



**Strathmore University**

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**Law School**

**GENDERED GENOCIDE: THE ROME STATUTE'S FAILURE IN RECOGNISING  
THE INEXTRICABLE ROLE OF RAPE AND GENDER IN GENOCIDE**

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By

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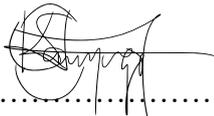
I would also like to express my heartfelt gratitude to my friends Michelle Malonza and Fenan Estifanos, who at different stages in the writing of this dissertation, helped me conceptualise and redefine my research by listening to and challenging my various ideas.

## **Dedication**

*To all the victims struggling to survive the effects of genocidal rape and sexual atrocities in past and continuing armed conflicts, and for whom its lasting effects continue to be subordinated or ignored.*

## Declaration

I, **EUGENE KANYUGO**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:  .....

Date: 25 July 2021

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....CAO.....

Supervisor Name: **Claire Adionyi**

## **Abstract**

*The Rohingya crisis in Myanmar, ISIS, Boko-Haram in Nigeria, South Sudan: these are just a few potentially genocidal, contemporary conflicts – in which rape seems to have predominantly taken root. Unfortunately, the genocide framework of the ICC under the Rome Statute, and the preceding ad hoc criminal tribunals, is an unamended replica of the definition within the Genocide Convention of 1948. This definition completely fails to recognise rape within the continuum of genocide, due to its non-fatal consequences. Genocidal rape in the aforementioned conflicts therefore, under this framework cannot possibly be redressed or even prevented, unless an entire paradigm shift is instituted. The risk and result of this current conception is that violence directed against women during genocide, despite its disproportionate perpetration based on gender, is ignored, unable to be prosecuted, and thus, a lethal threshold is reached.*

*Just like the other elements of genocide, genocidal rape is designed to diminish a population. With no precedent or textual support, the Office of the Prosecutor in Akayesu had to make the unprecedented case that rapes are just as detrimental as murders during genocides. Like this decision, at the very least, the international genocide framework ought to recognise genocidal rape for what it is – a horrific crime where the suffering continues long after the actual crime. One cannot punish what one does not recognise – a gendered revision of genocide is therefore long overdue to rid the law of the prevalent gender-blindness to genocide.*

## **List of Abbreviations**

CAH	Crimes against Humanity
ICC	International Criminal Court
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
UN	United Nations

## **List of Cases**

### **International Criminal Court (ICC)**

*Prosecutor v Germain Katanga (Decision on the Confirmation of Charges)*, ICC-01/04 - 01/07, ICC, 30 September 2008.

*Prosecutor v Mathieu Ngudjolo Chui (Judgment)*, ICC-01/04-02/12, ICC, 18 December 2012.

*Prosecutor v Omar Hassan Ahmad al-Bashir (Decision on the Second Warrant of Arrest)*, ICC-02/05-01/09, ICC, 12 July 2010.

### **International Criminal Tribunal for Rwanda (ICTR)**

*Prosecutor v Jean-Paul Akayesu (Trial Judgment)*, ICTR 96-4-T, ICTR, 2 September 1998.

*Prosecutor v Kajelijeli (Judgment)*, ICTR 98-44 A-T, ICTR, 1 December 2003.

*Prosecutor v Kayishema and Ruzindana (Trial Judgment)*, ICTR-95-1-T, ICTR, 21 May 1999.

*Prosecutor v Semanza (Judgment)*, ICTR-97-20-T, ICTR, 15 May 2003.

*Prosecutor v Sylvestre Gacumbitsi (Trial Judgment)*, ICTR 2001-64-T, ICTR, 17 June 2004.

### **International Criminal Tribunal for the former Yugoslavia (ICTY)**

*Prosecutor v Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, ICTR, 10 December 1998.

*Prosecutor v Dragoljub Kunarac et al (Appeal Judgment)*, IT-96-23 & IT-96-23/1-A, ICTY, 12 June 2002.

*Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, ICTY, 22 February 2001.

*Prosecutor v Radislav Krstic (Appeal Judgment)*, IT-98-33-A 32, ICTY, 19 April 2004.

## **List of Legal Instruments**

*Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544.

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

*Elements of Crimes, Rome Statute of the International Criminal Court*, ICC Publication RC/11, 2011, ISBN No. 92-9227-232-2.

## CHAPTER 1: INTRODUCTION

### 1.1 Introduction

The Rome Statute of the International Criminal Court defines ‘genocide’ as:

“any of the following acts committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group”.<sup>1</sup>

The notion of genocidal rape arises from the historical use of rape and sexual violence during armed conflict. International criminal justice has over time recognised wartime rape and gender-based violence as a crime.<sup>2</sup> This is evidenced by the inclusion of rape as a crime against humanity and war crime in the Rome Statute as well as various academic discussions addressing the semantics of such charges.<sup>3</sup> The main problem arising from this is that the legal classification of such charges omits the genocidal character and function that rape plays during armed conflict. This leads to ineffective prosecution and redress of sexual violence cases at the International Criminal Court (ICC).<sup>4</sup>

Therefore, this study aims to establish the failure of the ICC’s classification of rape as a constituent element of genocide, as being the probable cause of the lack of proper prosecution and redress. To do so, chapter two will discuss the strategic use of rape to further genocide by

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<sup>1</sup> Article 6, *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544. This is a verbatim copy of the definition of genocide as laid out in the preceding *Convention on the prevention and punishment of the crime of genocide* of 1948.

<sup>2</sup> Caddick H, ‘Sexual violence in Darfur’ International Bar Association, 22 June 2015 -<<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUId=8BE55DC6-54C1-47ED-A7D8-3ACAF8F0822D>>- on 26 December 2019.

<sup>3</sup> Article 7 and 8(2)(e), *Rome Statute*, 17 July 1998; Caddick H, ‘Sexual violence in Darfur’.

<sup>4</sup> Rogers S, ‘Sexual violence or rape as a constituent act of genocide: Lessons from the ad hoc tribunals and a prescription for the international criminal court’ 48 *George Washington International Law Review* 265, 2016, 267.

seeking out the status quo of genocidal rape under the current framework of the Rome Statute, and in doing so, demonstrate the dual role women play in conflict zones . Thereafter, chapter three will take specific focus on the *Akayesu* trial after the Rwandan genocide, analysing the reasoning and effects of this decision on the Rwandan and Yugoslav ad hoc tribunals' position on genocidal rape.

This will preface the ensuing debate in chapter four concerning the reasons for the ICC's failure to prosecute genocidal rape on account of its absence within the Rome Statute and the exclusion of women as a protected group under Article 6 of the Statute. The study will then end with a concluding chapter summarising the discussion and findings of the paper and a summation of the recommendations on the same.

## **1.2 Background**

An insurmountable problem in historical and contemporary armed conflict zones is the atrocious commission of sexual violence. Sexual violence, especially systematic rape as characterised by conflict all over the world, and most specifically in African countries, is commonly used as a 'cheap and devastating weapon' for the warring groups to humiliate, dominate, instil fear in and relocate communities and ethnic groups.<sup>5</sup>

The role of women in conflict zones has arguably been of a dual nature: as a consequential victim of rape, and as a strategic tool of war. Firstly, women in conflict zones constantly find themselves as primary victims of rape in war, no matter their ethnicity or religious background.<sup>6</sup> Despite the prohibitions on rape, these crimes were generally tolerated in war and regarded as an accepted practice for conquering enemies, a 'morale booster' or 'reward' before or after battle.<sup>7</sup> World War II and the preceding Sino-Japanese war saw the Japanese Army hold Chinese and Korean women in camps and term them 'comfort women'- a mass

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<sup>5</sup> Caddick H, 'Sexual violence in Darfur' International Bar Association, 22 June 2015.

<sup>6</sup> Newsweek, 'Making female bodies the battlefield', at <https://www.newsweek.com/making-female-bodies-battlefield-192076>- on 20 March 2020.

<sup>7</sup> Coomaraswamy R, 'Report on Violence Against Women, Its Causes and Consequences', Commission of Human Rights, 54th Session, UN Doc. E/CN.4/1998/54, 1998, Provisional Agenda Item 9(a).

rape which became known as the Rape of Nanking.<sup>8</sup> These crimes were resultantly considered incidental by-products of armed conflict, targeting women and children.<sup>9</sup>

The less considered role is the strategic role women and rape play within conflict zones, which has developed since the second world war.<sup>10</sup> This role had the plight of ‘comfort women’ becoming an organised, systematic attempt to destroy entire populations, while destroying a society's cultural, traditional and religious integrity.<sup>11</sup> In this instance, rape was used as a deliberate tactic of war, a way of demoralising and humiliating the enemy and destabilising entire communities.<sup>12</sup> The strategic importance of this was tied to the lingering perceptions that rape is a crime against the man to whom a woman belongs, whether the husband or the father.<sup>13</sup> This substantiates the dual nature of wartime rape and establishes a likeness between the characteristics of international crimes of genocide and rape as they currently exist.

The ICC, however, is currently in a state of legislative limbo concerning the prosecution of rape as genocide, which may largely be the cause of its failure in the redress of sexual violence crimes. Rape and sexual violence are excluded from Article 6 of the Rome Statute’s definition of genocide as well as the elements of the crime.<sup>14</sup> This precludes the ICC from issuing genocide charges based on acts of sexual violence. However, in 2010, the ICC issued its first warrant of arrest for sexual violence committed in furtherance of the crime of genocide in

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<sup>8</sup> Newsweek, ‘Making female bodies the battlefield’, at <https://www.newsweek.com/making-female-bodies-battlefield-192076>- on 20 March 2020.

<sup>9</sup> Askin K, ‘Prosecuting wartime rape and other gender-related crimes under international law: Extraordinary advances, enduring obstacles’ 21 *Berkeley Journal of International Law* 2, 2003, 297.

<sup>10</sup> Kivlahan C and Ewigman N, ‘Rape as a weapon of war in modern conflicts: Families and communities are victims, as well as individuals’ 341 *British Medical Journal* 7771, 2010, 468.

<sup>11</sup> Newsweek, ‘Making female bodies the battlefield’, at <https://www.newsweek.com/making-female-bodies-battlefield-192076>- on 20 March 2020.

<sup>12</sup> Bellamy C, ‘Women in armed conflict at extreme risk of sexual violence’ UNICEF Press Release, 25 November 2004 at [https://www.unicef.org/media/media\\_24290.html](https://www.unicef.org/media/media_24290.html)>- accessed on 21 July 2020.

<sup>13</sup> Sharlack L, ‘Rape as genocide: Bangladesh, the former Yugoslavia, and Rwanda’ 22 *New Political Science* 1, 2000, 90.

<sup>14</sup> Article 6, *Rome Statute*, 17 July 1998; Article 6, *Elements of Crimes, Rome Statute of the International Criminal Court, ICC Publication RC/11, 2011, ISBN No. 92-9227-232-2*.

Darfur against Sudanese President Omar al-Bashir.<sup>15</sup> The warrant contains counts of genocide, noting rape as a component of his ‘genocidal policy’.<sup>16</sup>

The conflict therefore arises between the ICC and the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICC has been widely criticised for failure and ineffective prosecution of sexual violence cases.<sup>17</sup> The two ad hoc tribunals however have been instrumental in redefining and condemning sexual violence crimes internationally.<sup>18</sup> Before the judgements rendered by the two tribunals since 1993 and 1994, rape was still considered a by-product of war and thus inevitable.<sup>19</sup>

The ICTR, despite having replicated the Rome Statute to formulate its own, was the first body to go beyond the textual confines of the definition by recognising sexual violence as a constituent act of genocide.<sup>20</sup> The case of *Prosecutor v Akayesu* marked the first successful legal prosecution of rape and other forms of sexual violence as instruments of genocide alongside crimes against humanity (CAH), despite not being envisioned by the Statute of the Tribunal.<sup>21</sup>

The issuance of the second al-Bashir warrant poses great questions upon the ICC since no principle of precedent exists with respect to the Court *vis a vis* the ad hoc tribunals. The situation in Darfur is one of the more egregious cases of ethnically targeted rape in Africa today, with over 200 women and girls having been raped by Sudanese government forces by 2015.<sup>22</sup> The legislative framework of the ICC is said to be in dire need of reconceptualisation

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<sup>15</sup> Rogers S, 'Sexual violence or rape as a constituent act of genocide: Lessons from the ad hoc tribunals and a prescription for the international criminal court', 268.

<sup>16</sup> *Prosecutor v Omar Hassan Ahmad al-Bashir (Decision on the Second Warrant of Arrest)*, ICC-02/05-01/09, ICC, 12 July 2010, p 6.

<sup>17</sup> Mubalama P and Nzigire E, 'ICC still facing rape case challenges' Institution for War and Peace Reporting, 8 August 2011 at <<https://iwpr.net/global-voices/icc-still-facing-rape-case-challenges>>- on 21 July 2020.

<sup>18</sup> Adams A, 'The legacy of the international criminal tribunals for the former Yugoslavia and Rwanda and their contribution to the crime of rape' 29 *European Journal of International Law* 3, 2018, 751.

<sup>19</sup> Adams A, 'The legacy of the international criminal tribunals for the former Yugoslavia and Rwanda and their contribution to the crime of rape', 751.

<sup>20</sup> Rogers S, 'Sexual violence or rape as a constituent act of genocide: Lessons from the ad hoc tribunals and a prescription for the international criminal court', 273.

<sup>21</sup> Askin K, 'Prosecuting wartime rape and other gender-related crimes under international law: Extraordinary advances, enduring obstacles', 318.

<sup>22</sup> Caddick H, 'Sexual violence in Darfur' International Bar Association, 22 June 2015.

in terms of genocidal rape. It has been shamefully surpassed by special international tribunals in this regard, which still find themselves winning the battle between justice and judicial activism.

### **1.3 Problem statement**

The textual definition of genocide in ICL under Article 6 of the Rome Statute does not provide for rape and sexual violence as constituent elements of the crime of genocide. This causes the laxity in treatment of sexual violence crimes by the ICC in investigation and prosecution alike. Additionally, women are not envisioned as a ‘protected group’ capable of destruction in whole or part through rape and other sexual crimes as per the definition of genocide. This being the case, the ICC remains legislatively precluded from effectively investigating and prosecuting rape and sexual violence acts, making redress for victims either prolonged or impossible.

### **1.4 Hypothesis**

Rape and sexual violence are used strategically by parties in armed conflict to achieve systemic, crippling and tactical aims in furtherance of the crime of genocide due to the central and fundamental significance of women in society and specifically in armed conflict.

### **1.5 Research objectives**

1. To analyse the status quo and duality of rape in furthering the crime of genocide under the framework of the Rome Statute.
2. To investigate the question of genocidal rape in the Rwandan genocide case study as dealt with by the International Criminal Tribunal of Rwanda.
3. To establish the causal relationship between the failure of redress of genocidal rape and the lack of its classification as a constituent element of genocide.

### **1.6 Research questions**

1. Does the duality of genocidal rape meets the standard laid out under the current genocide framework of the Rome Statute?
2. Did the ICTR consider genocidal rape of strategic importance in furthering the crime of genocide during the Rwandan genocide?
3. Is there a causal link between the failure of the ICC in the prosecution of genocidal rape and the lack of the Rome Statute’s inclusion of rape within the definition of genocide?

## **1.7 Justification of the study**

Michel Foucault argues that sexuality cannot be the object of punishment, and even if so, should only be punished as physical violence or an act of aggression.<sup>23</sup> It follows, that rape and sexual violence are classified as CAH and war crimes based on the perspective of harm inflicted on the victim alone. However, there is need to re-evaluate the classification of rape based on the second strategic role these crimes play as previously discussed. Only then can the necessity to include rape and sexual violence as constituent elements of genocide be established, and appropriate means for reparation and redress recommended.

## **1.8 Significance of the study**

As it stands, the concept of women in wartime is greatly impacted by the male dominance in society. However, the destabilising role of raping women on society is the greater systematic importance of this vice. This study will therefore aid in reshaping public opinion on the gravity of genocidal rape in the international sphere. Additionally, this study will benefit the international community in reconceptualising wartime sexual violence and hopefully nudging much needed amendment as the definition and elements of genocide. Finally, this study aims to aid victims of contemporary conflicts in seeking the best form of justice for women for genocidal rape, either through the existing criminal or proposed transitional justice mechanisms.

## **1.9 Theoretical framework**

This paper seeks to test the abovementioned hypothesis using two main theories: the strategic rape theory and the feminist rape theory.

### **1.9.1 Strategic rape theory**

The strategic rape theory, as posited by Gottschall, is broadly defined as ‘rape tactically executed by soldiers to achieve larger strategic objectives’.<sup>24</sup> Brownmiller premises this theory on wartime Yugoslavia, underscoring its relevance on the fact that rape in war is considered merely another ordinance like bombs or propaganda tactics which militia use to obtain strategic

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<sup>23</sup> Henderson H, ‘Feminism, Foucault, and rape: A theory and politics of rape prevention’ 22 *Berkeley Journal of Gender, Law and Justice*, 2007, 225.

<sup>24</sup> Gottschall J, ‘Explaining wartime rape’ 41 *The Journal of Sex Research* 2, 2004, 131.

objectives.<sup>25</sup> It is undoubted that strategic rape for military advantage is perpetrated in contemporary armed conflicts as the means to accomplish genocide, ethnic cleansing, forced impregnation, political intimidation and demoralisation.<sup>26</sup> This leads to advocates of the strategic rape theory referring to it as ‘genocidal rape’, as it is purposively designed to annihilate a people and culture. Through the use of women as weapons, rape is used as a strategy, a sanctioned and systematic means of achieving these specific political objectives of genocide.<sup>27</sup> Therefore, the relevance of the theory to this study is to establish the ultimate objective the military forces seek by using rape, not just to victimise women, but with strategic and systematic effect.

However, the contradistinction between this and the feminist theory of rape lies in their outcomes. While this theory emphasises the use of genocidal rape to destroy the population by destroying the enemy, the feminist theory below is seen to focus on the broad notions of dominance and individual drives.

### 1.9.2 Feminist rape theory

This theory attributes genocidal rape to ‘the exertion of dominance by man over a woman’, eventually manifesting in sexual violence during wartime.<sup>28</sup> Additionally, Foucault’s *Feminism and Power* theory suggests that the notion of power revolves around sexuality and as such, women are the primary target of techniques of such disciplinary power.<sup>29</sup> Discourses on power and feminism view the feminine body as weak and violable, but only when the victim’s experience of the rape is the grounding element.<sup>30</sup>

In this regard, rape is seen as a consequence of war, and the dominance theory greatly lays foundation for the victimhood of women. War is notably a ‘fundamentally gendered phenomenon’ given that typically, it is men who rape women, as a member of one group as against that of another.<sup>31</sup> Despite the various sides and reasons that men may fight for, in one

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<sup>25</sup> Gottschall J, ‘Explaining wartime rape’, 131.

<sup>26</sup> Benshoof J, ‘The other red line: The use of rape as an unlawful tactic of warfare’ 5 *Global Policy* 2, 2014, 147.

<sup>27</sup> Farwell N, ‘War rape: New conceptualisations and responses’ 19 *Affilia* 4, 2004, 393.

<sup>28</sup> Gottschall J, ‘Explaining wartime rape’, 130.

<sup>29</sup> Henderson H, ‘Feminism, Foucault, and rape: A theory and politics of rape prevention’, 229.

<sup>30</sup> Henderson H, ‘Feminism, Foucault, and rape: A theory and politics of rape prevention’ 229.

<sup>31</sup> Nordstrom C, ‘Rape: Politics and theory in war and peace’ 11 *Australian Feminist Studies* 23, 1996, 150.

sense, genocidal rape makes them all warriors on behalf of their gender, since the enemy is the woman.<sup>32</sup>

However, the notion of power also has great impact in rape prevention. Foucault argues that since the feminine body is the surface upon which the sexual hierarchical culture has been built, it is only upon the same that the tenets may be fought.<sup>33</sup> Consequently, when women's bodies are defined as a powerful tool of counteracting violence, the very power structures that support rape would be crippled, creating a duality within these theories as well.<sup>34</sup>

### 1.10 Literature review

In *Against Our Will*, Brownmiller presents an instrumental feminist approach regarding men in conflict zones towards rape. She describes rape as not being bound by the definition of which wars are 'just' and 'unjust'- with rape regrettably being used as a way to relieve the boredom of American soldiers in the case of the first World War.<sup>35</sup> Rape and sexual violence crimes became inevitable and unfortunate by-products of war, likened to civilian casualties of bombing in war, necessary for the greater good.<sup>36</sup> According to Brownmiller, rape was used against women in wartime and in 'peace'.<sup>37</sup> However, in wartime, rape was not only an attack on women *as women*, but as part of a wholesome attack against the enemy.<sup>38</sup> She argues that wartime rape was primarily a conquest of the victorious side asserting dominance on the defeated enemy's women.<sup>39</sup> Rape in warfare is considered to be an intoxication of triumph, but also to have a military effect after the fact. This secondary effect is the intimidation and demoralisation of the victim's side.<sup>40</sup> Though no party admits to having used rape strategically, Brownmiller argues that rape is considered by the people of a defeated nation as part of the

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<sup>32</sup> Gottschall J, 'Explaining wartime rape', 131.

<sup>33</sup> Henderson H, 'Feminism, Foucault, and rape: A theory and politics of rape prevention', 229.

<sup>34</sup> Henderson H, 'Feminism, Foucault, and rape: A theory and politics of rape prevention', 230.

<sup>35</sup> Brownmiller S, *Against our will: Men, women, rape*, Fawcett Columbine, New York, 1993, 32.

<sup>36</sup> Brownmiller S, *Against our will: Men, women, rape*, 32.

<sup>37</sup> Buss DE, 'Rethinking rape as a weapon of war' 17 *Feminist Legal Studies*, 2009, 148.

<sup>38</sup> Buss DE, 'Rethinking rape as a weapon of war', 148.

<sup>39</sup> Brownmiller S, *Against our will: Men, women, rape*, 35.

<sup>40</sup> Brownmiller S, *Against our will: Men, women, rape*, 37.

enemy's conscious effort to destroy them- 'vivid proof of victory for one and loss and defeat for the other.'<sup>41</sup>

Historically, the use of sexual violence in conflict was greatly for the purpose of "humiliating, subordinating, or emotionally destroying entire communities; to cause chaos and terror, make people flee and to ensure the destruction or removal of an unwanted group by forcible impregnation by a member of a different ethnic group."<sup>42</sup> Short presents the dehumanising view of a woman in war in terms of functionality, utility and group benefit for the conflicting parties.<sup>43</sup> He claims the necessity of this view in categorising the crime, since it allows to take into consideration both the intent of the perpetrators and the result of the sexual violence.<sup>44</sup> High regard is also placed on the intent, through rape, to destroy an ethnic group, despite the individual nature of each victim's experience, thus the stress for genocidal analysis.<sup>45</sup> He also emphasises the point made by Fitzpatrick, that the victims of this tool of war are more likely to be civilians than soldiers, women civilians.<sup>46</sup>

Rogers admits that the ICC's legislative framework is in need of amendments in order to improve its ability to prosecute genocidal rape and sexual violence.<sup>47</sup> The Western criminal justice system remains slow moving and claims dealing with wartime sexual violence are automatically locked out of the jurisdiction of current transitional justice mechanisms, leaving myriads of unresolved cases.<sup>48</sup> Ultimately, the ICC is reluctant to charge genocidal rape as the Statute and other documents offer minimal textual support, a lack of which, causes great

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<sup>41</sup> Buss DE, 'Rethinking rape as a weapon of war', 148.

<sup>42</sup> Short JM, 'Sexual violence as genocide: The developing law of the international criminal tribunals and the international criminal court' 8 *Michigan Journal of Race and Law* 503, 2003, 504.

<sup>43</sup> Askin K, 'Prosecuting wartime rape and other gender-related crimes under international law: Extraordinary advances, enduring obstacles'

<sup>44</sup> Short J, 'Sexual violence as genocide: The developing law of the international criminal tribunals and the international criminal court', 511.

<sup>45</sup> Short J, 'Sexual violence as genocide: The developing law of the international criminal tribunals and the international criminal court' 527.

<sup>46</sup> Fitzpatrick B, *Tactical rape in conflict: International Recognition and Response*, Bristol University Press, 2016, 50.

<sup>47</sup> Rogers S, 'Sexual violence or rape as a constituent act of genocide: Lessons from the ad hoc tribunals and a prescription for the international criminal court', 267.

<sup>48</sup> Corey A and Joireman S, 'Retributive justice: The Gacaca courts in Rwanda' 103 *African Affairs* 410, 2004, 73.

injustice before a bench practicing judicial restraint.<sup>49</sup> The fate of genocidal rape currently lies in the hands of a purposive interpretation of the law, since rape in war time is heavily used to further the functions and purpose of genocide.

In a comment on the *Akayesu Judgement* of the ICTR, MacKinnon, centralises the definition of rape internationally for its analytically correct categorisation. She asserts that internationally, 'illegal rape' revolves around force and unwantedness in sexual intercourse giving rise to coercion or non-consent definitions – whereby coercion entails the exercise of power domination and violence by the aggressor.<sup>50</sup> Contrarily, non-consent definitions envision rape as a crime of passion, one against the woman.<sup>51</sup> MacKinnon looks at coercion to define genocidal rape internationally, but analysing the surrounding collective realities of group membership, political forces, ethnical backgrounds among others.<sup>52</sup> Fortunately or unfortunately, these surrounding realities informing the more susceptible or vulnerable to rape, with maximum benefit as postulated by Short, happen to be the same grounds the Rome Statute presents as grounds for culpability for genocide.<sup>53</sup>

Presently, sexual violence as a crime against humanity and a war crime is greatly premised on the property theory of rape as earlier seen, as well as the crime being one of passion. However, MacKinnon categorically refutes this claim, stating that if sex was being engaged in simply for sexual gratification, for instance, it would predictably not be one-sidedly imposed on one ethnic group by another, as was the case in Bosnia and Croatia, as well as Tutsi women in Rwanda.<sup>54</sup> She therefore claims that the legislative text of the ICC, as well as shortcomings of the *Akayesu judgement* provide a great leeway for wartime rapists to walk away from their crimes with no one to answer to.<sup>55</sup>

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<sup>49</sup> Rogers S, 'Sexual violence or rape as a constituent act of genocide: Lessons from the ad hoc tribunals and a prescription for the international criminal court', 293.

<sup>50</sup> MacKinnon CA, 'Defining rape internationally: A comment on Akayesu' 44 *Columbia Journal of Transnational Law* 3, 2006, 941.

<sup>51</sup> MacKinnon C, 'Defining rape internationally: A comment on Akayesu', 941.

<sup>52</sup> MacKinnon C, 'Defining rape internationally: A comment on Akayesu', 956.

<sup>53</sup> Article 6, *Rome Statute*, 17 July 1998.

<sup>54</sup> MacKinnon C, 'Defining rape internationally: A comment on Akayesu', 956.

<sup>55</sup> MacKinnon C, 'Defining rape internationally: A comment on Akayesu', 958.

On the other hand, De-Brouwer debunks the notion that victims of wartime sexual violence wish for confidentiality measures to protect their identity.<sup>56</sup> After the Rwanda genocide, the *Gacaca* courts allowed victims to participate in sentencing and gave them a sense of justice and reconciliation with their attackers.<sup>57</sup> The public humiliation and nature of their crimes however defeats the purpose of closed sessions and anonymous testimony proceedings of the ICC's justice mechanism.<sup>58</sup> De-Brouwer highlights the importance of understanding sexual violence in armed conflict in order to enable its effective prosecution and redress for victims.<sup>59</sup> The investigation and prosecution of sexual violence is significantly less than other international crimes since prosecutors and investigators shy away from sexual violence evidence, causing under documentation and under inclusion in cases.<sup>60</sup>

Marcus agrees, stating that the gathering of evidence on sexual violence crimes poses no extra burden when compared to other international crimes.<sup>61</sup> Therefore, the key to proper prosecution of sexual violence crimes lies in formulating a plan that is open to evidence of the crimes that relies on a checklist of the elements to be proven.<sup>62</sup> The current body of literature primarily focuses on the role of rape from the perspective of dominance over women, and the exercise of power by the victors in war, justifying its charge as a war crime. Though present, there exists little analysis and research on the necessity for the prosecution of sexual violence as a constituent element of genocide as by the ICC, which is what this study aims to address.

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<sup>56</sup> De-Brouwer, A, 'The importance of understanding sexual violence in conflict for investigation and prosecution purposes' 48 *Cornell International Law Journal* 3, 2015, 652.

<sup>57</sup> De-Brouwer A and Hon Chu S.K, 'Gacaca courts in Rwanda: 18 years after the genocide, is there justice and reconciliation for survivors of sexual violence?' *IntLawGrrls*, 7 April 2012 at <<http://www.intlawgrrls.com/2012/04/gacaca-courts-in-rwanda-18-years-after.html>> on 25 July 2020.

<sup>58</sup> De-Brouwer, A, 'The importance of understanding sexual violence in conflict for investigation and prosecution purposes', 654.

<sup>59</sup> De-Brouwer, A, 'The importance of understanding sexual violence in conflict for investigation and prosecution purposes', 641.

<sup>60</sup> De-Brouwer, A, 'The importance of understanding sexual violence in conflict for investigation and prosecution purposes', 661-662.

<sup>61</sup> Marcus M, 'Investigation of crimes of sexual and gender-based violence under international criminal law' in De Brouwer A et.al (eds.) *Sexual violence as an international crime: Interdisciplinary approaches*, Intersentia, United Kingdom, 2013, 211.

<sup>62</sup> De-Brouwer, A, 'The importance of understanding sexual violence in conflict for investigation and prosecution purposes', 662.

### **1.11 Research methodology**

This research will most significantly be based on qualitative and doctrinal research. Information for this purpose will be obtained primarily from written law, books, journal articles, legal commentary and other credible publications available on the topic. Factual information may be obtained from reporting sources such as reputable newspaper publishers. Considering the ongoing nature of the problem, various judicial decisions and opinions on the same will be used to analyse courts' dispositions or lack thereof on each of the issues presented.

### **1.12 Limitations**

The main limitation to this study, albeit minor, may be the discrepancies in numbers reported in various areas from different sources. This is due to the fact that most international rape cases and statistics are factual, sourced from various authors' writings, and many remain unreported due to the stigmatisation and reluctance of victims to testify. The detection of rape and sexual violence cases is greatly dependent on focused studies on individual countries, and therefore there exists unified international reporting mechanism, which is one of the problems this paper aims to discuss.

This challenge will however be overcome as much as possible by using as accurately as possible, an average of the same figures if any throughout the study if need be, to avoid discrepancies in the sources available.

A secondary limitation may be the wide bank of literature available on the problem, presenting various perspectives of it. The only ensuing challenge may be the time to analyse as many perspectives as possible in order to come up with an accurate presentation of the current position. However, the author intends to use the allocated time as best as possible to encompass the widest possible views in the currently available body of literature.

### **1.13 Chapter breakdown**

Chapter one will introduce the research topic, presenting a background to the study enunciating the statement of the problem, hypothesis, research questions, methodology and significance of the study to the existing legal system.

Chapter two will discuss the status quo of rape and sexual violence as it stands, looking at the strategic duality of rape and women in conflict zones with respect to the genocidal framework under Article 6 of the Rome Statute.

Chapter three will discuss the practical realities of genocidal rape as theoretically discussed in the preceding chapter, using the case study of the Rwandan genocide, as discussed by the International Criminal Tribunal of Rwanda. This chapter will look at how the instances of rape and sexual violence gave effect to the furtherance of the crime of genocide, and the possible lessons to be borrowed by the ICC from the Rwandan Tribunal.

Chapter four will then briefly probe the possibility of a causal relationship between the failure of the ICC in prosecuting genocidal rape and two critical weaknesses of the legislative framework of the Rome Statute: the exclusion of rape as a constituent element of genocide, and the exclusion of gender as a protected group under Article 6. Given these weaknesses, this chapter aims at proposing possible amendments to remedy this situation.

Chapter five will be a review of the preceding chapters, summarising the findings of the study, providing a succinct account of the aforementioned recommendations for future genocidal rape prosecution.

## CHAPTER 2: THE STATUS QUO AND DUALITY OF GENOCIDAL RAPE

### 2.1 Introduction

Genocide does not come from nowhere, nor does rape as a ready and convenient tool of it.<sup>63</sup> Sexual atrocities in war are commonly discussed as *rape* or as *genocide*, not as what they are, *rape as genocide*; that is, rape directed toward women outside their innate protections: nationality, ethnicity, race or religion.<sup>64</sup> This evidently draws from the property theory of rape – with traditionally patriarchal narratives treating sexual violence in conflict as merely an ‘inevitable by-product’ rather than a tactic of the conflict itself.<sup>65</sup> The tactical deployment of sexual assault has been the greatest distinguishing factor in which rape, enforced prostitution and pregnancies have been utilised as a systematic means of destroying entire populations.<sup>66</sup> Historically, rape may not have been used genocidally, arguably resulting in the disparity that currently lies in how this crime is enunciated internationally, conventionally as a war crime or a crime against humanity.<sup>67</sup> However, since the mid 1990’s, an examination of recent conflicts indicates that this is how it is being deployed in modern conflict.<sup>68</sup> Therefore, understanding the integrality of linking sexual violence and genocide in international criminal jurisprudence requires an examination of how rape functions as a method of genocide.<sup>69</sup>

This chapter will consider the concept of genocidal rape in two limbs: the status quo of genocidal rape in ICL and the duality of rape in conflict zones. The discussion will analyse the current paradigm of genocide within the Rome Statute against a charge of the crime of genocidal rape. It shall be posited that in the crime of genocide, the mental requirement of genocidal intent carries the greater weight in substantiating such charges. Further, this chapter

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<sup>63</sup> MacKinnon C, ‘Rape, genocide, and women’s human rights’ 17 *Harvard Women’s Law Journal* 5, 1994, 8.

<sup>64</sup> MacKinnon C, ‘Rape, genocide and women’s human rights’, 8; The protected groups with respect to the crime of genocide are listed under Article 6, *Rome Statute*, 17 July 1998.

<sup>65</sup> McCausland C, ‘From tolerance to tactic: Understanding rape in armed conflict as genocide’ 25 *Michigan State International Law Review* 1, 2017, 150.

<sup>66</sup> Tompkins TL, ‘Prosecuting rape as a war crime: Speaking the unspeakable’ 70 *Notre Dame Law Review* 4 1995, 866.

<sup>67</sup> Ellis M, ‘Breaking the silence: Rape as an international crime’ 38 *Case Western Reserve Journal of International Law* 2, 2007, 246.

<sup>68</sup> McCausland C, ‘From tolerance to tactic: Understanding rape in armed conflict as genocide’, 160.

<sup>69</sup> Short J, ‘Sexual violence as genocide: The developing law of the International Criminal Tribunals and the International Criminal Court’, 509.

shall consider the duality of rape and women in conflict zones, considering both their victimisation and weaponisation in furthering the crime of genocide, and thereafter conclude.

## 2.2 The status quo of genocidal rape in international law

A criminal law analysis of any offence begins from the elementary distinction between the physical element (*actus reus*) and mental intent (*mens rea*).<sup>70</sup> The international definition of genocide allows for such an analysis by clearly separating the two elements as posited by the Rome Statute under Article 6, restated here for clarity.

“any of the following acts committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.<sup>71</sup>

To prosecute the crime of genocide, the prosecution must prove the specific material genocidal acts listed in the five paragraphs under Article 6, as well as establish the accused’s specific criminal intent or ‘guilty mind’.<sup>72</sup>

### 2.2.1 Actus reus

The genocide paradigm in ICL as enumerated under Article 6 provides an exhaustive list of acts constituting the crime of genocide, though apparent within the articles are elements of the *mens rea*.<sup>73</sup> Given the principle of legality, the drafting committee of the Genocide Convention, which the Rome Statute borrows from, opted not to enlarge the list of acts of genocide and to retain its exhaustive nature, despite contrary recommendations to make it non-exhaustive.<sup>74</sup>

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<sup>70</sup> Schabas WA, *Genocide in international law: The crime of crimes*, 2<sup>nd</sup> ed, Cambridge University Press, New York, 2009, 172.

<sup>71</sup> Article 6, *Rome Statute*, 17 July 1998.

<sup>72</sup> Schabas W, *Genocide in international law: The crime of crimes*, 172.

<sup>73</sup> Schabas W, *Genocide in international law: The crime of crimes*, 176.

<sup>74</sup> UN International Law Commission, ‘Report of the Commission to the General Assembly on the Work of Its Forty-Third Session’, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), 1991, p. 102, para. (2). According to the

Given the existing framework, the only actus reus requirement is that the prohibited genocidal acts must simply fall within one or more of the five sub-elements listed in the genocide definition.<sup>75</sup> However, none of the leading instruments in international criminal law, the primary sources on the law of genocide, mentions rape specifically as an act of genocide.<sup>76</sup>

As legal and academic discourse as well as jurisprudence continues to prove, charging rape as an international crime is a very modern proposition, let alone as genocide. The only positive advancement towards this only became evident when the Preparatory Commission for the ICC recognised that ‘rape may constitute genocide in the same way as any act, provided that the criteria of the crime of genocide are met’.<sup>77</sup> The result – the only legislative recognition of genocidal rape resides in a footnote to the Elements for Article 6(b) of the Statute, stating that ‘this conduct may include, but is not necessarily restricted to, acts of torture, *rape*, sexual violence or inhuman or degrading treatment’.<sup>78</sup>

The reasoning that rape can be an act of genocide has not however, agitated much disagreement.<sup>79</sup> The general acceptance of this reasoning is not based on legislative clarity, which it should be, but on the deductive reasoning deployed by the ad hoc tribunals such as the ICTR’s Trial Chamber, whose reasoning in this area is arguably unassailable as shall be discussed in a later chapter.<sup>80</sup> Ground-breaking efforts herein were evidently made in the ICTR’s decisions such as the *Akayesu* and *Kayishema* judgments, which successfully attempted an expansion of the current genocide paradigm to encompass genocidal rape.<sup>81</sup> However, the lack of legislative clarity is the very reason these gender-based crimes in the *Akayesu*

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drafting committee, the principle of *nullum crimen sine lege* and the need not to stray far from a text widely accepted by the international community, an exhaustive list was the most suitable list for the constituent acts of genocide.

<sup>75</sup> McCausland C, ‘From tolerance to tactic: Understanding rape in armed conflict as genocide’, 178.

<sup>76</sup> Eboe-Osuji C, *International law and sexual violence in armed conflicts*, Martinus Nijhoff Publishers, Boston, 2012, 159.

<sup>77</sup> Working Group for Elements of Crimes Coordinator, ‘Suggested Comments Relating to the Crime of Genocide’ UN Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/1999/WGEC/RT.3, 1999 - <<https://digitallibrary.un.org/record/1491506?ln=en>> on 30 November 2020.

<sup>78</sup> Article 6(b), *Elements of Crimes*, ICC, 2011, at footnote 3.

<sup>79</sup> Eboe-Osuji C, *International law and sexual violence in armed conflicts*, 159.

<sup>80</sup> Eboe-Osuji C, *International law and sexual violence in armed conflicts*, 159.

<sup>81</sup> *Prosecutor v Jean-Paul Akayesu (Trial Judgment)*, ICTR 96-4-T, International Criminal Tribunal for Rwanda, 2 September 1998; *Prosecutor v Kayishema and Ruzindana (Trial Judgment)*, ICTR-95-1-T, International Criminal Tribunal for Rwanda, 21 May 1999.

indictment were not prosecuted until midway through the trial.<sup>82</sup> It is in fact this ICTR's decision that set in motion the events that culminated in the Elements of Crime footnote under Article 6(b).

Nevertheless, each of the sub-elements of genocide, while distinct, are also interrelated: a single act of rape, let alone rape on a mass scale, may satisfy multiple elements of the definition of genocide.<sup>83</sup> Rape in armed conflict, in its many incarnations, has the potential to satisfy every element of genocide.<sup>84</sup> The analysis, however, seeks to definitively propose that rape is also pervasive enough to individually constitute an element or prohibited act of genocide.

### 2.2.2 *Mens rea: genocidal intent*

Despite the historically dominant feature of genocide being killing, the definition indisputably covers other violent acts such as serious bodily and mental harm, provided they are carried out with such genocidal intent.<sup>85</sup> The crime of genocide is distinguishable from other international crimes not solely by the scope of the acts, but rather by the intent of the perpetrators.<sup>86</sup> As previously established, Article 6 of the Rome Statute neatly separates the material acts that constitute genocide, and the mental element of intent to commit genocide. Therefore, the focus of this section is to consider the mental element of the crime of genocide and the protected groups therein under the chapeau of Article 6.

Establishing genocide requires proving a specific intent (*dolus specialis*) of the acts, to destroy in whole or in part, a national, ethnic, racial or religious group.<sup>87</sup> Based on the current drafting of the genocide framework, international law presupposes the purpose of genocide as the destruction of any of these protected groups, and not necessarily to commit the underlying offence, as rape would be.<sup>88</sup> This engenders continuing controversy as to the protected groups

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<sup>82</sup> *Prosecutor v Akayesu (Trial Judgment)*, ICTR, para 447.

<sup>83</sup> McCausland C, 'From tolerance to tactic: Understanding rape in armed conflict as genocide', 189.

<sup>84</sup> McCausland C, 'From tolerance to tactic: Understanding rape in armed conflict as genocide', 190.

<sup>85</sup> Jarvis M and Salgado EM, 'Future challenges to prosecuting sexual violence under international law: Insights from ICTY practice' in De Brouwer A et.al (eds.) *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Intersentia, United Kingdom, 2013, 118.

<sup>86</sup> Nowrojee B, *Shattered lives: Sexual violence during the Rwandan genocide and its aftermath*, Human Rights Watch/Africa, 4 September 1996, 20.

<sup>87</sup> Article 6, *Rome Statute*, 17 July 1998.

<sup>88</sup> Short JM, 'Sexual violence as genocide: The developing law of the international criminal tribunals and the international criminal court', 510.

under Article 6, since the crime must be perpetrated against a person or people because of their membership in a protected group, as a part of an overall objective to destroy the group.<sup>89</sup> This is the reason for consistent advocacy for and against the addition of gender to the list of protected groups within the definition of genocide.<sup>90</sup> In furthering this debate, MacKinnon adds that,

“Attacks on women, it seems, cannot define attacks on a people. If they are gendered attacks, they are not ethnic; if they are ethnic attacks, they are not gendered. One cancels the other. But when rape is a genocidal act, as it is here, it is an act to destroy a people. What is done to women defines that destruction. Also, aren't women a people?”<sup>91</sup>

However, because none of the forms of genocide are gender-specific under the current paradigm, it may only be conceivable that rape could singularly qualify as genocide only once the requisite intent has been established.<sup>92</sup> The systematic incidence with which rape continues to take place in conflict, coupled with the genocidal intent it is committed with, brings this practice within scrutiny as a genocidal element.<sup>93</sup>

Despite the debate about the acts that presently fall within the ambit of the definition of genocide, this controversy still does not perturb the conception of rape as genocide.<sup>94</sup> Of greatest significance to the question of genocidal rape is the proper degree of genocidal intent, which the debate on the acts does not engage itself in.<sup>95</sup> The proper degree of intent is as examined based on the requirements of Article 6 as reaffirmed by Article 30 of the Rome Statute which provides for both intent and knowledge of the crime.<sup>96</sup>

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<sup>89</sup> Russel-Brown SL, ‘Rape as an act of genocide’, 21 *Berkeley Journal of International Law* 2, 363. Russel-Brown discusses genocidal rape as a crime based on the intersectionality of gender and ethnicity. Here, the group itself would be the actual target of the individualised crime, and not a single person or even several people who happen to constitute a small fraction of the group.

<sup>90</sup> Askin K, *War Crimes Against Women: Prosecution in international war crimes tribunals*, Martinus Nijhoff Publishers, The Hague, 1997, 341-43.

<sup>91</sup> MacKinnon C, ‘Rape, genocide and women’s human rights’, 10.

<sup>92</sup> McCausland C, ‘From tolerance to tactic: Understanding rape in armed conflict as genocide’, 163.

<sup>93</sup> McCausland C, ‘From tolerance to tactic: Understanding rape in armed conflict as genocide’, 152.

<sup>94</sup> Eboe-Osuji C, *International law and sexual violence in armed conflicts*, 174.

<sup>95</sup> Eboe-Osuji C, *International law and sexual violence in armed conflicts*, 174.

<sup>96</sup> Article 30, *Rome Statute*, 17 July 1998 - reaffirms the specific intent of the crime of genocide, providing for criminal liability where the material elements of the crime are committed with intent and knowledge of the circumstances and consequences of the crime.

Based on these two approaches on the *mens rea* of genocide, Kress has contrasted the ‘purpose-based’ approach under Article 6 against the ‘knowledge-based’ approach.<sup>97</sup> Though less acclaimed since it does not feature in the chapeau of Article 6, the knowledge-based approach is more apt in approaching genocidal rape. This is because it directs the inquiry towards the plan or policy of the State’s combatants and highlights the collective dimension of the crime, as opposed to the prevailing purpose-based approach on its own, which results in a focus on individual’s personal motives.<sup>98</sup> Such an understanding of genocidal intent therefore fulfils one of the main functions of ICL, which serves ‘*to express the degree of wrongdoing, not simply the fact of wrongdoing*’.<sup>99</sup>

Effectively, Nowrojee posits, based on the Rwandan genocidal rapes, intent must be proven with respect to the specific categories of acts.<sup>100</sup> Any absence of legislative clarity therefore leads to ineffective prosecution and strenuous deductive reasoning by courts of sexual violence as genocide despite evident patterns of the crime in accomplishing such intent.<sup>101</sup> In this regard, the ICTY Appeals Chamber in *Krstic* enunciated that ‘the offence of genocide does not require proof that the accused chose the most efficient method to accomplish their objective of destroying the targeted part,’ evidently placing high regard to the intent of genocidal perpetrators.<sup>102</sup> Proof is only required as to the acts as listed in the Statute, and the specific intent as analysed herein.<sup>103</sup> Consequently, the question of specific intent cannot be removed from the prohibited acts as seen above.

### **2.3 Duality of rape and women in conflict zones**

Sexual violence is not only an attack against the protected ethnic group, but also against the woman as an individual, as she is the primary sufferer of sexual violence during armed

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<sup>97</sup> Claus Kress, ‘The Darfur Report and Genocidal Intent’ 3 *Journal of International Criminal Justice* 3, 2005, 566-567.

<sup>98</sup> Schabas W, *Genocide in international law: The crime of crimes*, 243.

<sup>99</sup> Frulli M, ‘Are Crimes Against Humanity More Serious than War Crimes?’ 12 *European Journal of International Law* 2, 2001, 350.

<sup>100</sup> Nowrojee B, *Shattered lives: Sexual violence during the Rwandan genocide and its aftermath*, Human Rights Watch/Africa, 4 September 1996, 20.

<sup>101</sup> Nowrojee B, *Shattered lives: Sexual violence during the Rwandan genocide and its aftermath*, Human Rights Watch/Africa, 4 September 1996, 21.

<sup>102</sup> *Prosecutor v Radislav Krstic (Appeal Judgment)*, IT-98-33-A 32, International Criminal Tribunal for the former Yugoslavia, 19 April 2004, 32.

<sup>103</sup> *Prosecutor v Radislav Krstic (Appeal Judgment)*, ICTY, 32.

conflict.<sup>104</sup> It is through calculated means such as sexual violence that perpetrators seek to destroy an entire ethnic group.<sup>105</sup> This cross purpose of the acts of genocide call to question the duality of women in conflict zones, with women being victimised and weaponised in conflict zones, necessitating their express protection as shall be discussed further.

### 2.3.1 Victimisation

Being raped is a most intimate violation, causing women to experience fear in triplicate to say the least – fear of the perpetrator, fear of future harm, and the greatest hurdle to international prosecution: fear of being revealed as the victim.<sup>106</sup> Rape in war has been viewed as one of the ‘spoils’ of war, incentivising soldiers to enlist, and as a result, a way of celebrating victory in battle.<sup>107</sup> The nature of this crime however is heavily gendered, such that the majority of the victims are women, facially targeted because they are women.<sup>108</sup>

The victimisation of women through sexual violence in genocide is evident on multiple levels. The first and more common, is the physical and psychological damage that causes the woman either be unable or unwilling to bear children.<sup>109</sup> Within the ranks of war, rape has been painted as the ultimate mark of pain and humiliation, hurting and often killing the women, and shaming the nation.<sup>110</sup> The result is thus: genocidal rape certainly leaves physical and mental scars on victims long after the violence ends, not just on the warfront, but the surviving women themselves.<sup>111</sup>

Second, sexual violence creates lasting and negative cultural impact on the women. Salzman takes the example of the Yugoslavian war, where the cultural response to women who had been raped would result in the prevention of births and the rejection of women for traditional

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<sup>104</sup> Short JM, ‘Sexual violence as genocide: The developing law of the international criminal tribunals and the international criminal court’, 504.

<sup>105</sup> Short JM, ‘Sexual violence as genocide: The developing law of the international criminal tribunals and the international criminal court’, 504.

<sup>106</sup> Davis P, ‘The politics of prosecuting rape as a war’, 34 *The International Lawyer* 4, 2000, 1225.

<sup>107</sup> Davis P, ‘The politics of prosecuting rape as a war crime’, 1227.

<sup>108</sup> McCausland C, ‘From tolerance to tactic: Understanding rape in armed conflict as genocide’, 152.

<sup>109</sup> Rogers S, ‘Sexual violence or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court’, 276.

<sup>110</sup> Davis P, ‘The politics of prosecuting rape as a war crime’, 1227.

<sup>111</sup> Brownmiller S, ‘Making female bodies the battlefield, in mass rape: The war against women in Bosnia-Herzegovina’, 181.

marriage and family life.<sup>112</sup> In either case, since women already face the deleterious effects of rape on procreation, the genocidal objective is clearly accomplished, especially in communities where rape victims are perceived as undesirable, soiled and unfit for marriage.<sup>113</sup>

Finally, and possibly the most complicated, is the infliction of forced pregnancy as an instrument of genocidal violence.<sup>114</sup> Closely tied to the physical harm occasioned on women, this goal achieves both the victimisation and weaponisation of women in war by the impregnation of women outside of a protected group as defined by Article 6.<sup>115</sup> This is however only an effective tool of genocide in theory at least in patrilineal societies, through the destruction of an ethnic group, and the creation of a new one by the genocidal perpetrator.<sup>116</sup>

These rapes are made enjoyable, and even irresistible: by the fact that the women are about to be sacrificed, by the vulnerability of the women and children in the face of their imminent murder at the hands of their aggressors.<sup>117</sup> Ultimately, to accomplish the feat of genocide, perpetrators turn to rape to accomplish both immediate and lasting atrocities upon women.<sup>118</sup>

### 2.3.2 Weaponisation

Mass rape in war acts as a tool, a tactic, a policy, plan, as well as a strategy of genocide.<sup>119</sup> From being fought by trained soldiers, over the 20<sup>th</sup> century, the burden of war shifted from armed forces to civilians, not only being victims of the wars, but increasingly the object of military and non-military operations.<sup>120</sup> What happens first is genocide, in which ethnicity is a

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<sup>112</sup> Salzman TA, 'Rape camps as means of ethnic cleansing: Religious, cultural, and ethical response to rape victims in the former Yugoslavia' 20 *Human Rights Quarterly* 2, 1998, 375.

<sup>113</sup> Campanaro J, 'Women, war, and international law: The historical treatment of gender-based war crimes' 89 *George Washington International Law Review*, 2001, 2571.

<sup>114</sup> Rogers S, 'Sexual violence or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court', 272.

<sup>115</sup> Short JM, 'Sexual violence as genocide: The developing law of the international criminal tribunals and the international criminal court', 510.

<sup>116</sup> Rogers S, 'Sexual violence or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court', 272-273

<sup>117</sup> MacKinnon C, 'Rape, genocide and women's human rights', 12.

<sup>118</sup> Short JM, 'Sexual violence as genocide: The developing law of the international criminal tribunals and the international criminal court', 510.

<sup>119</sup> MacKinnon C, 'Rape, genocide and women's human rights', 9.

<sup>120</sup> Hobsbawm E, 'War and Peace' The Guardian 22 February 2002 at <<http://www.theguardian.com/education/2002/feb/23/artsandhumanities.highereducation>> on 18 November 2020.

tool for political hegemony; the war is an instrument of the genocide; and the rapes an instrument of the war.<sup>121</sup>

Both historical and modern conflicts indicate that mass rape serves the tactical function of demonstrating the totality of victory over combatants' enemies, appeasing soldiers as well as a weapon for the perpetration of genocide.<sup>122</sup> In Yugoslavia and Rwanda, the use of sexual violence was geared at humiliating, subordinating and emotionally destroying entire communities; causing chaos and terror; and ensuring the destruction of an unwanted group by forcible impregnation by members of different ethnic groups.<sup>123</sup>

During the 'Bosnian genocide', Serbian forces raped between 10,000 to 60,000 women, these rapes being committed publicly in front of the whole village, with the aim of terrorising the population into fleeing.<sup>124</sup> In Rwanda, the case was different but with the same effect. Rape in the Rwandan genocide usually preceded murder or was intended to cause fatal injuries.<sup>125</sup> The victimisation of women turned to weaponisation, with the distinctive components of rape as genocide being the deliberate transmission of HIV and the forced impregnation of Tutsi women by *Interahamwe* militia men.<sup>126</sup> Though pregnancy in both cases was a consequence, the main difference was that in Yugoslavia the Serbian sought to have children from Muslim women as a form of ethnic cleansing, whereas in Rwanda, the goal of the men was to weaken and destroy the Tutsis.<sup>127</sup>

Regrettably, women in conflict zones present practically no operational cost to the perpetrators and shockingly effective results and therefore, rape and other sexual violence forms are the ultimate weapons of war.<sup>128</sup> The pattern of sexual violence indicates that such acts of rape and sexual mutilation were not accessory to the war, nor opportunistic assaults, but were carried

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<sup>121</sup> MacKinnon C, 'Rape, genocide and women's human rights', 8.

<sup>122</sup> Tompkins TL, 'Prosecuting rape as a war crime: Speaking the unspeakable', 859.

<sup>123</sup> Short JM, 'Sexual violence as genocide: The developing law of the international criminal tribunals and the international criminal court', 504.

<sup>124</sup> Sharlach L, 'Rape as genocide: Bangladesh, the former Yugoslavia and Rwanda' 22 *New Political Science* 1, 2000, 99.

<sup>125</sup> Nowrojee B, *Shattered lives: Sexual violence during the Rwandan genocide and its aftermath*, Human Rights Watch/Africa, 4 September 1996, 35.

<sup>126</sup> Sharlach L, 'Rape as genocide: Bangladesh, the former Yugoslavia and Rwanda', 99.

<sup>127</sup> Sharlach L, 'Rape as genocide: Bangladesh, the former Yugoslavia and Rwanda', 100.

<sup>128</sup> McCausland C, 'From tolerance to tactic: Understanding rape in armed conflict as genocide', 174.

out with the aim of eradicating the women and their communities.<sup>129</sup> These activities were a weaponisation of women because they were not solely acts directed at harming women in isolation, but rather connected to the destruction of members of the entire group – the very essence of genocidal intent.<sup>130</sup>

The weaponisation of rape and women in armed conflict is not only a policy of the pleasure of male power unleashed, which happens all the time in so-called peacetime; and not only a policy of men posturing to gain advantage and ground over other men.<sup>131</sup> This is not rape out of control: genocidal rape is rape *under* control; a tactical instrument of forced exile deployed to make you leave your home and never want to go back.<sup>132</sup>

## 2.4 Conclusion

An analysis of genocidal rape within the ambit of the definition under Article 6 brings to question criticism that prosecuting rape and other sexual violence crimes as genocide may eventually diminish the severity of genocide to actual confusion in understanding how this could meet the elements of genocide.<sup>133</sup> Such criticisms however may only prove the mischaracterisation of sexual violence as incidental and ancillary crimes to genocide that the duality of women in conflict zones seeks to negate.<sup>134</sup>

The implication therefore is that genocidal rape, though absent in the definition of genocide, may deductively be proven through the current paradigm of genocide, requiring only proof of genocidal intent.<sup>135</sup> Reflecting upon the evolution of changing war tactics illustrated by the duality above, it appears that a modification of the genocide paradigm inclusive of women as

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<sup>129</sup> Nowrojee B, *Shattered lives: Sexual violence during the Rwandan genocide and its aftermath*, Human Rights Watch/Africa, 4 September 1996, 21.

<sup>130</sup> Campanaro J, 'Women, war, and international law: The historical treatment of gender-based war crimes', 2570.

<sup>131</sup> MacKinnon C, 'Rape, genocide and women's human rights', 11-12.

<sup>132</sup> MacKinnon C, 'Rape, genocide and women's human rights', 11-12.

<sup>133</sup> Jarvis M and Salgado EM, 'Future challenges to prosecuting sexual violence under international law: Insights from ICTY practice', 118.

<sup>134</sup> Jarvis M and Salgado EM, 'Future challenges to prosecuting sexual violence under international law: Insights from ICTY practice', 118.

<sup>135</sup> McCausland C, 'From tolerance to tactic: Understanding rape in armed conflict as genocide', 174.

a protected group and with rape as an element of genocide would however be more appropriate.<sup>136</sup>

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<sup>136</sup> McCausland C, 'From tolerance to tactic: Understanding rape in armed conflict as genocide', 174.

## CHAPTER 3: TREATMENT OF GENOCIDAL RAPE BY THE ICTR IN *PROSECUTOR v AKAYESU*

### 3.1 Introduction

Chapter two above discusses the genocide paradigm in international law as it stands, and its exclusion of rape within the definition of rape, as well as women or gender as a protected group. It further establishes the dual role rape and women play in armed conflict, holding that the aforementioned exclusion leads to the inability of these crimes from being prosecuted as genocide.

Against such a background, scholars note that the prosecution of gender crimes internationally is often fraught with inherent difficulty and gratuitous obstacles, and therefore the crimes are usually indicted only after concerted pressure by women's rights organisations and feminist scholars to prosecute the crimes.<sup>137</sup> Rwanda was no exception.

However, still operating under the identical stringent genocide framework in its Statute, the Rwanda Tribunal managed to go beyond the textual confines of its statute - recognising sexual violence as a constituent act of genocide in the case of *Prosecutor v Jean-Paul Akayesu*.<sup>138</sup> This remains one of the most important cases of an international criminal tribunal for its successful prosecution of sexual violence as both an enumerated crime against humanity, and most significantly, a constituent element of genocide.<sup>139</sup>

While the ICTR's history is somewhat storied in relation to the prosecution of these crimes, it nevertheless did succeed in establishing a paradigm shift of how rape crimes should be perceived within the international community – from the traditional view of being spoils of war, to genocidal rape worthy of international prosecution.<sup>140</sup> This chapter will study the monumental legal significance of the *Akayesu judgment* in its attempts at deviating from the

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<sup>137</sup> Askin K, 'Prosecuting wartime rape and other gender-related crimes under international law: Extraordinary advances, enduring obstacles', 317. Witness reports indicate a perception among Tribunal investigators receiving rape reports that it was somehow a 'lesser' or 'incidental' crime not worth investigating. Nowrojee B, *Shattered lives: Sexual violence during the Rwandan genocide and its aftermath*, Human Rights Watch/Africa, 4 September 1996, 37.

<sup>138</sup> *Prosecutor v Akayesu (Trial Judgment)*, ICTR, 2 September 1998.

<sup>139</sup> Rogers S, 'Sexual violence or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court', 273.

<sup>140</sup> Bianchi L, 'The prosecution of rape and sexual violence: Lessons from prosecutions at the ICTR' in De-Brouwer A *et al* (eds.) *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Intersentia, United Kingdom, 2013, 124.

currently existent genocide and rape definitions; and also the ICTR's analysis of the intersectionality of gender and ethnicity to the crime of genocide as expressed in chapter two. Subsequently, this chapter will briefly highlight resulting developments arising in jurisprudence post-*Akayesu*.

## 3.2 The seminal case of *Jean-Paul Akayesu*

### 3.2.1 Contextual background

It would be necessary to summarise the nature of sexual violence that led to the *Akayesu* prosecution in the 1994 Rwandan genocide so as to accurately contextualise the ICTR's contribution in this decision.

Within only three months of the genocide, the violence assumed gender specific forms when members of the Hutu militia (*Interahamwe*), the Rwandan Armed Forces and civilians targeted Rwandan women and girls in a genocidal campaign of mass sexual violence.<sup>141</sup> It has been estimated that between 250,000 and 500,000 women were raped during the Rwandan genocide.<sup>142</sup> The UN Special Rapporteur reported these rapes as 'systematic and used as a weapon by the perpetrators of the massacres... and according to consistent testimony, *rape was the rule and its absence was the exception*'.<sup>143</sup>

However, when *Akayesu* first came to trial, it was common to hear the assertion that genocide was killing and not rape; and that the women who were raped and survived were lucky they were not dead.<sup>144</sup> It is arguably for this reason that the initial indictment contained the first twelve counts of genocide, CAH and war crimes committed in his prefecture of Taba, with the

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<sup>141</sup> Human Rights Watch, *Struggling to survive: Barriers to justice for rape victims in Rwanda*, New York, September 2004 (Volume 16, No 10 A), 7.

<sup>142</sup> Obote-Odora A, 'Rape and sexual violence in international law: ICTR Contribution' 12 *New England Journal of International and Comparative Law* 1, 2005, 137. These numbers do not account for the women whose injuries prevented them from conceiving a child, or who experienced multiple rapes or gang rapes. Nor do the numbers account for women who were mutilated by having their breasts cut off or implements brutally inserted into their genitals, or who were murdered after being raped. See: Copelon R, 'Surfacing gender: Reengraving crimes against women in humanitarian law' in Donmbrowski N (ed), *Women and war in the twentieth century: Enlisted with or without her consent*, Garland Publishing, New York, 1999.

<sup>143</sup> Degni-Segui R, 'Report of the special rapporteur on the situation of human rights in Rwanda' in The United Nations and Rwanda 1993-1996, 29 January 1996, Document 167, para 16-24.

<sup>144</sup> Short JM, 'Sexual violence as genocide: The developing law of the international criminal tribunals and the international criminal court', 515.

exclusion of rape.<sup>145</sup> As a result of extensive evidence of rape and other forms of sexual violence during the genocide by women's and human rights organisations, the office of the prosecutor convened the trial to investigate and amend the charges against *Akayesu* during the trial.<sup>146</sup>

On this basis, the Tribunal chose *sua sponte* to consider rape and sexual violence in connection to Count 1 on genocide and the allegations made in paragraphs 12(A) and 12(B) of the Indictment.<sup>147</sup> These paragraphs alleged the foregoing rape crimes, therefore allowing the Tribunal a possible finding of rape as an instrument of genocide if the evidence led to that conclusion, which is the subject of this section.<sup>148</sup>

### 3.2.2 Definitional guidance

Contrary to the predominant characterisation of rape as a wrong against men, against the woman's husband, father, brother, community and nation, the *Akayesu* Trial Chamber articulated seminal definitions of rape and sexual violence.<sup>149</sup> It defined rape as: *a form of aggression, as well as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive*.<sup>150</sup> This emphasis on coercive as opposed to non-consensual intercourse views genocidal rape fundamentally as a crime of inequality, whether physical or other force.<sup>151</sup> As the Tribunal established, such coercive circumstances need not be evidenced by a show of physical force, but may be inherent in certain circumstances, such as armed conflict or the military presence of threatening forces on an ethnic basis.<sup>152</sup>

In keeping with this definition of rape, the Tribunal made its second most significant step, recognising that the destructive nature of the acts of rape and sexual violence were perpetrated

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<sup>145</sup> *Prosecutor v Akayesu (Trial Judgment)*, ICTR, Chapter 1.2, para 6.

<sup>146</sup> *Prosecutor v Akayesu (Trial Judgment)*, ICTR, para 417.

<sup>147</sup> *Prosecutor v Akayesu (Trial Judgment)*, ICTR, Chapter 1.2, para 6, 12(A) and 12(B). Short JM, 'Sexual violence as genocide: The developing law of the international criminal tribunals and the international criminal court', 516.

<sup>148</sup> Askin K, 'Prosecuting wartime rape and other gender-related crimes under international law: Extraordinary advances, enduring obstacles', 319.

<sup>149</sup> Russel-Brown SL 'Rape as an act of genocide', 371-372.

<sup>150</sup> *Prosecutor v Akayesu (Trial Judgment)*, ICTR, para 687-688.

<sup>151</sup> MacKinnon CA, 'Defining rape internationally: A comment on Akayesu', 941.

<sup>152</sup> MacKinnon CA, 'Defining rape internationally: A comment on Akayesu', 943. *Prosecutor v Akayesu (Trial Judgment)*, ICTR, para 688.

against women *qua* women – by virtue of their gender.<sup>153</sup> The Tribunal found that rape and sexual violence, “constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.”<sup>154</sup>

The *Akayesu* Trial Chamber considered it possible to deduce such genocidal intent from the general context of the perpetration of other culpable acts systematically directed at the same group, whether committed by the same offender or by others.<sup>155</sup> The contentious issue of specific intent therefore requires analytical inferences from the pattern and circumstances in which genocidal acts are committed.<sup>156</sup> Evidentially, the *Akayesu* decision emphatically recognised that in the Hutu genocidal regime, rape crimes were perpetrated ‘as an integral part of the destruction process’.<sup>157</sup> It held that sexual violence was, as established in chapter two, a step in the process of the destruction of the Tutsi group – destruction of the spirit, their will to live, and of life itself.<sup>158</sup>

Essentially, what the Tribunal did was edge towards finding rape as an *actus reus* element of genocide – leading to the view of rape not as simply or purely a sexual crime, but as a tool of war, as a violent act perpetrated against a member of a group with the intent of destroying that group.<sup>159</sup> The judgment recognised that rape, though frequently a prelude to death, sufficed as an element on its own since at times the women were left alive because rape was considered worse than death.<sup>160</sup>

### 3.2.3 Intersectionality of gender and ethnicity as protected groups in *Akayesu*

As discussed in chapter two, the issue of intersectionality between gender and ethnicity is central to the debate on genocidal rape. Though the *Akayesu* Tribunal did not clarify all the

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<sup>153</sup> Russel-Brown SL ‘Rape as an act of genocide’, 371-372.

<sup>154</sup> *Prosecutor v Akayesu (Trial Judgment)*, ICTR, para 731.

<sup>155</sup> *Prosecutor v Akayesu (Trial Judgment)*, ICTR, para 523.

<sup>156</sup> Karagiannakis M, ‘Case analysis: The definition of rape and its characterisation as an act of genocide a review of the jurisprudence of the international criminal tribunals for Rwanda and the former Yugoslavia’ 12 *Leiden Journal of International Law* 2, 1999, 489.

<sup>157</sup> *Prosecutor v Akayesu (Trial Judgment)*, ICTR, para 731.

<sup>158</sup> *Prosecutor v Akayesu (Trial Judgment)*, ICTR, para 731-732.

<sup>159</sup> Russel-Brown SL ‘Rape as an act of genocide’, 371.

<sup>160</sup> Askin K, ‘Prosecuting wartime rape and other gender-related crimes under international law: Extraordinary advances, enduring obstacles’, 320-321.

concerns on all matters at the heart of this discourse, it made substantial contributions relevant to steer it in the right direction.<sup>161</sup>

The Tribunal in its decision recognised the intersectionality of the crime of genocidal rape and managed to surface gender in the midst of genocide.<sup>162</sup> As witnesses in the *Akayesu* trial testified, on one hand, being female was a risk factor, irrespective of one's age, ethnicity or political background.<sup>163</sup> On the other, the aim of rape was to terrorise and degrade a particular community (the Tutsi) and achieve a specific political end.<sup>164</sup>

Interpreting the existing genocide paradigm to include acts of rape, the *Akayesu* Trial Chamber recognised the subjectivity of the victims of genocidal rape.<sup>165</sup> In doing so, it acknowledged that rape could cause both serious bodily and mental harm to the individual on the basis of their gender, while being used to kill and destroy the people in the process.<sup>166</sup> For this reason, Tutsi women were solely targeted on the basis of their ethnicity and their gender.

Interestingly, the Tribunal did not address the continuing concern as to whether gender ought to be included as a protected group under the chapeau of the genocide definition in its Statute. Its objective approach on the genocide law proper indicates that it wished to restrict the protections to the four explicitly stated groups.<sup>167</sup> Possibly diluting this definition by making it non-exhaustive is argued to risk trivialising the gravity of the crime of genocide.<sup>168</sup> As such, though the specific genocidal rape was directed against women in various biological and cultural capacities, this was considered more a matter of the survival of the national, ethnic, racial or religious group to which women belong.<sup>169</sup>

In its deliberations however, the Tribunal found it necessary to search the *travaux préparatoires* of the Genocide Convention to discern the intention of its drafters, since the

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<sup>161</sup> Russel-Brown SL 'Rape as an act of genocide', 371.

<sup>162</sup> Russel-Brown SL 'Rape as an act of genocide', 371.

<sup>163</sup> Nowrojee B, *Shattered lives: Sexual violence during the Rwandan genocide and its aftermath*, Human Rights Watch/Africa, 4 September 1996, 1.

<sup>164</sup> Nowrojee B, *Shattered lives: Sexual violence during the Rwandan genocide and its aftermath*, Human Rights Watch/Africa, 4 September 1996, 1.

<sup>165</sup> *Prosecutor v Akayesu (Trial Judgment)*, ICTR, para 733.

<sup>166</sup> *Prosecutor v Akayesu (Trial Judgment)*, ICTR, para 733.

<sup>167</sup> *Prosecutor v Akayesu (Trial Judgment)*, ICTR, para 701.

<sup>168</sup> Schabas W, *Genocide in international law: The crime of crimes*, 133.

<sup>169</sup> Schabas W, *Genocide in international law: The crime of crimes*, 168.

Tutsi community are not a recognised protected group either.<sup>170</sup> In finding that the Tutsi community were capable of protection under the definition, the Tribunal considered that:

*The crime of genocide was perceived as targeting only "stable" groups; constituted in a permanent fashion and membership of which is determined by birth, in a continuous and often irremediable manner with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment.*<sup>171</sup>

Though the Tribunal was considering the inclusion of the Tutsis as an ethnic group, if the criteria for enumeration of groups is their stability and permanence, the same may certainly be applied to the protection of gender,<sup>172</sup> based on the intersectionality above - as well as the subjective effects of genocide on women. Through emphasising the suffering imposed on the women, as well as the role of rape as a tool of *their* destruction and that of the group, the Tribunal took a significant step in recognising women both as subjects in themselves and as part of their ethnicity.<sup>173</sup>

In these situations, gender intersects with other aspects of a woman's identity such as ethnicity, religion, social class or political affiliation, which unfortunately remain the only recognised protected groups.<sup>174</sup>

### **3.3 Akayesu's progeny in the ICTR and ICTY**

At the ICTR, Trial Chamber II built upon the *Akayesu* definition of genocidal rape in the case of *Prosecutor v Kayishema*.<sup>175</sup> It interpreted the third act of genocide – ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’ – to include methods of destruction which do not immediately lead to the death of the members of the group such as, inter alia, the act of rape.<sup>176</sup> The suggestion herein was that in

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<sup>170</sup> *Prosecutor v Akayesu (Trial Judgment)*, ICTR, para 511- 513.

<sup>171</sup> UN General Assembly, ‘Summary Records of the meetings of the Sixth Committee of the General Assembly’, 21 September - 10 December 1948.

<sup>172</sup> Schabas W, *Genocide in international law: The crime of crimes*, 168.

<sup>173</sup> Short JM, ‘Sexual violence as genocide: The developing law of the international criminal tribunals and the international criminal court’, 515- 516.

<sup>174</sup> Nowrojee B, *Shattered lives: Sexual violence during the Rwandan genocide and its aftermath*, Human Rights Watch/Africa, 4 September 1996, 1.

<sup>175</sup> Rogers S, ‘Sexual violence or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court’, 281-282.

<sup>176</sup> *Prosecutor v Kayishema, (Trial Judgment)*, ICTR, 106.

order for rape to meet this element, it must be committed: repeatedly; over a substantial period of time; and, without the intent to kill the victim by any other means.<sup>177</sup>

De Brouwer observed a notable condition of life in these circumstances as being the intentional infection with HIV/AIDS through rape.<sup>178</sup> The sexual transmission of the virus was intended not only for the slow death of the victims, but also eventually for the demise of their partners and unborn children.<sup>179</sup>

Therefore, while *Akayesu* aimed to fit genocidal rape within the specific intent of killing members of the group, causing serious bodily or mental harm or preventing births within the group, the *Kayishema* Trial Chamber effectively extended the definition to a fourth act, deliberately inflicting conditions designed to bring about the slow destruction of a group.<sup>180</sup>

On the contrary, an ensuing line of cases at the International Criminal Tribunal for the former Yugoslavia tilted the definition of rape for both tribunals away from the *Akayesu* breakthrough, and slowly back in the direction of consent as opposed to coercion.<sup>181</sup>

The first notable reversion was in the ICTY's trial decision of *Furundzija*.<sup>182</sup> Though it acknowledged that rape was a forcible act, it only mentioned the preceding *Akayesu* definition only to ignore it.<sup>183</sup> It completely deviated to the mechanical 'body parts' definition which *Akayesu* had expressly rejected only three months earlier.<sup>184</sup> According to the *Akayesu* Trial Chamber, a broader definition was warranted to include 'acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual'<sup>185</sup>

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<sup>177</sup> Rogers S, 'Sexual violence or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court', 283.

<sup>178</sup> De Brouwer A, *Supranational criminal prosecution of sexual violence: the ICC and the practice of the ICTY and the ICTR*, Intersentia, 2005, 57.

<sup>179</sup> De Brouwer A, *Supranational criminal prosecution of sexual violence: the ICC and the practice of the ICTY and the ICTR*, 57.

<sup>180</sup> Rogers S, 'Sexual violence or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court', 283.

<sup>181</sup> MacKinnon CA, 'Defining rape internationally: A comment on *Akayesu*', 944

<sup>182</sup> *Prosecutor v Anto Furundzija (Trial Judgement)* IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia, 10 December 1998.

<sup>183</sup> *Prosecutor v Anto Furundzija (Trial Judgment)*, ICTY, para 174.

<sup>184</sup> *Prosecutor v Anto Furundzija (Trial Judgment)*, ICTY, para 180.

<sup>185</sup> *Prosecutor v Akayesu (Trial Judgment)*, ICTR, para 686.

This departure in *Furundzija* paved way for an even stronger reversion in *Kunarac*, which was faced by the challenge of a conceptual *Akayesu* definition, and a more accepted mechanical definition as adopted in *Furundzija* and various national laws.<sup>186</sup> The Tribunal therefore opted for the mechanical definition, whilst returning the element of the victim's consent into the definition- notwithstanding the contradiction with the coercive circumstances in the definition, which the ICTR in *Akayesu* had taken cognisance of.<sup>187</sup> Later Trial Chambers in the ICTR such as *Semanza*,<sup>188</sup> *Kajelijeli*<sup>189</sup> and *Gacumbitsi*<sup>190</sup> have since reverted to the more traditional and mechanical approach rejected by *Akayesu*, and adopted a narrower non-consent based definition endorsed by the *Kunarac* Appeals Chamber.<sup>191</sup>

Nonetheless, these conflicting decisions have been brought forth by the absence and need for clarity, accuracy and specificity in the definition.<sup>192</sup> The *Akayesu* definition of genocidal rape is clearly well suited to addressing rapes that are part of mass or group-based atrocities, such as the crime of genocide.<sup>193</sup>

### 3.4 Conclusion

Through the *Akayesu* judgment, International Criminal Tribunal for Rwanda recognised three key factors:

1. How sex worked to destroy a people;
2. The intersectionality of 'ethnicised' rape and the gendered nature of the crime of genocidal rape; and

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<sup>186</sup> De Brouwer A, *Supranational criminal prosecution of sexual violence: the ICC and the practice of the ICTY and the ICTR*, 112-113.

<sup>187</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia, 22 February 2001, 442; *Prosecutor v Akayesu (Trial Judgment)*, ICTR, para 688.

<sup>188</sup> *Prosecutor v Semanza (Judgment)*, ICTR-97-20-T, International Criminal Tribunal for Rwanda, 15 May 2003.

<sup>189</sup> *Prosecutor v Kajelijeli (Judgment)*, ICTR 98-44 A-T, International Criminal Tribunal for Rwanda, 1 December 2003.

<sup>190</sup> *Prosecutor v Sylvestre Gacumbitsi (Trial Judgment)*, ICTR 2001-64-T, International Criminal Tribunal for Rwanda, 17 June 2004.

<sup>191</sup> Bianchi L, 'The prosecution of rape and sexual violence: Lessons from prosecutions at the ICTR', 143. *Prosecutor v Dragoljub Kunarac et al (Appeal Judgment)*, IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia, 12 June 2002, para 129-130.

<sup>192</sup> MacKinnon CA, 'Defining rape internationally: A comment on Akayesu', 945.

<sup>193</sup> MacKinnon CA, 'Defining rape internationally: A comment on Akayesu', 946.

3. The subjectivity of the rape victim in the crime of genocidal rape.<sup>194</sup>

The Chamber noted that rape and sexual violence can be instruments of genocide based primarily on the physical and psychological harm to the woman, and further, the potential impact on the targeted community.<sup>195</sup> The significance of this judgment is that rape is not included as a prohibited act in the genocide definition, nor is gender one of the protected groups under Article 6 of the Rome Statute, identical to Article 2 of the ICTR's Statute.<sup>196</sup> Evidently, these were uncharted waters for the Prosecutors at the Rwandan Tribunal, but according to Franke,

*“Rather than rely upon special laws that isolate rape and/or sexual assault as a privileged kind of harm, the Tribunal’s Prosecutor and judges chose to tailor the construction of these crimes to the way in which sex-related violence figures in the physical or mental destruction of a people or person”*<sup>197</sup>

The ICTR acknowledged that though textually confined to its Statute, it needed to be proactive in deviating where seemingly possible in order to bring justice to victims of genocidal rape and sexual violence, carving out a path for the future prosecution of such crimes in other armed conflicts.<sup>198</sup> This definitive activism is what the international community would potentially wish to have seen build up the prosecutorial practice of the ICC.

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<sup>194</sup> Russel-Brown SL ‘Rape as an act of genocide’, 371.

<sup>195</sup> Short JM, ‘Sexual violence as genocide: The developing law of the international criminal tribunals and the international criminal court’, 520.

<sup>196</sup> Article 6, *Rome Statute*, 17 July 1998; Bianchi L, ‘The prosecution of rape and sexual violence: Lessons from prosecutions at the ICTR’, 141.

<sup>197</sup> Franke K, ‘Putting sex to work’ *75 Denver University Law Review* 4, 1998, 1177.

<sup>198</sup> Bianchi L, ‘The prosecution of rape and sexual violence: Lessons from prosecutions at the ICTR’, 149.

## CHAPTER 4: THE LACK OF RECOGNITION AND PROSECUTION OF GENOCIDAL RAPE AT THE ICC

### 4.1 Introduction

The previous chapter sought to demonstrate the development of the genocidal rape definitions within the jurisprudence of the ICTR's decision in the case of *Prosecutor v Jean-Paul Akayesu*. It elaborated on the departure by the Rwandan Tribunal regarding rape as an enumerated war crime and crime against humanity – proceeding to make a forceful and novel recognition of sexual violence and rape as constituent elements of genocide.<sup>199</sup> Undeniably, despite borrowing from the ad hoc tribunals, the Statute of the ICC straddles the definitional divide rather than resolves it.<sup>200</sup>

As such, drawing from the precedent from the Rwandan and Yugoslavian Tribunals, this chapter seeks to establish the possible reasons for the failure of the ICC's prosecution of genocidal rape. The main aim here, is to establish the causal link between the lack in definitional clarity in the Statute and the ICC's failure to prosecute genocidal rape. This will form the backdrop for a prescription for the future of rape and sexual violence prosecution in the ICC as a constituent element of genocide.

### 4.2 Insufficient prosecution of genocidal rape under the ICC's Rome Statute

Although the Rwandan Tribunal in *Akayesu* successfully established a link between genocide and rape, there still continues to be a lack of prosecution of genocidal rape at the ICC, despite the continuance of genocides all over its jurisdiction.<sup>201</sup> As compared to Article 7 and 8's CAH and war crimes, the ICC's willingness to charge rape as genocide under the appropriate circumstances has been wondrously faint.<sup>202</sup>

Before the issuance of Sudan's President Omar al-Bashir's second arrest warrant citing rape as an element of his 'genocidal policy', the ICC had not charged a single defendant with genocidal

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<sup>199</sup> Karagiannakis M, 'Case analysis: The definition of rape and its characterization as an act of genocide a review of the jurisprudence of the international criminal tribunals for Rwanda and the former Yugoslavia', 490.

<sup>200</sup> MacKinnon CA, 'Defining rape internationally: A comment on Akayesu', 958.

<sup>201</sup> Powell C, 'You have no God: An analysis of the prosecution of genocidal rape in international criminal law' 20 *Richmond Public Interest Law Review* 1, 2017, 37 and 46.

<sup>202</sup> Simmons M, 'International Court Adds Genocide to Charges Against Sudan Leader', New York Times, 12 July 2010 at <<https://www.nytimes.com/2010/07/13/world/africa/13hague.html>>- on 18 December 2020.

rape since its establishment in 2002.<sup>203</sup> Even this was obtained with great difficulty as it was initially denied by the Court, which required an unjustifiably high standard of proof.<sup>204</sup> The Appeals Chamber however reversed this decision, issuing the warrant.

Similar genocidal indictments at the ICC have gone without any charges on genocidal rape, but instead as CAH and war crimes.<sup>205</sup> In the Democratic Republic of Congo for instance, the militia responsible for widespread and ethically motivated acts of violence were tried for sexual violence as CAH and a war crime – and received no indictments for genocide.<sup>206</sup> These charging decisions are emblematic of the Court’s generally ineffective prosecution of genocidal rape to date.<sup>207</sup>

This trend of insufficient ability to address sexual violence perpetrated with genocidal intent, as evident from the previous chapters, is explained by a number of challenges.<sup>208</sup> The most pertinent amongst these is the weakness of the textual support under the Rome Statute in allowing the prosecutors and judges to prosecute genocidal rape – which forms the basis of this chapter.

#### 4.2.1 Weak textual support for genocidal rape

The elements of rape are presently codified by the ICC and therefore, the Court need not concern itself with establishing its own definition per se.<sup>209</sup> This is unlike the preceding *ad hoc* tribunals which had to evidently synthesise a definition of rape by examining the crime within national legal systems.<sup>210</sup> By this standard, having preceded the Court, one would assume that

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<sup>203</sup> *Prosecutor v Omar Hassan Ahmad al-Bashir (Decision on the Second Warrant of Arrest)*, ICC, 12 July 2010,

<sup>204</sup> Simmons M, ‘International Court Adds Genocide to Charges Against Sudan Leader’, New York Times, 12 July 2010 at <<https://www.nytimes.com/2010/07/13/world/africa/13hague.html>>. See also: *Prosecutor v al-Bashir*, Case No. ICC-02/05-01/09, Second Warrant of Arrest, 12 July 2010.

<sup>205</sup> Powell C, ‘You have no God: An analysis of the prosecution of genocidal rape in international criminal law’, 37.

<sup>206</sup> *Prosecutor v Germain Katanga (Decision on the Confirmation of Charges)*, ICC-01/04 - 01/07, ICC, 30 September 2008, 339-54 (discussing rape and sexual slavery as a war crime); 437-44 discussing rape as a crime against humanity) *Prosecutor v Mathieu Ngudjolo Chui (Judgment)*, ICC-01/04-02/12, ICC, 18 December 2012.

<sup>207</sup> Rogers S, ‘Sexual violence or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court’ 297.

<sup>208</sup> Rogers S, ‘Sexual violence or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court’ 293.

<sup>209</sup> Article 7(1)(g)-1, *Elements of Crimes*, ICC, 2011.

<sup>210</sup> Ellis M, ‘Breaking the silence: Rape as an international crime’ 38 *Case Western Reserve Journal of International Law* 2, 2007, 239.

the ICC's guiding Statute ought to mirror the advancements of the tribunals – especially with respect to an element as pervasive as genocidal sexual violence. Unfortunately, 2010 saw the amendment and adoption of the ICC's Elements of Crime without any changes to the provisions of genocide.<sup>211</sup> As Rogers rightly puts it, the absence of rape outside of sub-element (b) despite the developments of the ICTR in *Akayesu* and *Kayishema* can only lead to a narrow interpretation of genocide and genocidal rape, where gender is involved.<sup>212</sup> Scholars acknowledge both sides of the discourse, noting that,

*'while it may be dehumanising to view acts of sexual violence against an individual woman in terms of functionality and group benefit, it is unrealistic for the Statute not to incorporate such analyses into the examination.... It is even more irresponsible not to also view and prosecute the sexual violence in such terms: as genocide.'*<sup>213</sup>

The second and more important question is why the drafters of the Rome Statute, despite enumerating sexual violence acts that constitute CAH and war crimes, explicitly failed to express them within the context of the genocide definition under Article 6.<sup>214</sup> Issue could be raised on a prosecutorial basis, the amendment of the Elements of Crimes or even the jurisprudence arising, but the root of the problem tracks back to the inconsistency in statutory drafting.

Based on the analyses in chapters two and three, it is apparent that this omission by the drafters was at best, an oversight and at worst, a significant misstep.<sup>215</sup> This view is premised on the lack of congruence between the Court's guiding Statute, the supplementary instruments such as the Elements of Crimes and the stark deviations in prevailing jurisprudence interpreting these same sources of law. This lays the groundwork for the prescription for the overdue

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<sup>211</sup> *Elements of Crimes*, ICC publication, RC/11: The Elements of Crimes adopted at the 2010 Review Conference are replicated from the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010.

<sup>212</sup> Rogers S, 'Sexual violence or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court' 295.

<sup>213</sup> Short JM, 'Sexual violence as genocide: The developing law of the international criminal tribunals and the international criminal court', 511. See also: Salzman TA, 'Rape camps as means of ethnic cleansing: Religious, cultural, and ethical response to rape victims in the former Yugoslavia', 379 - Salzman here addresses the functionality of women through reducing them to their reproductive capacities in order to fulfil the overall objectives of Serbian nationalism through rape in a traditionally patriarchal society.

<sup>214</sup> Rogers S, 'Sexual violence or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court', 297.

<sup>215</sup> Rogers S, 'Sexual violence or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court', 297.

amendment of the Statute and inclusion of genocidal rape in these definitions as set out in this chapter.

#### 4.2.2 Prescription for the future

As previously discussed, the designation of rape as a component of al-Bashir's 'genocidal policy' in his second arrest warrant does mark significant progress in the ICC's future prosecution of sexual violence within genocide. Recent years have seen the Office of the Prosecutor launch its Policy on Sexual and Gender-Based Crimes.<sup>216</sup> Inter alia, it specifically 'authorises the Court to exercise jurisdiction over sexual and gender-based crimes if they constitute acts of genocide and commits the Office to ensuring a consistent approach in giving full effect to those provisions.'<sup>217</sup> Though great developments in the policy framework of the Court, it is evident from this paper that the prosecutorial problem of genocidal rape primarily lies in the statutory definition of the elements of genocide.

Needless to say, any prescription made must be geared towards ensuring that the ICC have the same textual and statutory authority to prosecute genocidal rape as it does with CAH or war crimes.<sup>218</sup> This would benefit the Court by avoiding the ease with which both prosecutors and judges alike opt for the clearer Article 7 and 8 crimes rather than genocidal rape which, as it stands, requires more interpretive effort as seen in *Akayesu*.<sup>219</sup>

This paper therefore agrees with scholars like Rogers and Askin, that the best way in which genocidal rape should be premised within the current framework of the Rome Statute would be through the addition of a sixth category of prohibited acts under Article 6's definition that would read:

*f) committing rape, forced pregnancy, enforced sterilisation or mutilation, intentional transmission of disease, forced abortion or miscarriage, forced marriage, sexual slavery, or*

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<sup>216</sup> ICC, 'ICC prosecutor, Fatou Bensouda, launches policy on sexual & gender-based crimes: Ensuring victims have a voice in court today can prevent these crimes tomorrow #Endsexualviolence' Office of the Prosecutor, 9 December 2014 at -< <https://www.icc-cpi.int/Pages/item.aspx?name=pr1073>>- on 23 December 2020.

<sup>217</sup> Office of the Prosecutor, 'Policy paper on sexual and gender-based crime', I, June 2014 at -< [https://www.resdal.org/wps\\_sp/assets/otp-policy-paper-on-sexual-and-gender-based-crimes--june-2014.pdf](https://www.resdal.org/wps_sp/assets/otp-policy-paper-on-sexual-and-gender-based-crimes--june-2014.pdf)>, para 25.

<sup>218</sup> Rogers S, 'Sexual violence or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court', 300.

<sup>219</sup> Ellis M, 'Breaking the silence: Rape as an international crime', 241.

*any other form of sexual violence of comparable gravity committed as part of the genocidal actus reus articulated in (a)-(e)*<sup>220</sup>

This contemplates the primary textual weakness Article 6 presents, that is, the lack of rape and sexual violence as prohibited acts under the crime of genocide. At the very minimum, the drafting representatives of the Assembly of State Parties ought to amend the Court's Elements of Crimes to expressly encompass this language in the articulation of all the other sub-elements in Article 6.<sup>221</sup> It is important to acknowledge, as Askin and the *Akayesu* and *Kayishema* Chambers did, that rape and sexual violence can fall under each and every one of the sub-elements in the definition of genocide.<sup>222</sup>

The secondary prescription, and far less proposed, would be an explicit introduction of gender as a protected group under the chapeau of Article 6. As proposed by MacKinnon and Kalajdzic, based on the intersectionality of gender and ethnicity (already a protected group).<sup>223</sup> This stems from the importance to recognise the *particularity* as well as the generic nature of the crime of genocide.<sup>224</sup> MacKinnon notes that since genocidal rape is not just about a woman's identity but also about their identity in a particular group, it is important not to lose sight of the intersectionality of ethnicity and gender as both are equally important and distinguishing.<sup>225</sup> This view is buttressed by Kalajdzic, who more crudely puts it – that sexism and racism operate in conjunction to determine which women are raped.<sup>226</sup>

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<sup>220</sup> Rogers S, 'Sexual violence or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court', 301. Askin K, 'Prosecuting wartime rape and other gender-related crimes under international law: Extraordinary advances, enduring obstacles', 315-316.

<sup>221</sup> Article 6, *Elements of Crimes*, International Criminal Court, 2011.

<sup>222</sup> Askin K, 'Prosecuting wartime rape and other gender-related crimes under international law: Extraordinary advances, enduring obstacles', 316.

<sup>223</sup> MacKinnon CA, 'Crimes of war, crimes of peace' 4 *UCLA Women's Law Journal*, 1993. See also: Kalajdzic J, 'Rape, representation and rights: Permeating international law with the voices of women' 21 *Queens Law Journal*, 1996, 476.

<sup>224</sup> Russel-Brown SL, 'Rape as an act of genocide', 364.

<sup>225</sup> MacKinnon CA, 'Crimes of war, crimes of peace' 4 *UCLA Women's Law Journal*, 1993.

<sup>226</sup> Kalajdzic J, 'Rape, representation and rights: Permeating international law with the voices of women', 477.

The effect of these prescriptions would therefore be both prosecutorial and reputational – assisting those responsible for charging decisions in the interpretation of the Rome Statute, but also solidifying the prohibition of genocidal rape as a prohibited act and a *jus cogens* norm.<sup>227</sup>

### 4.3 Conclusion

As earlier discussed, developing and articulating a definition and framework of genocidal rape was one of the major achievements of the *ad hoc* tribunals, and specifically, the ICTR.<sup>228</sup> In light of the realism and practicality of the *Akayesu* definition, it is regrettable that the ICC only codified rape for its international purposes in the chronological middle of the tribunals' developments.<sup>229</sup> By the international tribunal's acknowledgment of rape comprehensively fitting within the understanding of genocide in multiple aspects, it was expected to assume a position at the apex of the hierarchy of international crimes.<sup>230</sup> Through this discussion, it is evident that the Rome Statute definitely lacks legislative support for genocidal rape, either as a prohibited act or as a constituent element of the crime. Unfortunately, the door *Akayesu* shut so decisively was left ajar by the Article 6 definition, through which rapists can and have walked away from potential genocidal rape indictments..<sup>231</sup>

However, in addition to the historical challenges and weaknesses presented, the Rome Statute amendments prescribed in this chapter may only be the first step in the right direction. Such an amendment would only be possible if legal scholars continue to probe the theoretical complexity surrounding genocidal rape – and the ICC in turn must continue to charge and establish cases of genocidal rape.<sup>232</sup> As evident, a successful Omar al-Bashir prosecution on this basis regarding the Darfur massacres would be a key step in the ICC's position on genocidal rape.<sup>233</sup>

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<sup>227</sup> Rogers S, 'Sexual violence or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court', 302.

<sup>228</sup> Ellis M, 'Breaking the silence: Rape as an international crime', 239.

<sup>229</sup> MacKinnon CA, 'Defining rape internationally: A comment on Akayesu', 957 - 958.

<sup>230</sup> McCausland C, 'From tolerance to tactic: Understanding rape in armed conflict as genocide', 174.

<sup>231</sup> MacKinnon CA, 'Defining rape internationally: A comment on Akayesu', 958.

<sup>232</sup> Powell C, 'You have no God: An analysis of the prosecution of genocidal rape in international criminal law', 46.

<sup>233</sup> Powell C, 'You have no God: An analysis of the prosecution of genocidal rape in international criminal law', 46.

## CHAPTER 5: CONCLUSION

This study was greatly sparked by the militarised sex accounts following the Rwandan genocide in De Brouwer's *The Men Who Killed Me: Rwandan Survivors of Sexual Violence*. Despite the military objectives therein and the current exclusion of rape as an element of genocide, of the approximately 800,000 deaths, approximately 250,000-500,000 were women who died due to genocidal rape – a number which excludes genocidal rape survivors.<sup>234</sup>

The preceding chapters have covered a large amount of ground in trying to set out the theoretical notion of genocidal rape and contextualising it within historical and contemporary armed conflict. As such, this chapter seeks to summarise the body of this study, by tying in the initial objectives of the study to its findings and finally summing up the earlier suggestions for reform by providing some recommendations.

### 5.1 Summary of findings

The objective of this study was to investigate the theoretical and practical plausibility of gendered genocide: probing the classification of rape as an element of genocide due to its already practical prevalence, and as a consequence, examining the possible inclusion of gender as a protected group within Article 6 of the Rome Statute. The purpose of this aim would be to remedy the ineffective prosecution of genocidal rape at the ICC.

Presently, the Rome Statute of the ICC only specifies that certain acts intended to destroy, in whole or in part, a national, ethnical, racial or religious group - without any mention of rape, are condemned as genocide.<sup>235</sup> Therefore, genocidal acts committed with the requisite specific intent, when directed against any other groups, such as groups defined by gender, are not considered to be genocide.<sup>236</sup> By doing this, the international criminal justice system forces the classification of gendered genocidal acts within the restricted groups, completely excluding the pervasiveness of gender as a crippling purposive tool of genocide in armed conflicts.

This research has evidently brought out the objective definitions of these protected groups as defined by the ICTR in the *Akayesu* decision, the first international trial to prosecute rape as

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<sup>234</sup> Nowrojee B, *Shattered lives: Sexual violence during the Rwandan genocide and its aftermath*, Human Rights Watch/Africa, 4 September 1996, 18.

<sup>235</sup> Article 6, *Rome Statute*, 17 July 1998.

<sup>236</sup> Hassellind FS, 'Groups defined by gender and the genocide convention' 14 *Genocide Studies and Prevention: An International Journal* 1, 2020, 60.

genocide.<sup>237</sup> However, the notable import of this decision is that it is nearly impossible to attribute a distinct meaning to them, as they intersect and overlap significantly.<sup>238</sup> For the protection of gender and rape within the definition of rape, a subjective approach to these groups may be better suited. This is argued precisely on the ground of the intersectionality between gender and the currently protected ground of ethnicity- where the two distinct identities of women in genocide converge.<sup>239</sup> Such a “subjective approach” refers to the perpetrator’s point of view of the victim group - if the *genocidaire* defines the victim group as one of the protected groups of genocide, the victim group is such a group.<sup>240</sup>

Unfortunately, despite the jurisprudence of the *ad hoc* tribunals, investigation and prosecution of rape as genocide at the ICC since its establishment has been slow if at all present. This study shows that even in cases where attempts have been made at prosecution of evident gender-specific genocides such as in the Congo, the textual exclusion of genocidal rape are emblematic of the mischaracterisation of prosecutorial decisions.<sup>241</sup> This is not to cast a shadow on the earlier mentioned policy advancements made by the ICC in recognising the challenges and obstacles to effective investigation and prosecution of sexual and gender-based crimes.<sup>242</sup> These developments remain very promising, in future prosecutions of the ICC of gender crimes, and hopefully with specific focus on genocidal rape.

However, the Genocide Convention and the Rome Statute alike seem to use Crimes against Humanity as a proxy for the prosecution of gender crimes, despite the two having extremely different *raison d’être* and protecting different values.<sup>243</sup>

The feminist legal theory relied on herein supports the assertion that the genocide framework as is currently constructed provides more than enough proof that ICL is heavily gendered,

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<sup>237</sup> *Prosecutor v Akayesu (Trial Judgment)*, ICTR, para 511-515.

<sup>238</sup> Hassellind FS, ‘Groups defined by gender and the genocide convention’, 64.

<sup>239</sup> For more on the discussion on intersectionality of sex, race and ethnicity: MacKinnon CA, ‘Intersectionality as a method: A note’ 38 *Intersectionality: Theorizing Power, Empowering Theory* 4, 2013, 1020 and 1026.

<sup>240</sup> Hassellind FS, ‘Groups defined by gender and the genocide convention’, 64.

<sup>241</sup> Rogers S, ‘Sexual violence or rape as constituent act of genocide: Lessons from the ad hoc tribunals and prescription for the international criminal court’, 297. *Prosecutor v Germain Katanga (Decision on the Confirmation of Charges)*, ICC, 339-354, 437-444.

<sup>242</sup> De Brouwer A, ‘The importance of understanding sexual violence in conflict for investigation and prosecution purposes’, 665.

<sup>243</sup> Eboe-Osuji C, *Protecting humanity: Essays in international law and policy in honour of Navanethem Pillay*, Martinus Nijhoff Publishers, Boston, 2010, 168.

against women – and yet gender permeates the crime of genocide.<sup>244</sup> This continued absence of women in genocide law despite their strategic victimisation and weaponisation in war leads to a narrow and insufficient jurisprudence which only legitimises the unequal position of women internationally rather than facing it.<sup>245</sup> Given this, this research is in par with many cited scholars arguing that the failure to encompass groups other than the four enumerated has caused the genocide framework to be ‘conceptually confused’.<sup>246</sup>

This study does not seek to diminish, subordinate or create a hierarchy between any of the enumerated or non-enumerated groups or do the same with the actus reus elements of genocide. However, the author effectively challenges the habitual reference to the intention of the drafters in restricting this definition to its current construction, leading to a so-called gender-blindness to genocide. The unwillingness to prosecute rape as genocide, when it clearly fits into the legal definition of genocide in many cases, demonstrates not only a reluctance to prosecute, but also perhaps, a reluctance to protect and expand women’s rights in the international sphere.<sup>247</sup>

With all due respect, the intention of the Genocide Convention’s drafters nearly seventy years ago cannot justify the choices we make concerning such an evolving crime today.

## 5.2 Recommendations

Though it is common to argue that an extravagant interpretation of genocide may trivialise or diminish the value-based signals the crime sends, the very same danger to its legitimacy may emerge if the construction is too narrow in its scope.<sup>248</sup> As such, the primary goal of this study is to instigate further study into the theoretical practicalities or otherwise of introducing gender groups within the definition of genocide. However, this study seeks to make three possible suggestions for further study and implementation.

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<sup>244</sup> Asharaph S and Radhakrishnan A, ‘Beyond killing: The critical role of gender in the recognition, prevention and punishment of genocide’, *Just Security*, 14 December 2018 at <https://www.justsecurity.org/61871/killing-critical-role-gender-recognition-prevention-punishment-genocide/> on 11 January 2021.

<sup>245</sup> Hassellind FS, ‘Groups defined by gender and the genocide convention’, 72.

<sup>246</sup> Lippman M, ‘The convention on the prevention and punishment of the crime of genocide: Fifty years later’ 15 *Arizona Journal of International and Comparative Law* 2, 1998, 505.

<sup>247</sup> Powell C, ‘You have no God: An analysis of the prosecution of genocidal rape in international criminal law’, 47.

<sup>248</sup> Schabas W, *Genocide in international law: The crime of crimes*, 133. See also: Hassellind FS, ‘Groups defined by gender and the genocide convention’, 71.

The first recommendation is the necessary inclusion of rape as an *actus reus* element of genocide, that is, a prohibited act under the definition in Article 6 of the Rome Statute as described in chapter four.

The second and consequent recommendation from this, is the construction of groups defined by gender, women being the focal point here, as a protected group within Article 6, as capable of destruction in genocide.

These two would serve to meet the third and more purposive recommendation, which is the inclusion of genocidal rape within the checklist of evidence in investigation of rape as genocide, absence of which currently hinders the investigation and prosecution of genocidal rape - until one of the other expressly included acts such as death are evident.<sup>249</sup>

Essentially, the real interest in including rape as an element of genocide and/or extending the Statute's scope to gender, is to strengthen its role in the prosecution of crimes directed against women.<sup>250</sup> This has somewhat been met previously by the purposive interpretation of the acts of genocide, but textual clarity of the Rome Statute would better accomplish this.

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<sup>249</sup> Marcus M, 'Investigation of crimes of sexual and gender-based violence', 237 and 241.

<sup>250</sup> Askin K, *War Crimes Against Women: Prosecution in international war crimes tribunals*, 342-344.

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