and Kelt thus rightly argue that the provisions on intent, relating to genocide, are quite different from the intent standard that flows from article 30.[98] In other words, the specific intent standard to commit genocide is not deviated from in the ICC statute.

For an accused to posses knowledge, he or she must be aware of the fact that genocide is taking place and he or she must also be aware of the plan formulated to destroy a group. Schabas rightly argues that knowledge under article 30 is indirectly requiring that there be a plan to commit genocide, even though the Genocide Convention [and the ICC statute] is

[98] See Herman Von Hebel and Maria Kelt 'Some Comments on the Elements of Crimes for the Crimes of the ICC Statute' (2000) 3 *Yearbook of International Humanitarian Law* 281.

silent on this.[99] In the *Kayishema and Ruzindana* judgment, the trial chamber stated the following:

> "…although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without a plan or organization… the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide."[100]

The trial chamber thus highlighted the point that a plan to commit genocide would serve only as evidence that the perpetrators intended to commit genocide. This plan however does become problematic in the context of sexual offences committed during genocide on a group which the perpetrators intend to annihilate. The problem lies in the fact that at times sexual violence is committed against members of the group to be annihilated, but it is not part of the overall plan to commit genocide. Schabas is of the opinion that in such a case, the circumstance of the genocide must be known to the accused.[101] In other words, the accused must have committed the sexual violence as part of his duty to implement the plan to commit genocide. Therefore, the accused must have possibly had mere knowledge of the plan. One can thus safely argue that the substance of the plan is irrelevant when considering that the accused only had to know that there was a plan to annihilate a protected group.

Apart from just knowledge, article 30 more specifically requires that the perpetrator act with intent. Schabas seems to be of the view that intent under article 30 should be read with article II of the Genocide Convention which requires that there be a special intention

[99] See WA Schabas op cit note 3 at 207.
[100] Paras. 94 and 276.
[101] See WA Schabas op cit note 3 at 209.

to commit genocide.[102] Werle argues that the prosecution would have to prove that the special intention above just by proving intent and knowledge.[103] I am of the opinion that article 30 is just a general section which applies to all crimes committed under the ICC statute. When assessing the elements of crimes (especially relating to subsections (a)-(e) of article 6) it is evident that the drafters 'wished-for' that the specific intention to destroy the group should be the standard of proving intention. Under each act listed to commit genocide, the elements of crimes state that the perpetrator must have acted with the intention to destroy one of the protected groups, which should be interpreted as the specific intention to destroy one of the protected groups.

2.3.2 Analysing intent

According to Schabas three components should be analysed when establishing the intention required to commit genocide.[104] They are the following: the offender must intend to destroy the group; the offender must intend that the group be destroyed in whole or in part; and the offender must intend to destroy a protected group under the definition of genocide.[105] De Brouwer states that the following requirements are needed to establish the intention on the part of the perpetrator: The degree of intent; the destruction of the group; and in whole or in part.[106] There are various similarities contained within these requirements of the different authors. I therefore come to the conclusion that the

[102] See WA Schabas op cit note 3 at 214.
[103] See G Werle op cit note 22 at 207.
[104] See WA Schabas op cit note 3 at 228.
[105] Ibid.
[106] See AMLM De Brouwer op cit note 43 at 60.

requirements needed to establish the intent are: (1) measure of intent; (2) the destruction of a group; and (3) the extent [in whole or in part] of the destruction of the group.

2.3.2.1 The measure of intent

The measure of the intention lies within the *dolus specialis* required to destroy one of the protected groups.[107] Schaefer rightly argues that problems arise when the mental state of the perpetrator is not directly focused on the destruction of a protected group.[108] If the specific intent to destroy a protected group is not present, then genocide could not have been committed. In other words, the degree of intent requires that the accused clearly projected that his or her actions would lead to annihilating one of the groups mentioned within the definition of genocide. I will continue this discussion in relation to where multiple perpetrators committed an act of genocide.

- The liability of superiors for the actions of subordinates

In terms of article 6(1) of the ICTR statute and article 7(1) of the ICTY statute, "a person, who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime… shall be individually responsible for the crime". In other words, these articles create criminal responsibility and liability upon individuals who did not physically take part in the implementation of a genocide policy or

[107] Ibid.
[108] See BU Schaefer op cit note 93 at 14.

plan. The prosecution would thus have to prove that each individual possessed the *dolus specialis* to commit genocide.

In terms of article 6(3) of the ICTR statute and article 7(3) of the ICTY statute, a "person who is in a superior position to a perpetrator will also be liable, if she or he failed to act if he knew that the perpetrator was committing a crime". De Brouwer rightly argues that no *dolus specialis* is needed to prove a superior liable.[109] I agree with De Brouwer, as the article states that the superior will not be relieved from prosecution if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. This article thus allows that the court may find a superior guilty, based on some form of intentional negligence similar to that of *luxuria*.[110] In terms of *luxuria* an accused will be found guilty of an offence if "he knew or have foreseen that a crime was being committed and he failed to take the reasonable steps to prevent the crime from happening".[111] This does not mean that the prosecution will find it easier to prove that a superior committed genocide when he knew that his subordinates were raping women. The fact that there is only one successful prosecution based on *luxuria* in South Africa gives testimony to this fact.[112] In this case the accused was charged with culpable homicide for shooting and killing a person. The accused intended

[109] See AMLM De Brouwer op cit note 43 at 61.
[110] '*Luxuria*' is also known as conscious negligence.
[111] See CR Snyman *Criminal Law* 4ed (2002) 219.
[112] See *R v Hedley* 1958 (1) SA 362 (N). This case is the only of its kind in South Africa where the accused was found to have negligence in the form of *luxuria.*

to shoot a duck on a lake, but instead missed and shot a person. In finding the accused guilty of culpable homicide (in the form of *luxuria*) the court found that he foresaw the possibility of shooting someone on the other side of the lake, but dismissed this possibility in his mind from happening. Burchell is of the opinion that these cases are rare because the accused either has to admit that he or she foresaw a remote possibility of a consequence occurring or the prosecution manages to prove that he or she did foresee such a possibility, which in itself is fairly difficult to prove.[113] It should be remembered that the prosecution still has to prove that the subordinates possessed intention in the form of *dolus specialis.*

In the case of *The Prosecutor v Kamuhanda*,[114] the ICTR laid down the following three conditions which must be met, when a superior may be held liable:

> "(i) There existed a superior-subordinate relationship between the person against whom the charge is directed and the perpetrators of the offence;
> (ii) The superior knew or had reason to know that the criminal act was about to be or had been committed; and
> (iii) The superior failed to exercise effective control to prevent the criminal act or to punish the perpetrators thereof."[115]

Apart from the above theory of negligence in the form of *luxuria,* the ICTR only added the requirement that a superior-subordinate relationship must have existed. The other two requirements both relate to my argument, mentioned above, to establish negligence in the form of *luxuria*. In the case of *The Prosecutor v Stakic*,[116] the ICTY stated that *dolus*

[113] See J Burchell op cit note 94 at 488.
[114] ICTR-95-54A-T, 22 January 2004. (Hereinafter referred to as the *Kamuhanda* judgment).
[115] Para. 603.
[116] Decision on Rule 98bis Motion for Judgment of Acquittal, IT-97-24-T, 31 October 2002. (Hereinafter referred to as the *Prijedor* judgment).

specialis is required when analysing the criminal prosecution of a superior. I respectfully disagree with the ICTY, as *dolus specialis* requires that the accused posses a special intention to annihilate a protected group. Article 7(3) of the ICTY statute clearly states that the superior must know or has reason to know that the subordinate is or will commit a crime and he fails to act, in stopping the subordinate. Failing to act cannot be a standard of intentionally wanting to destroy a protected group.

- The intent of the accomplice

In terms of the ICTY and ICTR statutes, complicity to commit genocide also constitutes a crime which is punishable under the jurisdiction of these institutions.[117] In the *Akayesu* judgment, the ICTR stated that complicity to commit genocide can only take place, when genocide has taken place.[118] The ICTR thus states that complicity to commit genocide is not an independent crime. This crime is dependent on the main crime being committed, which is genocide.

In the *Akayesu* judgment, the ICTR also analysed the position of an accomplice. They stated that:

> "… the Chamber is of the opinion that an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. Thus, if for example, an accused knowingly aided or abetted another in the commission of a murder, while being unaware that the principal was committing such a murder, with the intent to destroy, in whole or in part, the group to which the murdered victim belonged, the accused could be prosecuted for complicity in murder, and certainly not for complicity in genocide.

[117] See article 2(3) of the ICTR statute and article 4(3)(e) of the ICTY statute, respectively.
[118] Para. 529.

> However, if the accused knowingly aided and abetted in the commission of such a murder while he knew or had reason to know that the principal was acting with genocidal intent, the accused would be an accomplice to genocide, even though he did not share the murderer's intent to destroy the group."[119]

The ICTR thus made it easier for the prosecution to prove that an accomplice took part in the genocide. An accomplice in a rape charge, as a form of genocide, thus need not possess intention in the form of *dolus specialis*, if the main perpetrator acted with *dolus specialis.* An accomplice to a main perpetrator, during rape, is someone who assists the perpetrator in committing the crime. Examples of this include: where he holds the victim down, while the perpetrator commits the rape; and where he hands the perpetrator the weapon to commit the rape.[120] Currently no accomplices have been convicted of complicity to genocide for rape. Pauline Nyiramasuhuko and her son Shalom Ntahobali are facing charges of complicity to commit genocide, according to their indictment.[121] Pauline Nyiramasuhuko is also the first woman facing charges of rape as a crime against humanity.

- Joint criminal enterprise

Joint criminal enterprise is where multiple perpetrators committed genocide. In the appeal case of *The Prosecutor v Tadic*,[122] the ICTY stated the following three situations in which joint criminal capacity can take place:

> "[1]… co defendants, acting to a common design, posses the same criminal intention.[123]
> [2] The notion of common purpose was applied to instances where the offences charged

[119] Paras 540 and 541.
[120] See AMLM De Brouwer op cit note 43 at 67.
[121] Indictment, ICTR-97-21-I, 10 August 1999 (Hereinafter referred to as the *Nyiramasuhuko* indictment).
[122] IT-94-1-A, 15 July 1999 (Hereinafter referred to as the *Tadic* appeals judgment)
[123] Para. 196.

> were alleged to have been committed by members of military of administrative units such as those running concentration camps.[124] [3] The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless the natural and foreseeable consequence of the effecting of that common purpose."[125]

With the first situation all the perpetrators act with a common purpose and the same degree of intention. In other words, should sexual violence have taken place during genocide, then all the perpetrators that took part in that violence must have possessed intention in the form of *dolus specialis* to commit genocide. The second situation relates to where the multiple perpetrators committed rape, as a form of genocide in a camp.[126] This can also amount to a war crime.[127] However, if the necessary *dolus specialis* can be proved, then the perpetrators can be prosecuted for committing sexual violence as genocide, as joint criminal perpetrators. The third situation is different in the sense that the perpetrators acted outside the common design. De Brouwer stated that this ground can be seen as an extended form of joint criminal enterprise.[128] This ground relates to where the perpetrators, although not acting within the common design, could have foreseen that their actions would fulfil the necessary elements of a common purpose.

In further analysing these different situations of joint criminal enterprise, the appeals chamber in the *Tadic* appeals judgment stated the following:

> "With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regards to the

[124] Para. 202.
[125] Para. 204.
[126] It should be noted that during the conflict in Bosnia-Herzegovina many camps were set up as part of the strategy of 'ethnic cleansing'.
[127] It can amount to a war crime because it was committed by a militia group.
[128] See AMLM De Brouwer op cit note 43 at 68.

> second category personal knowledge of the system of ill treatment is required as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common place arises only if, under the circumstances of the 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.*"[129]

When examining this explanation of the ICTY, it is apparent that the first situation is the easiest to prove. This ground requires thus only intent to be proved by all the co-perpetrators. In other words, when the co-perpetrators committed sexual violence as genocide, they must all have had the necessary intention to annihilate a protected group under the genocide definition. The second variant is only a little abstract from the first situation in that personal knowledge of a system of ill treatment is required, with the common purpose. The third category requires an intention to participate and an agreed upon common purpose takes on characteristics of *dolus eventualis* and not of *dolus specialis*, in that it required that the common purpose was foreseeable and the accused reconciled himself to this foreseen possibility. In a situation of sexual violence it can thus be argued that although the perpetrator did not act with a common purpose, but he foresaw that his actions could lead to the same actions perpetrated by the other perpetrators, he can be prosecuted as being a joint criminal perpetrator for committing sexual violence. It should be remembered that the perpetrator must have foreseen the possibility and he should have reconciled himself to this possibility.

[129] Para. 228.

Thus far no cases of sexual violence have been prosecuted as joint criminal enterprise.[130] However, in the indictment in the case of *The Prosecutor v Slobodan Milosevic*,[131] it is stated that certain counts of the charges laid against him "were natural and foreseeable consequences of the execution of the object of the joint criminal enterprise and the accused was aware that such crimes were the possible outcome of the execution of the joint criminal enterprise".[132] In other words, the sexual violence charges laid against him can be prosecuted as genocide, but only if he acted with other perpetrators, where he could foresee that the crimes would amount to genocide and he reconciled himself to this possibility. It is worth noting that the international community will never see the finalisation of this case, as the accused has passed away while the trial was still in progress.

Once the degree of intention has been proved, the prosecution can go on to establish the next requirement needed to successfully prosecute sexual violence as rape. This requirement is the destruction of a group.

2.3.2.2 The destruction of a group[133]

De Brouwer argues that the definition of genocide is aimed primarily at protecting the listed groups mentioned under it.[134] She also argues that the victim of the crime of

[130] See AMLM De Brouwer op cit note 43 at 70.
[131] IT-01-50-I, 8 October 2001(Indictment). (Hereinafter referred to as the *Milosevic* indictment).
[132] Para. 8.
[133] See also 2.1 above where I specifically analyse the protected groups covered by the definition of genocide.

genocide is the group and not just the individual who belongs to the protected group.[135] To truly understand the nature of the crime of genocide, a slightly different structure of words needs to be used, than this of De Brouwer. Genocide is aimed at protecting members of the groups mentioned in the definition and therefore the victim of a genocide must be a member of one the groups mentioned. It should be understood from the premises that the group's existence is solely dependent on its members and not vice versa.

As far as sexual violence is concerned, the ICTR in the *Akayesu* judgment stated that these acts were done with the intent to destroy the Tutsi group.

> "These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."[136]

In other words, by committing rape against one person, the perpetrator had the intention to destroy the whole group. Quigley thus rightly argues that:

> "In the context of rape as committed in Rwanda, it has been suggested that those who promoted the widespread rape of Tutsi women did so with the understanding that it would tear Tutsi society apart. As known to the Hutus, Tutsi men were likely to reject Tutsi women who had been raped. Tutsi girls would be ineligible for marriage. Tutsi married women might be divorced. Many of the rape victims would contract [HIV] AIDS. Raping Tutsi women in large numbers would make it difficult for Tutsis to continue their social existence."[137]

Therefore a mere understanding that the group would be destroyed constituted an intention on the part of the perpetrator. The crimes thus committed must be done by

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[134] See AMLM De Brouwer op cit note 43 at 72.
[135] Ibid.
[136] Para. 731.
[137] See J Quigley op cit note 10 at 107.

keeping the destruction of the group in the back of the mind by the perpetrator. In the case of *The Prosecutor v Rutaganda*,[138] the court stated that:

> "The victims were systematically selected because they belonged to the Tutsi group and for the very fact that they belonged to the said group. As a result, the Chamber is satisfied beyond any reasonable doubt that, at the time of commission of all the above-mentioned acts which in its opinion are proved, the Accused had indeed the intent to destroy the Tutsi group as such."[139]

A way to establish whether the accused had the intention to destroy a listed group is by assessing his or her victims. If the victims of the accused all belonged to one group, then it can be understood to mean that he had the intention to destroy that group.

Thus in the case of where sexual violence is concerned, two elements need to take place in order to establish whether the perpetrator committed genocide. Firstly, an objective element, which is the rape or sexual violation of a victim. Secondly, a subjective element is required, being the intention to destroy the group to which the victim belongs.

Although the five acts of genocide are considered as methods to destroy a protected group, the intention to destroy a group goes beyond these methods. Quigley writes of the elimination of the group's ability to function on the basis of its "customs and traditions".[140] In the *Karadzic and Mladic* rule 61 judgment, the ICTY suggested that the indictment be broadened to include the following:

> "the specific nature of some of the means used to achieve the objective of "ethnic cleansing" tends to underscore that the perpetration of the acts is designed to reach the very foundations of the group or what is considered as such. The systematic rape of

[138] ICTR 96-3-T, 6 December 1999. (Hereinafter referred to as the *Rutaganda* judgment).
[139] Para. 399.
[140] See J Quigley op cit note 10 at 103.

> women, to which material submitted to the Trial Chamber attests, is in some cases intended to transmit a new ethnic identity to the child. In other cases, humiliation and terror serve to dismember the group. The destruction of mosques or Catholic churches is designed to annihilate the centuries-long presence of the group or groups; the destruction of the libraries is intended to annihilate a culture which was enriched through the participation of the various national components of the population."[141]

In other words, apart from just committing the physical acts as mentioned in the definition of genocide, the ICTY drew an inference from the destruction of religious buildings and libraries as a possible intention to destroy a group. It should be remembered that these buildings must have been essential in the existence of one of the protected groups mentioned. Quigley thus rightly argues that the destruction of cultural objectives may provide evidence that such acts were done with intent to destroy the group.

2.3.2.3 The intent [in whole or in part] of the destruction of the group

In the *Akayesu* judgment, the court stated that genocide does not require the actual destruction of a group, in whole or in part.[142] The ICTR stated that as long as the perpetrators had the necessary *dolus specialis* to commit genocide, could they be convicted of this crime.[143] In the *Kayishema and Ruzindana* judgment, the ICTR stated that "in part" requires the intention to destroy a considerable number of individuals.[144] The courts thus seem to be of the view that the actual annihilation is relative to that of the intended annihilation of the group by the perpetrators.

[141] Para. 94.
[142] Para. 497.
[143] Ibid.
[144] Para. 97.

Although this stance by the court is quite subjective, academics have posed the questioned as to what constitutes 'in whole or in part'. Akayesu was the *bourgmestre* of the Taba commune in Rwanda. He was prosecuted for genocide (among other crimes) that was committed only within the Taba commune. In the *Jelisic* judgment, the ICTY stated that the goal of the Genocide Convention was to deal with mass crimes and therefore a substantial part of the group must have been targeted.[145] It can thus be concluded that the crime of genocide only requires that the perpetrators intended to annihilate a protected group. This argument can be based on what the ICTY calls the 'goal' of the crime. In other words, when genocide is committed, the mental element that requires the attack to be 'in whole or in part' will be determined by the intention of the perpetrator to destroy the group. Schabas stated that the international law commission considered that it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. Nonetheless the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.[146] Therefore in the *Akayesu* case, if the accused intended to destroy the Tutsi group within his commune, it can amount to genocide. The actual destruction of all the Tutsis is not required for the act to be in whole or in part.

The ICTY in the *Jelisic* judgment referred to another way in which the attack constitutes in whole or in part. They stated that if the leadership structure of a group is destroyed, so

[145] Para. 82.
[146] See WA Schabas op cit note 3 at 236.

as to the fact that the group cannot exist because of this incapability, will an attack be in whole or in part.[147] They called this intention to destroy the group 'selectively'.[148] If a group is thus, selectively destroyed, in whole or in part, it is essential that the group should not be able to operate after the destruction of the leadership structure.

De Brouwer rightly argues that if the female population of a group is attacked, the survival of the group may be at stake, even if the attacks are localised.[149] Taking this into account, she thus broadens the scope of a 'selective' attack to a general group of women. I agree with her, as women are essentially the reproductive carriers of a group. If the reproductive carriers of the group are destroyed, the group will inevitably be destroyed. On reporting on the events with the debates around the definition of genocide at the international law commission, Schabas wrote that Bassiouni (who was a member of the commission) considered the definition to be "sufficiently pliable to encompass not only the targeting of an entire group, as stated in the convention, but also the targeting of certain segments of a given group, such as the Muslim elite or Muslim women".[150] Thus, in the context of sexual violence portrayed against women, during genocide, it can be argued from the viewpoint that women constitute the reproductive vessels of a group. If these reproductive vessels are incapacitated, then the group will eventually cease to exist. The prosecution will thus have to prove that when women were raped, it was not done for sexual or male domination interests, but for the destruction of a group, in whole or in part.

[147] Para. 82.
[148] Ibid.
[149] See AMLM De Brouwer op cit note 43 at 75.
[150] See WA Schabas op cit note 3 at 236-237.

When establishing the intention to commit genocide, it becomes clear that the requirements overlap each other in many circumstances. Committing genocide by using sexual violence towards women of a protected group is certainly possible. As read above, the intention needed to prove genocide is quite difficult. In domestic situations, rape (as a form of sexual violence) as a crime is also quite difficult to prove. Thus, it will even be more difficult for the prosecution to successfully prove that rape was used as a form of genocide. However, the case law decided on by the international criminal tribunals showed that it is certainly not impossible.

2.3.3 Evidence of the required intent

Proving that the perpetrator had the required *dolus specialis* to commit genocide can be very difficult to do. Quenivet states that a confession or an admission is the easiest way to prove this intention.[151] The question that thus needs to be answered is: how did the international criminal tribunals go about to establish the *dolus specialis* in cases where the accused was indicted for genocide related crimes?

In the *Akayesu* judgment, the ICTR stated the following on how it intends to asses the *dolus specialis* of the perpetrator, in the absence of a confession or an admission.

> "The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group,

[151] See NNR Quenivet op cit note 54 at 166.

> while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act."[152]

In other words, in the *Akayesu* judgment the court relied on the facts of the case. In my opinion, the most important factor which the court mentioned is the deliberate and systematically targeting of members of a certain group. This factor implies that the perpetrator had the intention of targeting his or her victim, because the victim belonged to a certain group.

Another method which the ICTR used to assess the intent of the perpetrator to commit genocide was by way of his or her speeches and utterances.

> "… regarding Akayesu's acts and utterances during the period relating to the acts alleged in the Indictment, the Chamber is satisfied beyond reasonable doubt, on the basis of all evidence brought to its attention during the trial, that on several occasions the accused made speeches calling, more or less explicitly, for the commission of genocide."[153]

In other words, where the accused did not make a confession or an admission the courts should looks at the utterances of the perpetrator. In this case a victim who was raped testified that before the Interahamwe militia raped her, they uttered words like: "let us now see what the vagina of a Tutsi woman tastes like".[154] They raped the victim because she belonged to a certain group and they wanted to destroy this group.

In the case of *The Prosecutor v Alfred Musema*,[155] the ICTR found that while acts of rape and sexual violence were committed, phrases such as "the pride of the Tutsis will end

[152] Para. 523.
[153] Para. 729.
[154] Para. 731.
[155] ICTR-96-13-T, 27 January 2000. (Hereinafter referred to as the *Musema* judgment).

today", were uttered by the perpetrator.[156] In this case these utterances portrayed the intention that the perpetrator wanted to commit genocide. The ICTR also held that the perpetration of rape and sexual violence was "an integral part of the plan conceived to destroy the Tutsi group".[157] Thus in this case the ICTR did not only look at speeches and utterances made by the perpetrator, but also the underlying plan to commit rape and sexual violence in the destruction of a group. The plan to rape and commit sexual violence against women of the Tutsi group portrayed the intention that the perpetrator not only wanted to rape or sexually violate women, but that these acts would form part of the greater plan to destroy the group.

Another example of using the perpetrators' utterances and speeches as evidence of the intention to commit genocide was in the *Gacumbitsi* judgment. In this case the ICTR considered the actions of the perpetrator in relation to his utterances.[158] The accused urged and motivated Hutu men to rape Tutsi women, who did not want to marry Hutu men. He also incited the Hutu population to kill those people of Tutsi ethnic origin.[159] The court stated that these utterances portrayed the intention of the perpetrator to destroy a group, in whole or in part.[160] The ICTR stated that the sever nature of rape and sexual violence perpetrated against Tutsi women portrayed the intention to destroy the Tutsi

[156] Para. 933.
[157] Ibid.
[158] Para. 259.
[159] Ibid.
[160] Ibid.

population.[161] In other words, the sexual violence and rape only took place against Tutsi women. The Hutu women were not targeted. The *dolus specialis* could thus be established by the fact that the women, raped and sexually violated were Tutsi.

As discussed here, in order to establish the evidence of the required intention or *dolus specialis* depends on the circumstances in which these crimes were committed. I thus agree with the ICTR when they investigated the speeches, actions and selective targeting of certain people to establish the evidence of the intention by the perpetrator to commit genocide. The speeches and actions of the perpetrator are vital in assessing the evidence of the intention to commit genocide. They are not the only factors that a court needs to take into account therefore they do not constitute a *numerus clausus.* The court can assess other factors too when trying to find the evidence of the intention of the perpetrator to commit genocide. The selective targeting of a certain group of people serves as a good point of departure when looking at whether the accused had the intention to commit genocide. When only women of a certain national, ethnic, racial or religious background are sexually violated, it sends out a message that these women are violated because they belong to one of the protected groups listed in the definition.

[161] Para. 732 of the *Akayesu* judgment.

2.4 Conclusion

The *Akayesu* judgment proved that it is possible that rape (as a form of sexual violence) can take place as genocide. Although proving this might be difficult, it is not impossible.

During 2007 the ICC issued a warrant of arrest for Germain Katanga from the Democratic Republic of the Congo (hereinafter referred to as the DRC). The accused was the highest ranked commander of a rebel militia, known as the *Force de Resistance Patriotique en Ituri* (hereinafter referred to as the FRPI). According to the warrant of arrest, there are reasonable grounds to believe that:

> "... the accused directed an attack against the village of Bogoro, and that during, and in the aftermath, of the attack… committed several criminal attacks against civilians, primarily of Hena ethnicity, namely i) the murder of about 200 civilians; ii) causing serious bodily harm to civilians; iii) arresting, threatening with weapons and imprisoning civilians in a room filled with corpses; iv) pillaging and v) sexual enslavement of several women and girls."[162]

The facts, as stated within the warrant of arrest, leads to the notion that the accused could possibly have also had the intention to commit genocide. Even though he has not been charged with committing genocide, there is also the possibility of amending the indictment during the trial proceedings when new evidence comes to light. The accused's militia group attacked a village and targeted people belonging to the Hena ethnic group. Here it is evident that he intended to attack this group. Although there is no mention of rape (as a form of sexual violence) in this warrant, the warrant does state that the accused committed a crime by sexually enslaving women and girls. Sexual enslavement is a form

[162] See page 4 of the warrant of arrest. ICC-01/04-01/07, 2 July 2007.

of sexual violence, which is possible of falling under the definition of genocide. The *Mail & Guardian* reported that:

> "Recent conflict in eastern Democratic Republic of Congo's (DRC) Nord-Kivu province has been accompanied by an upsurge in brutal rape and often barbaric mutilations of women and girls, medical relief worker report."[163]

Here again it is evident that women are sexually violated within situations of armed conflict.

The *Akayesu* judgment was hailed for finally acknowledging that women can be sexually violated as a form of genocide. Except for crimes against humanity and war crimes, sexual violence is sadly not expressly mentioned within the definition of genocide. However, the ICTR interpreted rape and sexual violence to form part of any of the other acts that are listed within the definition. It is quite interesting to note that post *Akayesu* multiple perpetrators were convicted of committing sexual violence as a form of genocide, yet the ICC statute (which came into operation during 2002) still makes no express mention of sexual violence as an act to commit genocide.

To alleviate the strenuous onus of proof on the prosecution, I suggest that sexual violence be expressly stated as an act perpetrated against a specified protected group, in an attempt to annihilate that group. Once this is done it will alleviate the burden on the prosecution

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[163] See <http://www.mg.co.za/article/2007-10-23-rape-leaves-lifelong-scars-in-drc-conflict-zones> (accessed 17 August 2009) the article was reported on Wednesday, 24 October 2007. The article is entitled: "Rape leaves life long scares in the DRC conflict zones".

to argue for an extension of the definition of genocide, to include sexual violence. However, this should be done, keeping the annihilation of the protected group in mind.

In the next chapter, sexual violence as a crime against humanity will be explored.

Chapter 3:

Sexual Violence as a Crime against Humanity

As mentioned in chapter one,[1] crimes against humanity has seen various amendments to its definition, which was completely dependent upon the circumstances of the atrocity which preceded the definition. Thus, the ICC statute had to make sure that it covers its entire basis with regards to the formulation of its definition for crimes against humanity, as this definition will be used throughout all the atrocities in which crimes against humanity will be committed and prosecuted by this court. As the ICC statute is indeed comprehensive, this definition will constitute the foundation of the present analysis, as it contains most of the elements which was also included in the definitions of crimes against humanity in the statutes establishing the previous international criminal tribunals.[2] In fact, the ICC statute contains even more elements than the previous statutes that established international criminal tribunals.[3] Bassiouni argues that the definition in the ICC statute is expansive as to the specific crime and adds much needed specification.[4]

Crimes against humanity in the ICC statute are defined in article 7 as:

> "1. For the purpose of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attacked directed against any civilian population, with knowledge of the attack:
> (a) Murder;

[1] See 1.2 in chapter 1.
[2] The definitions of a crime against humanity as contained in the Nuremburg Charter, The Tokyo Charter, Control Council No. 10, The ICTY statute, The ICTR statute and the SCSL statute.
[3] I.e. The Nuremburg Charter, The Tokyo Charter, Control Council No.10, The ICTY statute, The ICTR statute and the SCSL statute.
[4] See M Cherif Bassiouni *Crimes against Humanity in International Law* 2ed (1999) 202.

(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of Apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

This definition is somewhat broad as it leaves many alternative approaches open, which essentially will be subject to interpretation depending on the circumstances of the atrocity.[5] At the same time this definition is also somewhat progressive as it even explicitly criminalises the crime of apartheid and enforced disappearance of persons, as a crime against humanity.

This chapter will analyse the above definition to explain where crimes of a sexually violent nature finds itself within this definition. I will first analyse the individual acts of the definition, before considering the *chapeau* element of the crime and, ultimately, the required intention to commit the crime.

[5] An example of the so called alternative approached would be article 7(k) which states: "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".

3.1 Individual acts listed which can amount to sexual violence

As illustrated above the individual acts listed in the definition of crimes against humanity are quite extensive and do not constitute a *numerus clausus.* Article 7(k) is open to interpret other acts as a crime against humanity, subject to them causing great suffering, or serious injury to body or mental or physical health. Even though article 7(1)(g) specifically lists the acts which are of a sexual nature, the international criminal tribunals also interpreted sexual violence into the acts of enslavement and torture.[6]

3.1.1 Enslavement

Enslavement has been considered a crime against humanity ever since the Nuremberg Charter.[7] Back then the definition of slavery, as defined in the 1926 Slavery Convention, found application. Article 1(1) of the Slavery Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". In terms of this definition, slavery is thus defined as the ownership over a person on the basis of the person as an object.

In the case of *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*[8] the ICTY trial chamber elaborated on the act of enslavement as a crime against humanity.

[6] A reason for this can be attributed to the fact that the definitions of crimes against humanity in the ICTR and ICTY statutes, respectively, only included rape as an act of sexual violence. This does not apply to the SCSL statute, which mentions more than just rape in its definition of a crime against humanity.
[7] See article 6(c) of the Nuremberg Charter.
[8] IT-96-23, 22 February 2001 (Hereinafter referred to as the *Foca* trial judgment).

The accused were charged with, among other, the bad treatment of women and children as a result of forced and compulsory tautology.[9] The trial chamber acknowledged that:

> "The women were kept in various detention centres where they had to live in intolerable unhygienic conditions, where they were mistreated in many ways including, for many of them, being raped repeatedly. Serb soldiers or policemen would come to these detention centres, select one or more women take them out and rape them. Many women and girls, including 16 witnesses, were raped in that way. Some of these women were taken out of these detention centres to privately owned apartments and houses where they had to cook, clean and serve the residents, who were Serb soldiers. They were also subjected to sexual assault."[10]

Thus from the findings of the ICTY trial chamber it is evident that women were also sexually violated while being enslaved by Serbian soldiers.

The trial chamber further stated that the following elements need to be taken into account when considering whether enslavement took place:

> "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."[11]

The tribunal made a good example of one of the accused, Dragoljub Kunarac, who took two girls to a house in Trnova~e, Bosnia, where he detained them. The trial chamber was satisfied that Kunarac denied the women control of their lives. They had to obey orders, do household chores and were even subjected to sexual violence by being raped by Kunarac and one DP 6.[12] The trial chamber was satisfied that Kunarac even exercised

[9] See counts 18 and 22 respectively of the amended indictment: IT-96-23-PT, 8 November 1999.
[10] Para. 574.
[11] Para. 543.
[12] Para. 742.

sexual control and exclusivity over one of the girls by refusing DP 6 to have sexual intercourse with her.[13]

Radomir Kovac, on the other hand, also kept girls in his private apartment where they were also continuously sexually violated by him and even sold to soldiers for sexual purposes.[14] In its factual findings on this matter the trial chamber found that:

> "Kovacs conduct towards the two women was wanton in abusing and humiliating the four women and in exercising his de facto power of ownership as it pleased him. Kovac disposed of them in the same manner. For all practical purposes, he possessed them, owned them and had complete control over their fate, and he treated them as his property. The Trial Chamber is also satisfied that Kovac exercised the above powers over the girls intentionally. The Trial Chamber is satisfied that many of the acts caused serious humiliation, of which the accused was aware."[15]

When applying the ICTY's conception of enslavement, one can certainly conclude that control over the victim seems to play an important role. Both Kunarac and Kovac were found guilty of committing crimes against humanity as enslavement. More importantly for this study is the fact that the trial chamber acknowledged that sexual violence can take place while being enslaved. It can also be argued that the respective forms of sexual violence can constitute acts under the ICC statute, for example, enforced prostitution. Kovac sold women that he kept enslaved to people that bough these women from him for sexual purposes. Thus, the ICTY extended enslavement to situations where sexual violence is committed as part of the process of and purpose for enslavement.

[13] Para. 741.
[14] Paras. 749 and 756, respectively.
[15] Para. 781.

The Elements of Crimes (Hereinafter referred to as the EoC) annexed to the ICC statute describe enslavement as:

> "1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.[11]
>
> [11] It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children."

Prima facie it seems as if this understanding of enslavement makes no mention of the situation where the victim(s) are enslaved for the purposes of sexual violence. However, it should be kept in mind that the ICC statute creates an expressed act of sexual slavery as a form of a crime against humanity.[16] On the other hand, De Brouwer argues that this definition of enslavement is quite broad and can be interpreted to include crimes such as forced labour, forced marriage and trafficking in women and children for the purposes of forced prostitution.[17] Even though I agree with De Brouwer, I am also of the opinion that if a specific act of sexual slavery as a crime against humanity exist (as in the ICC statute), then this act should be taken advantage of and should be given jurisprudential recognition and interpretation, instead of relying on an addition to the definition that was included since the first time that crimes against humanity was defined.

[16] See 3.1.3.2 where sexual slavery is discussed.
[17] See Anne Marie LM De Brouwer *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005) 89.

3.1.2 Torture

The UN Convention against Torture and other Cruel Inhuman and Degrading Treatment or Punishment [hereinafter referred to as UNCAT] defines torture as:

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or any other person acting in an official capacity. It does not include pain and suffering arising only from, inherent in or incidental to lawful sanctions."[18]

This definition of torture comprises of the following elements: (1) intentionally inflicting mental or physical pain and/or suffering; (2) to obtain information or a confession; and (3) which was administered by a person acting in a public or official capacity.

In the *Foca* trial judgment the ICTY argued that this definition of torture is insufficient to deal with the situation where torture was used as a war crime or a crime against humanity. More specifically the *Foca* trial judgment disagreed with the notion that torture must be administered by a person acting in a public or official capacity. They stated that:

> "The Trial Chamber also points out that those conventions, in particular the human rights conventions; consider torture *per se* while the Tribunal's Statute criminalises it as a form of war crime, crimes against humanity or grave breach. The characteristic trait of the offence in this context is to be found in the nature of the act committed rather that in the status of the person who committed it. The Trial Chamber concludes that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law."[19]

[18] See article 1(1).
[19] Paras. 495-496.

The trial chamber went further and stated that elements for torture under international humanitarian law are the following:

> "(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
> (ii) The act or omission must be intentional.
> (iii) The act or omission must be aimed at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or discriminating, or any ground, against the victim or a third person."[20]

Thus, by eliminating the ground that a public official or a person acting in an official capacity should commit the torture the ICTY gave somewhat of a new feature to torture, as an international crime.

In order for sexual violence to also be considered as torture, it has to comply with the elements as set out above. In the case of *The Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*[21] the ICTY found that one of the accused, Delic, had raped a woman, because she did not provide him with information on the whereabouts of her husband.[22] Apart from not wanting to provide the accused with information of her husband's whereabouts, the tribunal also found that she was raped for discriminatory purposes, based on her sex.[23] Askin rightly argues that the accused tortured the victim by means of rape because she was a female of an opposing group. This, she writes, constitutes discriminatory treatment under UNCAT.[24]

[20] Para. 497.
[21] IT-96-21-T, 16 November 1998. (Hereinafter referred to as the *Celebici* judgment).
[22] Paras. 937 and 941.
[23] Para. 941.
[24] See Kelly Dawn Askin 'Prosecuting Wartime Rape and other Gender-Related Crimes under International Law' (2003) 21 *Berkley Journal of International Law* 324.

Sexual violence as torture also has to constitute severe pain or suffering, whether physical or mental. De Brouwer correctly argues that proving that sexual violence caused severe physical or mental pain or suffering is not that difficult at all, as sexual violence often inflicts both physical and mental harm.[25] In the case of *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*[26] the appeals chamber stated that there are no specific criteria by which to determine the degree of pain required for an act to amount to torture.[27] The appeals chamber went further and thus acknowledged that sexual violence can amount to torture as it will satisfy the first element.[28] However, it should be kept in mind that the first element of the *Foca* trial judgment is not the only requirement to satisfy when committing torture. The torturer will also have to commit sexual violence as a means of extracting information (or even a confession) from his or her victim. This requirement essentially constitutes a substantial foundation for the existence of the crime of torture.

The ICC statute is the most recent treaty that codifies the law on torture as a gross violation of international humanitarian law. In terms of this statute torture constitutes:

> "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."[29]

[25] See AMLM De Brouwer op cit note 17 at 100.
[26] Case No. IT-96-23-A and IT-96-23/1-A, 12 June 2002 (Hereinafter referred to as the *Foca* appeals judgment).
[27] Para. 149.
[28] Para. 150.
[29] See article 7(2)(e).

It is evident here that the ICC statute makes no specific mention to who has to commit the torture. It also recognises torture as the infliction of severe pain or suffering. The EoC annexed to the Statute describes torture as:

> "1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
> 2. Such person or persons were in the custody or under the control of the perpetrator.
> 3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions."

The EoC contains another essential requirement which was not discussed above. This requirement is the custody and control feature, as stated in number two. In terms of this requirement the torturer must have exercised control over the victim. In the *Foca* trial judgment the ICTY found that Kunarac and Kovac both exercised control over some of the victims which they repeatedly raped and sexually violated.[30] This form of control would be sufficient to satisfy this requirement of the crime.

As far as the *mens rea* of proving torture is concerned, article 30 of the ICC statute would find application. In other words, sexual violence as torture needs to be committed with intent and knowledge.[31]

3.1.3 The listed acts of sexual violence in the definition of a crimes against humanity in the ICC statute

The ICC statute expressly list five forms of sexual violence that can amount to a crime against humanity. These five forms do not constitute a *numerus clausus*, as other forms of

[30] See 3.1.1 above.
[31] See article 30(1).

sexual violence are also open to be interpreted as crimes against humanity as long as it is of "comparable gravity".[32] In this section I will analyse each listed form of sexual violence.

3.1.3.1 Rape

Rape and enforced prostitution had been recognised as crimes under international humanitarian law, though merely as violations of the honour, dignity and reputation of women, thus not as crimes in and of themselves.[33] Rape as a crime against humanity was first established in Control Council Law 10.[34] Even though rape was recognised in this legislation it was never analysed by a court of law in an international context, until the establishment of the criminal tribunals of the former Yugoslavia and Rwanda respectively. Rape also constituted a crime against humanity in the statutes of these tribunals. Rape was also differently conceptualised by these tribunals as both these tribunals attempted to create a definition for rape, which takes place in circumstances of conflict or unrest. However, the judgments in this regards seem to be in slight

[32] See article 7(1)(g) of the ICC statute, which reads as follows: "… rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity".

[33] See AMLM De Brouwer op cit note 17 at 102. See also article 27 of the Geneva Convention relative to the protection of civilian persons in time of war of 12 August 1949 (Hereinafter referred to as Geneva Convention IV) and article 76(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (Hereinafter referred to as Additional Protocol I).

[34] See chapter 1 where this definition was analysed. Article II(c) of the CCL.10 defines crimes against humanity as: "Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated".

contradiction with one another. In the cases of *The Prosecutor v Jean-Paul Akayesu*,[35] *The Prosecutor v Anto Furundzija*[36] and the *Foca* trial judgment, the definition of rape, in an international context were critically examined.

In the *Akayesu* judgment the ICTR defined rape as:

> "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[37]

The trial chamber in this case went further and stated that coercive circumstances need not be evidenced by a show of physical force.[38] They explained that:

> "Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal."[39]

Thus, the ICTR adopted a broad approach, which placed emphasis on sexual violence occurring in circumstances which are coercive, instead of emphasising consent as the case would be in domestic law.[40] This definition, as conceptualised by the ICTR, does not also place any emphasis on body parts.[41] De Brouwer here rightly argues that "a conceptual definition of rape could preclude situations in which victims have to talk about body parts

[35] ICTR-96-4-T, 2 September 1998. (Hereinafter referred to as the *Akayesu* judgment).
[36] IT-95-17/1-T, 10 December 1998. (Hereinafter referred to as the *Furundzija* judgment).
[37] Para. 688.
[38] Ibid.
[39] Ibid.
[40] An example of this would be the 'South African' Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Hereinafter referred to as the South African Sexual Offences Act 32 of 2007) that defines rape in section 3 as "Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape".
[41] Para. 597 reads as follows: "The Chamber considers that rape is a form of aggression and that the central elements of rape cannot be captured in a mechanical description of objects and body parts".

in minute detail".[42] In other words, when giving testimony in court, witnesses, who were victims of sexual violence, need not discuss the often traumatic technicalities of how they were raped. This definition and conceptualisation of rape during an armed conflict or unrest should be applauded, as now victims of sexual violence would not need to explain the technicalities of how they were raped.

The trial chamber also noted that:

> "coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of the Interahamwe among refugee Tutsi women at the bureau communal."[43]

In other words, the ICTR was completely aware of the circumstances in which sexual violence took place against women during the Rwandan atrocity. In many other conflicts women were also placed in a similar situation in which coercive circumstances were used to commit sexual violence.[44] Needless to say that feminist lawyers have applauded this definition, stating that it was concise and broad enough to be a good guide to enable courts to prosecute rape more easily in the future.[45] The ICTY, in the *Celebici* judgment, initially applied the definition of rape as formulated in the *Akayesu* judgment.[46]

[42] See De Brouwer op cit note 17 at 107.
[43] Para. 688.
[44] E.g. in the Balkan conflict many women were forcefully impregnated and in the Asian counterpart of World War II women were used as so called "comfort women" who were required to perform sexual favours to soldiers under coerced circumstances.
[45] See Noelle NR Quenivet *Sexual Offenses in Armed Conflict and International Law* (2005) 11.
[46] Paras. 478-479. Para. 479 reads as follows: "This Trial Chamber agrees with the above reasoning [which was a quotation taken from the *Akayesu* judgment in defining rape in an international context] and sees no reason to depart from the conclusion of the ICTR in the *Akayesu* judgment on this issue. Thus, the Trial Chamber considers rape to constitute a physical invasion of a sexual nature, committed on a person under circumstances that are coercive".

However, in the *Furundzija* judgment the ICTY dismissed the broad definition of rape, as conceptualised in the *Akayesu* judgment. This case brought about a new definition for rape under international law, which reads as follows:

> "(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."[47]

This definition is more of a mechanical definition focusing on the body parts of the perpetrator and his or her victims. It is also evident that the prosecution need not prove consent (based on this definition), but only coercion or force or threat of force against the victim or a third person. This would thus inevitably negate consent. De Brouwer rightly argues that if this definition is applied, it would make it more difficult for victims to build their case against an accused as they would have to describe the sexual act in graphic detail.[48] This definition would also negate the possibility of other forms of sexual violence to be indicted as crimes against humanity, unlike its Rwandan counterpart that made provision for acts of a sexual nature and not just penetration.[49] Thus this narrow definition would not benefit a victim who was, for example, forced to masturbate for and by the accused against her will.

[47] Para. 185.
[48] See AMLM De Brouwer op cit note 17 at 114.
[49] See footnote 36 above.

The ICTY in *Furundzija* also seemed to be setting double standards when attempting to narrow down the *Akayesu* definition when it conceptualised fellatio as an attack on human dignity and thus constituting rape. They stated:

> "The Trial Chamber holds that the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'etre* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human being from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape."[50]

Forced masturbation, as an example of other forms of sexual violence, does not amount to rape when the accused forced the victim. However, other forms of sexual violence, notably forced masturbation, also constitutes an attack on a person's human dignity. By explaining fellatio as an encroachment on a person's human dignity, and thus as a form of rape, the ICTY broadened the definition of rape and did not narrow it down as it intended to do.

After taking various countries' national definition of rape into account, the ICTY in the *Foca* judgment adopted a third definition of rape, which would be applicable in an international law context. This definition reads as follows:

> "The Trial Chamber understands that the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or the 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

[50] Para. 183.

> consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."[51]

This definition is imbedded in the notion of consent. In domestic laws rape is normally defined as non-consensual or coerced sexual penetration.[52] However, would a definition of rape during an atrocity normally boarder around the same circumstances where a victim of rape would be required to state that she did not expressly consent to being raped? The answer to this question is no. Rape in these circumstances takes place either as part of committing genocide, or a crime against humanity or a war crime. Thus the rape takes place as part of annihilating a specific listed group (if it is committed as part of a genocide) or as part of a widespread or systematic attack against a civilian population (if it is committed as part of a crime against humanity).

Multiple academics have rightly disagreed with the *Foca* definition of rape. Mackinnon argues that the consequence of this definition means that "rather than non consent being presumed corollary of the presence of force, evidence of force became reduced to evidence of non consent".[53] Thus proving that the victim did not consent also places an unjustified burden of proof on the prosecution to show that she did not consent, even

[51] Para. 460.
[52] Once again we can use the South African definition of rape as an example. It reads: "Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape." – Section 3 of the South African Sexual Offences Act 32 of 2007. Another example would be the Namibian definition of rape. It reads: "Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances – (a) commits or continues to commit a sexual act with another person; or (b) causes another person to commit a sexual act with the perpetrator or with a third person, shall be guilty of the offence of rape." – Section 2(1) of the Combating of Rape Act 8 of 2000.
[53] See Catharine A MacKinnon *Are Women Human? And other International Dialogue* (2006) 242.

though she might have been placed under coercion. Thus Schomburg and Peterson rightly states that sexual violence that qualifies as genocide or crimes against humanity (and even war crimes) occurs under circumstances that are inherently coercive and that will negate any possibility of genuine consent.[54] De Brouwer states that consent should not be an option under supranational criminal law, because: (1) "The definitions of rape in domestic law (that requires non-consent) was not codified as part of a larger atrocity in mind";[55] (2) "if rape took place as part of a genocide, then one would imply that the victim consented to genocide";[56] (3) "including consent in the definition of rape can expose victims of sexual violence to painful and humiliating questions, which would not be asked if she was coerced";[57] and (4) "victims will only perceive the tribunals and the court as legitimate if rape is defined in conformity with the reality of the crime".[58]

The debate around the definition of rape did not end with the *Foca* judgment. The ICTR in the case of *The Prosecutor v Laurent Semanza*[59] dismissed the *Akayesu* definition of rape as being too broad and adopted the same non-consent definition as conceptualised by the ICTY in the *Foca* judgment.[60] In the case of *The Prosecutor v Juvenal Kajelijeli*[61] the

[54] See Wolfgang Schomburg and Ines Peterson 'Genuine Consent to Sexual Violence under International Criminal Law' (2007) 101 *The American Journal of International Law* 124.
[55] See AMLM De Brouwer op cit note 17 at 120.
[56] See AMLM De Brouwer op cit note 17 at 121.
[57] See AMLM De Brouwer op cit note 17 at 122.
[58] See AMLM De Brouwer op cit note 17 at 123.
[59] ICTR-97-20-T, 15 May 2003 (Hereinafter referred to as the *Semanza* judgment).
[60] Para. 345.
[61] ICTR-98-44A-T, 1 December 2003 (Hereinafter referred to as the *Kajelijeli* judgment).

ICTR also adopted an approach of a non-consent definition as defined in the *Foca* judgment.[62]

In the case of *The Prosecutor v Sylvestre Gacumbitsi*[63] the ICTR stated that:

> "any penetration of the victim's vagina by the rapist with his genitals or with any object constitutes rape, although the definition of rape under Article 3(g) of the Statute is not limited to such acts alone."[64]

Although this definition does not take the notion of consent into account, it is quite gender specific and technical, as a penetration of the women's vagina is a specific requirement needed to commit rape.

It seems that the *Akayesu* definition, even though as broad as it may be, seems as a recommendable conceptualisation of rape that takes place as part of genocide or a crime against humanity. This definition seems to be victim centred as it does not require any victim to testify about the possibilities of giving consent (within a coerced environment), or about the humiliating manner in which an accused performed this crime. It is also gender sensitive as it does not assume that the victim could only be a woman.

In conclusion, the EoC of the ICC statute conceptualises rape as follows:

> "1. The perpetrator invaded [15] the body of a person by conduct resulting in penetration, however, slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

[62] Para. 915.
[63] ICTR-2001-64-T, 17 June 2004 (Hereinafter referred to as the *Gacumbitsi* judgment).
[64] Para. 321.

2. The invasion was committed by force, or by threat or force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. [16]
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

[15] The concept of 'invasion' is intended to be broad enough to be gender-neutral.
[16] It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 7(1)(g)-3, 5 and 6."

With this conceptualisation of the definition of rape, the ICC seems to adopt an approach that takes into account all three differing opinions by the *Akayesu, Furundzija and Foca* judgments. It borrows the invasion and sex neutrality from *Akayesu*, while it also encompasses the technicality of *Furundzija* and brings in the notion of consent, where the victim is incapable of consenting, by giving recognition to the *Foca* judgment.

3.1.3.2 Sexual slavery

Sexual slavery, during an atrocity, has its history imbedded in the Asian counterpart of World War II. The so called 'comfort women' were recruited, under disguise, to render services of a sexual nature to soldiers. Approximately 200 000 women were recruited to comfort stations to be sexual slaves to the forces of the Japanese army.[65] Women were recruited either by way of offering them work, as cleaners or cooks for the soldiers or they were brought by way of force and violence to render services to the Japanese army.[66]

[65] See CJ Hung 'For those that had no voice: The Multifaceted Fight for Redress by and for the "Comfort Women"' (2008) 15 *Asian American Law Journal* 183.
[66] See CJ Hung op cit note 65 at 185.

Keeping that in mind, it should be noted that one 'comfort woman' had testified about her ordeal, yet the Tokyo Tribunal did not see the need to prosecute the perpetrators for sexual slavery.[67] Many survivors of sexual slavery only received justice during December 2000, where the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery found many accused (including Emperor Hirohito) guilty of sexual slavery and rape, as a crime against humanity.[68] Sadly though, no punishment could be imposed, as most of the accused were already dead at the time of the verdict.[69]

It is quite interesting to note that it was only during 1998 in the ICC statute that sexual slavery was codified as a separate crime, under crimes against humanity. Subsequent to the ICC statute, sexual slavery was also included, as a crime against humanity, in the statute establishing the SCSL.

In the case of *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*[70] the SCSL, for the first time, had to conceptualise 'sexual slavery' as a crime against humanity. This court found that the following elements have to exist for sexual slavery to take place:

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[67] See CJ Hung op cit note 65 at 186.

[68] See Claire McEvoy in Jeanne Ward, Christopher Horwoord, Claire McEvoy, Pamela Shipman and Lauren Rumble *The Shame of War: Sexual Violence against Women and Girls in Conflict* (2007) 57.The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery was a people's tribunal, set up by Asian Women and Human Rights organisations. The purpose of this tribunal was to acknowledge that the 'comfort stations' did exist during World War II and that the Japanese government at the time had to take responsibility for this. The tribunal was presided over by judges from the United States of America, Argentina, the United Kingdom and Kenya.

[69] See C McEvoy in J Ward et al op cit note 68 at 58.

[70] SCSL-04-16-T, 20 June 2007 (Hereinafter referred to as the *AFRC* judgment).

> "1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
> 2. The perpetrator caused such person or persons to engage in one or more acts of sexual nature;
> 3. The perpetrator committed such conduct intending to engage in the act of sexual slavery or in the reasonable knowledge that it was likely to occur."[71]

It can thus be said that the elements of sexual slavery is concise in its formulation, as it covers both the deprivation of a person's liberty and the right to exercise her sexual autonomy.

At the same time, a dissenting opinion by Justice Doherty introduced the notion of 'forced marriages' as constituting part of "other inhumane acts".[72] The majority opinion seemed to confuse 'forced marriages' as sexual slavery and therefore dismissed this charge as duplicity.[73] The majority also dismissed the charge of sexual slavery against the accused persons, because the prosecutor listed the charge as 'sexual slavery and other forms of sexual violence'. They argued that this also amounted to duplicity and therefore had to strike down the entire charge.[74] I agree with Oosterveld and Marlowe when they argue that "by dismissing the crime against humanity charge of sexual slavery, the majority lost the opportunity to hold that gender-based violence was widespread or systematic in nature in AFRC-held areas".[75]

[71] Para. 708.
[72] Forced marriages will be discussed under heading 3.1.3.6 as Justice Doherty introduced this notion under "other inhumane acts", which is comparable to acts "of comparable gravity" as stated in article 7(g) of the ICC statute.
[73] Paras. 713 and 714.
[74] Para. 95.
[75] See Valerie Oosterveld and Andrea Marlowe 'Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu. Case No. SCSL-04-16-T. Special Court for Sierra Leone, Trial Chamber II, June 20,

In conclusion, the EoC for the ICC statute states that sexual slavery comprises of the following elements.

> "1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending, or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. [18]
> 2. The perpetrator caused such person or persons to engage in one or more acts of sexual nature.
> 3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
> 4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
>
> [18] It is understood that such deprivation of liberty may, in some circumstances include, exacting force labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children."

Thus, just apart from covering both the deprivation of liberty of a victim and the right to exercise her sexual autonomy, the elements in the ICC statute also requires that the attack be committed as part of a widespread or systematic attack against a civilian population. Needless to say that the latter requirement is what will define sexual slavery, as a crime against humanity.

3.1.3.3 Enforced prostitution

Enforced prostitution was first codified as a grave breach of international humanitarian law, as this act was inserted as one of the fundamental guarantees of section 75 of Protocol I additional to the Geneva Conventions.[76]

2007. Prosecutor v Moinina Fofana & Allieu Kondewa. Case No. SCSL-04-14-T. Special Court for Sierra Leone, Trial Chamber I, August 2, 2007' (2007) 101 *The American Journal of International Law* 854.

[76] See section 75(2)(b) of Protocol I additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts of 8 June 1977. This article reads as follows: "The following acts are and shall remain prohibited at any time and in any place whatsoever, whether

This act was subsequently codified as a crime against humanity in the ICC statute and the statute that established the SCSL. According to the EoC for the ICC statute, enforced prostitution is conceptualised as follows:

> "1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
> 2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of sexual nature.
> 3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
> 4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."

For the first *actus reus* of enforced prostitution, emphasis should be placed on the fact that the perpetrator caused one or more persons to engage in acts of a sexual nature. The second *actus reus* requires that the perpetrator receive some form of benefit for the act of the person mentioned in the first *actus reus.* The third and fourth elements are specific to a crime against humanity.

Werle argues that enforced prostitution will in all probability fit the definition of enslavement during an armed conflict, as the creation of 'brothels' during armed conflict does not frequently serve to make a profit, but to boost the morale of the troops.[77] I disagree with Werle as caution should be taken not to confuse sexual slavery with enforced prostitution, as the elements, as contained in the EoC, is fundamentally different in the following respect: sexual slavery requires that the perpetrator attach ownership over

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committed by civilian or by military agents: … (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault".

[77] See Gerhard Werle *Principles of International Criminal Law* (2005) 251.

the victim, while enforced prostitution only requires that the perpetrator receive some form of compensation or benefit for allowing the victim to take part in acts of a sexual nature. I thus agree with De Brouwer who argues that it is important "not to read the commercial aspect into the elements of sexual slavery and thus lift the distinction between sexual slavery and enforced prostitution".[78]

Thus far there has been no judgment on the interpretation of enforced prostitution as a crime against humanity.

3.1.3.4 Forced pregnancy

Forced pregnancy is one of the offences (of a sexual nature) of crimes against humanity that can only take place against women. This act is not a new emergence during atrocities as it was reported to take place in both Rwanda and the Balkan conflicts. No charge for this offence has been brought to the tribunals, as it does not have the jurisdiction to prosecute forced pregnancy as a crime against humanity. However, Beltz is correct when she states that "forced pregnancy is a new aspect of modern warfare and prevalent where racial and ethnic purity are valued".[79] She further explains that forced pregnancy takes place by the raping of women until they are pregnant and detaining them so that they cannot undergo an abortion.[80]

[78] See AMLM De Brouwer op cit note 17 at 143.
[79] See Amanda Beltz 'Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victim's Rights with the Due Process Rights of the Accused' (2008) 23 *St. Johns Journal of Legal Commentary* 172.
[80] Ibid at 79.

The EoC of the ICC statute explains the elements of forced pregnancy as:

> "1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
> 2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
> 3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."

The important features of these elements are that a woman must be (1) confined; (2) made pregnant; and (3) with the intention of affecting the ethnic composition. This does not mean that the perpetrator cannot also be charged with rape. If the prosecution can prove that the accused raped the woman with the intention of making her pregnant, then the perpetrator can also be charged with forced pregnancy, as a crime against humanity.

The only problematic feature of these elements is that it requires that a woman be *forcibly* made pregnant.[81] This seems to imply that if the woman did not object by force to being made pregnant, then the perpetrator did not impregnate her with force. The context in which this crime takes place is one in which a woman would be placed under extreme coercion. Therefore, the coercion, in this context, would negate the notion of force.

As with enforced prostitution, there has yet been no judgment that interprets force pregnancy. It will thus be interesting to see how a court will interpret this crime, especially in relation to the use of force.

[81] My emphasis added.

3.1.3.5 Enforced sterilization

Enforced sterilization is the last of the expressly listed acts of sexual violence mentioned under the definition of crimes against humanity in the ICC statute, apart from acts of comparable gravity.

The EoC of the ICC statute states that enforced sterilization occurs when:

> "1. The perpetrator deprived one or more persons of biological reproductive capacity. [19]
> 2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent. [20]
> 3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
> 4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
>
> [19] The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.
> [20] It is understood that 'genuine consent' does not include consent obtained through deception."

Enforced sterilization becomes a crime when the second *actus reus* is completed. In other words, enforced sterilization becomes a crime when the treatment was not medically prescribed, nor carried out with the consent of the victim.

De Brouwer argues that enforced sterilization may also include instances "where women have been raped so viciously that their reproductive system had been destroyed completely".[82] Even though this may indeed be the case, the prosecution will have the

[82] See AMLM De Brouwer op cit note 17 at 147.

huge burden of proving that the perpetrator intended and knew that the victim's reproductive system will be destroyed by continuously raping her.[83]

Thus far enforced sterilization has not been interpreted by an international tribunal or the ICC.

3.1.3.6 Any other form of sexual violence of comparable gravity

As a starting point, it seems interesting to note the differences in terminology adopted in the ICTY and ICTR statutes, the ICC and the statute establishing the SCSL. The ICC and the SCSL statutes use the term 'any other form of sexual violence', while the ICTY and ICTR statutes use the term 'other inhumane acts'.

The EoC attached to the ICC statute describes this section to contain the following elements:

> "1. The perpetrator committed an act of a sexual nature against one or more persons or cause such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
> 2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1(g), of the Statute.
> 3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
> 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
> 5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."

[83] This being in conformity with article 30 of the ICC statute.

The first element requires that the act be of a sexual nature, while the second element requires that it be comparable to the other acts of sexual violence listed in the definition of crimes against humanity. De Brouwer argues that this seems to imply that the act should involve some form of penetration.[84] She further reminds us that the statutes establishing the ICTY and the ICTR only require that the act be 'inhumane' and therefore these criminal tribunals could have convicted accused persons like Akayesu for forcing a Tutsi victim to undress in public and Tadic for sexual mutilation.[85] These acts that Akayesu and Tadic were convicted of did not involve sexual penetration.

Unfortunately I have to disagree with De Brouwer, as crimes involving sexual slavery and enforced sterilization do not necessarily involve penetration. The former act punishes the person who *deprived* the liberty of a victim for sexual purposes.[86] The perpetrator in this instance can be convicted of sexual slavery for depriving the victim of her liberty and sexual autonomy, even though he himself did not sexually penetrate the victim. As for enforced sterilization, the perpetrator can perform a medical procedure on the victim, for the reasons which are not medically required while the victim is coerced into it. This act also does not necessarily infer that sexual penetration takes place. I also disagree with De Brouwer when she argues that the *nullum crimen sine lege* principle as expressed in this article restricts the crime of sexual violence too much.[87]

[84] See AMLM De Brouwer op cit note 17 at 148.
[85] See AMLM De Brouwer op cit note 17 at 149.
[86] My emphasis added.
[87] See AMLM De Brouwer op cit note 17 at 150.

In her dissenting opinion in the *AFRC* judgment, Justice Doherty dismissed the majority argument about not convicting the accused for sexual slavery. She argues that even though the accused persons' actions might not have constituted sexual slavery, it did amount to forced marriages, which caused serious mental and physical harm to the victim.[88] The fact that forced marriages caused serious mental and physical harm to the victim is a strong enough argument to interpret it as 'other inhumane acts'.[89] The fundamental reason why sexual slavery cannot be considered as forced marriages is because the EoC for sexual slavery does not make provision for the perpetrator to take ownership of the victim by way of (putative) marriage.[90] Forced marriages cannot also amount to enforced prostitution as the perpetrator does not receive some form of remuneration or benefit from a third person for sexual services by the victim. Based on the fact that in most forced marriages the victim is required to provide services of a sexual nature to the accused (which does not necessarily mean sexual penetration and therefore also does not fall under EoC for rape), it can thus be correctly argued that forced marriages can amount to 'any other form of sexual violence of comparable gravity'. This act would thus amount to an act of a sexual nature; of comparable gravity to the other acts mentioned in article 7(1)(g) of the ICC statute where the perpetrator was aware of the

[88] Para. 57 of Justice Doherty's dissenting opinion.
[89] Para. 51 of Justice Doherty's dissenting opinion.
[90] I thus agree with Jain who argues that the distinguishing characteristic of forced marriages is the imposition of a marital status on one or both parties, against their will, or in circumstances that vitiate their consent, resulting in the involuntary assumption of obligations arising from a marriage-like relationship, as the concomitant physical and psychological suffering caused to the victim of the marriage. She states that sexual slavery may be present in these circumstances, but it is not the dominant feature. See Neha Jain 'Forced Marriages as a Crime against Humanity: Problems of Definition and Prosecution' (2008) 6 *Journal of International Criminal Justice* 1030.

gravity of his conduct. This therefore negates the *nullum crimen sine lege* principle. Thus it meets all the necessary elements as listed in the EoC.[91]

3.1.4 Persecution based on the ground of gender

Even though the focus of this study is to place emphasis on sexual violence, and not gender or sex, it is important to analyse persecution based on the ground of gender, as most crimes of a sexual nature take place against women, because of their gender. The ICC statute is quite clear that gender refers to the two sexes, male and female, within the context of society.[92]

As a starting point, it is interesting to note that the ICC statute is the first international criminal law statute that creates a ground for persecution based on gender.[93] The statutes establishing the ICTY and the ICTR only make provision for persecutions based on political, racial and religious grounds,[94] while the statute establishing the SCSL makes provision for persecutions based on political, racial, ethnic or religious grounds.[95]

The EoC of the ICC statute stipulates the following elements for persecution:

> "1. The perpetrator severely deprived, contrary to international law, [21] one or more persons of fundamental rights.

[91] The crime should obviously take place within a widespread or systematic attack upon a civilian population or the perpetrator knew or intended that the act take place as part of a widespread or systematic attack against a civilian population.
[92] See article 7(3).
[93] See article 7(1)(h).
[94] See article 5(h) of the ICTY statute and article 3(h) of the ICTR statute.
[95] See article 2(h) of the SCSL statute.

2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court. [22]
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

[21] This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes.
[22] It is understood that no additional mental element is necessary for this element other than that inherent in element 6."

The first element requires that the perpetrator deprive a victim of his/her fundamental rights. In the case of *The Prosecutor v Zoran Kupreskic et al*[96] the ICTY defined persecution as "the gross and blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5".[97] The ICTY is thus more specific in stating that the fundamental right must have been stipulated either in treaty law or international customary law. The tribunal was not prepared to stipulate which rights constituted fundamental rights and which do not, as excluded rights can be fundamental rights in another sense.[98] The Declaration on the Elimination of Violence against Women[99] stipulates that women are entitled to the enjoyment of equal human rights, which, *inter alia*, include: the right to life; the right to liberty and security of person; and the right not to be subjected to torture, or other cruel, inhuman or degrading treatment or

[96] IT-95-16-T, 14 January 2000. (Hereinafter referred to as the *Kupreskic et al* judgment).
[97] Para. 621.
[98] Para. 623.
[99] United Nations General Assembly Resolution 48/104 of 20 December 1993. (Hereinafter referred to as DEVAW).

punishment.[100] These rights constitute fundamental rights of women. As stipulated above, sexual violence can amount to torture, while sexual slavery can amount to a deprivation of liberty. Thus broadly interpreted, sexual violence can amount to a breach of protection offered to women.

The ICTY also added the requirement that the act must be of comparable gravity as that of the other forms of crimes against humanity. In other words, the act of persecution must contain similar elements as the crimes stipulated in articles 5(a)-(i) of the ICTY statute.

By stating that the perpetrator targeted the victim, because of his or her identity to a group, implies that the second and third elements contain some form of discrimination. As stated above, the ICC statute is the only treaty that creates a grouping for gender as a discriminatory ground. In the *Kupreskic et al* judgment the ICTY stated that the deliberate and systematic killing of Bosnian Muslims constituted persecution.[101] Thus, in this conflict, Muslims were targeted, because of their religion. De Brouwer thus rightly argues that with the dawn of the ICC statute a perpetrator can be prosecuted for persecution if he raped a woman solely for her being a woman.[102]

The fourth *actus reus* requires that the act be of similar gravity as to that of the other acts of a crime against humanity, as stipulated in article 7 of the ICC statute. As stated above,

[100] See articles 3(a), (c) and (h).
[101] Para. 629.
[102] See AMLM De Brouwer op cit note 17 at 160.

the ICTY in the *Kupreskic et al* judgment applied this element by stating that the act of persecution should be of comparable gravity to that of one of the acts listed in article 5 of the ICTY statute.[103]

In conclusion, I thus agree with Mettraux that stresses an important point, by arguing that acts of persecution cannot be viewed in isolation, but must be considered in their context by analysing their cumulative effect.[104]

3.2 The *chapeau* elements of crimes against humanity

The true identity of crimes against humanity is contained in the phrase "widespread or systematic attack against a civilian population". In other words, all of the acts mentioned above acts must take place as part of a widespread or systematic attack against a civilian population.

In order to have a substantial discussion about how sexual violence fits into this phrase, I will break it down into the following three elements in this chapter:

(1) An attack;

(2) Against a civilian population; and

(3) Widespread or systematic in nature

[103] See also footnote 93 above.
[104] See Guenael Mettraux *International Crimes and the Ad Hoc Tribunals* (2005) 184.

3.2.1 An attack

In the *Foca* trial judgment the ICTY described an attack to be "a course of conduct involving the commission of acts of violence".[105] In other words, the individual acts listed above form the basis for an attack. Thus, sexual violence is used as a tool to implement an attack.

Even though the ICTY definition for crimes against humanity requires that there be a conflict annexed to the commission of this crime, the judges in the *Foca* trial judgment stated that this attack is not limited to the conduct of hostilities.[106] This seems to imply that an attack as part of the conduct of hostilities is not necessarily at attack when committed as a crime against humanity. By conceptualising an attack in this broad manner, the ICTY made provision for the instances where an attack was not carried out by the armed forces only (during the Yugoslavia conflict), but also by civilians against other civilians, subject to the existence of an armed conflict. Thus, civilians who committed or even aided and abetted in the commission of sexual violence as a crime against humanity can be prosecuted. According to this judgment the following requirements should be met when committing an attack:

> "(i) the commission of an act which, by its nature or consequences, is objectively part of the attack; couple with
> (ii) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part of the attack."[107]

[105] Para. 415.
[106] Para. 416.
[107] Para. 418.

The first requirement only states that an act takes place. In other words, as Mettraux correctly argues "the perpetrator need not have committed a series of crimes for his acts to be part of the attack; a single act is sufficient in principle".[108] This attack should obviously be coupled with the notion that the accused had the required knowledge that he was committing this act as part of a broader attack. Therefore, for example, one rape can constitute an act which takes place as part of a broader armed attack upon a civilian population.

In the rule 61 decision of *The Prosecutor v Dragan Nikolic*[109] the trial chamber suggested the following factors when determining if an attack took place, *ex post facto.*

> "(i) whether there has been an authoritarian takeover of the region where the crime has been committed;
> (ii) whether a new authoritarian power structure has been established;
> (iii) whether discriminatory measures, such as restrictions on bank accounts held by one group of citizens, or *laissez-passer* requirements have been imposed;
> (iv) whether summary arrests, detention, torture, and other crimes have been committed;
> (v) whether massive transfers of civilian camps have taken place; and
> (vi) whether the enemy population has been removed from the area."[110]

These are factors that play a determining role in establishing whether crimes against humanity occurred. However, these factors do not adequately address whether sexual violence occurred in a certain geographical area, as part of an attack against a civilian population. It can thus be argued that the following factors can aid in assessing whether sexual violence took place as an attack: (1) the detention of women who were forcefully

[108] See G Mettraux op cit note 104 at 162.
[109] IT-94-2-R61, 20 October 1995. (Hereinafter referred to as the *Nikolic* rule 61 decision).
[110] Para. 27 of the rule 61 decision.

impregnated; (2) the separation of partners and family members; and (3) the creation of detention facilities for members of a certain sex and or gender.

3.2.2 Against a civilian population

This phrase implies that a crime against humanity can only take place against a civilian population, thus making the civilian population the primary object of the crime. Geneva Convention IV of 1949 defines civilians as "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause".[111] A civilian population has been interpreted to include the following 2 elements: (1) the constituent acts must be directed against non-combatants; and (2) a large number of victims must be targeted.[112]

The *Foca* trial judgment reiterated the decision in the *Tadic* judgment by stating that the fact that the attacks are rendered against a civilian population means that no random acts can constitute a crime against humanity.[113] This should not be confused with one act that can constitute an attack. In the latter instance, the accused must have the knowledge of committing a crime against humanity, while in the former this knowledge can be absent.

[111] See article 3(1) of Geneva Convention IV of 1949.
[112] See Margaret McAuliffe deGuzman 'The Road from Rome: The Developing Laws of Crimes against Humanity' (2000) 22 *Human Rights Quarterly* 361.
[113] Para. 422 of the *Foca* trial judgment.

Feminists such as Gardam and Charlesworth argue that by incorporating men and women into the general category of a civilian population, the different experiences that men and women face during such an atrocity are ignored.[114] Women do bear the brunt of experiencing sexual violence during armed conflict, but that does not mean that men cannot or do not fall victim to this crime.[115] I agree with Quenivet when she argues that a distinction between men and women would not provide better protection for women.[116] By using the term civilian population, both men and women are protected against sexual violence (among other crimes), as a crime against humanity is there to prosecute accused persons who coordinated and carried out an attack against a civilian population, and not just against women. Quenivet rightly argues that it is by time that the discussion about gender and more particularly about sexual offences be inclusive rather that exclusive.[117]

3.2.3 Widespread or systematic in nature[118]

Widespread or systematic in nature does not refer to the civilian population (the term population already refers to broad scope of people), but to the attack instead. In other words, the *attack* against the civilian population should be widespread or systematic in

[114] See Judith Gardam & Hilary Charlesworth 'Protection of Women in Armed Conflict' (2000) 22 *Human Rights Quarterly* 150.
[115] In the case of *The Prosecutor v Stevan Todorovic* IT-95-9/1-S, 31 July 2001, the accused pleaded guilty to sexual violence by forcing a man to perform fellatio on another man. See paras. 37-40.
[116] See NNR Quenivet op cit note 45 at 117.
[117] See NNR Quenivet op cit note 45 at 113.
[118] I will not venture into the debate about the cumulative or alternative use of the words widespread and systematic, as I will follow the ICC formulation of this crime, which has an alternative use. For a summary of this debate, the reader is welcome to read: McAuliffe deGuzman, Margaret; *The Road from Rome: The Developing Law of Crimes against Humanity;* Human Rights Quarterly 22; (2000); 335-403.

nature.[119] The ICTR statute was the first statute to include this element into its definition. Widespread refers to the quantitative nature of the attack and can be derived from the amount of victims of the crime, while systematic refers to the qualitative nature of the attack. The latter can be deduced from the organised nature of the attack.[120]

3.2.3.1 Sexual violence as being widespread

In order for sexual violence to be widespread in nature, it has to constitute a mass crime. Thus, there should be evidence that it was committed against vast numbers of victims. In the *Akayesu* judgment the ICTR found that multiple Tutsi women who sought refuge at the bureau communal of the Taba commune were subjected to rape.[121] The ICTR found Akayesu guilty for the rape of the women at the bureau communal, because he knew that these women were raped and did nothing to stop it and in some instances encouraged the rape of Tutsi women.[122]

Quenivet highlights that many feminists complain that sexual violence are only prosecuted when they occur on a large scale.[123] The widespread nature of a crime against humanity would unfortunately require that it be perpetrated on a large scale. However, this does not mean that a perpetrator who committed one rape only will not be prosecuted for this crime. In the latter instance the perpetrator can be prosecuted for committing a

[119] My emphasis added.
[120] See G Werle op cit note 77 at 225.
[121] Para. 449.
[122] Para. 452.
[123] See NNR Quenivet op cit note 45 at 132.

war crime.[124] This distinction does not necessarily mean that the raping of one woman is less serious or reprehensible compared to the raping of hundreds of women. The latter instance will serve as better evidence for the prosecution to produce to have a conviction for a crime against humanity, when the perpetrator intended to launch an attack against a civilian population.

3.2.3.2 Sexual violence as being systematic

One of the methods in which the systematic nature of sexual violence can be proved is by establishing that there was a policy or a plan behind the sexual violence, as a means to attack a civilian population. Proving that such a policy or plan was in place before the sexual violence took place is a difficult task faced by the prosecution.[125] However, in the *Akayesu* judgment the court found that the accused had made statements in public that motivated the raping of Tutsi women. For example, the ICTR found that he made statements to the Interahamwe militia saying: "Never ask me again what a Tutsi woman tastes like" after the militia raped a witness.[126] On another occasion the accused also supervised the raping of Tutsi women.[127] All these actions can be used as circumstantial evidence to prove that there was a plan or policy in place to rape Tutsi women, even though the prosecutor might not have been in possession of such plan or policy.

[124] See NNR Quenivet op cit note 45 at 129.
[125] See NNR Quenivet op cit note 45 at 135.
[126] Para. 452.
[127] Para. 122.

In the *Foca* trial judgment the ICTY was convinced that the accused committed attacks on the Muslim civilian population and that these attacks were carried out with the involvement of the local authorities.[128] The ICTY even found that the local head of the Foca police force was even identified as one of the men who took women out of detention centres and raped them.[129]

Thus in both these cases the criminal tribunals were convinced that there must have been a plan or policy annexed to the raping of Tutsi and Muslim women, based on the actions of the accused persons and not necessarily on the prosecution bringing evidence of the plan or policy to court.

'Widespread' and 'systematic' are not mutually exclusive notions, as they often overlap in practice. However, the prosecution is only required to prove one of these two notions, as the ICC statute requires either a widespread *or* a systematic attack on a civilian population.[130] Mettraux has compiled a list of the following factors which could be considered when establishing whether an attack was indeed widespread or systematic in nature:

> "(i) The number of criminal acts;
> (ii) The existence of criminal patterns;
> (iii) The logistics and financial resources involved;
> (iv) The number of victims;
> (v) The existence of public statements or political views underpinning the events;
> (vi) The existence of a plan or policy targeting a specific group of individuals;
> (vii) The means and methods used in the attack;

[128] Para. 576.
[129] Para. 124.
[130] See article 7(1) of the ICC statute. My emphasis added.

(viii) The inescapability of the attack;
(ix) The foreseeability of the criminal occurrences;
(x) The involvement of political or military authorities;
(xi) Temporally and geographically repeated and coordinated military operations which all led to the same result or consequences;
(xii) Alteration of the ethnic, religious, or racial composition of the population;
(xiii) The establishment and implementation of autonomous political or military structures at any level of authority in a given territory;
(xiv) Adoption of various discriminatory measures."[131]

These factors serve as a good indication to establish whether an attack was widespread or systematic in nature. These factors are furthermore broad enough to include acts of sexual violence as a widespread or systematic attack upon a civilian population.

3.3 Establishing the intention to commit sexual violence as a crime against humanity

Article 30 of the ICC statute stipulates the mental element needed to commit crimes under the jurisdiction of the ICC. The requirements needed to establish an intention on the part of the perpetrator, in terms of the ICC statute, is merely a declaratory reference of what was required in terms of rulings by the ICTY and the ICTR[132] and customary international law.[133]

Article 30 of the ICC statute is worded as follows:

"1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
   (a) In relation to conduct, that person means to engage in the conduct;
   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

[131] See G Mettraux op cit note 104 at 171.
[132] See G Mettraux op cit note 104 at 172-174.
[133] See G Werle op cit note 77 at 230.

> 3. For the purposes of this, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly."

Thus, in terms of article 30, an accused must have the knowledge and the intention to commit a crime against humanity. For purposes of sexual violence, the accused person must commit the act (i.e. sexual violence) knowing that (s)he will commit sexual violence as part of a widespread or systematic attack against a civilian population.

The extent as to which the perpetrator must be aware of an attack against a civilian population was the topic of debate at the drafting of the ICC statute. Von Hebel and Kelt states that:

> "On the one hand, several delegations though it would be sufficient if the perpetrator had knowledge of the existence of an attack, even though it could not be required that he knew of its exact nature or of all its implications. On the other hand, several delegations though that it should also be required that the perpetrator knew that the attack was widespread or systematic. The latter interpretation finds some support in Article 7 of the Statute, where the *chapeau* refers to "knowledge of *the* attack", referring back to "a widespread or systematic attack.""[134]

One can only presume that the delegations that opted for the approach of knowledge of a widespread or systematic attack did so on the basis of the *nullum crimen sine lege* principle. In other words, it is the attack, and not the acts of the accused, which must be directed at targeting the civilian population in order to prove that the accused committed a crime against humanity.

[134] See Herman von Hebel & Maria Kelt 'Some Comments on the Elements of Crimes for the Crimes of the ICC Statute' (2000) 3 *Yearbook of International Humanitarian Law* 284.

On the other hand, the accused must only know that his acts form part of his intention to launch an attack on the civilian population.[135] Thus, when a perpetrator commits sexual slavery, for example, he must only have the knowledge that this act of sexual violence forms part of his (or his superiors') larger plan to attack the civilian population.

Even though a prosecutor might have the burden of establishing both an intention and knowledge on the part of the perpetrator for committing a crime against humanity, (s)he only need to prove that the perpetrator had knowledge that he will be committing acts of sexual violence as part of a greater scheme to attack civilians.

3.4 Conclusion

This chapter contains an in-depth analysis of how sexual violence can be committed as a crime against humanity. Even though article 7 of the ICC statute only stipulates rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization, as expressed acts of crimes against humanity, the jurisprudence of the ICTY and the ICTR revealed that enslavement and torture can also constitute acts of sexual violence. The international criminal tribunals have obviously opted for such an interpretation, as these statutes only included rape as an express crime against humanity (as far as sexual violence is concerned). One should bear in mind that these acts are not the only forms of sexual violence constituting crimes against humanity. As I mentioned above,[136] forced

[135] See G Mettraux op cit note 104 at 173.
[136] See 3.1.3.6 above.

marriages can also amount to acts of sexual violence. There are also other acts that can amount to sexual violence, such as forced masturbation or forced nudity. Thus, one should always be mindful that article 7(g) does not constitute a *numerus clausus.*

At the time of writing, the prosecutor had closed his case against Charles Taylor in the SCSL. In the indictment, Taylor is also charged with committing rape and sexual slavery as a crime against humanity.[137] I sincerely hope that the SCSL does not follow its precedent in the *AFRC* judgment by dismissing charges of sexual violence unfairly and incorrectly against the former president of Liberia, if admissible evidence of such acts were to be proved by the prosecutor.

In the next chapter a comparative analysis will be drawn between sexual violence as a crime against humanity and genocide, respectively. Due to space constraints, only 4 similarities and differences will be explored.

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[137] See counts 4 and 5 respectively of *The Prosecutor v Charles Taylor* SCSL-03-01-PT, 2nd amended indictment.

Chapter 4:

Comparative Approaches to Sexual Violence: The Intersection of Genocide and Crimes against Humanity

> "One of the problems in adequately labelling crimes of sexual violence committed on a vast scale is that genocide requires proof of an ulterior, or specific intent. The acts of rape must be committed with the intent of destroying, in whole or in part, a national, ethnic, racial or religious group. Just because the rapes occur contemporaneously to, or within the general environment of, genocide does not mean that it will fit that crime's definition."[1]

> "The major difference between genocide and crimes against humanity is that genocide requires the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group." Accordingly, genocide is often considered a sub-set of crimes against humanity because acts of genocide also generally constitute crimes against humanity."[2]

> "Genocide overlaps with crimes against humanity only when certain specified conditions exist as to mens rea, the victim at issue, and the context in which the crimes are committed."[3]

The above quotations highlight the problem within which genocide and crimes against humanity can be compared. On the one hand, crimes of sexual violence may take place within an environment of genocide, while not legally constituting genocide, in terms of the definition of the crime. On the other hand, major legal differences exist between crimes against humanity and genocide. Based upon this perplexed conceptualisation, this chapter will seek to investigate the extent of the similarities and differences in committing sexual violence as genocide and as a crime against humanity.

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[1] See Claire De Than and Edwin Shorts *International Criminal Law and Human Rights* 1st Ed (2003) 355.
[2] See Margaret McAuliffe deGuzman 'The Road from Rome: The Developing Law of Crimes against Humanity' (2000) 22 *Human Rights Quarterly* 349.
[3] See David L. Nersessian 'Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes against Humanity' (2007) 43 *Stanford Journal of International Law* 251.

There exist multiple legal differences between crimes against humanity and genocide. Genocide has a narrow application as it only protects the four specified groups (national, ethnic, religious or racial), while crimes against humanity find application when any of the specified acts have been committed against a civilian population. Another difference can be found in the different onuses placed on the prosecution. For genocide the prosecutor will have to prove that the accused possessed *dolus specialis*, while for crimes against humanity this standard is not required. Of more direct interest to this study, the specific acts that can amount to crimes against humanity are listed of which sexual violence forms a large part, while with genocide crimes of sexual violence need to be interpreted into the specific acts.

On the other hand, based on the context within which these crimes are usually committed, the jurisdictional regime would be of an international nature for both genocide and crimes against humanity. Genocide and crimes against humanity are also individual acts committed by persons with the knowledge that their acts form part of a greater purpose, being either to annihilate a protected group in terms of genocide or a broader attack against a civilian population in terms of crimes against humanity. Both genocide and crimes against humanity can also take place in the absence of an armed conflict.

This chapter will also thus seek to outline the legal similarities and differences and its possible practical consequences. These will mainly be drawn from the success of prosecution of sexual violence as genocide and crimes against humanity for which an

accused was indicted. This chapter will first assess the differences of sexual violence as genocide and crimes against humanity in more detail before investigating the similarities and the effect this could possibly have on the prosecution of these crimes. As a third point this chapter discusses the importance of taking precaution against arbitrarily cumulating charges of sexual violence as genocide and crimes against humanity.

4.1 The differences

This section will highlight four legal differences in sexual violence as genocide and crimes against humanity. These four differences relate to: (1) the scope of application; (2) the degree of intention; (3) the burden of proof and (4) the interpretation of the acts of sexual violence.

4.1.1 The scope of application

The scope of genocide can be found in its definition that states: "…genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group…"[4] The scope for crimes against humanity can also be found within its definition: "… crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population…"[5] Thus while genocide seems to adopt a narrow approach to the groups of

[4] See article 6 of the ICC statute.
[5] See article 7 of the ICC statute.

people that it protects,[6] crimes against humanity grants protection to the civilian population.

As argued in chapter 2 of this thesis, the groups that the genocide definition protects are identified as traits that define a person's identity.[7] Even though women bear the brunt of sexual violence while genocide is being committed, the reason why they are targeted is more often than not based on their identification as forming part of a certain national, ethnical, racial or religious group, instead of their sex.[8]

Similar can be argued with regards to the extent of protection provided by the definition of a crime against humanity. Feminist scholars have been arguing for a break-away from including women and men into the broad protection provided to civilians, as it ignores the brunt of sexual violence perpetrated against women.[9] Once again it should be noted that the protection offered to civilians, as a whole, grants protection to women and men who fall victim to sexual violence in the context of a crime against humanity.[10] Article 7(1)(g) of the ICC statute gives recognition to this.

[6] It only protects national, ethnic, racial and religious groups of people. It does not protect any other group of people, as it does not state so within its definition. See also 1.3 in chapter 1 for a history of the definition.
[7] See 2.1. in chapter 2.
[8] See 2.1.2. in chapter 2.
[9] See Judith Gardam & Hilary Charlesworth 'Protection of Women in Armed Conflict' (2000) 22 *Human Rights Quarterly* 150. See also 3.2.2. in chapter 3.
[10] See 3.2.2. in chapter 3.

The scope of application does not just only apply to groups protected under the definitions of genocide and crimes against humanity, but also to the acts specified under these definitions.

The definition of genocide only list five acts of how this crime can be committed.[11] Even though some of the acts do not need further specification of how genocide can be committed, other acts are fairly vague and are completely depended on how they are interpreted. For example, killing persons of a protected group can be done in many ways, but the result of actions of killing always amount to human remains. However, causing serious bodily harm to members of a group can amount to a phenomenon that is completely subjective, which in the end requires a judge to skilfully interpret such a provision.[12] More relevant to the issue of sexual violence, the ICTR conceptualised sexual violence, in the form of rape, as an example of causing serious bodily or mental harm to a person.[13] Another abstract act of genocide are conditions to bring about the destruction of a group, as such conditions are not defined and no examples are given of the type of conditions to bring about the destruction of a group.

Both the ICTR and the ICTY have given various examples of measures intended to prevent births within a group. In the *Akayesu* judgment the trial chamber stated that

[11] These five acts are: "(a) Killing members of the group; (b) Causing serious bodily 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; and (e) Forcibly transferring children of the group to another group".
[12] See 2.2.2. in chapter 2
[13] See the *Akayesu* judgment at para. 731 and the *Muhimana* judgment at para. 302.

"sterilization, forced birth control, prohibition on marriages and segregation of the sexes" all amounted to ways in which one can prevent births within a group.[14] In the *Karadzic and Mladic* rule 61 judgment the ICTY proclaimed that "some camps were especially devoted to the raping of women, with the aim of forcing then birth of Serbian offspring. The women were held in captivity until it was too late for them to undergo an abortion".[15] There is thus also no clear specified understanding of the ways in which this act can be performed.

In chapter 2 I have argued that sexual violence can amount to all five acts of genocide. This clearly sheds light on my argument that these acts are very abstract in nature, and to establish whether it was the intention of the perpetrator to commit genocide by way of one of these acts in mind is thus difficult.

On the other hand, a crime against humanity, as defined in the ICC statute, lists a number of acts that can amount to a crime against humanity.[16] An important difference between genocide and crimes against humanity is that the latter has a specific section that only

[14] Para. 507.
[15] Para. 64.
[16] Article 7(1) of the ICC statute list the following ways in which a crime against humanity can be committed: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) the crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

deals with crimes of a sexual nature.[17] Even though rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization can take place in many ways, it is much easier to distinguish the intention of the perpetrator to commit these crimes. In other words, the prosecutor is not left to prove to a court that the perpetrator committed one of the acts of a crime against humanity, with a broader purpose in mind. The prosecutor is thus left with only having to prove that the accused had the intention to commit a widespread or systematic attack against a civilian population. With genocide the prosecutor would thus have to prove that the accused committed rape as part of the attack to cause serious bodily or mental harm to members of a protected group, with the intention of annihilating the whole group.

4.1.2 The degree of intention

In order to establish the intention that an accused possess to commit genocide, one would have to assess the criminal act committed (e.g. rape) and how this would influence on the destruction of a group. On the other hand, for crimes against humanity, to establish the intention of the accused, one would have to assess the criminal act committed (e.g. sexual slavery) and how this would influence the attack against a civilian population. Article 30 of the ICC statute regulates the mental element needed to commit a crime in terms of this statute.[18] This article regulates the mental element needed for all the crimes committed

[17] See article 7(1)(g) of the ICC statute in comparison to article 6(a)-(e) of the ICC statute that deals with the acts of genocide.

[18] Article 30 reads: "1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2. For the purposes of this article, a person has intent where: (a) In relation to

under the ICC statute, therefore it would apply both to genocide and crimes against humanity.

The definition of genocide states that "genocide means any of the following acts committed with *intent to destroy*, in whole or in part…"[19] Thus a perpetrator has to commit one of the acts of genocide, with the intention of destroying the group. Whether he or she succeeds in destroying a protected group is irrelevant at this stage, as the definition states that the protected group can be destroyed in whole or in part. The intention component to commit genocide is divided into two: (1) the general intent to commit an act (e.g. rape) and (2) the special intent to commit genocide (destroy a protected group).[20] Thus, for the prosecution to prove that an accused committed genocide by way of, for example, raping women, they would have to prove that the accused possessed *dolus directus* or *dolus eventualis* when he committed the rape,[21] and that he possessed *dolus specialis* to destroy the targeted group in whole or in part.[22] The prosecution is thus left with the difficult evidential burden of not just establishing that the

conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of event. 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly".

[19] See article 6 of the ICC statute. My emphasis added.

[20] See Bettina Ulrike Schaefer *Genocidal Intent at the ICTR and ICTY – Problems to indict for Genocide at the two Ad Hoc Tribunals* (2006) Unpublished LL.M Dissertation; University of Stellenbosch 8.

[21] In other words, he must have intended to rape the victim.

[22] In other words, the prosecution would have to prove that by raping the victim, the accused intended to destroy the targeted group that is also protected under the definition of genocide.

accused committed rape,[23] but that he had done so with the overall intention of destroying a protected group.[24]

Article 30 of the ICC statute would find application to establish the intention of an accused to commit a crime against humanity. Thus, a person accused of committing a crime against humanity would need to commit the act (e.g. sexual slavery) with the intention and with the knowledge that the act takes place as part of a broader attack against a civilian population.

Article 30 further explains what is required in order to establish intention and knowledge. In terms of article 30(2) an accused would possess intention if: (1) he means to engage in the conduct; and (2) if he means for that consequence to occur or is aware that the consequence would occur because of his conduct. An accused person would thus possess the intention of committing a crime against humanity if he commits sexual slavery (the conduct) and knows that it would form part of a greater attack against a civilian population (the consequence).

In terms of article 30(3) of the ICC statute knowledge "means awareness that a circumstance exists or a consequence will occur in the ordinary course of events". The

[23] As rape on its own is a crime not punishable by the ICC.
[24] It should be noted that the prosecutor also has the burden of proving to the court that the act of rape amounted to one of the five listed acts that can be committed in terms of the genocide definition. I.e. killing members of a group, causing serious bodily harm, deliberately conflicting conditions to bring about the physical destruction, imposing measures intended to prevent birth and forcibly transferring children.

first part of this explanation is quite clear that an accused must be aware of the attack against a civilian population (in order to commit a crime against humanity). However, in order to assess whether a consequence will occur, as part of a broader attack against a civilian population, seems somewhat relative. In order to successfully prove this, the prosecutor is left with the complex task of proving that the accused knew that a consequence would occur.

In conclusion, for the prosecutor to successfully argue that an accused committed sexual violence as a crime against humanity, he or she would have to prove the intention by: (1) proving that an accused meant to commit sexual violence; and (2) that the accused knew of the consequence of this act. The prosecution would also have to prove that by committing sexual violence, the accused had the knowledge of the broader context within which he committed these crimes, i.e. an attack against the civilian population. DeGuzman thus correctly argues that:

> "The mental element of crimes against humanity under customary international law consists of a requirement that the perpetrator have knowledge of the nexus between his or her act and a widespread or systematic attack against civilians. This knowledge requirement stands in contradistinction to the specific intent required for the crime of genocide."[25]

4.1.3 The burden of proof

The third legal difference between genocide and crimes against humanity can be found in the burden of proof. The burden of proof is closely linked to the degree of intention, as it sets the standard at which a crime should be proved by the prosecution. In criminal trials

[25] See M McAuliffe deGuzman op cit note 2 at 378.

a prosecutor should by default prove that an accused committed a crime beyond a reasonable doubt.[26] This is obviously different to what is required for civil law standards, being that the party who institutes a dispute should be able to prove that the opposing party did something or lacked to do something on a preponderance of probabilities.

In order to prove that an accused committed genocide, the prosecutor would have to prove that the accused possessed a special intention. On a broader level than sexual violence, Werle states that the following factors would suffice in proving that the accused possessed a special intention to destroy a protected group: "the existence of a plan, a large number of victims, choice of victims based on their membership in the group, and the perpetrator's bearing when committing the crime".[27]

Examples of sexual violence that can be used in order to establish that an accused possessed a special intention to destroy a protected group can be found in various decisions by the ICTR. The first example can be found in the *Akayesu* judgment. In this case the trial chamber found that:

> "The acts of rape and sexual violence … were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant."[28]

[26] See Jonathan Burchell and John Milton *Principles of Criminal Law* 3rd Ed (2005) 11.
[27] See Gerhard Werle *Principles of International Criminal Law* (2005) 210.
[28] Para. 731.

The ICTR also relied on testimony from witnesses who heard Akayesu tell the Interahamwe militia "don't ever ask again what a Tutsi woman tastes like"[29] before giving them permission to rape these women.

In the *Musema* judgment the court stated the following:

> "… on the basis of the evidence presented, it emerges that acts of serious bodily and mental harm, including rape and other forms of sexual violence were often accompanied by humiliating utterances, which clearly indicated that the intention underlying each specific act was to destroy the Tutsi group as a whole. The Chamber notes, for example, that during the rape of Nyiramusugi Musema declared: 'The pride of the Tutsis will end today'. In this context, the acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group… Witness N testified before the Chamber that Nyiramusugi, who was left for dead by those who raped her, had indeed been killed in a way. Indeed, the Witness specified that what they did to her is worse than death."[30]

Thus, by making discriminatory and humiliating utterances while specifically raping Tutsi women, the court established that Musema possessed the special intention needed to commit sexual violence as a form of genocide.

Similar to what Musema did, the accused in the *Gacumbitsi* judgment also possessed the special intention needed in order to satisfy the burden of proof needed to prove genocide. Gacumbitsi incited Hutu men to rape Tutsi women who refused to marry Hutu men, stating that the Tutsi women's refusal to marry Hutu men should be punished by way of inserting sticks into their genitals.[31]

[29] Para. 732.
[30] Para. 933.
[31] Paras. 200-202.

However, it should be remembered that the above acts of sexual violence had to be argued by the prosecution as constituting either: "(a) killing members of the group; or (b) causing serious bodily or mental harm to members of the group; or (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; or (d) imposing measures intended to prevent births within the group; or (e) forcibly transferring children of the group to another group".[32]

With crimes against humanity the position is slightly different. In terms of article 7(1) of the ICC statute the perpetrator must have *knowledge* of a widespread or systematic attack against a civilian population.[33] Werle rightly argues that the perpetrator's actions must form part of the attack.[34] He also states that is not necessary for the perpetrator to be aware of a government or organization's plan or policy.[35] This is a major difference with genocide where the perpetrator has to be aware of the policy or plan to annihilate a specific group in order to comply with the special intention standard.

Another major difference between genocide and crimes against humanity in establishing the burden of proof is that, with crimes against humanity the prosecutor would not have to prove that an act of sexual violence formed part of a broader attack directed at a civilian population. If the prosecutor thus proved that the accused, for example, committed sexual slavery with his victim, it will suffice to show evidence of this sexual

[32] See article 2(2)(a) - (e) of the ICTR statute.
[33] My emphasis added.
[34] See G Werle op cit note 27 at 231.
[35] Ibid at 33.

slavery and not that it formed part of causing serious bodily or mental harm. The latter would be required in order for a prosecutor to succeed with proving sexual violence as forming part of a genocide charge.

4.1.4 Interpreting the acts of sexual violence

This section highlights the last difference between the crimes that will be investigated in this chapter. As argued under 4.1.3, the interpretation of the acts of sexual violence would have an effect on the burden of proof standard that the prosecutor would have to meet.

The *Akayesu* judgment laid the foundation for the interpretation of sexual violence as one of the five acts of genocide. In terms of killing members of a group, the ICTR found in *Akayesu* that "in most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women. Many rapes were perpetrated near mass graves where the women were taken to be killed".[36] In the *Akayesu* judgment the ICTR also found that sexual violence constitutes serious bodily or mental harm.[37] In the *Kayishema and Ruzindana* judgment the court argued that "rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period"[38] constitutes conditions of life calculated to bring about a group's physical destruction in whole or in part. In the ICTY, the trial

[36] Para. 733.
[37] Para. 731: "…rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm".
[38] Para. 116.

chamber in the *Karadzic and Mladic* rule 61 judgment established that "some camps were specially devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late for them to undergo an abortion".[39] Thus sexual violence was interpreted as a form of imposing measures intended to prevent births within a group.

Thus, the precedent set down by the international criminal tribunals sheds light on the fact that it possible for sexual violence to form one of the five acts of genocide. This then places an added burden on the prosecutor to prove that an act of sexual violence, committed as part of genocide, constituted one of the five acts of genocide.

As discussed in chapter 1, the definition of a crime against humanity has evolved with time[40] and is currently comprehensively explained in the provisions of the ICC statute.[41] The ICTY and ICTR statutes both only make provision for the act of rape to form part of the definition of a crime against humanity.[42] Thus, rape could be prosecuted as a crime against humanity in the conflict that preceded both the establishment of these statutes. In the *Akayesu* judgment the ICTR attempted to by-pass the restrictive conditions placed in the ICTR statute by just mentioning rape as a crime against humanity. They did this by

[39] Para. 64.
[40] See 1.2. in chapter 1.
[41] See article 7 of the ICC statute.
[42] See article 5(g) of the ICTY statute and article 3(g) of the ICTR statute.

defining rape broadly.[43] Thus, even though other forms of sexual violence were not specifically mentioned in the ICTR statute, it could have been interpreted broadly using the *Akayesu* judgment as precedence.

Subsequent to the establishment of the ICTY and ICTR statutes, the statute establishing the SCSL went further and included sexual slavery, enforced prostitution and forced pregnancy as specific forms of sexual violence that can be committed as a crime against humanity.[44] The ICC statute added enforced sterilization as another form of sexual violence to the above specific forms.[45]

In order for the prosecutor to thus successfully prosecute a charge of sexual violence as a crime against humanity, mere proof of the act will suffice, as the various forms of sexual violence are specifically prohibited as a crime against humanity. Only once an act of sexual violence is not specifically mentioned, like in the case of forced marriages, would the prosecutor have to prove that this constitutes a crime against humanity.

As can be determined from the above legal differences between sexual violence as genocide and crimes against humanity, the former would place a more stringent burden on the prosecutor to prove that an act of sexual violence constitutes genocide. With

[43] Para. 688 reads: "The Tribunal considers sexual violence, which include rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive".
[44] See article 2(g) of the SCSL statute.
[45] See article 7(1)(g) of the ICC statute.

crimes against humanity, a less severe burden of proof is needed. The next section would investigate the similarities between these crimes, especially in relation to sexual violence.

4.2 The similarities

This section will highlight four similarities in genocide and crimes against humanity. They are: (1) the jurisdictional regime; (2) the knowledge of a broader context; (3) the element of persecution; and (4) the punishment of the crime.[46]

4.2.1 The jurisdictional regime

The following five theoretical principles govern the conceptualisation of jurisdiction. Firstly, the territorial principle requires that a suspect be in a country and physically detained by that country's authorities.[47] De Than and Shorts here rightly argues that this is the strongest claim to exercise jurisdiction.[48] Secondly, the nationality principle allows for a country to prosecute its own citizen for crimes committed in a foreign country.[49] Thirdly, the protective principle allows a state to exercise criminal jurisdiction over a

[46] As a point of interest, it would be best to also mention the views of Cassese, who states that genocide and crimes against humanity are similar in the following context: "(i) they encompass very serious offenses that shock our sense of humanity in that they constitute attacks on the most fundamental aspects of human dignity; (ii) they do not constitute isolated events but are instead normally part of a larger context, either because they are large-scale and massive infringements of human dignity or because they are linked to a broader practice of misconduct; and (iii) although they need not be perpetrated by State officials or by officials of entities such as insurgents, they are usually carried out with the complicity, connivance or at least the toleration of authorities." - See Antonio Cassese as quoted in DL Nersessian op cit note 3 at 246. Thus apart from the above technical legal similarities that will be investigated in this chapter, Cassese correctly highlights broader similarities based on the perceptions of human dignity.
[47] See Malcom N Shaw *International Law* 2nd Ed (1986) 349.
[48] See C De Than and E Shorts op cit note 1 at 38.
[49] See MN Shaw op cit note 47 at 353.

foreign national to protect the state's interest.[50] Fourthly, from a universality principle, any country is allowed to exercise jurisdiction over any perpetrator who committed an international crime.[51] The last theory of jurisdiction is called the passive personality principle. In terms of this principle a country can exercise jurisdiction over a foreign national even though the crime did not take place within its borders, however, some of the victims must be citizens of the country.[52]

The most written about theory that currently applies with crimes of an international character is the universal jurisdiction principle. Werle states that: "the principle of universal jurisdiction applies to crimes under international law".[53] Since both genocide and crimes against humanity form part of crimes of an international character, the principle of universal jurisdiction would apply to both these crimes. In other words, any country where a perpetrator may find him within can exercise jurisdiction over him and prosecute if he committed sexual violence as a form of one of genocide or crimes against humanity.

Another international feature of genocide and crimes against humanity is that the ICC has the competence to deal with such crimes. With that it should also be noted that the ICTY, ICTR and the SCSL have an international character within the constitution of these tribunals. Thus, the international community is left with the impression that crimes of

[50] See MN Shaw op cit note 47 at 358.
[51] See MN Shaw op cit note 47 at 359.
[52] See MN Shaw op cit note 47 at 357.
[53] See G Werle op cit note 27 at 59.

such magnitude, like genocide and crimes against humanity are quite serious as it requires a court or tribunal of an international character to prosecute these crimes.

It should also be noted that there are instances where national courts have prosecuted offenders of crimes of an international character. An example of this would be the 'Gacaca Tribunals' established in Rwanda to prosecute perpetrators that took part in the 1994 conflict.[54]

It can thus be concluded that since the conceptualisation of sexual violence as genocide and a crime against humanity, together with giving sexual violence recognition under various international treaties, sexual violence developed into a crime of an international character.

4.2.2 The knowledge of a broader context

When the differences between genocide and crimes against humanity were investigated, a clear argument was made that in order for the perpetrator to commit genocide, he must have knowledge of a plan or policy that is being implemented to destroy a protected group. Under the same heading the argument was also made that if a perpetrator commits a crime against humanity he only needs to have knowledge of the attack upon a civilian

[54] See William A. Schabas 'Genocide Trials and Gacaca Courts' (2005) 3 *Journal of International Criminal Justice* 881.

population.[55] Even though there exist a big difference between having knowledge of a plan or policy and having knowledge of an attack upon the civilian population, the common feature here remains that the perpetrator need to possess *knowledge*.[56]

In the case of *The Prosecutor v Krstic*[57] the ICTY discussed the relationship between genocide and crimes against humanity, as defined in the ICTY statute.[58] While doing this, the trial chamber argued that:

> "The requirement in Article 5 [the article that defines crimes against humanity] that the crimes be part of a widespread or systematic attack against a civilian population is comprised within the genocide requirement that there be an intent to destroy a specified type of group… acts of genocide must be committed in the context of a manifest pattern of similar conduct, or themselves constitute a conduct that could in itself effect the destruction of the group, in whole or in part, as such. Thus, Article 5's exclusion of random or isolated acts also characterises genocide."[59]

Put differently, the ICTY thus argued that within the construction of an intention to destroy a protected group (which is ultimately required to commit genocide), an element that justifiably acknowledged that the perpetrator knew of an attack (which is also required to prove that an accused committed a crime against humanity) is located. This element of knowing of an attack should also be present when a crime against humanity is committed against a civilian population.

Therefore, if sexual violence is being committed under circumstances of mayhem, it may not necessarily mean that a perpetrator intends to annihilate a protected group, when in

[55] See 4.1.2. above.
[56] My emphasis added.
[57] IT-98-33-T, 2 August 2001 (Hereinafter referred to as the *Krstic* judgment).
[58] Paras. 682 – 686.
[59] Para. 682.

actual fact he commits sexual violence by staging an attack against a civilian population. Put differently; if sexual violence is being committed under circumstances of mayhem, it may not necessarily mean that a perpetrator is staging an attack against a civilian population, when in actual fact he intends to annihilate a protected group under the definition of genocide. The knowledge under which these circumstances are articulated is thus commonly found within the context of both genocide and crimes against humanity.

4.2.3 The element of persecution

Persecution is listed as an act of a crime against humanity.[60] In terms of the ICTR and ICTY statutes persecution can only take place based on political, racial or religious grounds.[61] The statute establishing the SCSL makes provision for persecution to take place on political, racial, ethnic or religious grounds.[62] The ICC statute is the most progressive statute which not only makes provisions for the grounds stipulated in the SCSL statute, but also expressly creates grounds of persecution based on nationality, culture and gender.[63] It also leaves a backdoor open for interpretation by also recognising "grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court".[64] Thus, similar to the acts of sexual violence stipulated in the ICC statute,[65]

[60] See article 7(1)(h) of the ICC statute; article 5(h) of the ICTY statute; article 3(h) of the ICTR statute and article 2(h) of the SCSL statute.
[61] See article 5(h) of the ICTY statute and article 3(h) of the ICTR statute.
[62] See article 2(h) of the SCSL statute.
[63] See article 7(1)(h) of the ICC statute.
[64] Ibid.
[65] See article 7(1)(g) of the ICC statute.

the drafters of this act ensured that no loopholes are created by covering their basis by way of an open ended ground.

The EoC annexed to the ICC statute list the following elements for persecution to be committed:

> "1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
> 2. The perpetrator targeted such person or persons by way of the identity of a group or collectively or targeted the group or collectively as such.
> 3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3 of the Statute, or other grounds that are universally recognised as impermissible under international law.
> 4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
> 5. The conduct was conducted as part of a widespread or systematic attack directed against a civilian population,
> 6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."[66]

The ground of persecution thus requires that a victim be targeted based on her ethnicity, race, religious beliefs, cultural beliefs, nationality or political views. This is in stark similarity to what a victim of genocide is targeted upon. Genocide victims are targeted based on their nationality, ethnical grouping, race or religious views. In actual fact, the ground of persecution as a crime against humanity opens the door to groups that are not covered in the definition of genocide, like cultural beliefs, political views and gender. Even though, one can argue that political grounds does not constitute an inherently permanent group (as what Lemkin intended for the application of genocide[67]), in modern day and age religion is also not considered to be an inherently permanent group, as the freedom of choice of religion is guaranteed as a fundamental human right.

[66] See article 7(1) of the EoC annexed to the ICC statute.
[67] See 1.3. in Chapter 1.

In the *Krstic* judgment the ICTY stated that the accused was a perpetrator of persecution because he participated in:

> "a. the murder of thousands of Bosnian Muslim civilians, including men, women, children, and elderly persons;
> b. the cruel and inhumane treatment of Bosnian Muslim civilians, including severe beatings;
> c. the terrorizing of Bosnian Muslim civilians;
> d. the destruction of personal property of Bosnian Muslims; and
> e. the deportation or forcible transfer of Bosnian Muslims from the Srebrenica enclave."[68]

These grounds in themselves appear fairly similar to what would have been required had the ICTY found that the accused participated in a genocide plan against Bosnian Muslim civilians. Firstly, he murdered Bosnian Muslims and people from no other religious group. Secondly, he also treated Bosnian Muslims inhumanely and cruelly, which can amount to causing serious bodily or mental harm or deliberate conditions calculated to bring about a Muslim group's destruction. Thirdly, he participated in the deportation or transfer of Bosnian Muslims which, provided that the circumstances allowed, could amount to forcibly transferring children of the group to another group.

On the other hand, in the *Tadic* trial judgment the ICTY defined persecution as: "… some form of discrimination that is intended to be and results in an infringement of an individual's fundamental rights. Additionally, this discrimination must be on specific grounds, namely race, religion or politics".[69] Thus, the ICTY in this judgment argued that the victim, who was targeted based on her race, religion or political views must have been deprived of a fundamental right. The only slight difference between this definition of

[68] Para. 533.
[69] Paras. 697 and 715.

persecution and genocide is found in the action required. Persecution requires that a fundamental right be denied, while genocide requires the destruction, wholly or partially, of a protected group. However, at the same time, it can be argued that the right to sexual autonomy constitutes a fundamental right. Sexual violence against members of a certain group thus constitutes both an infringement of a fundamental right (to sexual autonomy) and an action that causes serious bodily or mental harm of a victim, as required for genocide.

In this regard, De Brouwer correctly argues that:

> "Kupreskic [an accused before the ICTY] clearly attacked his Muslim neighbours solely on the ground of their ethnicity and with the aim of cleansing the village of Muslim inhabitants. Blaskic [also an accused before the ICTY] was found guilty of persecutions against Muslim civilians of Bosnia on the basis of the following acts: attacks on towns and villages; murder and serious bodily injury; the destruction and plunder of property and, in particular, of institutions dedicated to religion or education; inhuman or cruel treatment of civilians and, in particular, their being taken hostage and used as human shields; and the forcible transfer of civilians."[70]

She goes further and again rightly argues that: "Following the interpretation of acts as discussed above, sexual violence crimes can thus also be seen as acts – when committed on any of the discriminatory grounds – that can constitute persecution".[71]

The only distinction between persecution and genocide lies in the *mens rea* required to commit these crimes. As mentioned above[72] the prosecution would have to prove that a perpetrator possessed a special intention to destroy in part or in whole a protected group

[70] See Anne-Marie LM De Brouwer *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005) 157.
[71] Ibid.
[72] See 4.1.2. above.

by committing sexual violence against his victim.[73] With persecution the prosecution would only have to prove that the perpetrator directed an attack against a civilian population based on some form of discrimination against the group, which was staged by sexually violating a victim who belonged to a protected group. De Brouwer broadly states this as follows: "in the crime of persecution, the criminal intent is to forcibly discriminate against a group or members of a group by grossly and systematically violating their fundamental human rights".[74]

In conclusion, Mettraux rightly argues that persecution can be seen as a "first step in a genocidal enterprise and it may serve from a prosecutorial point of view as a gap-filling criminal prohibition between other crimes against humanity which are not otherwise motivated by a persecutory agenda, and genocide, the *mens rea* of which may be difficult to prove".[75] Thus, even though a legal difference exists between genocide and persecution, the circumstances within which these crimes take place are so similar that the prosecution can possibly charge a perpetrator for persecution as a crime against humanity, by committing a sexual offence, even though the perpetrator intended to commit genocide.

[73] See also AMLM De Brouwer op cit note 70 at 152 – 162 for a discussion on persecution on the ground of gender and Guenael Mettraux *International Crimes and the Ad Hoc Tribunals* (2005) 334.
[74] See AMLM De Brouwer op cit note 70 at 161-162.
[75] See G Mettraux op cit note 73 at 336.

4.2.4 The punishment of the crimes

In order to ensure that punitive justice prevail a perpetrator would normally be sentenced to prison once he was convicted of committing an offence. The international criminal tribunals possess a huge discretion when deciding on an appropriate sentence once an accused has been convicted.[76] In sentencing proceedings two main factors would be considered by a judge before handing down an appropriate sentence. These are: (a) the gravity of the acts of the accused;[77] and (b) mitigating and aggravating factors[78] and the general practice of handing down prison sentences in the domestic court of the accused.[79] Even though sentences are handed down for each crime that an accused has committed (where he was convicted of committing multiple offences), concurrent sentences are normally favoured among judges.[80] However, in some instances the ICTY also handed down one sentence for all the offences that an accused was convicted of.[81]

Considering that only the ICTY and ICTR have convicted accused persons of both genocide and crimes against humanity, only the similarities found in these tribunals' jurisprudence will be assessed.

[76] See G Mettraux op cit note 73 at 347.
[77] Ibid.
[78] See G Mettraux op cit note 73 at 350.
[79] See AMLM De Brouwer op cit note 70 at 323.
[80] For example, in the *Akayesu*, *Gacumbitsi* and *Kayishema and Ruzindana* judgments the ICTR handed down a concurrent sentence after delivering a sentence for each offence the accused committed. Similarly in the ICTY the trial chamber handed down a concurrent sentence in the *Tadic* judgment.
[81] See the *Kvocka* judgment and the *Kunarac, Kovac & Vukovic* judgment.

Firstly it should be noted that article 23 of the ICTR statute and article 24 of the ICTY statute both provide the same provisions for punishment of convicted persons. These provisions are worded as follows:

> "1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of [Rwanda or the former Yugoslavia depending on the Statute applicable].
> 2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
>
> 3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners."

Both these tribunals are thus given the same guidelines that judges should take into account when considering an appropriate sentence that a convicted accused should serve.

In the sentencing judgment of *The Prosecutor v Dragan Nikolic*[82] the ICTY rightly argued that, apart from the taking the above factors into account, the main purpose of sentencing is to:

> "… influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced. Additionally, the process of sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody."[83]

A main component of the similarity argument is found within this purpose. If a legal awareness is created within the accused, the victims, their relatives, the witnesses and general public that crimes of a sexually violent nature (whether it be found within genocide or crimes against humanity) are seriously punished, it would serve as a deterrent for these crimes to be committed.

[82] IT-94-2-S, 18 December 2003 (Hereinafter referred to as the *Nikolic* sentencing judgment).
[83] Para. 139.

When studying the sentences handed down for sexual violence as a form of genocide, one can conclude that in the ICTR convicted accused persons received a sentence ranging from 30 years imprisonment to life imprisonment.[84] For committing sexual violence as a crime against humanity the prison sentences ranged from 12 years to life imprisonment.[85]

It is thus evident that the ICTR has handed down more severe prison sentences than the ICTY, notwithstanding the fact that the sentencing provisions for both these tribunals are the same. However, the ICTR has proved that it is possible for an accused to be given a life imprisonment sentence for committing sexual violence as a crime against humanity, just as it would order an accused a life imprisonment sentence for committing genocide.

4.3 Cumulative charges and convictions

Crimes against humanity and genocide are always committed in the form of another crime being committed. For example, rape can be committed as both a crime against humanity and genocide. Thus, when indicting an accused for committing rape as a crime against humanity or genocide (or even war crimes) the prosecution would not always be

[84] Gacumbitsi received a 30 year imprisonment sentence for sexual violence as a form of genocide, while Akayesu, Muhimana and Musema received life imprisonment sentences.
[85] In the *Kunarac, Kovac and Vukovic* judgment, Vukovic was given a 12 year sentence for raping a 15 year old girl, while in cases such as Akayesu, the accused was sentenced to 15 years imprison for committing rape as a crime against humanity. Muhimana received a life imprisonment sentence for committing rape as a crime against humanity.

sure whether the accused indeed committed one of crimes covered under the jurisdiction of the court.[86]

In this instance one would either have "true concurrences of offences or apparent concurrence of offences".[87] A true concurrence of an offence would be defined as that which factually happened, while an apparent concurrence would be offences that the perpetrator commit which can fall under various crimes, while in reality it only falls under one crime.[88]

In the case of *The Prosecutor v Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic and Vladimir Santic*[89] the ICTY highlighted various tests applied by other courts regarding the accumulation of offences.[90] In the end the trial chamber found that the prosecutor is allowed to charge an accused for an accumulation of offences by stating that:

> "If… a Trial Chamber finds that by a single act or omission the accused has perpetrated two offences under two distinct provisions of the Statute, and that the offences contain elements uniquely required by each provision, the Trial Chamber shall find the accused guilty on two separate counts. In that case the sentences consequent upon the convictions for the same act shall be served concurrently, but the Trial Chamber may aggravate the sentence for serious offence if it considers that the less serious offence committed by the same conduct significantly adds to the heinous nature of the prevailing offence."[91]

[86] See G Werle op cit note 27 at 180 where he states: "Prior to the presentation of all the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven."
[87] See Fulvio Maria Palombino 'The overlapping between war crimes and crimes against humanity in international criminal law' (2002) 12 *Italian Yearbook of International Law* 130.
[88] Ibid.
[89] IT-95-16-T, 14 January 2000 (Hereinafter referred to as the *Kupreskic et al* judgment).
[90] Paras. 678 et al for a discussion on these tests.
[91] Para. 718. Emphasis in the original.

The trial chamber thus stated that when assessing the sentencing of a cumulative offence, the heinous nature of the broader offence would find application, instead of a less serious offence that could have been committed. The ICTY went further and stated that:

> "On the other hand, if a Trial Chamber finds… that by a single act or omission the accused has not perpetrated two offences under two distinct provisions of the Statute but only one offence, then the Trial Chamber will have to decide on the appropriate conviction for that offence only."[92]

The trial chamber therefore covered all its bases by also providing for an interpretation of sentencing, should another court find that no cumulative offence was charged for and convicted.

However, thus far the cumulative offences charges have been developed by subsequent judgments in the ICTY. One of the cases in which the ICTY has laid down a test for cumulative offences was *The Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo.*[93] In this case the appeals chamber laid down the following test in order for a prosecutor to be successful in bringing cumulative charges against an accused:

> "Multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other. Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision."[94]

[92] Para. 719.
[93] IT-96-21-A, 20 February 2001 (Hereinafter referred to as the *Celebici* appeals judgment based on the place where the crimes were committed).
[94] Paras. 412 and 413.

The appeals chamber first stated the obvious, that cumulative offences can be convicted under different crimes, if it is proved by the prosecution under the different crimes. On the other hand, the appeals chamber stated that, should the prosecutor be unsuccessful in charging the accused for cumulative offences under different crimes, then the court should only convict the accused under one of the crimes for which it found the prosecution brought sufficient evidence. As an example, should the prosecutor bring charges of rape under both genocide and crimes against, but lack evidence for the former, then a conviction can be secured based on rape as a crime against humanity, should the prosecution be successful in proving it.

When assessing this in terms of whether a prosecutor should charge an accused for committing a sexually violent act in terms of genocide or a crime against humanity, the accumulation of offences could serve as an advantage to the prosecutor. This advantage is located in the fact that should the prosecutor, for example, fail in proving a sexually violent crime as genocide, he or she might still succeed with another serious charge, like a crime against humanity. However, Mettraux (a former Associate Legal Officer of the ICTY Chambers) alludes us to the reality that the prosecution "established an unfortunate practice of simply charging all possible crimes (and forms of liability for them), without any attempt to ascertain the most appropriate ones based on evidence".[95] He thus criticise

[95] See G Mettraux op cit note 73 at 316. Evidence of his previous position as an associate legal officer at the ICTY can be found on the inside cover of his book called: *International Crimes and the ad hoc Tribunals.*

the prosecution for not using an effective strategy when bringing charges against an accused.

Therefore, even though it might be easier for the prosecution to bring crimes of a sexual nature as both genocide and crimes against humanity, it has to be strategically thought through and not just listed under an indictment as both crimes, as it can amount to a serious waste of time and money, as the prosecutor would have to argue sexual violence as both crimes before the court.

4.4 Conclusion

The aim of this chapter was to highlight the differences and similarities in sexual violence as a form of genocide and a crime against humanity. In doing this, three ultra invisible components were discussed, being: (1) the legal effect; (2) the surrounding circumstances; and (3) how this would impact on the prosecution.

In assessing the first point, the differences clearly identified the legal effect that charging sexual violence has on genocide and crimes against humanity. When studying the legal definitions of these crimes, one can come to a remarkable conclusion that indeed there exists a difference in sexual violence as a crime against humanity as opposed to genocide. In assessing the second point, the similarities pointed out a palpable recognition of the surrounding circumstances within which sexual violence takes place as a crime against

humanity and genocide.[96] Thus, the conclusion in this regard would point out that indeed similarities exist in sexual violence as genocide and crimes against humanity.

In assessing the third point, it became evident that at these differences and similarities do indeed have an impact on the prosecution, by way of bringing cumulative charges against an accused for committing sexual violence as both forms of genocide and crimes against humanity. Therefore, even though the prosecution is allowed to charge one crime under multiple offences, it is also cautioned against not blindingly charging accused persons for multiple offences.

This chapter thus highlights an interesting challenge that the differences and similarities in sexual violence as genocide and a crime against humanity pose for the prosecution. Even though charging an accused for cumulative offences might seem as a plausible solution, the consequence thereof inherently threatens the development of sexual violence as a form of genocide. This is due to the fact that a significant difference between genocide and crimes against humanity is found in proving the high degree of intention for the former.

The next chapter will outline the concluding remarks in the conceptualisation of sexual violence as a crime against humanity and genocide. It will discuss whether the

[96] It points out this recognition of surrounding circumstances with the exception of the jurisdictional regime.

differences between the crimes are so significant, as to ignore it when a prosecutor should consider prosecution against an accused for committing sexual violence as genocide and instead charge an accused with committing sexual violence as a crime against humanity.

Chapter 5

Conclusion and Recommendations

5.1 Conclusion

Chapter 4 outlined the various differences and similarities in sexual violence as both genocide and a crime against humanity. In chapter 4 the conclusion was drawn that even though there indeed exists various legal differences between sexual violence as crimes against humanity and genocide, at the same time, various factual similarities can be drawn from sexual violence as both these crimes.[1]

In drawing a concrete conclusion it is necessary to revisit the central research question posed in chapter 1 and to provide an answer for it. The question was posed as: What are the essential and practical differences between sexual violence as crimes against humanity and genocide, and what is the legal effect of the differences, should there be any?[2]

Before answering this question, it is important to draw the context within which sexual violence is charged, and whether such charge would constitute one of the two crimes or not. Jean Paul Akayesu was the first accused who was charged with committing sexual violence during the Rwandan genocide. It should be noted that the prosecutor did not initially charge Jean Paul Akayesu with sexual violence and that the indictment was amended after the ICTR heard testimony about the involvement of Akayesu in sexually

[1] See pages 143-145 in chapter 4.
[2] See 1.5 in chapter 1.

violating witnesses.[3] In the rule 61 decision of *The Prosecutor v Dragan Nikolic*[4] the ICTY judges advised the prosecutors as follows:

> "From multiple testimony and the witness statements submitted by the Prosecutor to this Trial Chamber, it appears that women (and girls) were subjected to rape and other forms of sexual assault during their detention at Susica camp. Dragan Nikolic and other persons connected with the camp are alleged to have been directly involved in some of these rapes or sexual assaults. These allegations do not seem to relate solely to isolated instances.
>
> The Trial Chamber feels that the Prosecutor may be well-advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolic with rape and other forms of sexual assault, either as a crime against humanity or as grave breaches or war crimes."[5]

In the ICTY there thus also seemed to be some form of reluctance by the prosecution to charge the accused persons for crimes of a sexual nature. The prosecution could possibly have a plethora of reasons for why they did not charge the accused for crimes of a sexual nature.[6]

Of more interest to this study, in the quote above by the ICTY in the *Nikolic* rule 61 judgment, is the last portion where the judges advise to either charge the accused with committing sexual violence as a crime against humanity, grave breach or war crime. It is interesting to note that the judges did not advise the prosecution to charge the accused with sexual violence as a form of genocide. They did this knowing that the rapes and sexual assaults took place in the Susica camp where Muslim civilians were interned[7] and being well aware that the ICTY has the jurisdiction to try cases of genocide.[8]

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[3] See Fiona de Londras 'Prosecuting sexual violence in the *ad hoc* international criminal tribunals for Rwanda and the former Yugoslavia' (2009) *University College Dublin Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No. 06/ 2009* 11.
[4] IT-94-2-R61, 20 October 1995 (Hereinafter referred to as the *Nikolic* rule 61 judgment).
[5] Para. 33.
[6] Due to space restrictions, this thesis cannot venture into the reasons why the prosecution decided not to initially indict the accused for sexual violence.
[7] Para. 33.
[8] See article 4 of the ICTY statute.

In order to attempt to remedy this quandary resulting in a lack of sexual violence charges as a form of genocide, this thesis saw it fit to investigate the extent of the differences and similarities of sexual violence as a crime against humanity and genocide.

Chapter 4 of this thesis outlined four differences and similarities in sexual violence as a crime against humanity and genocide. The four differences were: 1) the scope of application;[9] 2) the degree of intention;[10] 3) the burden of proof;[11] and 4) interpreting acts of sexual violence.[12] On the other hand, the four similarities were: 1) the jurisdictional regime;[13] 2) the knowledge of a broader context;[14] 3) the element of persecution;[15] and 4) the punishment of the crimes.[16] It should be noted that due to technical constraints and limitations, only four similarities and differences could be discussed, even though there may exist many more.

Following on the first part of the question, the second part of the research question enquires into the extent of the legal effect that the differences have upon sexual violence. After extensive investigation in chapter 4, it is concluded that the extent between charging sexual violence as genocide and a crime against humanity, on the other hand, is to be welcomed.

[9] See pages 114 – 118 of chapter 4.
[10] See pages 118 – 121 of chapter 4.
[11] See pages 121 – 125 of chapter 4.
[12] See pages 125 – 128 of chapter 4.
[13] See pages 128 – 130 of chapter 4.
[14] See pages 130 – 132 of chapter 4.
[15] See pages 132 – 137 of chapter 4.
[16] See pages 137 – 139 of chapter 4.

In proving that the accused committed sexual violence as genocide, the prosecution would first have to show that the act the accused was charged with, constitutes sexual violence. After this is proved, the prosecution would have to convince the court that those acts of sexual violence constitute one of the five acts of genocide.[17] Once this is done, the prosecution is left with the daunting (and nearly impossible) task of proving that those acts of sexual violence were committed with the (special) intention of annihilating one of the protected groups, catered for by the definition of genocide.

In proving that the accused committed sexual violence as a crime against humanity, the prosecution is also called upon to show that the act the accused was charged with constitutes sexual violence, as various acts of sexual violence are catered for under the definition of a crime against humanity.[18] Once this is done, the prosecution would have to prove that the acts of sexual violence were committed as part of a widespread or systematic attack against a civilian population.

A prosecutor can thus charge and possibly convict an accused for committing sexual violence as a crime against humanity, where in fact the accused possibly committed sexual violence as a form of genocide.[19] The level of intention would not be that high, as the prosecutor would only have to prove that the accused possessed *dolus* and not *dolus specialis*, as would be required for genocide. With that, the prosecutor would also only

[17] These five acts being: "(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 with the group; and (e) forcibly transferring children of the group to another group".
[18] In the ICC statute, the following acts of sexual violence are provided for under article 7(1)(g): rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.
[19] See the *Nikolic* rule 61 judgment above, on page 147, as an example.

have to prove that the accused committed a widespread or systematic attack against a civilian population and not that the accused targeted a specific group, protected by the definition of genocide.

This, therefore, brings us to a perplexed conclusion that a scenario that *prima facie* might constitute sexual violence as genocide would stand a better chance of conviction if the accused is charged with committing sexual violence as a crime against humanity. Margaret Lyons thus correctly argues that:

> "A crime against humanity is sufficiently serious without adding the crime of genocide. A legal creation to produce a crime of genocide only trivializes the crime and confuses the international community responsible for implementing the tribunal's [ICTR] decision."[20]

In formulating this argument, Lyon made the following correct observation, regarding the extent of rape charges as genocide in the ICTY: "There are still many cases of genocide pending in the ICTY. Yet, indictments served for rape continue to fall under crimes against humanity".[21]

5.2 Recommendations

As pointed out above,[22] the extent to which sexual violence as genocide can be overruled as a crime against humanity is quite vast. In order to remedy this injustice, concrete recommendations are needed to ensure that sexual violence, as genocide, is recognised, charged, correctly applied and convicted in future.

[20] See Margaret A. Lyons 'Hearing the cry without answering the call: rape, genocide and the Rwandan tribunal' (2001) 28 *Syracuse Journal of International Law and Commerce* 123.
[21] See MA Lyons op cit note 20 at 120.
[22] See the argument formulated directly preceding the recommendations.

De Brouwer calls for an amended definition of genocide that expressly includes sexual violence as an act.[23] Her proposed definition will amend article 6 of the ICC statute as follows:

> "Genocide means any of the following acts committed with intent to destroy, in whole or in part, an identifiable groups, as such, including a national, ethnical, racial, religious or gender group:
>
> *Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity.*
>
> …"[24]

Based on the fact that the definition of genocide was formulated into law during 1948, one could certainly propose that the definition be re-examined to explore whether it would still find exact application in the 21st century.[25] By expressly stating acts of a sexual nature in the definition, the prosecution is not left with the burden of proving that acts of a sexual nature constituted one of the existing five grounds of genocide.[26]

However, De Brouwer's proposal does not sufficiently address the reason why the prosecution would not charge an accused for sexual violence, as genocide, but rather as a crime against humanity. This reason lies in the difficulty of proving that an act of sexual violence was perpetrated with the special intention to annihilate one of the protected groups covered by the definition. If a well structured amendment of the definition of genocide includes addressing the high standards imposed by the current definition, it

[23] See Anne-Marie LM De Brouwer *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005) 83.
[24] See AMLM De Brouwer op cit note 23 at 84 (my emphasis added).
[25] Apart from the fact that 61 years have lapsed since the Genocide Convention was signed as a treaty, the nature in which genocide is committed, has changed to the extent that sexual violence plays an enormous role in attempting to annihilate a protected group, covered by the definition.
[26] See footnote 17 above for the five acts of genocide.

could be seen as a possible solution to ensure more charges being brought against accused for committing sexual violence as genocide.

Apart from seeking such an amendment, it should be noted that the current definition of genocide forms part of customary international law and the *jus cogens.*[27] *Jus cogens* is defined as "peremptory norms… from which no derogation is permitted"[28] by States. In other words, States may not create laws contrary to those established by *jus cogens* norms. Therefore, a proposed amendment of article 6 of the ICC statute would meet extreme difficulty, especially in light of the fact that genocide forms part of customary international law and norms that States cannot derogate from.

Quenivet asks an important question, which has thus far not been answered in writing in any academic research. She writes that:

> "The real question is whether we want sexual offenses to become a specific category of crime or whether it is appropriate to enumerate them as a type of crime that falls under the purview of a big crime."[29]

In other words, she is questioning whether it would not be more beneficial to have sexual violence conceptualised as a separate crime and not as either genocide, or crimes against humanity, or war crimes.

This recommendation could possibly serve as a solution when one is confronted with the prospect of a comparative analysis between sexual violence as genocide and crimes against humanity. By 'removing' sexual violence from these crimes and adding it as a

[27] See Gerhard Werle *Principles of International Criminal Law* (2005) 191.
[28] See John Dugard *International Law: A South African Perspective* 2nd Ed. (2000) 40.
[29] See Noelle NR Quenivet *Sexual Offenses in Armed Conflict and International Law* (2005) 176.

separate crime, the prosecution would not have to face the prospect of considering how to approach and successfully prosecute sexual violence as either genocide or crimes against humanity. In the end, this could be seen as an easier method to ensure justice for victims of sexual violence during mass atrocities and armed conflict circumstances, where both genocide and crimes against humanity were committed.

BIBLIOGRAPHY

Books

Albertyn, Cathy and Bonthuys, Elizabeth (eds); *Gender, Law and Justice*; Juta; Cape Town; 2007.

Bassiouni, M. Cherif; *Crimes against Humanity in International Criminal Law;* 2nd Edition; Kluwer Law International; The Hague; 1999.

Burchell, Jonathan and Milton, John; *Principles of Criminal Law*; 3rd Edition; Juta; Cape Town; 2005.

De Brouwer, Anne-Marie L.M; *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR;* Insentia; Antwerpen, the Netherlands; 2005.

De Than, Claire and Shorts, Edwin; *International Criminal Law and Human Rights*; 1st Edition; Sweet & Maxwell Limited; London 2003.

Dugard, John; *International Law: A South African Perspective*; 2nd Edition; Juta; Cape Town; 2000.

Lemkin, Raphael; *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress;* Carnegie Endowment for International Peace; Washington; 1944.

MacKinnon, Catharine; *Are Women Human? And other International Dialogues;* Belknap Harvard Publishers; 2006.

Mettraux, Guenael; *International Crimes and the Ad Hoc Tribunals;* Oxford University Press; 2005.

Quenivet, Noelle; *Sexual Offenses in Armed Conflict & International Law;* Transnational Publishers Inc; New York, United States of America; 2005.

Quigley, John; *The Genocide Convention: An International Law Analysis;* Ashgate; Vermont; 2006.

Schabas, William A; *Genocide in International Law;* Cambridge University Press; United Kingdom; 2000.

Shaw, Malcolm N; *International Law*; 2nd Edition; Grotius Publications Limited; Cambridge; 1986.

Snyman, CR; *Criminal Law*; 4th Edition; Butterworths; Durban; 2002.

Stiglmayer, Alexandra (ed); *Mass Rape: The War against Women in Bosnia-Herzegovina*; University of Nebraska Press; Lincoln; 1994.
Ward, Jeanne; Horwood, Christopher; McEvoy, Claire; Shipman, Pamela; Rumble, Lauren; *The Shame of War: Sexual Violence against Women and Girls in conflict;* OCHA/ IRIN; 2007.

Werle, Gerhard; *Principles of International Criminal Law*; T.M.C. Asser Press; The Hague, Netherlands; 2005.

Case Law

International Criminal Court

The Prosecutor v Germain Katanga, (Warrant of Arrest), ICC-01/04-01/07, 2 July 2007.

International Criminal Tribunal for Rwanda

The Prosecutor v Jean-Paul Akayesu, ICTR-96-4-T, 2 September 1998.

The Prosecutor v Sylvestre Gacumbitsi, ICTR-2001-64, 3 April 2002.

The Prosecutor v Juvenal Kajelijeli, ICTR-98-44A-T, 1 December 2003.

The Prosecutor v Jean de Dieu Kamuhanda, ICTR-95-54A-T, 22 January 2004.

The Prosecutor v Clement Kayishema and Obed Ruzindana, ICTR-95-1-T, 21 May 1999.

The Prosecutor v Maki Muhimana, ICTR-95-1B-T, 28 April 2005.

The Prosecutor v Alfred Musema, ICTR-96-13-T, 27 January 2000.

The Prosecutor v Pauline Nyiramasuhuko and Arsene Shalom Ntahobali, (Indictment), ICTR-97-21-I, 10 August 1999.

The Prosecutor v George Rutaganda, ICTR-96-3-T, 6 December 1999.

The Prosecutor v Laurent Semanza, ICTR-97-20-T, 15 May 2003.

International Criminal Tribunal for the former Yugoslavia

The Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, IT-96-21-T, 16 November 1998.

The Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, IT-96-21-A, 20 February 2001.

The Prosecutor v Anto Furundzija, IT-95-17/1-T, 10 December 1998.

The Prosecutor v Goran Jelisic, IT-95-10-T, 14 December 1999.

The Prosecutor v Radovan Karadzic and Ratko Mladic Rule 61, IT-95-5-R61, 2 July 1996.

The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, IT-96-23-PT, 8 November 1999, Amended Indictment.

The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, IT-96-23, 22 February 2001.

The Prosecutor v Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovi, Dragan Papi and Vladimir Anti, IT-95-16-T, 14 January 2000.

The Prosecutor v Radislav Krstic, IT-98-33-T, 2 August 2001.

The Prosecutor v Slobodan Milosevic, (Indictment), IT-01-50-I, 8 October 2001.

The Prosecutor v Dragan Nikolic, IT-94-2-R61, 20 October 1995, Rule 61 Decision.

The Prosecutor v Dragan Nikolic, IT-94-2-S, 18 December 2003.

The Prosecutor v Milomir Stakic, Decision on Rule 98bis Motion for Judgment of Acquittal, IT-97-24-T, 31 October 2002.

The Prosecutor v Tadic, IT-94-1-A, 15 July 1999.

The Prosecutor v Stevan Todorovic IT-95-9/1-S, 31 July 2001.

South African National Case Law

R v Hedley 1958 (1) SA 362 (N).

Special Court for Sierra Leone

The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, SCSL-04-16-T, 20 June 2007.

The Prosecutor v Charles Taylor, SCSL-03-01-PT, 2nd Amended Indictment.

Domestic Legislation

Namibian Combating of Rape Act 8 of 2000.

South African Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

International Treaties' and Statutes

Charter of the International Military Tribunal at Nuremberg, 8 August 1945.

Control Council Law No. 10 on the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945.

Charter of the International Military Tribunal for the Far East, 19 January 1946.

Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.

Protocol I additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts of 8 June 1977.

UN Convention against Torture and other Cruel Inhuman and Degrading Treatment or Punishment [GET DATE].

Declaration on the Elimination of Violence against Women. United Nations General Assembly Resolution 48/104 of 20 December 1993.

Ad Hoc International Criminal Tribunal for the Prosecution of Persons Responsible for serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991.

The International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory

of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994.

Rome Statute of the International Court, 17 July 1998.

Statute of the Special Court for Sierra Leone, 14 August 2000.

Research Articles

Askin, Kelly Dawn; 'Prosecuting Wartime Rape and other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkley Journal of International Law*; pp. 288-349.

Beltz, Amanda; 'Prosecuting Rape in International Criminal Tribunals: The need to balance Victim's Rights with the Due Process Rights of the Accused' (2008) 23 *St. John's Journal of Legal Commentary*; pp. 167-209.

De Londras, Fiona; 'Prosecuting Sexual Violence in the *ad hoc* International Criminal Tribunals for Rwanda and the former Yugoslavia' (2009) *University College Dublin Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No. 06/ 2009*; pp. 1-18.

Gardam, Judith & Charlesworth, Hilary; 'Protection of Women in Armed Conflict' (2000) 22 *Human Rights Quarterly*; pp. 148-166.

Hung, CJ; 'For those who had no voice: The Multifaceted Fight for Redress by and for the "Comfort Women"' (2008) 15 *Asian American Law Journal*; pp. 177-204.

Jain, Neha; 'Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution' (2008) 6 *Journal of International Criminal Justice*; pp. 1013-1032.

Lyons, Margaret A; 'Hearing the cry without answering the call: Rape, Genocide, and the Rwandan Tribunal' (2001) 28 *Syracuse Journal of International Law and Commerce*; pp. 99-123.

Lyth, Annette; 'The development of the legal protection against sexual violence in armed conflicts – advantages and disadvantages' (2001) Unpublished Research Paper on file with the author.

McAuliffe deGuzman, Margaret; 'The Road from Rome: The Developing Law of Crimes against Humanity' (2000) 22 *Human Rights Quarterly*; pp. 335-403.

Nersessian, David L; 'Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes against Humanity' (2007) 43 *Stanford Journal of International Law*; pp. 221-264.

Oosterveld, Valerie & Marlowe, Andrea; 'Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu. Case No. SCSL-04-16-T. Special Court for Sierra Leone, Trial Chamber II, June 20, 2007. Prosecutor v Moinina Fofana & Allieu Kondewa. Case No. SCSL-04-14-T. Special Court for Sierra Leone, Trial Chamber I, August 2, 2007' (2007) 101 *The American Journal of International Law*; pp. 848-857.

Palombino, Fulvio Maria; 'The Overlapping between War Crimes and Crimes against Humanity in International Criminal Law' (2002) 12 *Italian Yearbook of International Law*; pp. 123-145.

Robinson, Darryl; 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 *The American Journal of International Law*; pp. 43 – 57.

Schomburg, Wolfgang & Peterson, Ines; 'Genuine Consent to Sexual Violence under International Criminal Law' (2007) 101 *The American Journal of International Law*; pp. 121-140.

Van der Poll, Letetia; 'The Emerging Jurisprudence on Sexual Violence Perpetrated against Women during Armed Conflict' (2007) *African Yearbook of International Humanitarian Law*; pp. 1 – 38.

Verdirame, Guglielmo; 'The Genocide Definition in the Jurisprudence of the ad hoc Tribunals' (2000) 49 *The International and Comparative Law Quarterly*; pp. 578 – 598.

Vikman, Elisabeth; 'Ancient Origins: Sexual Violence in Warfare, Part 1' (2005) 12 *Anthropology & Medicine*; pp. 21 – 31.

Von Hebel, Herman and Kelt, Maria; 'Some Comments on the Elements of Crimes for the Crimes of the ICC Statute' (2000) 3 *Yearbook of International Humanitarian Law*; pp. 273 – 288.

Wakefield, Lorenzo; 'Investigating where Rape finds itself within the Definition of Genocide' (2007) Unpublished Research Paper on file with the author.

Thesis

Schaefer Bettina Ulrike; *Genocidal Intent at the ICTR and ICTY – Problems to indict for Genocide at the two Ad Hoc Tribunals;* Unpublished LL.M thesis completed at the University of Stellenbosch; 2006.

Websites

www.preventgenocide.org

www.ictr.org

www.icty.org

www.icc-cpi.int/home.html

www.sc-sl.org

Newspaper Reports

http://www.mg.co.za/article/2007-10-23-rape-leaves-lifelong-scars-in-drc-conflict-zones

APPENDICES

Appendix A: Rome Statute of the International Criminal Court 1998 (extract)

Article 5
Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

Article 6
Genocide

For the purpose of this Statute, "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 7
Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not

indicate any meaning different from the above.

Appendix B: Elements of Crimes annexed to Rome Statute of the International Criminal Court 1998 (extract)

Article 6 Genocide

Introduction
With respect to the last element listed for each crime:
– The term "in the context of" would include the initial acts in an emerging pattern;

– The term "manifest" is an objective qualification;
– Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.

Article 6 (a) Genocide by killing

Elements
1. The perpetrator killed 2 one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.

3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Article 6 (b) Genocide by causing serious bodily or mental harm
Elements
1. The perpetrator caused serious bodily or mental harm to one or more persons. 3
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.

3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

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2 The term "killed" is interchangeable with the term "caused death".
3 This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual

violence or inhuman or degrading treatment. 6

Article 6 (c) Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction
Elements
1. The perpetrator inflicted certain conditions of life upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.

3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part. 4
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Article 6 (d) Genocide by imposing measures intended to prevent births
Elements
1. The perpetrator imposed certain measures upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.

3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The measures imposed were intended to prevent births within that group.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Article 6 (e) Genocide by forcibly transferring children
Elements
1. The perpetrator forcibly transferred one or more persons. 5
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.

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4 The term “conditions of life” may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.

5 The term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment. 7

3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The transfer was from that group to another group.
5. The person or persons were under the age of 18 years.
6. The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.

7. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction. 8

Article 7 Crimes against humanity

Introduction
1. Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.
2. The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.
3. “Attack directed against a civilian population” in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population. 6

Article 7 (1) (a) Crime against humanity of murder

Elements
1. The perpetrator killed 7 one or more persons.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

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6 A policy which has a civilian population as the object of the attack would be implemented by

State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack.

The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.
7 The term “killed” is interchangeable with the term “caused death”. This footnote applies to all
elements which use either of these concepts. 9

Article 7 (1) (b) Crime against humanity of extermination

Elements
1. The perpetrator killed 8 one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population. 9

2. The conduct constituted, or took place as part of, 10 a mass killing of members of a civilian population.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (c) Crime against humanity of enslavement
Elements
1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. 11

2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

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8 The conduct could be committed by different methods of killing, either directly or

indirectly.
9 The infliction of such conditions could include the deprivation of access to food and medicine.
10 The term “as part of” would include the initial conduct in a mass killing.
11 It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children. 10

Article 7 (1) (d) Crime against humanity of deportation or forcible transfer of population
Elements
1. The perpetrator deported or forcibly 12 transferred, 13 without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.

3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (e) Crime against humanity of imprisonment or other severe deprivation of physical liberty
Elements
1. The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty.

2. The gravity of the conduct was such that it was in violation of fundamental rules of international law.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

12 The term “forcibly” is not restricted to physical force, but may include threat of force

or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment. 13 “Deported or forcibly transferred” is interchangeable with “forcibly displaced”. 11

Article 7 (1) (f) Crime against humanity of torture 14
Elements
1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-1 Crime against humanity of rape
Elements
1. The perpetrator invaded 15 the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. 16
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

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14 It is understood that no specific purpose need be proved for this crime.
15 The concept of “invasion” is intended to be broad enough to be gender-neutral.
16 It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 7 (1) (g)-3, 5 and 6. 12

Article 7 (1) (g)-2 Crime against humanity of sexual slavery 17
Elements
1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. 18
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-3 Crime against humanity of enforced prostitution
Elements
1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.

3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

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17 Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose. 18 It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children. 13

Article 7 (1) (g)-4 Crime against humanity of forced pregnancy
Elements
1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-5 Crime against humanity of enforced sterilization
Elements
1. The perpetrator deprived one or more persons of biological reproductive capacity. 19
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent. 20
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-6 Crime against humanity of sexual violence
Elements
1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

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19 The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice. 20 It is understood that "genuine consent" does not include consent obtained through deception. 14

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (h) Crime against humanity of persecution
Elements
1. The perpetrator severely deprived, contrary to international law, 21 one or more persons of fundamental rights.

2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.

3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court. 22

5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (i) Crime against humanity of enforced disappearance of persons 23,24
Elements
1. The perpetrator:
(a) Arrested, detained 25,26 or abducted one or more persons; or

(b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.

2. (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the
fate or whereabouts of such person or persons; or

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21 This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes. 22 It is understood that no additional mental element is necessary for this element other than that inherent in element 6. 23 Given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose. 24 This crime falls under the jurisdiction of the Court only if the attack referred to in elements 7 and 8 occurs after the entry into force of the Statute. 25 The word “detained” would include a perpetrator who maintained an existing detention. 26 It is understood that under certain circumstances an arrest or detention may have been lawful. 15

(b) Such refusal was preceded or accompanied by that deprivation of freedom.
3. The perpetrator was aware that: 27
(a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; 28 or
(b) Such refusal was preceded or accompanied by that deprivation of freedom.

4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.
5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.
6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.

7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
8. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (j) Crime against humanity of apartheid
Elements
1. The perpetrator committed an inhumane act against one or more persons.
2. Such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts. 29

3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.
5. The perpetrator intended to maintain such regime by that conduct.
6. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

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27 This element, inserted because of the complexity of this crime, is without prejudice to the General Introduction to the Elements of Crimes. 28 It is understood that, in the case of a perpetrator who maintained an existing detention, this element would be satisfied if the perpetrator was aware that such a refusal had already taken place.
29 It is understood that “character” refers to the nature and gravity of the act. 16

7. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (k) Crime against humanity of other inhumane acts
Elements
1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.

2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute. 30
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

30 It is understood that “character” refers to the nature and gravity of the act. 17

Appendix C: The Statute of the International Criminal Tribunal for Rwanda (extract)

Article 2
Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.

2. 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 to 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.

3. The following acts shall be punishable:

    a. Genocide;

    b. Conspiracy to commit genocide;

    c. Direct and public incitement to commit genocide;

    d. Attempt to commit genocide;

    e. Complicity in genocide.

Article 3
Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

a. Murder;

b. Extermination;

c. Enslavement;

d. Deportation;

e. Imprisonment;

f. Torture;

g. Rape;

h. Persecutions on political, racial and religious grounds;

i. Other inhumane acts.

Appendix D: The Statute of the International Criminal Tribunal for the Former Yugoslavia (extract)

Article 4
Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. 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.

3. The following acts shall be punishable:

    a. genocide;

    b. conspiracy to commit genocide;

    c. direct and public incitement to commit genocide;

    d. attempt to commit genocide;

    e. complicity in genocide.

Article 5
Crimes against Humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

a. murder;

b. extermination;

c. enslavement;

d. deportation;

e. imprisonment;

f. torture;

g. rape;

h. persecutions on political, racial and religious grounds;

i. other inhumane acts.

Appendix E: Statute of the Special Court for Sierra Leone (extract)

Article 3
Crimes against Humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

a. Murder;

b. Extermination;

c. Enslavement;

d. Deportation;

e. Imprisonment;

f. Torture;

g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;

h. Persecution on political, racial, ethnic or religious grounds;

i. Other inhumane acts.