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Source / Izvornik: **Zbornik Pravnog fakulteta u Zagrebu, 2010, 60, 1309 - 1334**

Journal article, Published version
Rad u časopisu, Objavljena verzija rada (izdavačev PDF)

Permanent link / Trajna poveznica: https://urn.nsk.hr/urn:nbn:hr:118:234098

THE CRIME OF RAPE IN THE ICTY'S AND THE ICTR'S CASE-LAW

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UDK 343.54:341.322.5
341.492(497.1)
Pregledni znanstveni rad
Primljeno: siječanj 2010-

Despite the fact that women may be active participants in armed conflicts as soldiers, they are still mostly the victims. Violation against women during war time is not just an act of sexual violence, but rather a method of warfare, i.e., *an instrument of revenge and a means of dishonouring not just the woman, but "her man" and in the end the whole nation. Through the case-law of the International Criminal Tribunal for the Former Yugoslavia (hereinafter: ICTY) and the International Criminal Tribunal for Rwanda (hereinafter: ICTR) it has become obvious that the crime of rape is no longer a matter of state, but that it has been recognized as a crime on the international level – as a crime against humanity, serious war crime, and (in some cases where we can fortify and sustain a* mens rea) *even genocide. The fact that many women do not acknowledge what happened - because of the traditional upbringing and rigid religious systems, is at the same time interesting and daunting. In many cases being a rape victim is a shame for the raped woman.*

Key words: armed conflicts; rape; ICTY; ICTR; crime against humanity; war crime; crime of genocide

1 INTRODUCTION

Rape is a crime which violates the rights of the attacked woman in the most intimate way possible. It often results in traumatic, long-lasting psychological trauma that includes shock, shame, guilt, humiliation, paralyzing fear of injury or death, a strong sense of defilement, loss of control over life, and the like. These psychological consequences are compounded when the rape is

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committed during war time; at that time the victim may also have experienced many additional negative emotions – the death of relatives, dislocation, injuries, loss of home or possessions, or even unwanted pregnancy.[1]

Women are being raped in all forms of armed conflicts (international and non-international), regardless of the nature of the conflict – religious, political, national, ethnic or some other, or as a combination of all, with no predicted enemy.[2] Rape in the case of war is not merely a matter of chance, or women victims being in the wrong place at the wrong time, nor a question of sex. It is rather a question of power and control and it could erode the community in a way that few weapons can.

The damage inflicted by rape can be devastating due to the strong communal reaction to the violation and pain stamped on women's families. In many societies and cultures, raped women are shunned or fear ostracism from their families and communities and mental or physical repulsion from their relatives. The Muslim culture for instance, has attached a profound stigma to rape that has resulted in a reluctance of victims to report the crime (according to the ICTY's case-law). For a traditional Muslim woman to be raped means that she has become an outsider in her own family and community, even if she energetically resisted her attacker and is a true victim! She has become soiled or defiled. In the conservative Muslim culture, the rape of woman is considered not "just" as a personal attack, but also as an attack on the woman's family.[3] If the woman is single, she will be deemed not eligible to marry. On the other hand, if she is married, she will try to hide the rape from her husband for fear that he might divorce her or even kill her for her impurity.[4]

Violence against women may be directed towards the social group of which she is a member, because in many traditional and conservative systems – rape of women is a humiliation for the entire community. It is the consequence of a belief that women are seen as the reproducers and carriers of their societies. Also men of raped women could experience a profound sense of shame or defeat for having failed to protect their women. Men of a conquered nation

1 Healey, "Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia", 21 *Brooklyn Journal of International Law* (1995) 2, at 327.

2 Women are raped by men from both sides – members of enemy and/or friendly forces, or even by members of UN peacekeeping forces.

3 Aydelott, "Mass Rape During War: Prosecuting Bosnian Rapists Under International Law", 7 *Emory International Law Review* (1993) 2, at 602.

4 Davis, "The Politics of Prosecuting Rape as a War Crime", 34 *The International Lawyer* (2000) 4, at 1237.

traditionally view rape of their women as the ultimate humiliation and a severe impact on their sexuality or manhood.

2 HISTORY OF RAPE AS A WEAPON OF WAR

The sexual abuse of women during war has been recognized for centuries, subsumed under outrages on personal dignity, and incorporated into the main military codes of their time.

For example, the military codes of Richard II (1385) and Henry V (1419) both subjected violators to capital punishment.[5] In addition, the Leiber Code listed rape as a specific offence, categorizing it as a capital offence.[6] Furthermore, by broad interpretation it can be said that the 1899 and 1907 Hague Regulations entail provisions concerning rape. For instance, the Hague Convention Respecting the Laws and Customs of War on Land states in part that family honour and rights, the life of person and private property, as well as religious conviction and practice must be respected.[7]

In the last century, perceptions of rape in war were shifted, departing from something that is inevitable, when men are deprived of female companionship for a prolonged period of time, to an actual "war tactic".

Criminal prosecutions after the 2nd World War reinforced the prohibition of rape and other sexual violence. Although it was not codified in the Charters of the International Military Tribunals, some evidence of sexual violence was presented before them, most notably before the International Military Tribunal for the Far East.[8] Unfortunately, in those trials, acts of sexual violence and rape were not placed at the level that would allow them to stand alone. The Tribunal and its lawyers, while deserving ample credit for presenting the evidence and recognizing the atrociousness of the offences committed against women, lumped the acts of sexual violence under the residual umbrella of Crimes

[5] Meron, "Rape as a Crime Under International Humanitarian Law", 87 *American Journal of International Law* (1993) 3, at 424 – 425.

[6] Lieber code, see Art. 44 and 47.

[7] Hague Convention Respecting the Laws and Customs of War on Land, Art. 46.

[8] The Tokyo International Military Tribunal convicted generals Toyoda and Matsui of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which includes rapes and sexual assaults. The former Foreign Minister of Japan, Hirota, was also convicted for these atrocities. See B. V. A. Roeling and C. F Rueter (eds.), *The Tokyo Judgment: The International Military Tribunal for the Far East*, (1977) I, at 385.

against Humanity - Inhumane Treatment.[9] The same qualification was made for the "deliberate destruction of the members of national, racial or religious groups, such as the Poles, Jews, Gypsies and others", which will be recognized as a crime of genocide a few years later.

After the 2nd World War rape was prohibited by the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter: Geneva Convention IV). It states that women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.[10] Even though the essence of the whole corpus of international humanitarian law as well as human rights law lie in the protection of the human dignity of every person, regardless of the gender issue, these provisions additionally underline the necessity of proclaiming that women must be treated with special consideration.[11]

Furthermore, rape is specifically prohibited by the 1977 Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (hereinafter: Additional Protocol I). It also states that women shall be the object of special respect and protected in particular against rape, forced prostitution and any other form of indecent assault.[12] Moreover, rape is expressly prohibited by the 1977 Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter: Additional Protocol II). It forbids outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution as well as any other form of indecent assault.[13]

The development in the last decade of the 20th century has led to the conclusion that it could be said that rape and sexual violence now have a firm

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[9] On the historical occurrence of rape in armed conflict see more: Davis, *supra* note 4, at 1225 – 1228, 1233; Healey, *supra* note 1, at 329 – 330.

[10] Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 973, Art. 27(2).

[11] This paragraph is based on a provision introduced into the Prisoners of War Convention in 1929, and on the proposal submitted to the International Committee by the International Women's Congress and the International Federation of Abolitionist. See Final Record of the Diplomatic Conference of Geneva 1949, Vol. II-A, at 821.

[12] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, 1125 UNTS 3, Art. 76(1).

[13] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, 1125 UNTS 609, Art. 4.

foothold as specifically enumerated offences under international humanitarian law. For the first time rape was specifically codified as a recognizable and independent crime within the Statutes of the ICTY and ICTR.[14] These two historic international instruments, together with the Rome Statute of the International Criminal Court,[15] now represent the foundation upon which crimes of rape and sexual violence are punished.

The Rome Statute has further advanced the work of the international criminal *ad hoc* tribunals. Gender crimes are no longer subsumed under outrages on personal dignity. Rape, sexual slavery, forced pregnancy and other forms of sexual violence are now expressly enumerated as crimes against humanity, as well as war crimes referring to both international and non-international armed conflicts. Goldstone concludes that the Rome Statute represents the normative benchmark of international criminal law, and gender crimes are now given the recognition that has been denied to them for a long time.[16] Despite the historical prohibition of wartime rape by national codes of conduct, states have been hesitant to prosecute rape as a war crime. In Carlton's opinion, the reason for that attitude may be the men-dominated leadership in most of the world's governments, as well as the fact that international humanitarian law has been drafted and interpreted primarily by men. In addition, reluctance to recognize rape as a gender-specific crime could be a side effect of the male cultural control and resistance to disturb the *status quo* among other things.[17]

In June 2008 the UN Security Council unanimously adopted Resolution 1820, which stresses effective steps to prevent and respond to acts of sexual violence that can significantly contribute to the maintenance of international peace and security.[18] The Security Council noted that women and girls are par-

[14] Both Tribunals were established pursuant to Chapter VII of the UN Charter. International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed on the territory of Former Yugoslavia since 1991, was established pursuant to Security Council resolution S/Res/827(1993), 25 May 1993. See also: Secretary General Report, S/257074, from 3 May 1993, paras. 19 – 20. International Criminal Tribunal for Rwanda was established pursuant to Security Council Resolution S/Res/955(1994), 8 November 1994.

[15] Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90.

[16] Goldstone, "Prosecuting Rape as a War Crime", 34 *Case Western Reserve Journal of International Law* (2002) 3, at 285.

[17] Carlton, "Equalized Tragedy: Prosecuting Rape in the Bosnian Conflict Under the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia", 6 *Journal of International Law and Practice* (1997) 1, at 106.

[18] Security Council Resolution S/RES/1820 (2008), 19 June 2008, para. 1.

ticularly targeted by the use of sexual violence, both as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group. The Resolution demanded the immediate and complete cessation by all parties to the armed conflict of all acts of sexual violence against civilians, and taking appropriate measures to protect civilians, including women and girls, from all forms of sexual violence.[19] Hence, this Resolution makes a direct link between crimes of sexual violence and conflicts that may rumble on for years.

3 RAPE CASES IN THE FORMER YUGOSLAVIA AND RWANDA IN THE EARLY 1990S

During the last two decades international media attention has been directed towards various expressions and significant number of widespread and systematic rapes, torture and forced pregnancies in war-torn regions in Rwanda and former Yugoslavia.

Sexual violence against Tutsi women in Rwanda was systematically incorporated in the widespread attacks against the members of the Tutsi tribe. Stories of rape, along with reports of mass systematic killing surfaced as a part of the attempted genocide of the Tutsis by Hutu officials and soldiers. Over ten percent of Rwandan citizens were slaughtered, thousands of women and girls were held, publicly gang-raped, tortured, and then killed. For example, as it was concluded in one of the ICTR's judgements, the accused (Sylvestre Gacumbitsi) circulated around the area in a vehicle announcing by megaphone that Tutsi women should be raped and sexually degraded. Attacks and rapes of Tutsi women followed immediately thereafter, often serving as a prelude to murder.[20] In some raids in Rwanda, virtually every adolescent girl who survived an attack by the militia was subsequently raped. Many of those who became pregnant were ostracized by their families and communities. Some abandoned their babies, while others committed suicide.

In the former Yugoslavia rape was organized, systematic and massive. In many cases it was committed in particularly sadistic ways to inflict maximum humiliation on the victims, their families, and on the whole commu-

[19] *Ibid*., paras. 2 and 3.

[20] *Prosecutor v. Sylvestre Gacumbitsi*, Judgement (hereinafter: Gacumbitsi Trial Judgement), ICTR-2001-64-T, 17 June 2004, para. 198.

nity. Reports suggested widespread sexual abuse and repeated rapes of girls as young as six; gang rapes so brutal that the victims died after that; rapes by neighbours; rapes in front of mothers, father and relatives; rapes committed explicitly to impregnate women and hold them captive until they gave birth to the perpetrator's child. Brothers or fathers of these women were often forced to rape them as well. If they refused, they were killed.[21]

In the early 1990s revelations about concentration camps became a regular part of the world's daily news from the region. The first reports of rapes that occurred in the former Yugoslavia came to light in 1992, when refugees fleeing the war-torn region recounted atrocities that included stories of different ways of raping. Women were kept in various detention centres where they were systematically raped. Systematic rape was often used as a weapon of war in the process of "ethnic cleansing", a special method of crime against humanity.[22] Rape itself in the former Yugoslavia had become a weapon of war; in Davis's opinion – a tool of the military in conquering and dispersing the Muslim and Croat people.[23]

Most probably we will never know the exact number of women and girls raped during the conflict in former Yugoslavia. Estimates of the number of women raped in Bosnia and Herzegovina vary widely from 10000 to 60000 women and girls, regardless of their ethnic or national affiliation. They were raped in their homes, schools or concentration camps all over the region.

The European Community sent a team of experts to investigate the reports of rape cases. A confidential interim report, issued in early 1993, estimated that Bosnian Serb soldiers had raped 20000 Muslim women.[24]

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[21] For instance, in Omarska camp, on June 26 1992, guards tried to force Mehmedalija Sarajlic, an elderly Bosnian Muslim to rape a female detainee. After he refused, the soldiers beat him to death. See *Prosecutor v. Radoslav Brdanin*, Judgement (hereinafter: Brdanin Trial Judgement), IT-99-36-T, 1 September 2004, para. 516.

[22] Tadeusz Mazowiecki, the Special Reporter appointed by the UN Commission on Human Rights, concluded that rape was used not only as an instrument of war, as an attack on the individual victim, but as a method of ethnic cleansing intended to humiliate, shame, degrade and terrify the entire ethnic group. See Report on the situation of human rights in the territory of the former Yugoslavia submitted by Tadeusz Mazowiecki, Pursuant to Commission Resolution 1992/S-1/1, E/CN.4/1993/50, 10 February 1993, para. 85.

[23] Davis, *supra* note 4, at 1236.

[24] Aydelott, *supra* note 3, at 604.

Amnesty International also released a report during 1993 on the issue of rape. The report warned that, since mass rape is being used as a propaganda weapon by Bosnia, any estimates of the number of rapes and victims must be treated with caution. Amnesty International investigators could not verify the European Community committee's estimate of 20000 victims.[25]

Catherine A. MacKinnon, who counselled several Croatian women's organizations, set the number of rapes at 50000 in 1992.[26]

In 1995, the UN War Crimes Commission head Cherif Bassiouni estimated 12000 instances of both reported and unreported rape in the former Yugoslavia.[27]

Medical evidence about the refugees also provided useful information. In January 1993, an international team of four physicians, sent by the UN to investigate rapes in the former Yugoslavia, collected data on abortions, deliveries, known pregnancies due to rape, and sexually transmitted diseases. The team identified 119 pregnancies resulting from rape on a small sample of six hospitals in Croatia, Bosnia and Herzegovina and Serbia. The report noted that since medical studies indicate that a single act of unprotected intercourse will result in pregnancy between one and four percent of the time, the identification of 119 pregnancies may represent more then 11900 rapes.[28]

Exceptional humiliating significance of many rape cases in former Yugoslavia and Rwanda was the existence of the mass rapes practice.

By Aydelott's opinion, information relating to the mass-rape cases is to be taken with certain caution. Considering that mass rape is a strategy utilized only when one side is already winning the battle and gaining control over the enemy ground, its use as an effective military strategy is greatly overstated. As ground troops advance in enemy territory, the retreating side leaves behind women and children, and sexual sadism arises with astonishing rapidity. As the winning side does the raping, the losing side publicizes the rapes in an effort to convince the world that its enemy is so evil that other countries should band

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[25] Amnesty International, *Bosnia-Herzegovina: Rape and Sexual Abuse by Armed Forces*, 4 (1993), at 3 – 4.

[26] Mann, Rape and War Crimes, *Washington Post*, 13 January 1993, D22.

[27] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) UN SCOR, Addendum Annex IX, at 70-71, UN Doc s/1994/674/Add.2 (1995) (under the direction of M. Cherif Bassiouni, Chairman and Rapporteur on the Gathering and Analysis of the Facts).

[28] Healey, *supra* note 1, at 372.

together and help the losing side.[29] Every major war has had its instances of mass rape.[30]

Nevertheless, such rapes, often committed in the public setting or in front of the mother, father and relatives, appear calculated to bring the resulting shame on the survivor's family and community. As it was confirmed in the *Cesic* case, the family relationship and the fact that raped women were watched by others make the offence of humiliating and degrading treatment particularly serious.[31] The Trial Chamber in the *Delalic and others* case also confirmed that rape committed in the presence of others exacerbated the victim's humiliation.[32]

The presence of witnesses during rape as especially humiliating for the victim was also recognized in the ICTR's case-law. One witness in the *Akayesu* case testified to the humiliation she felt as a mother, by being raped in the presence of her children: "Just thinking about it made the war come alive inside me."[33] Another witness said that her mother begged the man to kill her daughter rather then rape them in front of her. The man replied that the principle was to make them suffer and the girl was raped after that.[34] The Trial Chamber in the *Musema* case confirmed that humiliating utterances, which often accompany rape and he explicitly mentioned Musema's declaration during one rape. He said: "The pride of the Tutsis is going to end today".[35]

Humiliation is generally taken into account when assessing the gravity of a crime.[36] An important factor when assessing such gravity is the vulnerability of the victims.[37] Another important factor is the physical and mental trauma

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[29] Aydelott, *supra* note 3, at 588.

[30] See more: *ibid*., at 588 – 597.

[31] *Prosecutor v. Ranko Cesic*, Sentencing Judgement (hereinafter: Cesic Sentencing Judgement), IT95-10/1, 11 March 2004, para. 35.

[32] *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, Judgement in the Trial Chamber (hereinafter: Delalic and others Trial Judgement), IT-96-21-T, 16 November 1998, para. 1262.

[33] *Prosecutor v. Jean – Paul Akayesu*, Judgement (hereinafter: Akayesu Trial Judgement), ICTR-96-4-T, 2 September 1998, para. 423.

[34] *Ibid*., at 430.

[35] *Prosecutor v. Alfred Musema*, Judgement and Sentence (hereinafter: Musema Trial Judgement), ICTR-96-12-T, 27 January 2000, para. 907.

[36] Cesic Sentencing Judgement, paras. 35, 53; *Prosecutor v. Dragan Zelenovic*, Sentencing Judgment (hereinafter: Zelenovic Sentencing Judgement), IT-96-23/2-S, 4 April 2007, para. 36.

[37] *Prosecutor v. Tihomir Blaskic*, Judgement in the Appeal Chamber, IT-95-14-A, 29 July 2004, para. 683; *Prosecutor v. Dario Kordic and Mario Cerkez*, Judgement in the Appeal

suffered by the victim, even long after the commission of the crime.[38] For example, the victims of sexual abuse in the detention centres in Foca (Bosnia and Herzegovina) suffered unconceivable pain, indignity, and humiliation of being repeatedly violated, without knowing whether they would survive the ordeal. Most of the time, women would have to agonize through the day, not knowing what was to be their own fate in the coming night.[39] As a result of the violent sexual assaults, the physical and psychological health of many of the victims was seriously damaged. The women and girls in the detention centres lived in constant fear of repeated rapes and sexual assault. Some became suicidal and others became indifferent to what happened to them. The scars left from the crimes committed against them were deep and might never heal. This, perhaps more than anything, according to the *Zelenovic* case conclusion, speaks about the gravity of the crimes.[40]

In response to all atrocities committed in former Yugoslavia and Rwanda, the UN Security Council established two international criminal *ad hoc*tribunals to investigate the crimes and to prosecute those responsible for them - the ICTY and the ICTR.

ICTY's and ICTR's cases have also reinforced the legal basis for arguing that rape and sexual violence are individual crimes against humanity, a grave breach of the 1949 Geneva Conventions, a violation of the laws of customs of war or an act of genocide, if the requisite elements are met. This jurisprudence handed down from both international criminal ad hoc tribunals has altered the landscape of criminal prosecution for good and affected the scope of consequences that any potential perpetrators must consider.

It all started quietly within the ICTR in the case against Jean-Paul Akayesu. This became a historic rule because for the first time rape was found to be an act of genocide.[41] This landmark case is now the cornerstone of all future genocide and crimes against humanity prosecutions. In that case, for the first

Chamber, IT-95-14/2-A, 17 December 2004, para. 1088; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Judgement in the Trial Chamber (hereinafter: Kunarac and others Trial Judgement), IT-96-23&IT-96-23/1-T, 22 February 2001, para. 352.

38 *Prosecutor v. Mitar Vasiljevic*, Judgement in Trial Chamber II, IT-98-32-T, 25 February 2004, para. 167.

39 *Prosecutor v. Dragan Nikolic*, Sentencing Judgement, IT-94-2-S, 18 December 2003, paras. 46, 194.

40 Zelenovic Sentencing Judgement, para. 40.

41 Akayesu Trial Judgement, para. 507.

time, rape and acts of sexual violence were put on equal footing with all other offences.

In the late 1998, the ICTY produced equally historic precedents in two cases – in the case against Anto Furundzija,[42] the first case to consist exclusively of rape charges,[43] as well as in the *Delalic and others* case. These judgments recognized rape as a violation of laws and customs of war, and as a basis of torture under the 1949 Geneva Conventions.

Recent advancements of international humanitarian law in the area of rape and sexual violence broaden the scope of individual criminal responsibility to leaders and commanders who lend their influence and tacitly encourage crimes against women. The *Akayesu* and the *Furundzija* decisions hold that officials and leaders can be directly responsible when they witness acts of sexual violence and rape committed by attackers, even when those attackers are not strictly under their chain of command. This is reasonable case-law in all armed conflicts, both internal and international, as well as in situations of genocide. What is more, the above is ever so important given that today's paramilitary and militia command structures are often covertly organized and not easily defined.

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[42] *Prosecutor v. Anto Furundzija*, Judgement in the Trial Chambers (hereinafter: Furundzija Trial Judgement), IT-95-17/1-T, 10 December 1998.

[43] The most interesting aspect of this trial from the perspective of women's advocates is that in June 1998, after the trial had been concluded, but before the verdict had been rendered, the prosecution revealed to the defense that one witness had been receiving counseling for the post-traumatic stress disorder (PTSD) related to the rape and interrogation. The symptoms of this disorder include: cronic suicidal preoccupation; self-injury; explosive or extremely inhibited anger; reliving experiences, sense of helplessness, shame, guilt, and self-blame; a sense of defilement or stigma; and a sense of complete difference from others. See more: Davis, Patricia H., *supra* note 4, at 1241, note 155. The defense filed a motion to strike the testimony of that witness, or in the event of a conviction to receive a new trial. The Trial Chamber found that the evidence about psychological treatment was relevant to the issue of witness's credibility, and so reopened the proceedings. Significantly, after hearing the testimony of the prosecution that witness's credibility was diminished, the Trial Chamber concluded that PTSD does not render a person's memory of traumatic events unworthy of belief. In fact, the expert evidence indicated that intense experiences such as the events in this case are often remembered accurately despite some inconsistencies. The Trial Chamber noted that even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given, and concluded at the end that there is no reason why a person with PTSD cannot be a perfectly reliable witness. See: Furundzija Trial Judgement, paras. 105, 109.

4 THE DEFINITION OF RAPE IN THE ICTY'S AND ICTR'S CASE-LAW

No definition of rape can be found in international law. However, some general indications can be discerned from the provisions of international treaties. In particular, attention must be drawn to the fact that there is prohibition of both "rape" and "any form of indecent assault" on women in the 1949 Geneva Convention IV (Art. 27), 1977 Additional Protocol I (Art. 76(1)) and 1977 Additional Protocol II (Art. 4(2)).

Hence, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity.[44] The inference is warranted that international law, by specifically prohibiting rape as well as, in general terms, other forms of sexual abuse, regards rape as the most serious manifestation of sexual assault. This is confirmed by the ICTY's Statute (Art. 5), which explicitly provides for the prosecution of rape, while it implicitly covers other less grave forms of serious sexual assault through Article 5(i) as other inhumane acts.[45]

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[44] The principle of respect for human dignity is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honor, 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. The Trial Chamber in the Furundzija case, for example, holds that the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. See: Furundzija Trial Judgement, paras. 183 – 184.

[45] The parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 and other international instruments on human rights or on humanitarian law. The expression at issue undoubtedly embraces such acts as serious sexual assaults short of rape proper (rape is specifically covered by Art. 27 of Geneva Convention IV and Art. 75 of Additional Protocol I, and mentioned in the Report of the Secretary-General pursuant to para. 2 of Security Council Resolution 808 (1993) S/25704, para. 48), enforced prostitution (indisputably a serious attack on human dignity pursuant to most international instruments on human rights and covered by the provisions of humanitarian law just mentioned as well as the Report of the Secretary-General), or the enforced disappearance of persons (prohibited by the General Assembly Resolution 47/133 of 18 December 1992 and the Inter-American Convention on Human Rights of 1969).

The Trial Chamber in the *Furundzija* case reviewed the various sources of international law and found that it was not possible to discern the elements of the crime of rape from international treaty or customary law, nor from the general principles of international criminal law or general principles of international law. It concluded that to arrive at an accurate definition of rape based on the criminal law principle of specificity, it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.[46]

Most legal systems, in spite of inevitable discrepancies, consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus. Such sexual activity is accompanied by force or threat of force to the victim or a third party. In these circumstances victims become particularly vulnerable and their ability to make an informed refusal negated. The sexual activity occurs without the consent of the victim. As it was confirmed in the international criminal ad hoc tribunal's case-law, consent for this purpose must be given voluntarily and 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.[47] The Trial Chamber in the *Furundzija* case emphasized that any form of captivity vitiates consent.[48] The Trial Chamber in the *Kvocka and others* case endorses these holdings.[49]

According to one of the most famous decisions for the subject of rape, the *Akayesu* case decision before the ICTR, the Trial Chamber considered that the traditional mechanical definition of rape did not adequately capture its true nature and instead offered a definition of rape as physical invasion of a sexual nature, committed to a person under circumstances which are coercive. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects[50] and/or the use of bodily orifices not considered to be

[46] Furundzija Trial Judgement, para. 177.

[47] Kunarac and others Trial Judgement, para. 460; Brdanin Trial Judgement, para. 1008; *Prosecutor v. Juvénal Kajelijeli*, Judgement and Sentence (hereinafter: Kajelijeli Trial Judgement), ICTR-98-44A-T, 1 December 2003, para. 915.

[48] Furundzija Trial Judgement, para. 271.

[49] *Prosecutor v. Miroslav Kvocka, Milojica Kos, Mlado Radic, Zoran Zigic, Dragoljub Prcac*, Judgement in the Trial Chamber (hereinafter: Kvocka and others Trial Judgement), IT-98-30/1-T, 2 November 2001, para. 178.

[50] The horrifying testimonies before the ICTR confirmed that in Rwandan conflict the

intrinsically sexual.[51] The act of sexual violence which includes rape must be committed as part of a wide-spread or systematic attack on a civilian population on certain catalogued discriminatory grounds, namely national, ethnic, political, racial, or religious grounds.[52]

Thus, sexual violence is broader than rape and includes such crimes as sexual slavery or molestation.[53] Moreover, the *Akayesu* Trial Chamber emphasized that sexual violence need not necessarily involve physical contact and cited forced public nudity as an example.[54]

The *Akayesu* conceptual definition of rape was approved in the *Musema* case,[55] where the Trial Chamber highlighted the difference between "a physical invasion of a sexual nature" and "any act of a sexual nature" as being the difference between rape and sexual assault.[56]

Nevertheless, the "*Akayesu* definition" of rape has not been adopted *per se* in all subsequent jurisprudence of the international criminal ad hoc tribunals. The ICTR's Trial Chambers in the *Semanza* case, the *Kajelijeli* case and the *Kamuhanda* case, for example, described only the physical elements of act of rape,[57] and thus seemingly shifted their analyses away from the conceptual definition established in the *Akayesu* case.[58]

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special type of humiliating women was by inserting objects in their genitals. See for example: Akayesu Trial Judgement, para. 437; Gacumbitsi Trial Judgement, paras. 201, 207, 215.

51 Akayesu Trial Judgement, para. 596.

52 *Ibid*., para. 598.

53 Sexual violence would also include such crimes as sexual mutilation, forced marriage, and forced abortion as well as the gender related crimes explicitly listed in the Rome Statute of the International Criminal Court as war crimes and crimes against humanity, namely rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other similar forms of violence. Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9, 17 July 1998, at Art. 7(1)(g), Art. 8(2)(b)(xxii), and Art. 8(2)(e)(vi).

54 Akayesu Trial Judgement, para. 688.

55 Musema Trial Judgement, para. 226. See also *Prosecutor v. Mihaeli Muhimana*, Judgement and Sentence, ICTR-95-1B-T, 28 April 2005, para. 20; *Prosecutor v. Eliézer Niyitegeta*, Judgement, ICTR-96-14-T, 16 May 2003, para. 456.

56 Musema Trial Judgement, para. 227.

57 As set out in the Kunarac and others case, listed hereinafter.

58 See Kajelijeli Trial Judgement, para. 915; *Prosecutor v. Jean Dieu Kamuhanda*, Judgement, ICTR-95-54A-T, 22 January 2004, para. 706; Semanza Trial Judgement, paras. 344 – 345.

The ICTY's Trial Chamber in the *Furundzija* case articulated the objective elements of rape and found that based on its review of the national legislation of a number of states, the *actus reus* of the crime of rape is: i) the sexual penetration, however slight of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.[59]

The Trial Chamber in the *Kunarac* and others case agreed that these elements, if proved, constitute the *actus reus* of the crime of rape in international law. However, that Chamber considers that the "*Furundzija* definition", although appropriate to the circumstances of that case, is in one respect more narrowly and restrictively stated than required by international law. In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the "*Furundzija* definition", according to the *Kunarac and others* Trial Chamber, does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.[60]

The Trial Chamber in the *Kvocka and others* case agrees with the factors set forth in the *Kunarac and others* case, defining rape as a violation of sexual autonomy.

In considering allegations of rape, the *Delalic and others* Trial Chamber stressed that coercive conditions are inherent in situations of armed conflict.[61]

As mentioned above, the ICTR's jurisprudence has also accepted the „*Kunarac and others* definition" in several cases[62]. Thus, it was confirmed in the *Semanza* case, that the „*Akayesu* definition" enunciated a broad definition of rape, which included any physical invasion of a sexual nature in coercive circumstance and which was not limited to forcible sexual intercourse. The *Kunarac and others* case definition, in contrast, affirmed a narrower interpretation, indicating that consent must be given voluntarily and freely and is assessed within the context of the surrounding circumstances. The *Semanza* case Trial Chamber concluded that while such mechanical style of defining rape was originaly rejected by the ICTR, the Chamber has found the comparative analysis

[59] Furundzija Trial Judgement, para. 185.

[60] Kunarac and others Trial Judgement, para. 438.

[61] Delalic and others Trial Judgement, para. 495. See also Akayesu Trial Judgement, para. 688.

[62] See *supra* note 58.

in the *Kunarac* and others case to be persuasive and consequently adopted the *Kunarac and others* case definition.[63]

5 PROSECUTION OF RAPE

The ICTY's Statute refers explicitly to rape as a crime against humanity within the Tribunal's jurisdiction in Article 5(g). Rape may also amount to a grave breach of the 1949 Geneva Conventions, a violation of the laws or customs of war, or an act of genocide. The jurisdiction to prosecute rape as an outrage against personal dignity, in violation of the laws or customs of war pursuant to the ICTY's Statute (Art. 3), including the basis of common Article 3 to the 1949 Geneva Conventions, is also clearly established. Article 3 constitutes an "umbrella rule", which makes an open-ended reference to all rules of international humanitarian law.[64]

A Rape as a Crime against Humanity

Crime against humanity was recognized for the first time after the 2nd World War (in 1945) in Charter of the International Military Tribunal (Art. 6c). According to this document, crimes against humanity are: "murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, 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".[65]

The targeting of a collective in the form of a civilian population rather than the individual victim, place crime against humanity among the gravest of the crimes.

In compliance with the ICTR's Statute (Art. 3) and the ICTY's Statute (Art. 5), crimes against humanity represents a substantive group of international crimes which must be committed as part of a widespread or systematic attack and directed against any civilian population on national, political, eth-

[63] Semanza Trial Judgement, para. 344.

[64] For example, Trial Chamber at Kunarac and others case recognized rape, torture and outrages upon personal dignity as constituting parts of serious violations of Common Article 3. See Kunarac and others Trial Judgement, para. 408.

[65] On the origin of the crimes against humanity see more for example: Cassese, *International Criminal Law* (2003), at 68 – 74.

nic, racial or religious grounds. This element is what distinguishes crimes against humanity from ordinary crimes and all that can be found in the Yugoslav and Rwandan armed conflicts.[66] According to those Articles, rape is recognized as a crime against humanity.[67]

B Rape as a serious war crime

The ICTY's Statute (Art. 3) also prohibits other serious violations of customary international law, however, without explicitly referring to rape.[68] Nevertheless, the gravity of rape was emphasized in several ICTY cases.

The *Delalic and others* Trial Judgment confirmed that there can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law.[69]

According to the *Furundzija* case opinion it is indisputable that rape and other serious sexual assaults in armed conflicts entail criminal liability of the perpetrators. The right to physical integrity is a fundamental one, and is undeniably part of customary international law.[70]

In keeping with such jurisprudence, the Appeals Chamber in the *Kunarac and others* case confirmed previous decisions and concluded that rape meets

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[66] It should be emphasized that crime against humanity can be committed during the time of any type of armed conflict, and also in times of peace. This opinion was first confirmed in the Secretary-General's Report to the Security Council at the time of the adoption of the ICTY Statute. In this report the Secretary-General explicitly refused to qualify armed conflict as an ingredient of crime against humanity and he concluded: "Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character." Report of the Secretary-General pursuant to para. 2 of Security Council Resolution 808 (1993), para. 47 (emphasis added).

[67] Together with murder, extermination, enslavement, deportation, imprisonment, torture, persecutions on political, racial and religious ground etc.

[68] The Appeals Chamber in the Tadic case outlined four requirements to trigger Article 3 of the ICTY's Statute: 1) the violation must constitute an infringement of a rule of international humanitarian law; 2) the rule must be customary in nature; 3) the violation must be "serious" – it must constitute a breach of a rule protecting important values; 4) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. *Prosecutor v. Dusko Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, IT-94-1-AR72, 2 October 1995, para. 94.

[69] Delalic and others Trial Judgement, para. 476.

[70] Furundzija Trial Judgement, paras. 169 – 170.

these requirements and, therefore, constitutes a recognized war crime under customary international law, punishable under Article 3 of the Statute.[71]

C Rape as Torture

Torture in times of armed conflict is specifically prohibited by international treaty law, in particular by the 1949 Geneva Conventions[72] and the two 1977 Additional Protocols.[73] The term "torture", in accordance with the 1984 Convention against torture and other cruel, inhuman and degrading treatment or punishment, means 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 is suspected of having 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 other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[74]

The UN Special Rapporteur on torture, human rights bodies, and legal scholars have listed several acts that are considered severe enough *per se* to constitute torture and those that are likely to constitute torture depending on the circumstances.[75]

The vicious and ignominious practice can take on various forms, including rape. As it was confirmed at the Kvocka and others Trial Judgement, beating,

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[71] The universal criminalization of rape in domestic jurisdictions, the explicit prohibitions contained in the Geneva Convention IV and in the Additional Protocols I and II, and the recognition of the seriousness of the offence in the jurisprudence of international bodies, including the European Commission on Human Rights and the Inter-American Commission on Human Rights. *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Judgement in the Appeal Chamber (hereinafter: Kunarac and others Appeal Judgement), IT-96-23&IT-96-23/1-A, 12 June 2002, para. 195.

[72] See Art. 3 common to all 1949 Geneva Conventions; Art. 12 and 50 of Geneva Convention I; Art. 12 and 51 of Geneva Convention II; Art. 13, 14 and 130 of Geneva Convention III; Art. 27, 32 and 147 of Geneva Convention IV.

[73] Art. 75 of Additional Protocol I and Art. 4 of Additional Protocol II.

[74] The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, Art. 1(1).

[75] UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/56/156, 3 July 2001, para. 8.

sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, as well as threats to torture, rape, or killing relatives were among the acts most commonly mentioned as those likely to constitute torture. Mutilation of body parts would be an example of acts *per se* constituting torture.[76]

The Trial Chamber in the *Furundzija* case concluded that Article 3 of the Statute covers torture and outrages upon personal dignity, including rape.[77] Moreover, torture by means of rape is a particularly grave form of torture.[78] For rape to be categorized as torture, both the elements of rape and the elements of torture must be present.

According to the ICTR's jurisprudence set forth in the *Akayesu* case, rape was used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape represents a violation of personal dignity and constitutes torture when inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity.[79]

In the *Delalic and others* case, the Trial Chamber also considered the issue of torture through rape.[80] The Trial Chamber indicated that the severity of the pain or suffering is a distinguishing characteristic of torture that sets it apart from similar offences.[81] Summarizing the international case-law, that Chamber concluded that rape involves the infliction of suffering at a required level of severity to place it in the category of torture.[82]

The existing case-law of the ad hoc international criminal tribunals has not determined the absolute degree of pain required for an act to amount to torture; however, severe pain or suffering as a consequence of rape was accepted

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[76] Kvocka and others Trial Judgement, para. 144.

[77] *Prosecutor v. Anto Furundzija*, Decision on the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction), 29 May 1998, para. 3.

[78] Furundzija Trial Judgement, para. 295; Zelenovic Sentencing Judgement, para. 36.

[79] Akayesu Trial Judgement, para. 597.

[80] Delalic and others Trial Judgement, paras. 475 – 496.

[81] The Appeals Chamber overturned the Appellant's convictions under Art. 3 of the ICTY's Statute as improperly cumulative in relation to Art. 2 of the Statute, but the Trial Chamber's extensive analysis of torture and rape remains persuasive. Grounding its analysis in a thorough survey of the jurisprudence of international bodies, the Trial Chamber concluded that rape may constitute torture. Delalic and others Trial Judgement, paras. 468, 491.

[82] Delalic and others Trial Judgement, para. 489.

in many cases.[83] In certain circumstances, the suffering in the context of rape can be exacerbated by social and cultural conditions and it should take into account the specific social, cultural and religious background of the victims when assessing the severity of the alleged conduct.[84]

In the opinion issued by the Commission on Human Rights it is also stated that the severe suffering which rape causes to its victims necessitates that it be defined as a form of inhuman treatment. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterization as an act of torture.[85]

D Rape as a Crime of Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide from 1948 (hereinafter: the 1948 Genocide Convention),[86] defines genocide as an act committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.[87] It consists of five basic acts of violence: 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 and e) forcibly transferring children of the group to another group.[88]

Genocide constitutes a very serious act of violence not connected with the existence of an armed conflict (even though it is usually followed by this type of circumstances); it could be committed even in times of peace.[89] It is

[83] Delalic and others Trial Judgement, paras. 475 – 493; Furundzija Trial Judgement, paras. 163, 171; Kunarac and others Appeal Judgement, para. 150.

[84] Delalic and others Trial Judgement, para. 495; *Prosecutor of the Tribunal v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Second Amended Indictment, IT-03-66-PT, 12 February 2004, para. 237.

[85] See Commission on Human Rights, 48th session, Summary Record of the 21st Meeting, 11 February 1992, Doc. E/CN.4/1992/SR.21, 21 February 1992, para. 35: "Since it was clear that rape or other forms of sexual assault against women held in detention were a particularly ignominious violation of the inherent dignity and right to physical integrity of the human being, they accordingly constituted an act of torture."

[86] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 9 1948, 78 UNTS 277.

[87] *Ibid*., Art. 2.

[88] *Loc. cit*.

[89] *Ibid*., Art. 1.

generally recognized as "the worst of all crimes"and is found in many national legislations, and also in the case-law of various international courts.

The essential element that makes genocide far worse than other "ordinary" international crimes, and represents its dominant characteristic is *dolus specialis* – the special intention to destroy, in whole or in part, a given group that has been strictly defined. The case-law of the international courts indicates that there is lack of evidence of such a specific genocidal intention on the part of the perpetrator.

In the *Akayesu* case, the Trial Chamber found that acts of rape and sexual violence formed an integral part of the process of destruction of the Tutsi as a group and could, therefore, constitute genocide. 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. It was a step in the process of destruction of spirit, of the will to live, and of life itself in the Tutsi group.[90]

The Trial Chambers in the *Kayishema and Ruzindana* case concurred with this view. That Chamber also referred to the International Law Commission, which stated that in the process of committing genocide it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe.[91] A partial destruction of a group is enough to constitute a crime of genocide.

Similar to that, the mass rapes of Muslim women in Bosnia and Herzegovina imposed conditions on the group that contribute to their physical destruction in violation of the 1948 Genocide Convention's provisions. Healey concludes that this destruction includes the murder of rape victims and the creation of an environment of fear in the community brought on by the rapes, which are often committed in public. This fear sometimes forces the civilian population to flee their homes and become dispersed, contributing to the destruction of the group.[92]

Furthermore, the rape and forced impregnation should be considered

[90] Akayesu Trial Judgement, paras. 731 – 732. For the confirmation of that opinion see also Musema Trial Judgement, para. 933.

[91] *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgement, ICTR-95-1-T, 21 May 1999, para. 95, referring to 1996 ILC Draft Code, at 42.

[92] Healey, *supra* note 1, at 370.

as preventing births within the group in violation of the 1948 Genocide Convention's provisions.[93] The Trial Chamber in the *Akayesu* case concluded that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.[94] For example, to the Muslim population forced impregnation of women is particular destructive because under Islamic law and culture, the ethnicity of children is determined by the ethnicity of the father.[95] The children being born of a Serbian man and a Muslim woman is effectively transferred out of the Muslim group.

Furthermore, that measures intended to prevent births within the group may be physical, but can also be mental. Rape can thus 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.[96] The genocidal logic of rape for impregnation is not only that it threatens the targeted people's reproductive potential. Any mass killing threatens reproduction by limiting the number of reproducers. Any rape threatens reproduction because it renders survivors damaged goods in a patriarchal system that defines the woman as a man's possession, whereas the virgin is seen as his most valuable asset.[97]

Genocidal rape aimed at enforced pregnancy and eventual childbirth erases the cultural identity of the victim, the very characteristic that ostensibly made that person an enemy in the first place.[98] Unfortunately, forced impregnation of women in war has historically been treated as a by-product of rape, rather than as a specific crime worthy of its own remedy. However, there have been numerous instances where Serbian soldiers have raped for the express purpose

[93] Convention on the Prevention and Punishment of the Crime of Genocide, Art. 2(d).

[94] Akayesu Trial Judgement, para. 507.

[95] Davis, *supra* note 4, at 1237.

[96] Akayesu Trial Judgement, para. 508.

[97] Allen, *Rape Warfare, The Hidden Genocide in Bosnia-Herzegovina and Croatia* (1996), at 96.

[98] *Ibid*., at 101.

of making sure the victims gave birth to their babies. Captured soldiers admit to having raped women and young girls in an effort to ethnically cleanse the community, and some contend that they were ordered to commit the rapes by their commanding officers and threatened with death if they refused. Usually, superior officers ordered their soldiers to prove their ethnic superiority and love to their country or religion, by killing or sexually assaulting women. For instance, in the course of one of the rapes, Dragoljub Kunarac expressed with verbal physical aggression his view that the rapes against the Muslim women were one of the many ways in which the Serbs could assert their superiority and victory over the Muslims.[99]

Consequently, the mass rapes and forced impregnations carried out consciously and methodically are calculated to bring about the physical destruction of the group and thus they fall within the purview of the 1948 Genocide Convention.

6 CONCLUSION

Every rape is inconceivable horror. As it was mentioned in the *Tadic* case: "… [people] could, perhaps, explain it to themselves when somebody steals something from them, or even beatings or even some killings. Somehow they sort of accepted it in some way, but when the rapes started they lost all hope. Until then they had hope that this war could pass, that everything would quiet down. When the rapes started, everybody lost hope, everybody in the camp, both men and women. There was such fear, horrible…"[100]

Furthermore, as it was established in the *Stakic* case – for a woman, rape is by far the worst offence, sometimes even worse than death because it brings shame on her.[101] Witness of the rape in the *Musema* case concluded that rape and "… what they did to her was worse than death…".[102]

Women in war have been raped for centuries - multiple times, by multiple perpetrators, by groups, in front of their families; they have been raped until

[99] Kunarac and others Trial Judgement, para. 583.

[100] The statement of Vasif Gutic, prisoner at Trnopolje camp. See *Prosecutor v. Dusko Tadic*, Opinion and Judgement in the Trial Chamber, IT-94-1-T, 7 May 1997, para. 175.

[101] *Prosecutor v. Miomir Stakic*, Judgement in the Trial Chambers II, IT-97-24-T, 31 July 2003, para. 803.

[102] Musema Trial Judgement, para. 933.

they became pregnant and held in captivity until they could no longer safely obtain an abortion. It is a horror, without any doubt.

Today, at the beginning of the 21st century, it may be said that we have more means to investigate and prosecute different forms of sexual violence. In recent years, a significant degree of progress has been made. The ICTY and the ICTR have been prosecuting rape and other crimes of sexual violence. Those Tribunals have the opportunity to clarify international law and explicitly recognize rape as an international crime. The law of rape and sexual violence continues to evolve through the Rome Statute of the International Criminal Court.

That being said, the use of rape and sexual violence as a weapon of war is a matter of security (national, as well as international). However, the weighty decision to convict and punish a rapist should be based on clear and well-established criteria. It should not to be allowed that the proceedings against rapists turn into a perverted process insulting for the victims and inflicting them with additional trauma.

It must, first and foremost, be fair to the rape victim.

Zusammenfassung

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DAS VERBRECHEN DER VERGEWALTIGUNG IN DER RECHTSPRECHUNG DES INTERNATIONALEN STRAFGERICHTSHOFES FÜR DAS EHEMALIGE JUGOSLAWIEN UND DES INTERNATIONALEN STRAFGERICHTSHOFES FÜR RUANDA

Obwohl Frauen an bewaffneten Konflikten auch als Soldatinnen mitwirken, sind sie dennoch in der überwiegenden Zahl Opfer. Gewalt gegen Frauen in Kriegszeiten ist nicht nur ein Akt sexueller Gewalt, sondern auch eine Methode der Kriegsführung, ein Instrument der Rache und Demütigung, durch das nicht nur Missachtung gegenüber den Frauen, sondern auch gegenüber ihren männlichen Partnern und sogar der Nation, der sie angehören, demonstriert wird. Die Tätigkeit und Rechtsprechung des Internationalen Strafgerichtshofes für das ehemalige Jugoslawien sowie des Internationalen Strafgerichtshofes für Ruanda machen die offenkundige Tatsache deutlich, dass das Verbrechen der Vergewaltigung nicht mehr allein unter die Zuständigkeit der innerstaatlichen Gesetzgebung fällt, sondern als internationales Verbrechen erkannt und anerkannt wurde, sodass es im Zusammenhang des Verbrechens gegen die Menschlichkeit, des Kriegsverbrechens und – sofern das Merkmal der mens rea erfüllt ist – sogar des Völkermords zu betrachten ist. Die Tatsache, dass viele Frauen unter dem Einfluss traditioneller patriarchalischer und strenger religiöser Systeme nicht zugeben wollen, was ihnen widerfahren ist, ist bemerkenswert und erschreckend zugleich. In vielen Fällen ist es für die vergewaltigte Frau eine Schande, Opfer einer Vergewaltigung geworden zu sein.

Schlüsselwörter: bewaffnete Konflikte, Vergewaltigung, Internationaler Strafgerichtshof für das ehemalige Jugoslawien, Internationaler Strafgerichtshof für Ruanda, Verbrechen gegen die Menschlichkeit, Kriegsverbrechen, Verbrechen des Völkermords

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Sažetak

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ZLOČIN SILOVANJA U PRAKSI MEĐUNARODNOG KAZNENOG TRIBUNALA ZA BIVŠU JUGOSLAVIJU I MEĐUNARODNOG KAZNENOG TRIBUNALA ZA RUANDU

Unatoč tome što žene u oružanim sukobima sudjeluju kao vojnici, one su uglavnom ipak žrtve. Nasilje nad ženama tijekom ratnih vremena nije samo čin seksualnog nasilja, već i metoda ratovanja, odnosno instrument osvete i sredstvo izražavanja nepoštivanja i omalovažavanja ne samo žene, već i "njenog" muškarca, pa čak i nacije kojoj žena pripada. Aktivnost i sudska praksa Međunarodnog kaznenog tribunala za bivšu Jugoslaviju i Međunarodnog kaznenog tribunala za Ruandu ukazale su na očitu činjenicu da zločin silovanja nije više u nadležnosti samo unutarnjeg zakonodavstva pojedine države, već se radi o zločinu priznatom i prepoznatom kao međunarodni zločin – taj se zločin može sagledati u kontekstu zločina protiv čovječnosti, ratnog zločina, pa čak i (u slučajevima postojanja elementa mens rea) zločina genocida. Činjenica da mnoge žene u praksi ne priznaju što im se dogodilo – pod utjecajem tradicionalnih patrijarhalnih i strogih religioznih sustava, u isto je vrijeme i zanimljiva i zastrašujuća. U mnogim slučajevima biti žrtva silovanja jest sramota za silovanu ženu.

Ključne riječi: oružani sukobi, silovanje, Međunarodni kazneni tribunal za bivšu Jugoslaviju, Međunarodni kazneni tribunal za Ruandu, zločin protiv čovječnosti, ratni zločin, zločin genocida

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