



## SEXUAL VIOLENCE IN ARMED CONFLICTS

By Archita Choudhary and Declyn Gomes  
From CHRIST (Deemed to be University)

### ABSTRACT

The paper deals with the kind of atrocities meted out against women during the times of conflicts. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda were the first tribunals set up to prosecute individuals for war crimes that included genocide, war crimes and all such crimes against humanity. This paper dwells deeper into the issue of crimes during war. It deals with sexual violence during the times of the war. There have been umpteen reports and interviews by women that were captured and tortured and raped. They claim that they are systematically raped and tortured. More than the importance that has been emphasized upon the reported cases and the interviews, there have been claims that there are a lot more sexual violence cases than the mere reported number. What is also not focused upon is the kind of treatment that rape victims' children get. There is a difference between when rape is a systematic ideology and methodology imposed to rape women as a method for the men of the community to succumb to the higher tribe. The case of Akayesu by the ICTR held sexual violence also as a war crime and now tribunals do prosecute individuals for sexual acts and violence during periods of war and conflicts. The Rome Statute has been considered along with the ICTR Statute and the ICTY Statute

which have also been taken into consideration while understanding the framework and working nature of the criminal tribunals.

### INTRODUCTION

The International Criminal Tribunal for Rwanda (ICTR) defined rape in the case of Prosecutor v Akayesu<sup>1</sup> as, "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive". Further the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of Kuranac et al case in the year of 2001 as, "the sexual penetration, however slight: (a) of the vagina or the anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim." However, these are rapes during conflicts or war time and therefore the definition of rape however being as per given by the tribunals, 'wartime rape' has also been defined by various people. Jonathan Gottschall defined mass rape as, "distinct patterns of rape by soldiers at rates that are much increased over rates of rape that prevail in peacetime."<sup>2</sup> The tribunal again in the case of Akayesu defined sexual violence as, "which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the body and may include acts that do not involve penetration or physical contact."<sup>3</sup> This view on sexual violence was upheld in the case of Prosecutor v Kvočka et. al.<sup>4</sup>

<sup>1</sup> Prosecutor v Akayesu, Judgement I.C.T.R., No. ICTR-96-4-T (1998)

<sup>2</sup> Gottschall, "Explaining Wartime Rape", P. 129.

<sup>3</sup> Prosecutor v Akayesu I.C.T.R., No. ICTR-96-4-T (1998)

<sup>4</sup> Prosecutor v Kvočka et. al. Case No. IT/98-30/1-T



For some time now there have been efforts to bring rape and sexual assaults under the realm of war crimes. However, this has been completely ignored and side stepped until very recently. The first 3 Geneva Conventions did not consider rape and sexual assault on women as a methodology and a systematic method to inflict violence and fear upon the masses during the times of war. In addition to this there was no mention of rape in the Genocide convention adopted by the UN General Assembly on the 9<sup>th</sup> of December, 1948. The Nuremburg Trials also ignored rape as a war crime. This is important because rape and sexual assault was not considered as a war crime even after there have been documentation of rape in Nazi Germany as well as forced prostitution within the concentration camps<sup>5</sup>. But, these offenders were never prosecuted for their sexual violence against women.

#### **INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA**

After the fall of communism in the 1990s and the death of then President Josip Broz Tito in 1980, civil infractions kept breaking out. The Government of Yugoslavia became extremely unstable and fell into deeper and deeper problems. The wars and the conflicts resulted into 10 years of complete destruction and mass wiping out of people. There were close to 300,000 deaths that occurred in this time and this was declared as the first genocide since the Second World War. The first war in was the Ten-Day War which was caused by the JNA (Yugoslav People's Army) after the secession of Slovenia. The next war that followed was the Croatian War

of Independence which had actually started weeks before the Ten-Day War. The war began when the Serbs in Croatia announced their cession because they opposed Croatian Independence. When Franji Tudman was elected as the first Croatian President, he initiated extreme changes in the Constitution of Croatia and reinstated the Croatian flag. The word 'socialist' was also removed from the title of the republic. In retaliation the Serbian politicians caused an insurrection in many areas. In the year 1990 the new Croatian constitution was ratified and the Serb National Council formed SAO Krajina which was a self proclaimed Serbian autonomous region. Following these clashes between the Serbs and Croats which begun with the Battle of Borovo Selo and ended with Croatian independence by the Brioni Agreement. However wars continued to break on a regular basis. In the following years of 1992 to 1995 the Bosnian war started. Bosnia and Herzegovina had declared independence from Yugoslavia. The war revolved around a territorial conflict with the main aim of maintaining territorial integrity for the newly formed Bosnia and Herzegovina. This was the worst of the wars. The Bosnian Croats and Bosniaks who were once allies now turned against one another which led to the Croat-Bosniak War. The Bosnia war was followed by the Kosovo war between the years of 1998 and 1999. There was horrendous treatment meted out toward the Albanians with their jobs and medical facilities and banks all taken away. As a result the Albanians started an insurgency. The insurgency in the Presevo Valley and in the Republic of Macedonia also led to war situations.

<sup>5</sup> Robert Sommer, "Camp Brothels: Forced Sex Labour in Nazi Concentration Camps," in *The Brutality of Desire: War and Sexuality in Europe's*

*20th Century*, ed. Dagmar Herzog, 168-196 (New York: Palgrave MacMillan, 2009).



The International Criminal Tribunal for the former Yugoslavia was initiated after the resolution 808 (1993) by which this tribunal was created by the Security Council for individual accountability. What is of extreme importance is that the Council did specially rely on the, “grave breaches of humanitarian law that were committed on a massive scale and in a systematic fashion.” The tribunal was basically set up for prosecuting people responsible for serious violations of International Humanitarian Law. Once the ICTY was set up the decision with regards to the principle ‘nullum crimen sine lege’, was to be applied. In addition only those parts of International Humanitarian law that formed part of customary law were to be applied. Therefore, the Secretary General held that the breach of provisions of the Geneva Convention of 1949, the 1907 Hague Convention (IV) on the laws and customs of war, the 1948 genocide convention and the 1945 Charter of the Nuremberg Tribunal all formed parts of customary international law<sup>6</sup>. Article 1 to 6 of the statute conferred jurisdiction upon the tribunal over all people responsible for serious violations of international law. However, due to the large amount of cases the ICTY decided that evidence that was found regarding lower level accused member were to be handed over to domestic prosecutors.<sup>7</sup> These cases came to be known as ‘Category 2 cases.’ The ICTR comprises of 14 judges of different nationalities. The judges are elected by the General Assemble of the UN. While electing the judges, it is also kept in mind about the

equitable geographic nationalities. They hold tenure for a period of 4 years and are selected from a list of 22 names selected by the Security General. The tribunals and National courts have concurrent jurisdiction to prosecute people who are guilty of serious crimes of international law<sup>8</sup>. Article 9.2 of the ICTY statute says that international courts have primacy over national courts. The principle of Ne Bis in Idem is followed where one person cannot be tried for the same crime by the National as well as the International courts. However, the exception is that if the individual was tried for an ordinary crime or if the National court was not impartial or independent or the trial was designed to shield the accused from an International trial, then the international Tribunal could try the person.<sup>9</sup> The ICTY for the first time held that rape was a separate war crime and defined rape as, “coercion of force or threat of force against the victim or a third person.”<sup>10</sup> The Tribunal then went on to hold that sexual penetration non- consensual or non voluntary on part of the victim could also amount to rape<sup>11</sup>. For a long time rape during armed conflicts were considered as collateral damage and were not prosecuted for. While all other crimes of genocide and crimes of serious violations of humanitarian law were prosecuted, rape as a separate crime was not yet prosecuted. The ICTY held high profile perpetrators like Zdravko Tolimir, Radovan Karadzic and Ratko Mladic guilty for crimes against humanity. In addition to this the ICTY was the first tribunal to indict a sitting head of state Slobodan Milosevic. The ICTY

<sup>6</sup> Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), S/25704 paragraph 35

<sup>7</sup> The ICTY: Transitional Justice, the Transfer of Cases and Lessons for the ICC, D. Tolbert and A. Kotic.

The Emerging Practice of the ICC, eds. C. Stahn and G. Sluiter. Brill (2008): 135–162.

<sup>8</sup> Article 9 of the ICTY Statute

<sup>9</sup> Article 10.2 of the ICTY Statute

<sup>10</sup> Prosecutor v. Furundzija. No. IT-95-17/1-T

<sup>11</sup> Prosecutor v. Gagovic (Foca), No. IT-96-23-1



tried rape as a sexual war crime for the first time in the case of Prosecutor v Tadic<sup>12</sup>. The tribunal went through the ordeal of examining the incidents. One of which was when a group of men forced one of the detainees to bite off the testicles of another detainee. Dusko Tadic was held guilty of cruel treatment and inhumane acts. The ICTY also held Hazim Delic guilty for the rape of 2 women in the camps. A woman named Grozdana Cecez testified to the fact that she had been repeatedly raped while she was in the camp for the sole reason that she could not tell the men the whereabouts of her husband. Zdravko Mucic and Esad Landzo were also held guilty for sexual violence and rape as a form of torture during war. For the first time the ICTY held that the rape of a woman could constitute as a form of torture.<sup>13</sup> The ICTY also for the first time held Furundzija guilty for rape and sexual violence even though he personally had not raped these women. However, the tribunal were of the opinion that since he was at the time the commander of the jokers which was a special unit of Croatia, he had knowledge of the rapes<sup>14</sup>. A shocking incident had come to light where soldiers had raped women in front of other soldiers that used to stand and laugh. The tribunal also for the first time in the Kunarac case held men guilty for the crime of sexual slavery. The court heard over 20 testimonies of women who all testified that they were kept in houses later came to be called as rape camps. Soldiers would enter rape women and leave. Testimonies relating to rape, gang rape and various sexual atrocities and intimidations were used against the women. Testimonies were also given to

the fact that women were bought and sold like commodities and kept being passed around. The court was of the opinion that this kind of slavery was of sexual nature and therefore held 3 men guilty for these rape camps<sup>15</sup>.

### INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

In the year 1994 a plane carrying Rwanda's then President Juvenal Habyarimana was shot down and at the same time the Rwanda Patriotic Front had come into power. The Rwanda Patriotic Front's commander General Paul Kagame gained control which came to be known as 'Hutu Power', systematically and organisationally raped, killed and massacred Tutsi and some Hutu people. These extreme atrocities against humanity kept occurring without any restriction. The International Criminal Tribunal for Rwanda (ICTR) was formed to prosecute the perpetrators of these crimes on an International front. The ICTR was established upon the passing of Resolution 955. The tribunal's seat is in Arusha and Tanzania. Since the ICTR would have to follow International Humanitarian Law, they would not be permitted to sanction the death penalty as a punishment. This was severely criticized by many. The ICTR also like the ICTY has 3 organs. The ICTR has 3 chambers with one presiding judge and 2 other judges<sup>17</sup>. These judges are elected by the General Assembly. At present the ICTR consists of 9 permanent judges and are assisted by 18 judges. The second chamber is the office of the Prosecutor. The office of the Prosecutor has the responsibility to investigate all the allegations that are

<sup>12</sup> Prosecutor v. Tadic', No. IT-94-1-T

<sup>13</sup> Prosecutor v Delic, IT-04-83-T

<sup>14</sup> Prosecutor v. Furundzija. No. IT-95-17/1-T

<sup>15</sup> Prosecutor v Kunarac et al, IT-96-23-T

<sup>16</sup> Alison Des Forges, "Leave None to Tell the Story": Genocide in Rwanda (New York: Human Rights Watch, 1999), pp. 1, 6, 15-16

<sup>17</sup> Art. 11(a) ICTR Statute



complained off. The Registry and its staff are responsible for all the administrative support of the ICTR. The ICTR has subject matter jurisdiction over all crimes of genocide and crimes against humanity and war crimes. The ICTR also has temporal jurisdiction by Resolution 955 covers crimes over a one year period<sup>18</sup>. The ICTR also has personal jurisdiction over anyone who has committed any crime under the Rwandan Statute. The ICTR has primacy over any crimes under the Rwandan Statute. If there were to occur an instance when an individual is being tried by the national court and the ICTR is of the opinion that they should conduct the trial, they can formally request the national court to defer its competence to the ICTR. Crimes of genocide, crimes against humanity, war crimes and individual criminal responsibility can be charged against anyone who has either committed these crimes or has planned or instigated or ordered these crimes. Article 6.1 of the statute does not give immunity to any heads of the states. The fact that an individual ordered the commission of a crime does not absolve him of the crime itself by the defence that he was not the one that committed the crime. Secondly, the fact that an individual committed a crime on the order of a superior also does not absolve him of the criminal responsibility. The proceedings initiated by the prosecutor could be on the basis of information received or evidence received from any source either direct or indirect. Under rule 11bis the Prosecutor may refer cases to the National Courts after they are confident that the National Courts would give the accused a complete fair trial and that the

death penalty would not be imposed. In the case of Prosecutor v Hategekimana,<sup>20</sup> the tribunal held when the Prosecutor were to ask for a transfer of the case the tribunal would hold a meeting to decide on the following conditions in order to transfer the case. Firstly, whether the accused would or would not receive a fair trial. Secondly, the competence of the nation's judiciary is considered. Thirdly, the basic rights of the accused and fourthly that the death penalty would not be imposed. The case of Prosecutor v Akayesu<sup>21</sup> was an important judgement by the ICTR for various reasons. For the first time a tribunal had convicted an individual on the grounds of genocide. The ICTR also put an end to one of the longest standing questions, whether victims of genocide would have to constitute of a distinct ethnic group. However, most importantly the tribunal held that rape could also be a form of genocide and a war crime and a crime against humanity. The tribunal held that rape could be a form of violence that could seriously affect an individual's body as well as mental health. Rape and sexual violence have now become convictable offences and that rape could also be a method to commit genocide if there are systematic and organised orders to commit these crimes. Further in the case of Kayishema and Ruzindana<sup>22</sup> the court held that the jurisdiction of the tribunal could be invoked of an armed conflict were to occur. This armed conflict could also be between armed forced and dissident forces. The court further held that if an individual was being tried the prosecutor would first have to establish a link

<sup>18</sup> S.C. Res. 955, 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

<sup>19</sup> Art. 8 ICTR Statute

<sup>20</sup> Prosecutor v. Hategekimana, Case No. ICTR-00-55B

<sup>21</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T

<sup>22</sup> Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-A



between the individual being tried and either of the armed forces that were involved in the conflict. In the case of Prosecutor v. Nahimana, Barayagwiza & Ngeze<sup>23</sup> the court held that these men were involved with the media of Rwanda. They indirectly also caused the genocide by their print and broadcast media. The media created public hatred by printing against the tutsi people who were being massacred against. These men were employed by media to create hatred amongst the people and were shown to have intent to kill.

### JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

The International Criminal Tribunal for the former Yugoslavia (ICTY) is a United Nations court of law dealing with war crimes that took place during the conflicts in the Balkans in the 1990s. The most important objective of this was the precedent that was set that individuals in senior position can no longer be protected from prosecution. The jurisdiction of the ICTR and the ICTY are invoked from Article 1 of the Rome Statute where in the article states that,

*“An International Criminal Court (‘the Court’) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute<sup>24</sup>.”*

The statute created the ICTY and the ICTR in order to deal with the war crimes that were committed during these wars. The jurisdiction arises for any of the crimes that are mentioned within the statute itself. In furtherance to this these courts gain their jurisdictional powers from Article 5 of the Rome Statute. Article 5 reads as,

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

- (a) The crime of genocide;*
- (b) Crimes against humanity;*
- (c) War crimes;*
- (d) The crime of aggression.*

*2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”*

The definition of genocide is contained in Article 6 and it is identical to the definition of genocide as given in Article 2 of the Geneva Convention. However, the definition and the extent of crimes against humanity have not been agreed upon and it leaves the term to be widely interpreted. In specificity the terms genocide has been defined in Article 6 of the Rome Statute of the International Criminal Court.

*For the purpose of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a*

<sup>23</sup> Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR-99-52-A

<sup>24</sup> Article 1 Rome Statute of the International Criminal Court



*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.*

The definitions given in the Rome Statute for genocide was gotten from the Convention for the Prevention and Punishment of the Crime of Genocide. The essence of Article 6 of the Rome Statute lies in the wording of the brief definition. It includes the words ‘with intent’, to depict that acts of genocide are premeditated and wilful violence against a particular section of people. According to the ICTY Appeals Chamber, “genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established.<sup>25</sup>” In the Akayesu judgement the court deliberated on the word ‘killed’ and were of the opinion that it was to narrow a word to be used in the context of genocide. Forcing another person to commit a crime or forcing someone to commit suicide would be difficult to bring under the term killed and therefore the court held that ‘caused death’

would be a more appropriate term to be used. In the case of Prosecutor v Kayisherma & Ruzindana<sup>26</sup> the court held that there was virtually no difference between the English word ‘killed’ and the French word ‘meurtre’. However, the word emphasized on the word virtually and was of the opinion that there was a minimalistic difference in the words. Issues arose with clause b as for what mental harm would mean. The general understanding of mental harm would mean more than a temporary impairment of mental facilities.<sup>27</sup> The International Court of Justice extended the fact that the depraved mental health could also be a result of rape and other forms of sexual violence.<sup>28</sup> In clause c of Article 6 the general understanding is the imposition of certain living mechanisms or general ways to life that would result in the destruction of them. This too would be a method of genocide. This would include deportations or putting people on a restrictive diet or withholding medical facilities or decent living accommodations.<sup>29</sup> The last two clauses of Article 6 deal with prevention of birth of the group in question and transferring the children of the group to another group. In the case of A.G. Israel v Eichmann<sup>30</sup> the court held that Adolf Eichmann resorted to measures in order to prevent the Jews from giving birth to children as well as the interruption of pregnant Jew women. The Supreme National Tribunal of Poland found the directors of these camps for

<sup>25</sup> Prosecutor v Krstic

<sup>26</sup> Prosecutor v Kayisherma & Ruzindana, note 29, para. 104

<sup>27</sup> Robinson, in his seminal study of the Convention, considered that mental harm, within the meaning of the Convention (article II), ‘can be caused only by the use of narcotics’. Robinson, The Genocide Convention: A Commentary (ix) (1960)

<sup>28</sup> Rukundo v. Prosecutor (ICTR-2001-70-A), Judgment, 20 October 2010.

<sup>29</sup> Robinson, The Genocide Convention: A Commentary, 60, 63–64. Cited with approval by the ILC, Code of Crimes against the Peace and Security of Mankind, UN Doc. A/51/332 (1996), p. 126

<sup>30</sup> A. G. Israel v. Eichmann (D.C.), note 4, para. 244



acts of genocide in the nature of sterilisation and castration.<sup>31</sup>

Article 7 deals with crimes against humanity. Crimes against humanity vary from a lot of different crimes and the section itself tries to bring in a varied number of crimes that affect humanity. Occasions have arisen when the accused could be charged under Article 6 and Article 7. At the Ad hoc tribunals cumulative charges under both Articles have been allowed. This can be done when before the evidence has been produced there is straight jacket which would create specificity for whether the crime would be charged under Article 6 or Article 7. Once the evidence is produced the court would be poised to evaluate which charge would the accused be charged with. This would also not be a violation of double jeopardy because the accused would not be convicted under 2 Articles for the same crime.<sup>32</sup> Crimes against humanity were first enshrined in the St. Petersburg Declaration of 1868 which initially limited the use of explosive against the laws of humanity. In 1899 the First Hague Peace Conference adopted this Martens clause. The first formal reference for crimes against humanity was in the Declaration of France, Great Britain and Russia when they opposed the inhuman treatment by the Ottoman Empire of Armenians in Turkey. For this paper clause 1 (g) is of extreme importance. It deals with rape and/or any other form of sexual slavery. Rape has

become a widespread method of war. There have been claims by the Yazidi community that till date they are being tormented because they are considered as devil worshippers because of the Peacock Angel that people say is Satan. They have been hunted, massacred and killed and raped since time immemorial<sup>33</sup>. Rape was initially identified as a war crime in the Lieber Code of 1863<sup>34</sup>. However till very recently sexual assaults and sexual crimes were considered as attacks on honour rather than a crime of personal autonomy of the victim. There have been various theories in the past of why is rape and sexual assault has been used. The first theory is to induce fear into the public and as a result of this there have been times when the woman has been publicly raped in front of everyone and then made to walk through the town. There were brothels for the German soldiers all over Germany occupied Europe. The women were taken there and the raped by the soldiers as and when they desired. Some women have been able to escape and tell the world their stories. Another theory of why rape and sexual violence was used was to show a stand of dominance. The most precise example would be when the Hutu and Tutsi went at each other. As and when the man of the Tutsi family was killed or taken away the women of the family were raped by the Hutu men to show them that they were in complete control of the land. All the Geneva Conventions failed to address rape as a separate war crime. Even the fourth Geneva

<sup>31</sup> Poland v. Hoess, (Supreme National Tribunal of Poland), 7 L. Reports of Trials of War Criminals 11, 25 (1948)

<sup>32</sup> Prosecutor v. Krnojelac, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb. 1999, paras. 8–10.

<sup>33</sup> Sexual violence as a weapon of war: the case of ISIS in Syria and Iraq, Sali Bitar, Uppsala Universitet, 2015.

<sup>34</sup> Instructions for the Government of Armies of the United States in the Field, US War Department, Adjutant General's Office, General Orders No. 100 (24 Apr. 1863) (Lieber Code), article XLIV ('All wanton violence...all rape, wounding, maiming or killing...[is] prohibited under penalty of death, or other such severe punishment as may be seen adequate'.)



Convention failed to add rape into the grave breach provisions. Direct reference to rape was under Article 27 where any attack on honour; prostitution, rape etc were held to be crimes and could be prosecuted.<sup>35</sup> The first major development was seen in Article 5 (g) of the ICTY statute and Article 3 (g) of the ICTR statute. Both the statutes incorporated rape and sexual assaults and crimes against humanity. It is pertinent to take note of the fact that rape has been gender neutral and applies to both men and women and therefore the definitions of rape and sexual assault has also remained gender neutral. The explicit definition of rape for a long time did not have an express definition and courts would always struggle with it. The UN Special Rapporteur gave a definition on systematic rape and sexual assaults as, ‘the insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim’s vagina or anus; or the insertion, under conditions of force, coercion or duress, of a penis into the mouth of the victim.’<sup>36</sup> Another form of sexual assault is sexual slavery. This is a form of enslavement itself but along with it, it has repeated sexual assaults. Forced sex, forced marriage and domestic help are also types of sexual slavery. In the case of *Prosecutor v Gagovic*<sup>37</sup>

the court held that keeping women in rape camps also amounted to sexual enslavement. Forced pregnancy has also been debated widely around the world. However, forced pregnancy can also invoke the jurisdiction of the International Criminal Courts. Forced pregnancy has been used when a particular set of people intentionally impregnate women of the opposition in order to stop the reproduction of those people. ‘Forced Sterilisation’ has been seen in the concentration camps during the Second World War<sup>38</sup>. This intends to prevent births within the group and result in genocide of that group. Courts have held that sexual violence in not limited to physical contact but could also be sexual violence even though there is no penetration or a physical invasion of the body. Rape and sexual assault were described as acts of genocide in the case of *Omar Al Bashir*<sup>39</sup>.

Under Article 8 clause 2 (b) (xxii) the jurisdiction of the court could also be invoked for crimes of rape and other forms of sexual violence during the times of war. It is pertinent to take note of the fact that there have no convictions under Article 8 (2) (b) (xxii) as of yet. In the case of *Procureur v Katanga*<sup>40</sup> there was no conviction on the

<sup>35</sup> Geneva Convention IV, article 27.

<sup>36</sup> Final Report of the Special Rapporteur on the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13 (22 June 1998), para. 24. She explained that the definition of rape advanced in the study ‘reflects current international elaborations, modern applications, examples derived from municipal law and practice, working definitions of rape that have been submitted by the Office of the Prosecutor to the International Criminal Tribunal for the Former Yugoslavia and to the International Tribunal for Rwanda, and definitions that have been adopted by various international non- governmental

organisations’. Taken from the commentary on the Rome Statute of the International Criminal Courts.

<sup>37</sup> *Prosecutor v. Gagovic*, No. IT-96-23-1, Indictment, 26 June 1996, paras. 1.5 and 4.8.

<sup>38</sup> In the Medical Case, several defendants were found guilty of having committed war crimes and crimes against humanity involving different kinds of medical experiments under which sterilisation experiments, U.S. v. Brandt, *Trials of War Criminals Before Nuernberg Military Tribunals*, Vols. 1 and 2, Case No. 1.

<sup>39</sup> *Prosecutor v. Al Bashir*, No. ICC-02/05-01/09-94, Second Decision on the Prosecution’s Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010

<sup>40</sup> *Procureur v. Katanga*, ICC-01/04-01/07-3436



grounds of sexual assault or sexual violence. However, there were convictions on the grounds of rape and sexual slavery in the cases of Bemba Gombo<sup>41</sup> and Ntaganda<sup>42</sup>. As mentioned earlier there has been no blanket definition on the crime of rape. However, in the case of Prosecutor v Furundzija<sup>43</sup> the trial chamber concluded on a definition of rape as, “the sexual penetration of the vagina or anus of the victim by the penis of the perpetrator or the use of any object or even the penetration of the mouth of the victim by the penetrator. The extent of the penetration is of no significance. However slight the penetration maybe, it would still constitute rape.” Along with these sexual slavery was also taken under consideration. Testimonies of people during the trials as well as interviews with people who have gotten away from these horrific incidents have brought to light the atrocities that these people face. There have been stories by women who have chosen to remain anonymous due to various reasons where they speak about how they were taken from place to place and kept their overnight and then transferred from person to person and they fell into the cycle which they could not get out off. These forms of sexual slavery have also now been condemned under International Law.

\*\*\*\*\*

<sup>41</sup> Prosecutor v. Bemba Bombo, ICC-01/05-01/08-424

<sup>42</sup> Prosecutor v. Ntaganda, ICC-01/04-02/06-309

<sup>43</sup> Prosecutor v. Furundzija, IT-95-17/1-T