



**RIGA  
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**BACHELOR THESIS**

**The Challenges of Prosecuting Crimes of Sexual  
Violence in Armed Conflict under International  
Criminal Law**

**AUTHOR:**

Paula Šūtava  
LL.B 2022/2023 year student  
student number B020070

**SUPERVISOR:**

Linda Ingeborga Kronberga, LL.M

**DECLARATION OF HONOUR:**

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) .....

## **ABSTRACT**

This research explores the challenges of prosecuting crimes of sexual violence during armed conflict under international criminal law. Despite the prevalence of sexual violence in armed conflicts, prosecution rates remain low. The aim of the study is to identify the main challenges in prosecuting such crimes. The research question of the topic is - What are the challenges of prosecuting crimes of sexual violence in armed conflict under international criminal law?

Through doctrinal research, the author concludes that the main challenges include inadequate law enforcement competence, lack of resources caused by the armed conflict, and possibility of forum shopping. Procedural matters, such as lack of jurisdiction, are often significant obstacles, as well as the collection of evidence and sensitive nature of such crimes. Overall, this research highlights the need for improved support system for victims of sexual violence during armed conflicts and greater international cooperation to address the challenges of prosecuting sexual violence during armed conflicts.

**Key words:** International Criminal Court, sexual violence, armed conflicts, international criminal law, prosecution challenges

## SUMMARY

Sexual violence during armed conflict is a pervasive issue that continues to afflict many. The true extent of this problem is difficult to determine, but it is believed to be much greater than what has been officially reported. Recent reports from Ukraine serve as a reminder that this issue is still prevalent.

Unfortunately, justice is not always served and those responsible and guilty will not always be convicted. International Criminal Court has been criticised for having low rates regarding prosecutions of sexual violence. Despite efforts to improve the situation, impunity remains a persistent problem. Identifying the main challenges is crucial to addressing and improving the situation.

Sexual violence during armed conflicts is an important problem that demands continuous attention and effective solutions. It is only by acknowledging the seriousness of this problem and actively pursuing fair punishment that it can be hoped to prevent such crimes from occurring. Failing to hold perpetrators accountable sends a message to potential offenders that their actions will go unpunished, perpetuating the cycle of violence.

Many definitions regarding sexual violence during armed conflicts have been impacted by the case law of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as the Special Court for Sierra Leone. This case law has played a significant role by impacting the classification of different offences, setting precedents for different offences that had not yet been analysed in courts or tribunals and providing guidance on sensitive matters surrounding such crimes, such as the treatment of testifying victims and the collection of evidence in post-conflict settings.

The answer to the research question is as follows – the main challenges of prosecuting crimes of sexual violence in armed conflict under international criminal law are possible cases of forum shopping, inadequate law enforcement competence, and lack of resources caused by the armed conflict, which leads to prioritisation of other issues, and lack of referral systems for victims. Different classifications of crimes raise challenges for prosecutors to successfully bring charges, as well as the scope of different modes of liability. Procedural matters, such as lack of jurisdiction, are often one of the most significant obstacles, as well as the collection of evidence and the sensitive nature of such crimes.

To surmount these challenges, it is crucial to provide training for law enforcement institutions globally, develop stronger support systems for victims, and prioritise the prosecution of sexual violence crimes during armed conflicts. Contributions from ICC could include creating a more thorough historical record, enhancing victim support services, providing technical assistance to national courts, fostering greater collaboration with international organisations, and elevating the public priority of prosecuting sexual violence crimes during armed conflicts.

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## INTRODUCTION

Sexual violence in armed conflicts remains a very topical and painful issue. It is not something historical, alien or distant. It happened in the past, it is happening now, and it would be utopian to believe that it will not happen in the future. In 2021, there were 3 293 United Nations confirmed cases of sexual violence during conflicts.<sup>1</sup> It should be noted, however, that it is estimated that for every reported case, there are 10-20 undocumented cases.<sup>2</sup> Therefore, it can be concluded that in 2021, there have been approximately 32 930 to 65 860 cases of sexual violence in armed conflict. Then, in 2022 and 2023, news of horrific cases of sexual violence in Ukraine spread.<sup>3</sup> Detailed accounts and testimonies of rape and sexual violence in liberated and occupied territories show that sexual violence is being used as a military strategy in this war.<sup>4</sup> It is, therefore, disappointing to note that this is a very topical issue.

It is also regrettable to note that justice cannot always be expected to prevail and that those responsible and guilty will be convicted. International Criminal Court has been criticised for having “a poor track record” regarding prosecutions of sexual violence.<sup>5</sup> Despite efforts to improve the situation, impunity remains a persistent problem, with many perpetrators going unpunished.<sup>6</sup> There are many different reasons behind this unfortunate fact, and the first step to addressing them is to identify them. Therefore the research question of this thesis is - what are the challenges of prosecuting crimes of sexual violence in armed conflict under international criminal law?

It is essential to identify these problems in order to find their root cause and address them. To improve the situation, that is, to improve the statistics on convictions for sexual offences, it is necessary to find the right solutions. That is the first step towards helping past and future victims.

The aim of this thesis is to analyse articles 6, 7, and 8 of the Rome Statute<sup>7</sup> of the International Criminal Court and existing case law dealing with sexual violence during armed conflicts to determine problems, gaps and challenges that prevent successful prosecution. The author will determine what the legislation entails, challenges in case law punishing sexual

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<sup>1</sup> United Nations. Justice critical to fighting sexual violence in conflict, available on: <https://news.un.org/en/story/2022/04/1116192>. Accessed May 1, 2023.

<sup>2</sup> United Nations. Remarks of SRSR Patten at UNGA 76 side-event “Preventing & Addressing CRSV as a Tool of War”, co-hosted by the Office for Global Women’s Issues, US Department of State, Search for Common Ground, Georgetown Institute for Women, Peace and Security, 29 September 2021, available on: <https://www.un.org/sexualviolenceinconflict/statement/remarks-of-srsg-patten-at-unga76-side-event-preventing-addressing-crsv-as-a-tool-of-war-co-hosted-by-the-office-for-global-womens-issues-us-department-of-state-search-f/>. Accessed May 1, 2023.

<sup>3</sup> Yogita Limaye, “Ukraine conflict: ‘Russian soldiers raped me and killed my husband’,” *BBC*, April 11, 2022, <https://www.bbc.com/news/world-europe-61071243>.

<sup>4</sup> Human Rights Watch. Ukraine: Apparent War Crimes in Russia-Controlled Areas, available on: <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas>. Accessed May 1, 2023.

<sup>5</sup> QRIUS. The odd track record of the International Criminal Court, available on: <https://qrius.com/the-odd-track-record-of-the-international-criminal-court/>. Accessed May 1, 2023.

<sup>6</sup> Philipp Schulz, Kathrin Kreft, “Accountability for Conflict-Related Sexual Violence,” *International Studies Association and Oxford University Press*, available on: <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/03/report/accountability-for-conflict-related-sexual-violence/20220224-CRSV-Philipp-Schultz.pdf>. Accessed May 1, 2023.

<sup>7</sup> International Criminal Court. Rome Statute of the International Criminal Court. 1998, available: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

violence in armed conflict, and the main shortcomings that need to be addressed. It should also be noted that although the research question focuses on international criminal law, the author will not only look at problems at the international level, but will also focus, at least in part, on investigations and trials at the national level in order to make comparisons and draw conclusions.

The author of this thesis is going to perform doctrinal legal research method by analysing articles 6, 7, and 8 of the Rome Statute of the International Criminal Court, existing case law on sexual violence during armed conflicts, and academic sources from legal and political scholars. There are 3 cases from the case law reviewed that are analysed in more depth - *The Prosecutor v. Duško Tadić*,<sup>8</sup> *Prosecutor v. Jean-Paul Akayesu*,<sup>9</sup> and *Prosecutor v. Charles Ghankay Taylor*.<sup>10</sup> These particular cases were chosen as they are considered landmark cases, have set important precedents, or have had a major impact on the subsequent development of international criminal law. These findings from case law will allow further analysis of specific definitions, identification of possible challenges to prosecution and possible solutions to these issues.

This thesis consists of three chapters. The first chapter consists of three sub-chapters where the author analyses legal acts, case law and determines the difference between the crime of sexual violence during a time of armed conflicts and peacetime. The second chapter consists of a detailed analysis of three cases - *The Prosecutor v. Duško Tadić*, *Prosecutor v. Jean-Paul Akayesu*, and *Prosecutor v. Charles Ghankay Taylor*. The author analyses facts of the cases, arguments, challenges and lessons in depth. In the third chapter, the author studies the challenges of prosecuting crimes of sexual violence and suggested solutions.

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<sup>8</sup> Prosecutor v. Duško Tadić, case No. IT-94-1-T. ICTY (14 July 1997), available on: <https://www.icty.org/x/cases/tadic/tjug/en/tad-sj970714e.pdf>

<sup>9</sup> The Prosecutor v. Jean-Paul Akayesu (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, available on: <https://www.refworld.org/cases,ICTR,40278fbb4.html>

<sup>10</sup> Prosecutor v. Charles Ghankay Taylor, SCSL, Trial Chamber II (18 May, 2012), available on: <http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf>

# 1. CONCEPTUALISING WAR CRIME OF SEXUAL VIOLENCE IN ARMED CONFLICTS

## 1.1. Analysis of Legal Acts

Sexual violence, which in itself includes such acts as rape, forced pregnancy, sexual slavery, enforced prostitution, enforced sterilisation and other forms, is prohibited by international humanitarian law, both during international armed conflicts and non-international armed conflicts. Precisely, it constitutes a war crime and a grave breach of the Geneva Conventions of 12 August 1949<sup>11</sup> (hereinafter – the Geneva Conventions), as defined by the Rome Statute of the International Criminal Court<sup>12</sup> (hereinafter – the Rome Statute) article 8 paragraph 2 (b)(xxii) and (e)(vi). Throughout this research the author is going to primarily look at the definitions in the Rome Statute, as it is the main treaty that established the International Criminal Court, which is going to be the focus of this research.

For a crime to constitute a grave breach of the Geneva Conventions, it has to be exercised towards protected persons, such as but not limited to wounded combatants, prisoners of war and civilians in occupied territory.<sup>13</sup>

Sexual violence during international armed conflicts is covered by article 8 paragraph 2 (b)(xxii) of the Rome Statute. As defined by Common Article 2(1)<sup>14</sup> of the Geneva Conventions, international armed conflict is either a declared war or

any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them

or “all cases of partial or total occupation of the territory of a High Contracting Party”, which means that the declaration of war is not a prerequisite for a conflict to be recognised an armed conflict. For example, Russia has not declared war on Ukraine as of May 2023, however, it is recognised as war and international armed conflict.<sup>15</sup> The main criterion for a conflict to be recognised as international armed conflict is the resort to hostile armed forces between states. The minimal amount of armed violence between the armed forces of states is sufficient to constitute an international armed conflict.<sup>16</sup>

On the other hand, sexual violence during non-international armed conflicts is covered in article 8 paragraph 2 (e)(vi) of the Rome Statute. The threshold for non-international armed conflicts to be recognised as armed conflicts is much higher than international armed conflicts. It is not clearly defined in article 3 of the Geneva Conventions, which provides minimal guarantees to be respected during non-international armed conflicts. However, Article 8 paragraph (f) of the Rome Statute provides that the conflict must be protracted and the armed

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<sup>11</sup> The Geneva Conventions of 12 August 1949, International Committee of the Red Cross, available: <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf>

<sup>12</sup> Rome Statute of the International Criminal Court, *supra* note 7.

<sup>13</sup> Mark Klamburg, eds., *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher, Brussels, 2017), accessed February 8, 2023, <https://www.legal-tools.org/doc/aa0e2b/pdf/>

<sup>14</sup> The Geneva Conventions, *supra* note 11.

<sup>15</sup> United Nations. The UN and the war in Ukraine: key information, available on: <https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/>. Accessed February 8, 2023.

<sup>16</sup> Rulac. International armed conflict, available on: <https://www.rulac.org/classification/international-armed-conflict#collapse1accord>. Accessed February 8, 2023.

groups must be highly organized. The same article clarifies that the prohibition of sexual violence during non-international armed conflicts does not apply to

situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

Elements of Crimes of the International Criminal Court<sup>17</sup> provide a detailed description of war crimes of sexual violence. It describes and defines in great detail all the acts of sexual violence mentioned above. It is not required for the perpetrator to be aware that their acts are linked to a conflict of an international nature. However, all these acts are subject to the requirement that the conduct occurred in the context of and was related to an international armed conflict and that the perpetrator was aware of the factual circumstances indicating the existence of an armed conflict. There has to be a nexus between the act and the conflict, and it is required that the perpetrator is aware that the victims were protected by the Geneva Conventions.<sup>18</sup>

The war crime of rape is defined as invading a body by penetration, involving the victim's or perpetrator's organ of sexual nature or the victim's anal or genital opening. Penetration is the main component that separates this crime from other forms of sexual violence. Force, threat of force or advantage of a coercive environment was used against the victim, or the victim was incapable of giving genuine consent. In this case, the gender of the victim or the perpetrator is irrelevant.<sup>19</sup> It is considered to be the most severe kind of sexual violence.<sup>20</sup>

War crime of sexual slavery is defined by such characteristics as purchasing, selling, lending, bartering, or shortly, attaching the right of ownership over the victim and making them engage in a sexual act. It is recognised that sexual slavery mainly affects women and children.<sup>21</sup> It could include detention in so-called rape camps, forced marriages, domestic servitude or other forms of forced labour if any sexual act is involved. In contrast to a war crime of rape being a completed offence, the war crime of sexual slavery is a continuing offence.<sup>22</sup> Meaning that it is an act that is continuing for some period of time, not a single act. For enslavement to be recognised as a war crime, there is a requisite of a sexual component. Otherwise, it would be recognised as crime against humanity.

Similarly to the war crime of rape, enforced prostitution is also exercised by the use of force, threats, fear of violence, duress, detention, psychological oppression or abuse of power, or the victim is incapable of giving genuine consent. In this case, the victims are caused to engage in acts of sexual nature and the perpetrator, or a person connected to the perpetrator, has obtained or expects to obtain monetary benefits in connection with this act of sexual nature.<sup>23</sup> Monetary benefits are the main aspect that separates this war crime from the war crime of sexual slavery. Enforced prostitution can be either continuing or completed offence. It is explicitly

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<sup>17</sup> International Criminal Court. *Elements of Crimes of the International Criminal Court*. Available at: <https://www.icc-cpi.int/sites/default/files/ElementsOfCrimesEng.pdf>

<sup>18</sup> Klamberg, *supra* note 13, pp.65-67.

<sup>19</sup> Elements of Crimes, *supra* note 17, p.28

<sup>20</sup> Klamberg, *supra* note 13, p. 49.

<sup>21</sup> Elements of Crimes, *supra* note 17, p.28

<sup>22</sup> Klamberg, *supra* note 13, p. 52.

<sup>23</sup> Elements of Crimes, *supra* note 17, p.29



forbidden by the Geneva Convention IV as an attack on a woman's honour<sup>24</sup> and Additional Protocol I as an outrage upon personal dignity.<sup>25</sup>

Another kind of war crime of sexual violence is forced pregnancy. Victims of this crime are biological women who are forcibly made pregnant and are unlawfully kept confined in order to affect the ethnic composition of the particular population.<sup>26</sup> Unlawful confinement, in this case, does not have to be severe or meet specific time requirements. It means holding a woman in confinement so that she cannot do an abortion, including situations when the woman has been impregnated by someone other than the perpetrator holding her captive.<sup>27</sup> There is an ongoing debate in academia whether forced pregnancies, when exercised against a particular population, can be considered genocide, despite formally not being recognised as such in the Rome Statute.<sup>28</sup>

Enforced sterilisation can also be performed against a specific population in order to affect its reproduction. The war crime of enforced sterilisation is defined by the perpetrator depriving the victim of biological reproductive capacity. Important to note that this does not include temporary birth-control methods that do not have a permanent effect on reproductivity. As well as the definition of the war crime of enforced sterilisation applies to a situation only when the act was not justified by medical or hospital treatment of the victim nor done with their genuine consent.<sup>29</sup> This crime also includes situations when the victim was raped so severely that it destroyed their reproductive system.<sup>30</sup>

The war crime of sexual violence itself is defined as an act of sexual nature committed against the victim or caused the victim to engage by the use of force, threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, by taking advantage of a coercive environment or the victim's incapacity to give genuine consent. This conduct was of a gravity that constitutes a grave breach of the Geneva Conventions, and the perpetrator was aware of that.<sup>31</sup> It is understood that this crime also covers forced masturbation, forced nudity and forced touching of the body.<sup>32</sup>

In general, sexual violence is prohibited in both international and non-international armed conflicts. The Rome Statute defines sexual violence as a grave breach of the Geneva Conventions. However, it is very important to mention that all prohibited acts are subject to the condition that the act took place during or was connected with an international armed conflict and that the perpetrator had knowledge of the factual circumstances indicating the existence of an armed conflict. There must also be a "nexus" between the crime and the conflict. In sum, it means that sexual violence is a very serious violation of international criminal law and must be

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<sup>24</sup> The Geneva Conventions, *supra* note 11.

<sup>25</sup> The Geneva Conventions of 12 August 1949, Additional Protocol I, International Committee of the Red Cross, available: [https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0321.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf)

<sup>26</sup> Elements of Crimes, *supra* note 17, p.29

<sup>27</sup> Klamberg, *supra* note 13, p.53

<sup>28</sup> Soh Sie Eng Jessie, "Forced Pregnancy: Codification in the Rome Statute and its Prospect as Implicit Genocide," *New Zealand Journal of Public and International Law* 4 (2006), accessed February 8, 2023, [https://genderandsecurity.org/sites/default/files/Eng\\_-\\_Forced\\_Pregnancy.pdf](https://genderandsecurity.org/sites/default/files/Eng_-_Forced_Pregnancy.pdf)

<sup>29</sup> Elements of Crimes, *supra* note 17, p.29

<sup>30</sup> Klamberg, *supra* note 13, p.54

<sup>31</sup> Elements of Crimes, *supra* note 17, p.30

<sup>32</sup> Klamberg, *supra* note 13, p. 54

strongly condemned. The international community should therefore ensure that perpetrators of sexual violence are brought to justice and punished.

## 1.2. Analysis of Case Law

Courts often rely on case law to look for specific definitions not to be found in the Statutes or commentaries. Many cases have impacted the way the war crime of sexual violence is perceived. The evolution of the judicial system and the international criminal courts that coexist within it has led to several definitions of the elements of sexual violence as a crime.<sup>33</sup>

There are no clear definitions of what exactly “armed conflict”, “non-international armed conflict”, and others are in the main legislative acts. Therefore the Court often refers to the definitions found in the case law. In the case *Prosecutor v. Lubanga*<sup>34</sup> Thomas Lubanga Dyilo was found guilty of the war crimes of enlisting and conscripting children under 15 years and using them to participate in armed conflicts. The International Criminal Court (hereinafter – ICC), in which this trial was held, referred to the International Criminal Tribunal for the former Yugoslavia (hereinafter – ICTY) to define “armed conflict”. The definition they used was

whenever there is resort to armed forces between states or protracted violence between governmental authorities and organized armed groups or between such groups within a State.<sup>35</sup>

This definition was first used in the *Prosecutor v. Tadić*<sup>36</sup> case. This case is looked at in more detail in this thesis's second chapter. In the same *Prosecutor v. Lubanga*,<sup>37</sup> the Court also concluded that international and non-international conflicts can occur simultaneously on the same territory.<sup>38</sup> The Court also reiterated that in a case of an international armed conflict, when at least two states are involved, there is no necessity to apply the threshold of violence.<sup>39</sup> As well as the fact that the armed conflict can be considered international if a state is involved in

organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.<sup>40</sup>

However, in this case, no crime of sexual violence was brought, although there was evidence of various forms of sexual abuse of girls soldiers. The Prosecution urged the Trial

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<sup>33</sup> Patricia Viseur Sellers, “The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation.” *United Nations and the Rule of Law* (2008), accessed February 9, 2023, [https://www2.ohchr.org/english/issues/women/docs/paper\\_prosecution\\_of\\_sexual\\_violence.pdf](https://www2.ohchr.org/english/issues/women/docs/paper_prosecution_of_sexual_violence.pdf)

<sup>34</sup> The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 533. Available on: <https://www.icc-cpi.int/court-record/icc-01/04-01/06-2842>

<sup>35</sup> *Ibid.*

<sup>36</sup> Prosecutor v Tadic, IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995. Available on: <https://www.asylumlawdatabase.eu/en/content/icty-prosecutor-v-tadic-it-94-1-ar72-icty>

<sup>37</sup> The Prosecutor v. Thomas Lubanga Dyilo, *supra* note 34.

<sup>38</sup> The Prosecutor v. Thomas Lubanga Dyilo, *supra* note 34, para. 540

<sup>39</sup> The Prosecutor v. Thomas Lubanga Dyilo, *supra* note 34, para. 541

<sup>40</sup> The Prosecutor v. Thomas Lubanga Dyilo, ICC PT. Ch. I, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, 29 January 2007, para. 211. Available on: <https://www.icc-cpi.int/court-record/icc-01/04-01/06-803-ten>.

Chamber to take into account evidence of sexual abuse as an integral element of the recruitment and use of child soldiers.<sup>41</sup>

The case *Prosecutor v. Bemba*<sup>42</sup> laid down the fact that the Article 8 of the Rome Statute<sup>43</sup> can be applicable to both international armed conflicts and non-international armed conflicts. In 2016 Jean-Pierre Bemba Gombo was found guilty of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape and pillaging). However, in 2018 the Appeals Chamber of the ICC reversed Trial Chamber III's decision and decided to acquit Bemba from the charges. It needs to be recognised that in this case, the court did not recognise forced nudity by making women undress in the streets in order to humiliate them as sexual violence.<sup>44</sup>

As mentioned, military occupation also constitutes an international armed conflict if the hostile army has established authority over the territory. In the case *Katanga*, the ICC established a list of criteria to be considered when determining whether the authority has been established. It includes such factors as occupying power in a position to substitute the territory's authority, enemy's forces being surrendered, defeated or withdrawn, establishing temporary administration, and occupying power issuing and enforcing directions to the civilians.<sup>45</sup>

A crucial case for sexual violence as such was *Prosecutor v. Kvočka*. The Trial Chamber declared that sexual violence is not limited only to rape but includes crimes such as sexual slavery, molestation and acts that do not involve physical contact.<sup>46</sup>

When analysing specific acts of sexual violence, many definitions were impacted by the legal reasoning in the cases of ICTY and the International Criminal Tribunal for Rwanda (hereinafter – ICTR). It can often help clarify the interpretation of the elements of the offence while highlighting different approaches to the key elements of sexual violence, including "force" and "non-consent". In the case *Prosecutor v. Furundzija*, it was held that "force or threat of force constitutes the main element of rape".<sup>47</sup> While on the other hand, in the case *Prosecutor v. Kunarac*, the main element of rape was found non-consent.<sup>48</sup> About the term "coercion", used in the definition of the war crime of rape, the Court held in the case *Prosecutor v. Akayesu* that a coercive environment does not require physical force.<sup>49</sup> This case will also be examined in a more detailed manner in the second chapter of this thesis, as it played a significant role in

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<sup>41</sup> *Prosecutor v. Lubanga*, ICC T. Ch. I, Prosecution's Closing Brief, ICC01/04-01/06-2748-Red, 1 June 2011, paras. 139, 142 and 205. Available on: <https://www.icc-cpi.int/court-record/icc-01/04-01/06-2748-red>

<sup>42</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC PT. Ch. II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, ICC-01/05-01/08-424, 15 June 2009, para. 216. Available: <https://www.icc-cpi.int/court-record/icc-01/05-01/08-424>

<sup>43</sup> Rome Statute of the International Criminal Court, *supra* note 7.

<sup>44</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC PT. Ch. I, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 10 June 2008, para. 40. Available on: <https://www.icc-cpi.int/court-record/icc-01/05-01/08-3343>

<sup>45</sup> *The Prosecutor v. Germain Katanga*, ICC T. Ch. II, Judgement, ICC-01/04-01/07-3436, 7 March 2014, para. 1180. Available on: <https://www.icc-cpi.int/court-record/icc-01/04-01/07-3436-teng>

<sup>46</sup> *Prosecutor v. Miroslav Kvočka et al. Appeal Judgement*, Case No. IT-98-30/1-T, ICTY T. Ch., 2 November 2001, para. 180. Available on: <https://www.refworld.org/cases,ICTY,4148117f2.html>

<sup>47</sup> *Prosecutor v. Anto Furundzija. Appeal Judgement*, Case No. IT-95-17/1-T, ICTY T. Ch. I, Judgment, 10 December 1998. Available on: <https://www.refworld.org/cases,ICTY,40276a8a4.html>

<sup>48</sup> *Prosecutor v. Kunarac, Kovac and Vukovic. Case No. IT-96-23 and 23/122*. Available on: <https://www.icty.org/en/case/kunarac>

<sup>49</sup> *The Prosecutor v. Jean-Paul Akayesu*, *supra* note 9, para. 598.

shaping how the crime of sexual violence is defined. Because it also included acts that do not require a physical invasion of the human body or penetration (forced nudity, forced masturbation and forced touching of the body).<sup>50</sup> Later on, in the case *Prosecutor v. Katanga*, the Court referred to the *Prosecutor v. Akayesu* case and held 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 military presence.<sup>51</sup>

Much development regarding the definition of the war crime of sexual slavery came into place after the case *Prosecutor v. Katanga and Ngudjolo*. It was stated that forced marriages, domestic servitudes and other forms of forced labour involving sexual activity are parts of sexual slavery.<sup>52</sup> Therefore, it can be concluded that this case changed how the war crime of sexual slavery was perceived.

In the case *Prosecutor v. Muthaura and Kenyatta*, the Court did not charge forced male circumcision and penile amputation as sexual violence but rather as inhumane acts because it seemed that these acts were motivated by ethnic prejudice and not strictly sexual motivation.<sup>53</sup> It stated that

not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence.<sup>54</sup>

It follows that case law has contributed to the development of different definitions. It is therefore possible to broaden the scope of definitions through real trials, as it is not always possible to foresee all possible crimes and their details. In this way, international tribunals and courts have specified the definition of terms such as “armed conflict”, “authority over territory”, “coercion”, “sexual violence”, “sexual slavery”, and others.

### **1.3. The Difference Between the Crime of Sexual Violence During a Time of Armed Conflicts and Peacetime**

It is essential to distinguish the difference between sexual violence during armed conflict and during peacetime. In order to identify the main challenges in prosecuting crimes of sexual violence in armed conflict under international criminal law, it is necessary first to conceptualise the factual differences between these two circumstances in which the crime was committed.

As stated before, the most critical element for a sexual violence crime to be considered a war crime is that the conduct occurred in the context of and was related to an international armed conflict and that the perpetrator was aware of the factual circumstances indicating the existence of an armed conflict. However, in cases when the act of sexual violence, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or other, was not committed in a time of an armed conflict or was not connected to it in any way, these

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<sup>50</sup> *Akayesu* case, *supra* note 9, para. 688

<sup>51</sup> *The Prosecutor v. Germain Katanga*, ICC PT. Ch. I. Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, para. 440. Available on: <https://www.icc-cpi.int/court-record/icc-01/04-01/07-717>

<sup>52</sup> *Katanga* case, *supra* note 45, para. 431

<sup>53</sup> *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC PT. Ch. I, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC01/09-02/11-382-Red, 23 January 2012, para. 266. Available on: <https://www.icc-cpi.int/court-record/icc-01/09-02/11-382-red>

<sup>54</sup> *Kenyatta* case, *supra* note 53, para. 265

crimes are considered as crimes against humanity under the Rome Statute article 7(g). However, an essential aspect of recognising these crimes as crimes against humanity is that they must be committed as part of a widespread or systematic attack against any civilian population.

The five most important elements have been identified to recognise a crime as widespread or systematic:

- (i) an attack directed against any civilian population, (ii) a State or organisational policy, (iii) the widespread or systematic nature of the attack, (iv) a nexus between the individual act and the attack, and (v) knowledge of the attack.<sup>55</sup>

Therefore there are no requirements for a nexus to an armed conflict. The attack needs to be either widespread or systematic in its nature, meaning that only one of the two requirements needs to be manifested. Generally, it means that the attack needs to be collective, targeted against a specific civilian population,<sup>56</sup> targeting a large number of victims, involving planning or organisation,<sup>57</sup> involving acknowledged policy targeting a particular community, the establishment of parallel institutions, high-level political or military authorities, financial, military or other resources, repeated, unchanging and continuous nature.<sup>58</sup> A widespread attack means that the attack is being conducted on a large scale with a high number of victims,<sup>59</sup> with a series of inhumane acts of extraordinary magnitude,<sup>60</sup> and being massive, frequent, large-scale action carried out collectively.<sup>61</sup> While systematic attack means that the attack is of organised character, with the improbability of their random occurrence, involving patterns and deliberate, regular repetition,<sup>62</sup> involves organized action, a regular pattern, substantial public or private resources and a preconceived plan or policy.<sup>63</sup>

The definition of rape is the same for crimes against humanity and war crimes, although the contextual elements differ. The way the crime against humanity of rape and war crime of rape differs from each other is that combatants cannot be victims of a crime against humanity of rape, unless in some very specific circumstantial situations where the combatants themselves are victims of a wider attack directed against civilian population in general. However, in general, it is not considered to be as legitimate crime against humanity if it is conducted against combatants, because they are not civilians. It needs to be aimed at a significant number of victims. However, it is important to realise that a single rape can also be a crime against

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<sup>55</sup> Situation in the Republic of Kenya, ICC PT. Ch. II, ICC01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 79. Available on: <https://www.icc-cpi.int/court-record/icc-01/09-19-corr>

<sup>56</sup> Prosecutor v. Dario Kordic and Mario Cerkez, IT-95-14/2-A, Appeals Chamber, ICTY, 17 December 2004. Available on: <https://cld.irmct.org/assets/filings/Judgement-Kordic.pdf>

<sup>57</sup> The Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, International Criminal Tribunal for the Former Yugoslavia, 3 March 2000. Available on: [https://www.icty.org/x/file/Legal%20Library/jud\\_supplement/supp13-e/blaskic.htm](https://www.icty.org/x/file/Legal%20Library/jud_supplement/supp13-e/blaskic.htm)

<sup>58</sup> The Prosecutor v. Goran Jelusic - Case No. IT-95-10-T, International Criminal Tribunal for the Former Yugoslavia, 14 December 1999. Available on: [https://www.icty.org/x/file/Legal%20Library/jud\\_supplement/supp10-e/jelusic.htm](https://www.icty.org/x/file/Legal%20Library/jud_supplement/supp10-e/jelusic.htm)

<sup>59</sup> The Prosecutor v. Prlić et al., IT-04-74-T, Trial Chamber, Judgement and Opinion, International Criminal Tribunal for the Former Yugoslavia, 29 May 2013, available on: <http://www.icty.org>

<sup>60</sup> *Kordić and Cerkez* case, *supra* note 56.

<sup>61</sup> Prosecutor v. Musema, Case No. ICTR-96-13-A, International Criminal Tribunal for Rwanda. Available on: <https://www.womenslinkworldwide.org/en/gender-justice-observatory/court-rulings-database/the-prosecutor-v-musema-case-no-ictr-96-13-a>

<sup>62</sup> *Prlić* case, *supra* note 59

<sup>63</sup> *Musema* case, *supra* note 61

humanity if it was conducted as part of systematic or widespread nature. Similarly how for rape to constitute a war crime, the perpetrator needs to be aware of the factual circumstances indicating the existence of an armed conflict. In this scenario, the perpetrator needs to be aware of the crime being part of a systematic attack or the factual circumstances of a widespread attack.<sup>64</sup> Some examples of cases where rape was charged as a crime against humanity include *Prosecutor v. Bemba*<sup>65</sup>, *Prosecutor v. Jean-Paul Akayesu*<sup>66</sup>, *Prosecutor v. Kenyatta*<sup>67</sup>, *Prosecutor v. Gbagbo*<sup>68</sup> and others.

Sexual slavery can be both a war crime or a crime against humanity. It depends on whether the perpetrator was aware of the factual circumstances indicating the existence of an armed conflict or whether they knew that the conduct was part of or intended to be part of a widespread or systematic attack directed against a civilian population.<sup>69</sup> However, under a classification of a crime against humanity, also falls enslavement as such. It cannot constitute a war crime because its definition is identified as customary international law by the ICTY in the case *Prosecutor v. Kunarac*.<sup>70</sup> However, it is a big challenge to distinguish sexual slavery as a war crime from a crime against humanity, as they are similar in their nature and share similar characteristics. The main distinction is the motivation of the perpetrator, which may be challenging to establish, because circumstances surrounding the sexual slavery may be complex and multifaceted. For example, in the case *Prosecutor v. Katanga and Ngudjolo*, it was found that women being forced to engage in sexual intercourse with combatants or work in sex slavery in military camps constitutes a crime against humanity.<sup>71</sup>

There are not only legally definable differences but also practical ones. For example, victims of sexual violence need access to health care, as it can be considered a medical emergency. Access to health care is much more difficult in times of armed conflicts than in times of peace, as the medical infrastructure may be damaged or destroyed by the conflict. As well as, during a time of armed conflict, it may be much less safe for the victims to attempt to reach medical help services. In addition to medical help, the victims may also require psychological help, which is also quite limited during times of war. Another aspect to consider is that civilians may be more vulnerable and subject to sexual violence in times of peace and struggle to escape it once it has occurred.<sup>72</sup>

In conclusion, it is very important to identify the main difference between sexual violence in armed conflict and in peacetime in order to be able to identify the main challenges to accountability for sexual violence under international criminal law. Sexual violence can be considered a war crime if it occurs during an armed conflict and the perpetrator is aware of the factual circumstances indicating the existence of a conflict. While if the crime is committed in peacetime, it is considered a crime against humanity, provided that it was committed as part of

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<sup>64</sup> Klamberg, *supra* note 13, page 50

<sup>65</sup> *Gombo case*, *supra* note 44

<sup>66</sup> *Akayesu case*, *supra* note 9

<sup>67</sup> *Kenyatta case*, *supra* note 53

<sup>68</sup> *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC, ICC-02/11-01/15, July 2021. Available on: <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/gbagbo-goudeEng.pdf>

<sup>69</sup> *Elements of Crimes*, *supra* note 17, p. 6

<sup>70</sup> *Kunarac case*, *supra* note 48, para. 543

<sup>71</sup> *Katanga case*, *supra* note 45, para. 434

<sup>72</sup> *Sexual violence in armed conflict: questions and answers*, ICRC blog, 15 June 2015, available on: <https://blogs.icrc.org/ilot/2014/06/15/sexual-violence-in-armed-conflict-questions-and-answers/>

a widespread or systematic attack against any civilian population. But there are also practical issues to consider, such as the unavailability of medical assistance during a conflict or the danger of reporting it as a crime.

## 2. IDENTIFICATION OF HISTORICAL CHALLENGES IN EXISTING CASE LAW

In the second chapter of this thesis, the author is going to analyse three specific cases - *Prosecutor v. Duško Tadić*, *Prosecutor v. Jean-Paul Akayesu*, and *Prosecutor v. Charles Ghankay Taylor*. These particular cases have been selected due to their noteworthy impact in shaping the perspective on sexual violence during armed conflicts, and their significant contributions towards the development of certain definitions and analyses. The reasons behind their significance will be explored in further detail in this chapter by an in-depth analysis for each case, including the scrutiny of the case facts, challenges encountered in prosecuting the perpetrator, and the resultant lessons learned, as well as the impact of these cases on the manner in which sexual violence during armed conflicts are prosecuted.

### 2.1 Analysis of *The Prosecutor v. Duško Tadić*

*Prosecutor v. Duško Tadić*<sup>73</sup> (hereinafter- the Tadić case) is one of the most significant cases regarding sexual violence as a war crime. Its' significance manifests in many different ways. First, it was the first case heard at the ICTY. The judges were required to establish a legal framework that would serve as a precedent for all subsequent cases. ICTY itself was established to bring justice for war crimes committed during the Bosnian war. The establishment of ICTY itself was a significant development as it was the first time after WWII Nuremberg Trials, an international tribunal was established. Second, it set critical legal precedents regarding the prosecution of war crimes, such as the definition of crimes against humanity and the doctrine of command responsibility, which will be analysed throughout this chapter. Third, this case was a tangible example of why collecting evidence during wartime is so essential, as the prosecution relied on witness testimony, documentary evidence, and forensic evidence. Fourth, it sent an important message to war criminals that they would be held responsible for the crimes committed.

#### 2.1.1 Facts of the Case and Trial

The Bosnian war was an international armed conflict in Bosnia and Herzegovina from 1992 until 1995. It resulted from the breakup of Yugoslavia. The war was very violent, as it is characterised by widespread atrocities, including ethnic cleansing, genocide, and crimes against humanity, and resulted in the deaths of an estimated 100,000 people.<sup>74</sup>

In response to these atrocities, in May 1993, the United Nations Security Council established ICTY to deal with war crimes, genocide and crimes against humanity committed during the war.<sup>75</sup> It had jurisdiction over grave breaches of Geneva Conventions and violations of the laws and customs of war.

The first case that the ICTY heard was the Tadić case. Tadić was a former shift supervisor in the Omarska detention camp, operated by Bosnian Serb forces, where prisoners

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<sup>73</sup> *Prosecutor v. Duško Tadić*, *supra* note 8.

<sup>74</sup> Lenard J Cohen, *Broken Bonds: Yugoslavia's Disintegration And Balkan Politics In Transition* (Routledge, 2nd ed., 1993), accessed March 1, 2023, <https://doi.org/10.4324/9780429495397>

<sup>75</sup> The International Residual Mechanism for Criminal Tribunals. International Criminal Tribunal for the former Yugoslavia, available on: <https://www.icty.org/>. Accessed March 1, 2023.



were subjected to inhumane treatment. He allegedly was a member of a paramilitary group that was responsible for committing numerous crimes against Bosnian Muslims and Bosnian Croats, including murder, rape, and torture.

At first, Tadić was arrested in Germany in 1994. He was facing 12 counts of crimes against humanity, 12 counts of grave breaches of the Geneva Conventions, and 10 counts of violations of the customs of war. He pleaded not guilty. After the pre-trial proceedings, the trial started on May 1996. On May 1997, Tadić was found guilty on nine counts and partially guilty on two counts. However, it was appealed both by Tadić and the prosecution on various grounds.<sup>76</sup> The case was later heard by the Appeals Chamber of the ICTY. On July 14, 1999, the Appeals Chamber upheld Tadić's conviction but reduced his sentence to 15 years.

November 1999, the Trial Chamber II bis issued its sentencing verdict on the extra charges, sentencing Tadić to 25 years in prison. Later on, Tadić filed an appeal against the sentencing judgment. The Appeals Chamber agreed to combine the appeal with the one against the Sentencing Judgment of July 14, 1997. On January 26, 2000, the Appeals Chamber issued its judgment, which confirmed Tadić's convictions for war crimes and crimes against humanity. However, it found that the Trial Chamber had made errors in the sentencing and reduced the prison sentence to 20 years.<sup>77</sup>

### 2.1.2 Arguments and Challenges

This case presented many challenges, both of legal and practical nature.

Firstly, there was a question on jurisdiction. In his trial, Tadić's defence raised a question of whether ICTY, as an international tribunal, even has jurisdiction over hearing crimes committed in the Bosnian war. They argued that ICTY's creation by the United Nations Security Council was illegitimate, as the Security Council is an executive governmental branch and therefore does not have the power to establish a judicial body. As well as that Tribunal's jurisdiction over national courts, as outlined in the Tribunal's statute, was unlawful.<sup>78</sup> They also contended that the Tribunal did not have subject matter jurisdiction because the indictment relied on articles of the statute (Articles 2, 3 and 5) that apply only to international armed conflicts, while the alleged crimes were committed during an internal armed conflict.<sup>79</sup> Regarding the first argument the tribunal concluded that Security Council had the power to establish the Tribunal under chapter VII, article 41 of the UN Charter, and it was established "in accordance with the rule of law".<sup>80</sup> Regarding the argument about the tribunal's jurisdiction over national courts, the tribunal dismissed it because this primacy was necessary to prevent forum shopping (practice of pursuing a claim subject to concurrent jurisdiction in the court that will treat the claim most favourably)<sup>81</sup> or fake proceedings that would protect the perpetrators.<sup>82</sup>

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<sup>76</sup> Prosecutor v. Duško Tadić, *supra* note 8.

<sup>77</sup> International Crimes Database. The Prosecutor v Duško Tadić, available on: <https://www.internationalcrimesdatabase.org/Case/79/Tadi%C4%87/>. Accessed March 2, 2023.

<sup>78</sup> George H. Aldrich, "Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia," *The American Journal of International Law* 90, no. 1 (1996): pp. 64–69, accessed March 2, 2023, <https://doi.org/10.2307/2203751>.

<sup>79</sup> Prosecutor v. Duško Tadić, *supra* note 8, para. 32

<sup>80</sup> *Ibid*, para. 45.

<sup>81</sup> Cornell Law School. *Forum shopping definition*, available on: [https://www.law.cornell.edu/wex/forum\\_shopping](https://www.law.cornell.edu/wex/forum_shopping). Accessed May 1, 2023.

<sup>82</sup> Prosecutor v. Duško Tadić, *supra* note 8, paras. 55-60.

Moreover, lastly, regarding the argument of subject matter jurisdiction, the trial chamber held that all three crimes covered in Articles 2, 3 and 5 of the statute – grave breaches of the Geneva Conventions, violations of the laws or customs of war, and crimes against humanity – apply to both internal or international conflicts.<sup>83</sup>

Secondly, an aspect that raised some issues was protective measures for witnesses. The prosecution argued that some witnesses' identities should be hidden or concealed because it might compromise their safety. This anonymity would include hiding their real names from the defence and distorting their voices and images. The defence opposed such a proposition and argued it could go against the defendant's right to a fair trial.<sup>84</sup> This was a crucial issue because the defendant has the right to a fair trial and the right to confront the accusations, while witnesses have the right to protection against intimidation, retaliation or harm. Finding an appropriate balance between these interests was a difficult task for the ICTY, as it had to weigh the gravity of the crime and the potential impact on witnesses.<sup>85</sup> The trial chamber ultimately granted some protective measures to the witnesses, including using pseudonyms and concealing their identities from the public but allowed for the defence to cross-examine them.<sup>86</sup>

Thirdly, one of the biggest challenges, in this case, was gathering evidence. Similarly, as in other cases of crimes committed during armed conflicts, obtaining evidence is very limited. The reasons behind this include witnesses being afraid to testify, and it may be re-traumatising for them, as argued in the previous paragraph. Another reason is that many documents containing evidence were destroyed during the conflict. The evidence that was provided by the witness statements was often inconsistent. This is a common issue for international tribunals, as they do not have such coercive powers as national courts. International criminal courts and tribunals rely on the voluntary assistance of states. In the absence of such cooperation, the legitimacy of the proceedings and the court's credibility may be undermined, posing a severe challenge to the pursuit of international justice.<sup>87</sup> In the Tadić case, the Defence recognized the challenges encountered by both sides in obtaining evidence, and therefore the Trial Chamber implemented a range of measures to ease those difficulties.<sup>88</sup> The Court concluded that

steps [...] taken by the International Tribunal to assist the parties [...] did appear to alleviate the inherent difficulties of the situation.<sup>89</sup>

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<sup>83</sup> *Ibid*, para. 70.

<sup>84</sup> Joanna Pozen, "Justice Obscured: The Non-Disclosure Of Witnesses' Identities In ICTR Trials," *International Law and Politics* 38 (2006): p. 291, accessed April 16, 2023, available on: [https://nyujilp.org/wp-content/uploads/2013/02/38.1\\_2-Pozen.pdf](https://nyujilp.org/wp-content/uploads/2013/02/38.1_2-Pozen.pdf)

<sup>85</sup> Sangkul Kim, "The Witness Protection Mechanism of Delayed Disclosure at the Ad Hoc International Criminal Tribunals," *Journal of East Asia and International Law* 1 (2016): p.59, accessed March 3, 2023, available on: <https://www.legal-tools.org/doc/0d416e/pdf/>

<sup>86</sup> Prosecutor v. Dusko Tadic, Decision on the prosecutor's motion requesting protective measures for victims and witnesses paragraphs (10 August 1995), available on: <https://www.icty.org/x/cases/tadic/tdec/en/100895pm.htm>, paras. 11 to 32.

<sup>87</sup> Jacob Katz Cogan, "The Problem of Obtaining Evidence for International Criminal Courts," *Human Rights Quarterly* Vol. 22, No. 2 (2000): p. 415, accessed March 3, 2023, available on: <https://www.jstor.org/stable/4489284>

<sup>88</sup> Prosecutor v. Duško Tadić, case No. IT-94-1-A. ICTY (15 July 1999), para. 32, available on: <https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>

<sup>89</sup> Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, T. Ch. II, paras. 530-31

The steps in question included a video-conferencing link from a secure location for the witnesses, the suppression of victims' identities both for prosecution and defence, and allowing the witnesses to give testimonies in closed sessions.<sup>90</sup> Even though the defence on these grounds later appealed this aspect of the Trial Chamber's decision, the Appeals Chamber endorsed the "equality of arms" principle. It rejected that this principle would have been violated.<sup>91</sup>

### 2.1.3 Lessons

The Tadić case has set new precedents that have influenced the investigation and prosecution of other international criminal cases. First, in terms of jurisdiction, the case strengthened the legitimacy of the ICTY's jurisdiction to try individuals for war crimes, crimes against humanity and genocide committed during the Bosnian war. The case also reinforced the Tribunal's primacy over national courts and refuted any arguments challenging the Tribunal's jurisdiction over these types of crimes.

Second, the Tadić case highlighted the importance of witness protection in international criminal cases. The case helped reinforce fundamental aspects of strengthening witness protection, including using pseudonyms, closed hearings, and providing support. However, it also drew attention to the risks that make it challenging to use witnesses - re-traumatisation of witnesses and the problems of strengthening witness protection. It also highlighted the difficulty to obtain witness testimony, as the victims are highly likely to be afraid of retaliation.

Thirdly, the case highlighted the difficulties in obtaining valid evidence in international criminal cases, particularly by drawing attention to cases where a court or tribunal does not have the same powers as national courts. It revealed the extent to which international tribunals and courts rely on international cooperation to provide sufficient evidence. The complexity of this case revealed the challenges of obtaining evidence because of such factors as witness intimidation, destruction of physical evidence during the conflict, language barrier and other. This issue is specifically crucial for sexual violence cases. Overall, the Tadić case highlighted the need for a comprehensive approach to evidence, the importance of setting such precedents, and the need for specialized training and expertise in sexual violence prosecution.

Fourthly, this case was the first case that recognised sexual violence against men. It set a strong precedent, thus developing the understanding of sexual violence during armed conflicts against men.<sup>92</sup>

## 2.2 Analysis of The *Prosecutor v. Jean-Paul Akayesu*

Akayesu case<sup>93</sup> is often considered a landmark case, as it was the first time that the crime of rape and other acts of sexual violence were addressed as acts of war crimes, genocide, and crimes against humanity. As a precedent, it played a significant role in the future recognition

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<sup>90</sup> Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, T. Ch. II, pp. 530-31

<sup>91</sup> Prosecutor v. Dusko Tadic, Case Number IT-94-1, App. Ch., pp. 50-51

<sup>92</sup> Jennifer Park, "Sexual Violence As A Weapon Of War In International Humanitarian Law," *International Public Policy Review* Vol. 3, No. 1 (2007): p. 18, available on: <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=24d7bf2a3fd98396ea9bb5cc664989afb247ed58#page=13>. Accessed May 1, 2023.

<sup>93</sup> *Prosecutor v. Jean-Paul Akayesu*, *supra* note 9.

of rape and sexual violence as international crimes. It further helped develop a legal framework for prosecuting such crimes in international criminal trials. This case was heard in ICTR, a tribunal established explicitly for the prosecution of crimes committed during the Rwandan genocide in 1994, a mass killing that resulted in more than 800 thousand deaths of Tutsi and moderate Hutu.<sup>94</sup> Akayesu case was the first case to be heard at the ICTR and established a legal framework for further trials of the ICTR.

### 2.2.1. Facts of the Case and Trial

Jean-Paul Akayesu was the mayor of Taba commune in Gitarama prefecture in Rwanda. During the Rwandan genocide, as a mayor with proper authority, not only did he refrain from stopping the killings, he personally supervised and commanded the killings and other acts of violence, including rape.<sup>95</sup>

Akayesu had to stand trial for 15 counts of genocide, crimes against humanity, war crimes, and violations of the Geneva Convention. The prosecution presented evidence, such as witness testimony, documentary evidence, expert testimony, physical evidence, and others, that proved Akayesu's role in the planning and execution of the genocide. That included ordering the killing of Tutsi civilians and inciting Hutu militia to carry out attacks against them, as well as the fact that Akayesu had personally participated in the rape and sexual assault of Tutsi women and girls, as well as ordering and encouraging others to commit such acts.<sup>96</sup>

The defence argued that Akayesu did nothing of the kind and was powerless to stop the atrocities. Despite the defence's efforts, he was found guilty of 9 counts of genocide, numerous crimes against humanity and direct and public incitement to commit genocide. However, he was not found guilty of the counts of complicity in genocide, war crimes, including rape as an act of genocide, and Article 4(2)(e) of Additional Protocol II to the Geneva Conventions.<sup>97</sup> He was sentenced to life in prison.

Akayesu lodged an appeal contesting his convictions and sentence, primarily based on his lack of legal representation of his choice. Additionally, the Prosecution raised four grounds of appeal. In its judgment, the Appeals Chamber clarified that an indigent defendant's right to have counsel provided at no cost did not necessarily entail the ability to select their chosen advocate. The Chamber emphasized that the allocation of legal assistance in this case had been misused by the accused at the expense of the global community.<sup>98</sup>

### 2.2.2 Arguments and Challenges

One of the arguments raised during the trial was the definition of genocide and whether the acts committed by Akayesu constituted genocide under international law. The defence argued that the atrocities committed were not done to destroy the Tutsi population but instead were just a

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<sup>94</sup> United States Holocaust Memorial Museum. Rwanda, accessed March 4, 2023. Available on: <https://www.ushmm.org/genocide-prevention/countries/rwanda>

<sup>95</sup> Prosecutor v. Jean-Paul Akayesu. Indictment, International Criminal Tribunal for Rwanda, (13 October 1997), paras. 8-34

<sup>96</sup> J. Turay, "The Jean-Paul Akayesu Case: The Definition of Rape as a Crime Under International Law," *American University Journal of Gender, Social Policy & the Law*, vol. 23, no. 1 (2014): pp. 1-40.

<sup>97</sup> Prosecutor v. Jean-Paul Akayesu, *supra* note 9, para 643 and 644

<sup>98</sup> International Crimes Database. Akayesu, available on: <https://www.internationalcrimesdatabase.org/Case/50/Akayesu/>. Accessed March 4, 2023.

part of a broader conflict. In its deliberations, the Chamber examined the definition of genocide contained in the Genocide Convention, as it is identical to the definition presented in the ICTR Statute. The Chamber emphasized that sexual violence and rape could amount to genocide on an equal footing with any other act, so long as they were perpetrated with a deliberate intention to eliminate, in whole or in part, a particular group. The Chamber highlighted that in Rwanda, sexual violence constituted a crucial component of the genocidal campaign that specifically targeted Tutsi women and thus was part of the broader scheme to annihilate the Tutsi group.<sup>99</sup> This conclusion of the Chamber developed the recognition of rape and sexual violence as a tool of genocide. By recognising rape as a component of one of the most severe international crime, a significant step was made towards recognition of sexual violence during armed conflicts as a severe and punishable crime. This precedent was really important to completely the change the way sexual violence was treated by paving a way for future prosecutions. Besides that, it was also a strong signal to society that these kinds of crimes are not going to be tolerated, which is a crucial step towards justice and putting an end to sexual violence during armed conflicts.

The Akayesu judges note that

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.<sup>100</sup>

Another argument was, similar to the Tadić case that the defence challenged the credibility of witnesses and argued that they had motives to fabricate their testimonies. In this case most victims were allowed to testify behind screens to keep their identities hidden from the public. However, none of them testified anonymously.<sup>101</sup> The witnesses were survivors of sexual violence committed by Akayesu and his associates. However, the defence could not disregard the testimonies of the witnesses, as prosecution also had physical evidence in the form of photographs and medical records that supported the testimonies of the witnesses and provided additional details.<sup>102</sup> The judges also dismissed the evidentiary rule, which requires corroboration of evidence prior to its admission, referring to their own procedural rules, as well as the Tadić case and affirmed their ability to assess the probative value of the evidence.<sup>103</sup> It meant that it was allowed to consider a broader range of evidence, thus facilitating prosecution's case. The dismissal of the evidentiary rule in the Akayesu case made it possible to have a more complete and detailed comprehension of the genocide that occurred in Rwanda, and it established a crucial precedent for the acceptability of evidence in forthcoming international criminal cases.

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<sup>99</sup> Asoka De Z. Gunawardana, "Contributions by the International Criminal Tribunal for Rwanda to Development of the Definition of Genocide," *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 94 (2000): p.278. Available on: <https://www.jstor.org/stable/25659411>. Accessed March 5, 2023.

<sup>100</sup> Opinion and Judgment, Prosecutor v. Tadic, Case No. IT-94-1-T (Trial Chamber, ICTY, May 7, 1997) .

<sup>101</sup> Prosecutor v. Jean-Paul Akayesu, *supra* note 9, para. 12.

<sup>102</sup> W. Schabas, "The Prosecution of Gender-Based Crimes at the International Criminal Tribunal for Rwanda," *Journal of International Criminal Justice*, vol. 1, no. 4 (2003), pp. 810-813

<sup>103</sup> Jose E. Alvarez, "Lessons from the Akayesu Judgement," *ILSA Journal of International & Comparative Law*, Vol 5:359 (1999): p.5. Available on: <https://nsuworks.nova.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1215&context=ilsajournal/>. Accessed March 5, 2023.

The defence also raised the question of jurisdiction. They argued that ICTR does not have jurisdiction to hear the case of Akayesu because he is not a high-ranking official in the Rwandan government or military and based their argument on the fact that ICTR mandate was limited to prosecuting those who were primarily responsible for the genocide. However, the prosecution contended that the ICTR possessed jurisdiction over Akayesu owing to his mayoral position, granting him authority over his municipality and his involvement in the orchestration and perpetration of the genocide. The prosecution posited that the scope of the ICTR's jurisdiction encompassed not only high-ranking officials but also individuals who had committed serious violations of international humanitarian law.<sup>104</sup> The Appeals Chamber held that the ICTR had jurisdiction over all those who committed serious violations of international humanitarian law during the genocide, regardless of their official position or rank.<sup>105</sup> By doing so, they established the principle of individual criminal responsibility, which was unclear prior to the case. It set a precedent that all individuals, irrespective of their military rank or position, can be held responsible for the crimes they have committed individually during armed conflicts. Thereby changing the way such crimes are treated in forthcoming cases.

### 2.2.3. Lessons

The verdict in Akayesu is very significant, as it adopted a comprehensive and progressive interpretation of rape and sexual violence and included these gender-based atrocities in the genocide definition. This was the first case that showed sensitivity to gender-specific violence.

It provided the Chamber's explicit confirmation that the ICTR Statute "does not establish a hierarchy of norms" but grants jurisdiction over individual offences on an equivalent basis. The judges confirmed that the offences of genocide, crimes against humanity, and war crimes each have different elements and may give rise to multiple convictions even when they relate to the same circumstances.<sup>106</sup>

The most important achievement and legacy of this case are that it set an important precedent for the recognition of rape and sexual violence as international crimes and helped to establish the legal framework for prosecuting sexual violence in future international criminal trials. It also contributed to recognising sexual violence as a tool of war, which has since been incorporated into the Rome Statute. It also raised awareness of the use of rape and sexual violence as weapons of war and as a form of gender-based violence and contributed to the development of to prevent and address such atrocities.

Not only it provided legal consequences, it also brought attention to how important it is to validate the experiences of the victims and support their efforts to bring justice for everything they have suffered.

## 2.3 Analysis of The Prosecutor v. Charles Ghankay Taylor

The case *Prosecutor v. Charles Ghankay Taylor*<sup>107</sup> was a landmark case in prosecuting a former head of state. Charles Ghankay Taylor was a former president of Liberia, and he was accused

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<sup>104</sup> *Prosecutor v. Akayesu*, *supra* note 9, paras. 543-568.

<sup>105</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgment, October 1, 1999., paras. 15-18, 21-26, and 39-43.

<sup>106</sup> Alvarez, *supra* note 103.

<sup>107</sup> *Prosecutor v. Charles Ghankay Taylor*, *supra* note 10

of having supported and directed armed rebel groups in Sierra Leone's civil war (1991-2002). The rebel groups were responsible for killing, raping, and gruesomely attacking civilians. The trial was held at the Special Court for Sierra Leone (hereinafter - SCSL), and it was overseen by ICC.<sup>108</sup>

### 2.3.1 Facts of the Case and Trial

Taylor was charged with 11 counts of war crimes, crimes against humanity, and other serious violations of international humanitarian law, including murder, rape, sexual slavery, other forms of sexual violence, outrages upon personal dignity, enslavement, and other crimes. According to the prosecution, Taylor provided military training, finances, arms, and other support to the rebel groups, as well as planned and directed military operations carried out by the Revolutionary United Front, one of the main rebel groups in Sierra Leone.<sup>109</sup> Taylor pleaded not guilty.

During the trial, Taylor boycotted it and did not participate, stating that the trial was not fair or impartial.<sup>110</sup>

It was also alleged that one of the key witnesses against Taylor went into hiding after being threatened.<sup>111</sup> Other witnesses testified that Taylor was practising human sacrifice during the civil war, as well as that had some cannibalistic tendencies and was forcing cannibalism on his soldiers.<sup>112</sup>

The verdict in the Taylor case was announced on April 26, 2012. SCSL unanimously announced Taylor guilty on all 11 counts and sentenced to 50 years in prison.<sup>113</sup> Considering the fact that at the time of sentencing, Taylor was 64 years old, this sentence *de facto* can be considered a life sentence. He is now serving his imprisonment in the United Kingdom.

### 2.3.2 Arguments and Challenges

One of the challenges of the trial was that it was very lengthy. It began on June 4, 2007, and lasted until April 26, 2012, which makes it almost five years. The reason behind it was that this case was very complicated, and lots of evidence and witnesses were involved. As well as, because the events took place in West Africa, but the trial was held in the Netherlands, it was hard to deal with logistical issues, such as obtaining visas for witnesses or financing their travels.<sup>114</sup>

The case itself was very emotionally charged, as the great suffering of the victims was analysed in detail. The Trial Chamber found gruesome details that were not recognised in the

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<sup>108</sup> Human Rights Watch. Charles Taylor, <https://www.hrw.org/topic/international-justice/charles-taylor>. Accessed March 6, 2023.

<sup>109</sup> Prosecutor v. Charles Ghankay Taylor, *supra* note 10, paras. 1097-1113

<sup>110</sup> Special Court for Sierra Leone. *Press and Public Affairs Office*, available on: <http://www.rscsl.org/Clippings/2008/2008-01/pc2008-1-8.pdf> p. 10. Accessed March 7, 2023.

<sup>111</sup> CNN. *Witness in Taylor war crimes trial in hiding after threats*, available on: <https://web.archive.org/web/20080229224224/http://edition.cnn.com/2008/WORLD/africa/02/28/Taylor.warcrimes.ap/index.html>. Accessed March 7, 2023.

<sup>112</sup> Prosecutor v. Charles Ghankay Taylor, *Supra* note 10, p.101-102

<sup>104</sup> Prosecutor v. Charles Ghankay Taylor, *Supra* note 10, pp. 2475-2478

<sup>114</sup> Human Rights Watch. Taylor Trial: U.K. Removes a Key Obstacle, available on: <https://www.hrw.org/news/2006/06/15/taylor-trial-uk-removes-key-obstacle>. Accessed March 7, 2023.

previous two cases of SCSL that heard evidence of widespread rape during the conflict. For example, women and girls of all ages were subjected to abduction or capture and rape, or that breastfeeding mothers were targeted too. This judgement also confirmed that various rape tactics were used, including gang rape, public rape, sexual mutilation, beating on the genitals and others.<sup>115</sup> As well as the fact that rape was not an isolated crime but often came together with other violations, including murder, abduction, mutilation, forced nudity, sexual slavery, forced labour, forced marriage, and physical assault.<sup>116</sup>

Additionally, Taylor was *inter alia* charged with acts of terrorising civilians as a war crime as part of campaign to terrorise the civilian population,<sup>117</sup> which is a violation of Common Article 3 of the Geneva Conventions and of Additional Protocol II.<sup>118</sup> The Trial Chamber identified, concurred with the approach taken by the ICTY Appeals Chamber, and elaborated on elements that should be proven<sup>119</sup>: *actus reus* (“grave consequences [...], which include but are not limited to death or serious injury to body or health”)<sup>120</sup>, *mens rea* of the crime (“perpetrator ‘wilfully’ made the civilian population or individual civilian the object of an act or threat of violence”),<sup>121</sup> and specific intent (“‘the spreading of extreme fear’ must be specifically intended”).<sup>122</sup>

One aspect of what this trial was criticised about – sexual violence crimes were looked at as committed only to women and girls. Sexual violence towards men and boys was not recognised.<sup>123</sup> The reason behind this was argued that the Prosecutor did not notice in a timely manner that the offences were directed against men too.<sup>124</sup> Therefore it could be argued that this aspect made the trial judgement regressive in a way – by disregarding sexual violence towards men and boys.

### 2.3.3. Lessons

This case contributed a lot to advance international criminal law, specifically regarding rape. The trial acknowledged that proving the *actus reus* element of rape may require circumstantial evidence.<sup>125</sup> This is due to the context of widespread sexual violence during armed conflicts, where many victims may face societal stigma.<sup>126</sup> Moreover, the Taylor trial judgment acknowledged that some groups of individuals, such as those underage, disabled, ill, or under the influence of drugs, cannot give consent to sexual activity.<sup>127</sup>

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<sup>115</sup> Prosecutor v. Charles Ghankay Taylor, *Supra* note 10, paras. 894, 903, 980–81, 992, 895, 903, 927, 989.

<sup>116</sup> Prosecutor v. Charles Ghankay Taylor, *Supra* note 10, paras. 896–97, 901, 903, 923–28, 1002–04

<sup>117</sup> Prosecutor v. Charles Taylor, SCSL-03-01, Prosecutor’s Second Amended Indictment, (‘Indictment’) 29 May 2007, para 5.

<sup>118</sup> The Geneva Conventions of 12 August 1949, Additional Protocol II, International Committee of the Red Cross, available: <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and-0>

<sup>119</sup> Prosecutor v. Charles Ghankay Taylor, *Supra* note 10, paras 562–568

<sup>120</sup> Prosecutor v. Charles Ghankay Taylor, *Supra* note 10, para 407

<sup>121</sup> Prosecutor v. Moinina Fofana Allieu Kondewa, Case No.SCSL-04-14-A, Appeal Judgement, available on: [http://hrlibrary.umn.edu/instreetree/SCSL/SCSL-04-14\\_files/SCSL-04-14-A-829.htm](http://hrlibrary.umn.edu/instreetree/SCSL/SCSL-04-14_files/SCSL-04-14-A-829.htm), para 353–355.

<sup>122</sup> *Ibid.*, para 356

<sup>123</sup> Prosecutor v. Charles Ghankay Taylor, *Supra* note 10, paras.124–34; Prosecutor v. Taylor, Case No. SCSL-03-01-PT, Trial Chamber II, Prosecution’s Second Amended Indictment, at 5 (May 29, 2007).

<sup>124</sup> Prosecutor v. Charles Ghankay Taylor, *supra* note 10, paras. 124–134.

<sup>125</sup> Prosecutor v. Charles Ghankay Taylor, *Supra* note 10, para.416

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*



The Taylor trial case presented several noteworthy advancements in addressing gender-related issues, specifically pertaining to the court's examination of sexual slavery, including forced marriage or conjugal slavery (enslavement through means of sexual slavery and gender-specific forms of forced labour).<sup>128</sup> The verdict of the Taylor trial played a crucial role in solidifying the universal definition of sexual slavery, and furthermore, delineating the nuances of the crime as a continuing crime,<sup>129</sup> with respect to the reality of the victims' lives.<sup>130</sup> In addition, this judgment also provided a comprehensive analysis that established a clear differentiation between the previous concept of "forced marriage" and the newly introduced notion of "conjugal slavery."<sup>131</sup>

This case was also significant in that it was the first time since the Nuremberg trials that a former head of state had been prosecuted and convicted for war crimes by an international tribunal. Thus it sent a strong message that no immunity will save current or former presidents from being held responsible for international crimes, even by aiding or abetting rebel groups.<sup>132</sup> While at the same time this trial highlighted the challenges of linking the committed crimes to the heads of state, especially if the head of the state in question was in a different country at the time of the atrocities. Thereby it was revealed how important are accurate and reliable reports in such cases.<sup>133</sup> Nevertheless, this case also held a significant symbolic value as it exemplified the capacity of the international justice system to bring those who have committed grave breaches of international humanitarian law to account, irrespective of their political status or position.

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<sup>128</sup> Valerie Oosterveld, "Gender and the Charles Taylor Case at the Special Court for Sierra Leone," *William & Mary Journal of Race, Gender, and Social Justice* Volume 19, Issue 1 (2012): p. 21, accessed April 15, 2023, available on: <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1347&context=wmjowl>

<sup>129</sup> Prosecutor v. Charles Ghankay Taylor, *Supra* note 10, paras. 418–21.

<sup>130</sup> Oosterveld, *supra* note 128, p.17

<sup>131</sup> Prosecutor v. Charles Ghankay Taylor, *Supra* note 10, para. 429

<sup>132</sup> Charles C. Jalloh, "The Law and Politics of the Charles Taylor Case," *Denver Journal of International Law and Policy*, Vol. 43, No. 3 (2015): p. 276, accessed April 16, 2023, available on: <https://ssrn.com/abstract=2524366>

<sup>133</sup> Oosterveld, *supra* note 128, p. 33.

### 3. CHALLENGES OF PROSECUTING CRIMES OF SEXUAL VIOLENCE AND SUGGESTED SOLUTIONS

When the ICC was established, Richard Goldstone, a former prosecutor of the ICTY and ICTR, stated that he hoped that

the history of impunity for gender crimes under international criminal law will resolutely be replaced in the future by accountability and deterrence and prevention.<sup>134</sup>

Unfortunately, it is not possible to declare with confidence that Goldstone's hopes have been fulfilled. In this chapter, some of the challenges are going to be analysed.

#### 3.1 International Courts vs Domestic Courts

It is essential to note the ICC's principle of complementarity, meaning that the purpose of the court is not to replace national court prosecution but to complement it. For the ICC to prosecute the crime, there should be an absence of domestic proceedings either because of unwillingness or inability of the state. Because otherwise, as stated by the Rome Statute article 17(1)(a),<sup>135</sup> the case is inadmissible if it is being investigated or prosecuted by a State with jurisdiction over it. The right to prosecution as the first instance belongs to the national courts.<sup>136</sup> Therefore, the ICC can only take jurisdiction if there are no ongoing prosecutions in the State or there have been in the past but the state has decided not to prosecute the perpetrator.<sup>137</sup>

This is because domestic courts and legal systems are very significant in holding accountable the perpetrators. Those states that have ratified Rome Statute have the jurisdiction to hear cases of sexual violence committed as an international crime that has occurred during armed conflict, whether it is a war crime, genocide or crime against humanity.<sup>138</sup> It is generally agreed that national courts can and should take the responsibility of investigating these crimes.<sup>139</sup> However, there are lots of possible problems that make it quite challenging.

First of all, often a significant challenge is inadequate police competence when police officers are insufficiently trained to handle cases of sexual violence. This is not limited to police forces only but also judges. It has been noted that frequently judges are subject to myths and stereotypes about sexual violence or are not familiar with the sensitivity of acquiring proof in sexual violence cases. A significant factor behind this is the fact that in many countries police forces are male-dominated, which tend to affect the attitude towards sexual violence crimes.<sup>140</sup> Even creation of specialised police units for sexual violence does not guarantee successful

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<sup>134</sup> Richard J. Goldstone, "Prosecuting Rape as a War Crime," *Case Western Reserve Journal of International Law* 34 (2002): pp. 277, 285

<sup>135</sup> Rome Statute of the International Criminal Court, *supra* note 7.

<sup>136</sup> Theresa U. Akpoghome, "Challenges in Prosecuting Sexual Violence in Armed Conflict under Nigerian Law," *Beijing Law Review* 11 (2020): p.268, accessed April 3, 2023, available on: [https://www.scirp.org/pdf/blr\\_2020032016044681.pdf](https://www.scirp.org/pdf/blr_2020032016044681.pdf)

<sup>137</sup> The Prosecutor v. Germain Katanga, ICC, Appeals Chamber Judgment of 25 Sept. 2009, available on: <https://www.icc-cpi.int/news/appeals-chamber-upholds-decision-admissibility-case-against-germain-katanga>

<sup>138</sup> Akpoghome, *supra* note 136, p.268

<sup>139</sup> Kim Thuy Seelinger, "Domestic accountability for sexual violence: The potential of specialized units in Kenya, Liberia, Sierra Leone and Uganda," *International Review of the Red Cross* 96 (2014): p.540, accessed April 4, 2023, available on: <https://international-review.icrc.org/sites/default/files/irrc-894-seelinger.pdf>

<sup>140</sup> *Ibid*, pp. 551-552

investigation, as sometimes it is seen as compromising the stability and effectiveness of specialised units. As well as, rarely are they trained to deal with sexual violence crimes as crimes under international criminal law, but under national law. One of the most significant differences between the two is the fact that in many countries, under their national law, rape is acknowledged as only victimising girls and woman. Therefore it might make it challenging to recognise sexual violence against men as a crime.<sup>141</sup> Also, crimes of sexual violence under domestic criminal law and crimes of sexual violence under international criminal law have different burdens of proof. Nationally it is needed to prove the elements of the crime and prove that the accused person is the direct perpetrator. Usually, it is done by providing physical evidence, such as sworn personal testimony and DNA samples. Under international criminal law, the prosecutor has to prove contextual elements of the crime for a war crime, crime against humanity or genocidal act. As well as, under international criminal law in some occasions, knowledge of different liability modes are required.<sup>142</sup> These types of evidence may be unfamiliar to police investigating sexual violence crimes in general.<sup>143</sup> Therefore, it is crucial for State security institutions, such as the police, military forces, and other security forces to be trained appropriately to appropriately recognise, prevent and punish sexual violence, including disciplinary and criminal sanctions.<sup>144</sup>

Second of all, rarely when crimes committed during armed conflicts are prosecuted while the conflict is continuing. The reasons behind this include reporting and infrastructural challenges, such as court closures.<sup>145</sup> Aftermath of an armed conflict always manifests in the limitation of resources. Therefore the prosecution of sexual violence crimes might not be considered a priority in comparison to other social reconstruction, rehabilitation, and reconciliation initiatives that are just as important and urgent as the pursuit of justice, and they require the same limited resources and time when emerging from an armed conflict.<sup>146</sup> As well as it should be noted that partly contributing to this problem might be the law's persistent resistances to feminism,<sup>147</sup> which slow down the seriousness and urgency with which these problems should be addressed and prosecuted. Therefore, this problem creates a prevailing societal perception that there are supposedly more important and serious war crimes that deserve to be prosecuted as a matter of priority in comparison to sexual and gender-based crimes. However, what needs to be understood is that these crimes of sexual nature are used as a warfare strategy rather than being distinct. War criminals use sexual violence to terrorise and intimidate entire communities. Therefore the reach of these crimes goes far beyond individual

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<sup>141</sup> *Ibid*, p. 556

<sup>142</sup> Anne-Marie De Brouwer, "The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes," *Cornell International Law Journal* 48, no. 3 (Fall 2015): p.664, available on: [https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/cintl48&id=668&men\\_tab=srchresults](https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/cintl48&id=668&men_tab=srchresults). Accessed May 1, 2023.

<sup>143</sup> Seelinger, *supra* note 139, p. 561

<sup>144</sup> Gloria Gaggioli, "Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law," *International Review of the Red Cross* 96 (2014): p.533, accessed April 5, 2023, available on: <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/F14982FBF972DE4A86D8399695154FD5/S1816383115000211a.pdf/sexual-violence-in-armed-conflicts-a-violation-of-international-humanitarian-law-and-human-rights-law.pdf>

<sup>145</sup> Seelinger, *supra* note 139, p.552

<sup>146</sup> Chile Eboe-Osuji, "Prosecution of Sexual Violence against Women in Post-Conflict Societies," in *International Law and Sexual Violence in Armed Conflicts* (Brill, 2012), p.257, accessed April 8, 2023, available on: <https://www.jstor.org/stable/10.1163/j.ctt1w76w29.14>

<sup>147</sup> Carol Smart, *Feminism and the Power of Law* (Routledge, 1989).

trauma, which is the essence of why sexual violence war crimes deserve the same focus on punishment in international courts as any other crime that is perceived as grave, such as genocide, for example.

Third of all, in many states, the sad reality is that even though different forms of sexual violence are prohibited, rarely are they investigated and prosecuted. The reason behind this includes a lack of referral systems for victims, excessively long procedures or the lack of trust in the State institutions. As well as a lack of willingness to prosecute these crimes from state institutions responsible for this.<sup>148</sup> This can be changed by improving the health system, providing economic assistance, and psychosocial support. It is important to note that these measures should be taken already in times of peace.<sup>149</sup>

However, there is a lack of information and the impact of national domestic proceedings as international legal research has surprisingly neglected these prosecutions and how global norms have influenced them. It might be because of several reasons – language barrier, lack of publications, or infrequent prosecutions.<sup>150</sup> However, there is one good example where sexual violence prosecutions at national courts were comprehensively assessed – the OSCE report on the legal framework for sexual violence of Bosnia and Herzegovina in 2014. They analysed the application of international case law, practices, and findings in sexual violence cases prosecuted before the Court of Bosnia and Herzegovina. It was concluded that there is a comprehensive legal framework for addressing sexual violence and Bosnia and Herzegovina’s Prosecutor’s Office has made noteworthy progress in investigating and prosecuting a wide range of crimes of sexual violence during armed conflicts, the public is unaware of the number of unresolved cases and their complexity, leading to frustration among victims. Despite the challenges that are beyond the Court’s control, such as lack of evidence and suspects, there is a need to increase the dedicated capacity to prioritise, investigate and prosecute such crimes.<sup>151</sup>

As shown in the previous paragraphs, there might be a disparity between domestic courts and international tribunals, which can sometimes result in challenges prosecuting the crime. ICC serves a complementary function, however, many challenges make it difficult for them to investigate crimes of sexual violence committed during armed conflict as an international crime. It might include such challenges as selectivity, which has been described as the “greatest problem of international criminal justice”,<sup>152</sup> lack of resources,<sup>153</sup> and lack of co-operation with the respective State.<sup>154</sup> It would be almost impossible to ensure that every country in the world

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<sup>148</sup> Gaggioli, *supra* note 144, p.533

<sup>149</sup> Gaggioli, *supra* note 144, pp.5 33-534

<sup>150</sup> Jasenka Ferizović, Gorana Mlinarević, “Applying International Experiences in National Prosecutions of Conflict-related Sexual Violence: A Case Study of Application of the ICTY Law, Findings and Practices in Prosecutions before the Court of Bosnia and Herzegovina,” *Journal of International Criminal Justice* Volume 18, Issue 2 (2020): p.329, accessed April 6, 2023, available on: <https://academic.oup.com/jicj/article-abstract/18/2/325/5864750#no-access-message>

<sup>151</sup> OSCE. *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges*. Available on: <https://www.osce.org/bih/117051>. Accessed April 6, 2023.

<sup>152</sup> Birju Kotecha, “The International Criminal Court’s Selectivity and Procedural Justice,” *Journal of International Criminal Justice*, Volume 18, Issue 1 (2020): p.104, <https://doi.org/10.1093/jicj/mqaa020>. Accessed May 1, 2023.

<sup>153</sup> United Nations. *Facing Political Attacks, Limited Budget, International Criminal Court Needs Strong Backing to Ensure Justice for Atrocity Crimes, President Tells General Assembly*, available on: <https://press.un.org/en/2018/ga12084.doc.htm>. Accessed May 1, 2023.

<sup>154</sup> Valerie Oosterveld, Mike Perry, John McManus, “The Cooperation of States With the International Criminal Court,” *Fordham International Law Journal* Volume 25, Issue 3 (2001): p.767, available on:

is willing or able to conduct high-quality investigation and prosecution of these crimes for the above reasons. It would also be utopian to believe that providing quality education and training for the responsible forces in every country would be possible. Therefore, more research on the impact of national domestic proceedings is required.

### 3.2 Different Classifications of International Criminal Crimes

Another important distinction is that sexual violence crimes committed during armed conflicts may belong to different classifications of international crimes. Depending on different distinctions, it may be classified as either war crimes, crimes against humanity or genocide. In the following chapters, the differences between them will be distinguished.

An important feature to analyse is the perpetrator's motivation and relation status to the armed conflict. Therefore, what may be challenging for prosecutors is to realise whether this crime was committed for military, strategic or personal reasons or whether this sexual violence act was committed as part of a widespread or systematic attack on a civilian population. Therefore the act itself needs to be analysed in as much detail as possible to answer such questions as by whom, against whom, why, and how it happened?<sup>155</sup> Unfortunately, such answers are almost impossible to get without the perpetrator's confession.

As described in the chapter 1.3 of this thesis, sexual violence act might be classified as a crime against humanity if it was committed as "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".<sup>156</sup> To put it differently, for there to be a crime against humanity, a government or de facto authority must either have a policy or practice of committing crimes or tolerate and condone such actions. Therefore the individual case of rape might be very challenging to recognise as a crime against humanity, unless the connection to a wider attack on a civilian population can be proven. The first time rape was classified as a crime against humanity was in the post-Second World War Control Council Law No. 10. Later, it was followed by the statute of ICTR, ICTY, and finally ICC.<sup>157</sup> As a real-life example of rape as a crime against humanity can be considered the *Kunarac* case. In this case, rape was committed by Serb forces against Muslim women as part of ethnic cleansing of the area.<sup>158</sup> However, on the opposite, a negative example is the beforementioned case of *Prosecutor v. Lubanga*. In this case, although the prosecution had obtained evidence of sexual violence, it was not possible to uphold these crimes of a systematic nature, thus unfortunately, they did not meet the threshold to be recognised as crimes against humanity.<sup>159</sup> The main issue at hand was the Prosecution's inability to disclose approximately 200 documents, as they were obtained through confidentiality agreements.<sup>160</sup> Even though in this

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<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1834&context=ilj&httpsredir=1&referer=>. Accessed May 1, 2023.

<sup>155</sup> Seelinger, *supra* note 139, p.544

<sup>156</sup> Rome Statute, *supra* note 7, Art. 7 (1)(g)

<sup>157</sup> Gaggioli, *supra* note 144, p.530

<sup>158</sup> *Kunarac* case, *supra* note 48

<sup>159</sup> *Prosecutor v. Lubanga*, *supra* note 34; *Prosecutor v. Lubanga*, ICC-01/04-01/06 A 5, Appeals Judgment (Dec. 1, 2014), [https://www.icc-cpi.int/CourtRecords/CR2014\\_09844.PDF](https://www.icc-cpi.int/CourtRecords/CR2014_09844.PDF).

<sup>160</sup> Alex Whiting, "Lead Evidence And Discovery Before The International Criminal Court: The Lubanga Case," *UCLA Journal of International Law and Foreign Affairs*, Vol. 14, No. 1 (2009): p. 223, available on: [https://www.jstor.org/stable/pdf/45302339.pdf?refreqid=excelsior%3A7f02034f630d5f1cc6c635cfb05e9496&ab\\_segments=&origin=&initiator=&acceptTC=1](https://www.jstor.org/stable/pdf/45302339.pdf?refreqid=excelsior%3A7f02034f630d5f1cc6c635cfb05e9496&ab_segments=&origin=&initiator=&acceptTC=1). Accessed May 1, 2023.

case it is considered that this situation was the fault of the prosecutor,<sup>161</sup> this incident reveals that specific requirements for international crimes can significantly complicate the process of pressing for prosecution.

As well as sexual violence crimes may amount to genocide if it was done with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.<sup>162</sup> The Rome Statute also includes such features as “causing serious bodily or mental harm to members of the group”, “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” or “imposing measures intended to prevent births within the group”.<sup>163</sup> By doing so, the violent act committed is both an attack against the victim and an attack against the ethnic group simultaneously. Due to the nature of genocidal crimes, these acts of sexual violence most often involve the restriction or enforcement of childbirth and reproduction, therefore the victims of sexual crimes as genocide are predominantly women.<sup>164</sup> The way it happens and how it happened in Yugoslavia and Rwanda was that sexual violence was used in order to “humiliate, subordinate, or emotionally destroy entire communities”. The perpetrators’ goal was also achieved by making targeted people flee or to work on the removal of the specific ethnic group by forcefully impregnating women.<sup>165</sup> The Prosecutor v. Jeal-Paul Akayesu case established a link between genocide and rape. More details of this case are looked at in chapter 2.2 of this thesis - Analysis of The Prosecutor v. Jean-Paul Akayesu.

Finally, sexual violence crimes under international criminal law might be classified as war crimes. For the sexual violence act to be recognised as such, it is not necessary for there being a systematic or widespread requirement.<sup>166</sup> However, as discussed in chapter 1.1 of this research, there is a requirement of a nexus with an armed conflict for the crime to get classified as a war crime. Meaning that the crime needs to be in a way connected to the ongoing armed conflict, in order for it to be distinguished from ordinary crimes.<sup>167</sup> War crimes require the reflection of the nature of war. However, that does not mean that war crimes are only those acts of sexual violence that are done for military purpose. Under war crimes fall also the acts that have been done for personal pleasure, if the perpetrator did it under the pretext of the armed conflict.<sup>168</sup> This point was established by the Trial Chamber in Tadic case, which is analysed in the Chapter 2.1 of this thesis.

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<sup>161</sup> Louise Chapell, “The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy,” *Oxford Studies in Gender and International Relations* (2016): pp. 44-46, accessed April 8, 2023, available on: <https://doi.org/10.1093/acprof:oso/9780199927890.001.0001>

<sup>162</sup> Rome Statute, *supra* note 7, Art. 6

<sup>163</sup> Rome Statute, *supra* note 7, Arts 6(1)(b)(c) and (d)

<sup>164</sup> Jonathan M.H. Short, “Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court,” *Michigan Journal of Race and Law* 8 (2003): p.505, accessed April 9, 2023, available on: [https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1177&context=mjrl\\_p.504](https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1177&context=mjrl_p.504)

<sup>165</sup> Jocelyn Campanaro, “Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes.” *Georgetown Law Journal* 89, no. 8 (2001): pp. 2557, 2570, available on: <https://giwps.georgetown.edu/resource/women-war-and-international-law-the-historical-treatment-of-gender-based-war-crimes/>. Accessed May 1, 2023.

<sup>166</sup> Kosovo Focus on Human Rights. Sexual Violence as International Crime, available on: <https://www.hrw.org/legacy/campaigns/kosovo98/seviolence.shtml>. Accessed May 1, 2023.

<sup>167</sup> H. van der Wilt, “War crimes and the requirement of a nexus with an armed conflict,” *Journal of International Criminal Justice*, Vol. 10, Issue 5 (2012): p.1116, available on: <https://dare.uva.nl/search?identifier=ece67250-8238-4c0c-83ac-d85f8e8ebbf>. Accessed May 1, 2023.

<sup>168</sup> *Ibid*, p.1128

All these different requirements and having to prove the contextual elements of the crime make it very difficult for prosecutors to make decisions regarding the classification of the crime. Additionally, the existence of armed conflict plays a crucial role in classification of the crime, which may not always be easily established, due to the fact that, as argued in the first chapter, armed conflicts are not always declared. As well as it might pose a challenge to prove the *mens rea* (intent) requirement, meaning that for different types of crimes the intent threshold might differ.<sup>169</sup> Prosecutors should be cautious when limiting the indictment to only prosecuting one specific kind of crime. Nowadays, when a significant portion of the legal system is novel, it would be more advantageous for prosecutors to create and pursue charges for this offence using multiple legal theories, such as crimes against humanity, genocide, and war crimes, whenever appropriate. Otherwise, it might limit rather than broaden the prosecution possibilities.<sup>170</sup> Different classifications may sometimes raise a challenge to the prosecutors as it might be challenging to comprehend the motivation and relation of the perpetrator to the conflict, as these are one of the most critical aspects of the classification. There are different bars between different crimes, which can significantly complicate the prosecution process. Therefore, when investigating a crime, it is essential to understand all the possible aspects mentioned as thoroughly as possible.

### 3.3 Modes of Liability

Another important aspect of international sexual violence crime is the nature of criminal responsibility. Individual Criminal Responsibility is not the only way mode of liability. Command Responsibility is another way how prosecutions for war crimes may happen. What differs is that the person standing the trial may not always be the direct perpetrator and *vice versa* – the factual perpetrator may not always be the one who is bearing the responsibility. In international criminal law, the person being prosecuted may be the commander ordering or failing to prevent the offence. Proving commander's responsibility might pose a challenge to prosecutors as this approach is entirely different than in domestic criminal cases. Prosecutors need to excel in utterly different kinds of evidence, investigation and prosecution strategies in order to prove the link between the commander and the acts committed by his subordinates.<sup>171</sup> Such evidence includes detailed information on military structure, reporting procedures, official or private communications and even troop movement.<sup>172</sup> In order for legal responsibility to be established, a court must determine that there was a relationship of authority between two parties, with one acting as a superior to the other. The court must also find that the superior either knew or had reason to know that a criminal act was going to be or had been committed and failed to take appropriate and reasonable actions to prevent the crime or punish the perpetrator.<sup>173</sup> One of the reasons why it might be so challenging is because the victims may

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<sup>169</sup> Johan D. Van der Vyver, "The International Criminal Court And The Concept Of Mens Rea In International Criminal Law," *University of Miami International and Comparative Law Review*, Vol. 12, Issue 1 (2004): p. 70, available on: <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1088&context=umiclrl>. Accessed May 1, 2023.

<sup>170</sup> Short, *supra* note 164.

<sup>171</sup> Akpoghome, *supra* note 136, p.271

<sup>172</sup> Seelinger, *supra* note 139, p.561

<sup>173</sup> Mary Deutsch Schneider, "About Women, War and Darfur: The Continuing Quest for Gender Violence Justice," *North Dakota Law Review* 83 (2007): pp. 915, 948, accessed April 9, 2023, available on: <https://commons.und.edu/ndlr/vol83/iss3/5/>

not be able to identify or provide any information on the commanders.<sup>174</sup> As well the fact that it much harder to make commanders responsible in cases when there has not been an order to commit sexual violence crimes but only the toleration of it.<sup>175</sup> Because of how complicated this process is, usually only high-level commanders are being prosecuted and those who assume the highest level of accountability for the most heinous acts.<sup>176</sup>

This way, when the emphasis is put on persons “who bear the greatest responsibility”, particularly those who hold leadership or command positions, there is a prioritization of systematic crimes that are closely linked to armed conflicts in the prosecution strategy.<sup>177</sup> Moreover, the incorporation of command responsibility as a recognized mode of liability increases the probability of recognizing sexual violence as a weapon of war, rather than just an incidental crime. This acknowledges that such acts may have been directly or indirectly sanctioned by leaders as a means of achieving military objectives.<sup>178</sup> The *Tadić* judgement has provided three categories that must be manifested: a plurality of persons, a common plan, and the actor must have voluntarily participated in the common plan.<sup>179</sup>

ICC has taken a different route on how to view this doctrine. The closest resemble to joint criminal enterprise is article 25(3) (a) and (d) of the Rome Statute, which states that

A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible... [or that] (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.<sup>180</sup>

However, the ICC instead perceives it as residual form of participation rather than a form of co-perpetration.<sup>181</sup>

The extension of the conventional mode of criminal liability, which used to focus solely on direct individual responsibility, to these newer forms has been a contentious issue, particularly in relation to Joint Criminal Enterprise liability. This is due to the conventional belief that an individual should only be held criminally accountable for the crimes that they personally commit.<sup>182</sup> Furthermore, these modes of liability have been condemned for their ability to violate the rights of the accused by not alleging their criminal activity with sufficient clarity.<sup>183</sup>

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<sup>174</sup> Seelinger, *supra* note 139, p.551

<sup>175</sup> Gaggioli, *supra* note 144, p.536

<sup>176</sup> Seelinger, *supra* note 139, p.541

<sup>177</sup> Eboe-Osuji, *supra* note 146, p.259

<sup>178</sup> K. Alexa Koenig, Ryan Lincoln, Lauren Groth “The jurisprudence of sexual violence,” *Sexual Violence & Accountability Project Working Paper Series* (2011): p. 21, accessed April 10, 2023, available on: <https://www.law.berkeley.edu/wp-content/uploads/2015/04/The-Jurisprudence-of-Sexual-Violence-SV-Working-Paper.pdf>

<sup>179</sup> Tadic Judgment, IT-94-1, Appeals Chamber, 15 July 1999

<sup>180</sup> Rome Statute, *supra* note 7, article 25(3)(d)

<sup>181</sup> Miren Odriozola-Gurrutxaga, “The Doctrine Of Joint Criminal Enterprise At The Ad Hoc Tribunals And Its Applicability In The Rome Statute Of The ICC,” *Electronic Review of the IAPL* (2013): p.2, available on: <https://www.penal.org/sites/default/files/files/Miren%20Odriozola.pdf>. Accessed May 1, 2023.

<sup>182</sup> Koenig, *supra* note 178, p. 22

<sup>183</sup> Cecily Rose, “Troubled Indictments at the Special Court for Sierra Leone,” *Journal of International Criminal Justice* 7 (2009): p.353, accessed April 10, 2023, available on: <https://academic.oup.com/jicj/article-abstract/7/2/353/902173>



However, due to the pervasive and widespread nature of sexual violence during times of conflict, these newer modes of liability are essential in addressing the historical and pervasive impunity for such crimes. The first reason for this is that it may be impractical and ineffective to prosecute every (often lower-ranking) individual who has committed an act of sexual violence. Secondly, obtaining adequate testimony that identifies specific individuals responsible for sexual violence can be challenging due to the fear of retaliation and the societal taboos and stigmatization that often silence victims. Nonetheless, utilizing various modes of liability can enable prosecutors to charge high-ranking individuals for implicitly endorsing or tolerating sexual violence perpetrated by others and demonstrate that sexual violence is not merely a random occurrence but instead is frequently employed as a systematic method of warfare intended to intimidate and subjugate opposing populations.<sup>184</sup>

Different modes of liability have their own set of challenges and solutions. Co-perpetration may pose challenges in determining the level of contribution and responsibility of each individual in a group, which may require more detailed evidence and testimonies. Command responsibility, on the other hand, may face challenges in identifying the scope of authority and the level of knowledge of the commander, which may require examining the military and hierarchical structure of the group or organization. Overall, while there may be challenges associated with different modes of liability, these challenges can be mitigated through careful investigation, analysis, and use of available resources.

### 3.4 General Issues

Unfortunately, the harsh reality is that ICC has tried only a small number of perpetrators for sexual violence, whether as a war crime, crime against humanity, or genocide, and even fewer have been found guilty and sentenced.

The most significant obstacles to look at are procedural matters. Firstly, the ICC can only pursue charges against individuals who are accused of committing or aiding in the commission of genocide, crimes against humanity, or war crimes. Secondly, the accused person must be a citizen of a country that has agreed to the ICC's jurisdiction, or the crime must have occurred within the borders of such a country, or the United Nations Security Council must have referred the matter to the ICC Prosecutor. Additionally, the alleged crime must have occurred after the date the Rome Statute became effective for the nation under consideration. Finally, the case must meet the standard of "sufficient gravity" to warrant the ICC's involvement. To assess whether a crime is severe enough to warrant prosecution by the ICC, various factors are taken into account from a qualitative perspective. These factors may include the intensity of the alleged crimes in terms of their geographical and temporal scope, the nature of the crimes themselves, the methods used to commit them, and the impact on victims and their families.<sup>185</sup>

Additionally to the reasons analysed above, another reason is the difficulty international tribunals face in collecting evidence due to cultural and political attitudes and ideologies, geographical distance, and the passage of time.<sup>186</sup> For example, one of the kinds of evidence in cases of sexual violence is forensic evidence, which can be obtained by medical personnel.

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<sup>184</sup> Koenig, *supra* note 178, pp. 22-23

<sup>185</sup> *Ibid*, p.23

<sup>186</sup> Akpoghome, *supra* note 136, p.271

However, during armed conflicts, medical personnel is often deployed at other emergencies related to the conflict.<sup>187</sup> Another reason includes the unwillingness and inability to report by the victims. Often these victims are not emotionally or psychologically able to do so. Women who survive sexual violence in times of armed conflict face many challenges. Often they may suffer if they decide to report by losing their status or their family. Sometimes victims are encouraged or even pressured not to report.<sup>188</sup> However, the ICC cannot guarantee the anonymity of witnesses, it can offer confidentiality, which means that a witness's identity can be kept private from the general public, but not necessarily from the defence.<sup>189</sup> Victims of sexual violence may also face obstacles such as safety concerns, geographic distance, and expenses related to transportation, which can prevent them from seeking assistance. This creates a dilemma for humanitarian organizations seeking to prevent sexual violence and aid victims. To address this challenge, the International Committee of the Red Cross (ICRC) has recently introduced a new approach in its operations. The ICRC assumes that sexual violence occurs in armed conflicts and aims to offer an appropriate humanitarian response to victims of sexual violence, even if there are no explicit allegations.<sup>190</sup>

The nature of sexual violence crimes themselves is what makes the evidence gathering and prosecution so challenging. First of all, the effects of sexual violence are often less visible than those of other crimes. Second of all, the stigmatisation of the topic. Even nowadays there is much of stigma that victims face, however, this is a much broader discussion falling out of the scope of this particular research. Third of all, much attention needs to be paid to the sensitivity of the topic and the sensitivity needed to be paid to the victims considering the impact of sexual violence on survivors and their communities.<sup>191</sup> The definition of sexual violence should be comprehensive, but it is important to avoid an excessively broad interpretation that could conflict with the principle of legality, hence it is vital to establish a balance between this. Although there have been some creative proposals, there is no well-defined comprehension of what actions qualify as sexual violence or gender-based violence and how these concepts are related.<sup>192</sup>

From the beginning, the notion that the ICC could eliminate the impunity associated with sexual violence in conflict situations was impractical, given the jurisdictional limitations, inadequate resources, and reliance on state cooperation of the ICC. As more legal cases concerning sexual offences progress to the trial and appeal phases, the judges at the ICC will have additional chances to specify and improve their understanding of sexual offences and other forms of gender-based violence that do not involve sexual acts.<sup>193</sup>

Sexual violence crimes are a complicated issue that bring tragedy and trauma to the victims. There is still much room for development and things to consider, such as recognizing

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<sup>187</sup> Seelinger, *supra* note 139, p.551

<sup>188</sup> Akpoghome, *supra* note 136, p.272

<sup>189</sup> Koenig, *supra* note 178, p. 26

<sup>190</sup> Gaggioli, *supra* note 144, p.504

<sup>191</sup> Tanja Altunjan, "The International Criminal Court and Sexual Violence: Between Aspirations and Reality," *German Law Journal* 22 (2021): p. 885, accessed on April 10, 2023, available on: <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/6B37A67C8196A6159237A893D2A5722A/S2071832221000456a.pdf/the-international-criminal-court-and-sexual-violence-between-aspirations-and-reality.pdf>

<sup>192</sup> *Ibid*, pp. 891-892

<sup>193</sup> *Ibid*, p.893

that victims can come from diverse groups, including men and children, acknowledging the potential for secondary victimization and the impact on those closely connected to victims, such as their children, partners, and communities, addressing the unique needs of children born as a result of rape and forced pregnancies, recognizing the role of force and violence in the negation or blurring of consent, identifying the most effective approaches to empowering victims through the development of laws and policies that address sexual violence.<sup>194</sup>

Generally speaking, challenges include inadequate police competence, myths and stereotypes about sexual violence, the lack of recognition of sexual violence against men as a crime, different burdens of proof, and the fact that crimes committed during armed conflicts are rarely prosecuted while the conflict is ongoing, as well as limited resources and prioritization of other social reconstruction, rehabilitation, and reconciliation initiatives, as well as the lack of referral systems for victims, excessively long procedures, and the lack of trust in state institutions responsible for prosecuting these crimes.

In order to overcome these challenges, it is important to train state security institutions appropriately to recognize, prevent, and punish sexual violence. Additionally, create referral systems for victims, improved health systems, economic assistance, and psychosocial support can be implemented to address the lack of trust in state institutions and facilitate the prosecution of these crimes. It is also crucial to prioritize the prosecution of sexual violence crimes during armed conflicts and to ensure that domestic courts have the jurisdiction to hear cases of sexual violence committed as international crimes. Overall, addressing these challenges requires a comprehensive and multifaceted approach that involves both legal and societal changes.

It is positively noteworthy that the Office of the Prosecutor has issued different policies regarding crime of gender persecution<sup>195</sup> or sexual and gender-based crimes to help put its aims more fully into practice.

There are several steps that particularly ICC might take in order to overcome the challenges of prosecuting sexual violence during armed conflicts. Firstly, it is necessary to establish a more complete historical record by creating a more comprehensive and accurate account of the atrocities committed.<sup>196</sup> Secondly, providing protection and support services for victims to come forward and testify by establishing specialized units to handle sexual violence cases, advancing measures such as closed sessions, the use of pseudonyms, and witness protection programs, as well as working with civil society organizations and victim support groups to take into account the interests of survivors.<sup>197</sup> Thirdly, in cases where national authorities have jurisdiction over sexual violence cases, ICC could provide technical assistance and providing guidance on best practices in order to increase accountability to perpetrators and greater access to justice for victims. Fourthly, increase cooperation with international organisations, such as United Nations and different NGOs in order to share information and expertise, as well as exchange resources. Finally, commit to ensuring that charges for sexual

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<sup>194</sup> Koenig, *supra* note 178, p. 52

<sup>195</sup> International Criminal Court. *Policy on the Crime of Gender Persecution*. Available on: <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf>. Accessed May 1, 2023.

<sup>196</sup> *Ibid*, p.5

<sup>197</sup> International Criminal Court. *Policy Paper on Sexual and Gender-Based Crimes*. Available on: [https://www.icc-cpi.int/sites/default/files/Policy Paper on Sexual and Gender-Based Crimes-20 June 2014-ENG.pdf](https://www.icc-cpi.int/sites/default/files/Policy%20Paper%20on%20Sexual%20and%20Gender-Based%20Crimes-20%20June%202014-ENG.pdf), p.5. Accessed May 1, 2023.

violence cases will be brought, bring cumulative charges to accurately portray the seriousness and severity of the crimes and enunciate their extent, charge acts of sexual and gender-based crimes as different categories of crimes, consider full range of modes of liability, propose sentences which give due consideration to the sexual and gender dimensions, overall being committed to bring justice.<sup>198</sup>

To conclude, as the legal analysis reveals, there is no single specific circumstance that complicates the prosecution of sexual violence crimes during armed conflict. It is a combination of several different challenges that create different problems at every turn. Consequently, there is no one particular solution, or one particular actor who can solve these problems. The solution to the issue is based on cooperation, support and sharing of resources between different bodies. In this case, responsibility cannot be placed on the shoulders of a single institution, but rather on global cooperation to improve the situation.

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<sup>198</sup> *Ibid*, pp. 6-7

## CONCLUSIONS

The analysis of the Rome Statute, case law and secondary sources reveals that for the crime to be punished under international criminal law, there needs to be a nexus between the act and the armed conflict, and it has to be exercised towards protected persons as provided by the Geneva Conventions. Sexual violence under international criminal law includes rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilisation. There is no clear definition of what precisely armed conflict means; therefore, the Court often refers to the definitions found in case law, such as *Prosecutor v. Lubanga or Prosecutor v. Tadić*. Article 8 of the Rome Statute can apply to both international and non-international armed conflicts. Case law of ICTY and ICTR, as well as SCSL, has played a significant role in shaping the definitions of different terms, such as "force", "non-consent", "rape", "coercion", and others. ICC's principle of complementarity provides that the purpose of the court is not to replace national court prosecution but to complement it.

It should be noted that, in addition, this work also analysed investigations and trials at national level in order to compare with possible international challenges and to analyse the problems posed by the principle of complementarity of the ICC.

The answer to the research question is as follows – the main challenges of prosecuting crimes of sexual violence in armed conflict under international criminal law are possible cases of forum shopping, inadequate law enforcement competence, and lack of resources caused by the armed conflict, which leads to prioritisation of other issues, and lack of referral systems for victims. Different classifications of crimes raise challenges for prosecutors to successfully bring charges, as well as the scope of different modes of liability. Procedural matters, such as lack of jurisdiction, are often one of the most significant obstacles, as well as the collection of evidence and the sensitive nature of such crimes.

In order to overcome these obstacles, it is essential to train law enforcement institutions globally, establish more robust support systems for victims, and prioritise prosecuting sexual violence crimes during armed conflicts. Contributions from ICC could include establishing a more comprehensive historical record, support victims' support services, providing technical assistance to national courts, increasing cooperation with international organisations, and raising the public priority of prosecuting sexual violence crimes during armed conflicts.

It should be noted that this bachelor thesis had its limitations. The most significant was the extreme sensitivity and emotional severity of the subject. While writing this thesis, the author considered changing the topic several times, as it was too overwhelming to read the detailed descriptions of the crimes and statistics on the frequency of these crimes. Therefore, it is possible that this topic could have been the subject of more extensive public research if it had not been so burdensome. Another limitation is the need for more information and research on the impact of national domestic proceedings, as well as the very high number of unreported crimes. This leads to a huge information gap on the crimes committed.

The research could be continued by further analysing concrete steps that the ICC can take in order to change the statistics regarding the prosecution of sexual violence during armed conflicts, researching how could the state of the art technology contribute to this issue, and, most importantly, focusing on the development of victim support systems, which is one of the most critical aspects of developing improvements regarding justice prevalence.

Sexual violence during armed conflicts is an important problem that requires constant attention and solutions. Only by taking this issue seriously and consciously seeking to ensure fair punishment will it be possible to prevent such crime. Leaving these violent acts unpunished sends a signal to potential perpetrators that such acts are being left without repercussions.

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