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"DEFINING THE ACTUS REUS OF SEXUAL VIOLENCE AS A CRIME AGAINST HUMANITY: DEVELOPMENTS IN INTERNATIONAL CRIMINAL LAW"

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Abstract:

The interpretation and application of article 7(1)(g)-6 of the Statute of the International Criminal Court (ICC), punishing “any other form of sexual violence of comparable gravity” as a crime against humanity, has proved challenging due to its vague and undefined terms. Yet, understanding what this crime entails is primordial in light of the principle of legality. Hence, this study first examines how the actus reus of sexual violence has been defined in international law with a focus on the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. Second, drawing on the ICC’s applicable law, case law, and scholarship, this study conducts an in-depth analysis of each actus reus requirement of article 7(1)(g)-6 of the Statute of the ICC to clarify their scopes and meanings. While the implications of the “violence” requirement are evident, ambiguities remain for the “act of sexual nature” and “of comparable gravity” requirements. Consequently, this study suggests an “act of sexual nature” to be understood as a conduct that objectively targets the victim’s sexual characteristics, sexuality, or sexual autonomy. Additionally, the cultural context, the rationale behind sexual violence in conflict, and the victim’s physical integrity and personal dignity must also be considered. To assess the gravity of an act, this study further argues, its nature must first be considered, and other criteria in a second step, such as the number of victims, the reiterative character or public commission, the immediate or long-term impact on the victim, or the cultural context.

L'interprétation et l'application de l'article 7(1)(g)-6 du Statut de la Cour pénale internationale (CPI), punissant "toute autre forme de violence sexuelle de gravité comparable" en tant que crime contre l'humanité, s'est avérée difficile en raison de ses termes vagues et indéfinis. Pourtant, il est primordial de comprendre ce qu’implique ce crime à la lumière du principe de légalité. De ce fait, cette recherche examine dans un premier temps comment l'actus reus des violences sexuelles a été défini en droit international, avec un accent sur le Tribunal pénal international pour l'ex-Yougoslavie et le Tribunal pénal international pour le Rwanda. Dans un second temps, en s'appuyant sur le droit applicable de la CPI, la jurisprudence et la doctrine, cette recherche procède à une analyse approfondie de chaque condition de l'actus reus de l'article 7(1)(g)-6 du Statut de la CPI afin de clarifier leurs portées et leurs significations. Si les implications de l'exigence de "violence" sont évidentes, des ambiguïtés subsistent en ce qui concerne les exigences d’"acte de nature sexuelle" et de "gravité comparable". Par conséquent, cette recherche suggère qu'un "acte de nature sexuelle" soit compris comme un comportement

qui vise objectivement les caractéristiques sexuelles, la sexualité ou l'autonomie sexuelle de la victime. En outre, le contexte culturel, la rationalité derrière les violences sexuelles en temps de conflit, ainsi que l'intégrité physique et la dignité personnelle de la victime doivent également être pris en compte. Selon cette étude, pour évaluer la gravité d'un acte, il faut d'abord examiner sa nature et, dans un second temps, d'autres critères, tels que le nombre de victimes, le caractère réitératif ou la commission en public, l'impact immédiat ou à long terme sur la victime, ou encore le contexte culturel.

Keywords: Sexual violence; crimes against humanity; International Criminal Court; International Criminal Tribunal for the former Yugoslavia; International Criminal Tribunal for Rwanda

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1 Introduction

Evidence of sexual violence perpetrated in conflict is abundant. Most recently, such incidents have been documented in Ukraine.[1] Reports show that sexual violence also took place on a large scale during the war in Darfur, Sudan.[2] In the first half of the 20th century, imperial Japan's troops committed mass rapes and sexual slavery.[3] The phenomenon even appears in the Bible[4] and Greek mythology[5].

Despite the longstanding history of sexual violence during conflict, their prosecution was virtually inexistent until the late 1990s. At this time, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) took up their work in response to the conflicts in the former Yugoslavia, where an estimated 20'000 to 50'000 women were raped, and Rwanda, where these numbers range from 250'000 to 500'000.[6] In this context, the long-held assumption that sexual violence in conflict is a secondary by-product of hostilities was revised.[7] Such crimes, thus, played a significant role during the proceedings at the *ad hoc* tribunals, with 48% of indictees facing charges of sexual violence at the ICTY[8] and 46% at the ICTR[9]. The establishment of the International Criminal Court (ICC) constituted another turning point for sexual violence under international criminal law as it has jurisdiction over the specific offenses of "sexual slavery", "enforced prostitution", "forced pregnancy", and "enforced sterilization" as war crimes and crimes against humanity, in addition to the previously recognized offense of "rape". Residual clauses[10] for offenses of sexual violence were also introduced. Accordingly, crimes against humanity of "any other form of sexual violence of comparable gravity" are punished under article 7(1)(g)-6 of the ICC Statute.

The interpretation of this "crime against humanity of sexual violence"[11] provision, however, has proved challenging, as it is demonstrated in the following chapters. This article and its

[1] UN General Assembly. "Independent International Commission of Inquiry on Ukraine, Note by the Secretary-General," October 18, 2022, A/77/533, https://www.ohchr.org/en/documents/reports/a77533-independent-international-commission-inquiry-ukraine-note-secretary, paras. 88–98.
[2] UN International Commission of Inquiry on Darfur, "Report to the Secretary-General" (United Nations, January 25, 2005), https://www.un.org/ruleoflaw/blog/document/report-of-the-international-commission-of-inquiry-on-darfur-to-the-united-nations-secretary-general/, paras. 333–361.
[3] Richard J. Goldstone and Estelle A. Dehon, "Engendering Accountability: Gender Crimes Under International Criminal Law," (hereafter "Engendering Accountability") *New England Journal of Public Policy* 19, no. 1 (2003): p. 123.
[4] "Zechariah 14:2." English Standard Version Bible, 2001, https://www.esv.org/Zechariah+14/.
[5] Moriz Haupt, *Die Metamorphosen Des P. Ovidius Naso*, vol. 1 (Leipzig: Weidmannsche Buchhandlung, 1853), p. 80–81.
[6] UN General Assembly, "In-Depth Study on All Forms of Violence against Women, Report of the Secretary-General," July 6, 2006, A/61/122/Add.1, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/419/74/PDF/-N0641974.pdf?OpenElement, para. 146.
[7] Laurel Baig *et al.*, "Contextualizing Sexual Violence: Selection of Crimes," in *Prosecuting Conflict-Related Sexual Violence at the ICTY*, ed. Serge Brammertz and Michelle Jarvis, First edition (Oxford: Oxford University Press, 2016), p. 172.
[8] "Crimes of Sexual Violence: In Numbers," International Criminal Tribunal for the former Yugoslavia, accessed May 13, 2023, https://www.icty.org/en/features/crimes-sexual-violence.
[9] Linda Bianchi, "The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR," in *Sexual Violence as an International Crime: Interdisciplinary Approaches*, ed. Anne-Marie de Brouwer *et al.* (Cambridge: Intersentia, 2013), p. 128.
[10] This notion is discussed in chapter 5.1.
[11] As named in the "Elements of Crimes" (The Hague, 2013), ICC-PIOS-LT-03-002/15_Eng, https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf, art. 7(1)(g)-6.

corresponding elements[12] include vague and undefined terms. Furthermore, ICC case law on matters of sexual violence, limited to date, only provides little clarification.[13] Yet, although judges must have enough room for interpretation so as to include all potential acts of sexual violence, it is important to understand what this crime entails in accordance with the principle of legality.[14] In light of these ambiguities, this study examines how the *actus reus* of sexual violence has been defined in international criminal law. In particular, it performs a thorough analysis of the *actus reus* for article 7(1)(g)-6 of the ICC Statute, punishing "any other form of sexual violence of comparable gravity" as an underlying act of crimes against humanity.

The aforementioned research questions call for a twofold terminological clarification. First, "sexual violence", as used by the ICC, is also generally employed throughout this study. Yet, "sexual assault" has frequently described identical acts, especially in earlier judgments.[15] "Sexual assault" is therefore used when citing such case law. In that event, "sexual assault" should be understood as a synonym of "sexual violence" for the purpose of this study unless specified otherwise. Second, *actus reus* translates to "guilty act" and refers to requirements defined individually for each offense needed to be fulfilled for the commission of a crime. Concerning crimes against humanity, some authors argue that their contextual element – meaning that "the act in question must be committed as part of an 'attack' directed against the civilian population" under customary law[16] – are a part of their *actus reus* since it is a material element rather than a mental one.[17] Others consider that *actus reus* in the context of crimes against humanity only refers to the material requirements specific to each underlying act and see the contextual element as a distinct category.[18] As the latter interpretation is also observed in ICC judgments[19], it is followed throughout this study.

Since the research question focuses on the *actus reus* of sexual violence as a crime against humanity, the contextual element that introduces the international dimension to the offense is not addressed in the present study. The same applies to the *mens rea* requirements of underlying

[12] "Elements of Crimes," art. 7(1)(g)-6.
[13] See *infra* chapter 4.3 for a selection of cases.
[14] See Rosemary Grey, "Conflicting Interpretations of 'Sexual Violence' in the International Criminal Court: Recent Cases," (hereafter "Conflicting Interpretations of 'Sexual Violence' in the International Criminal Court") *Australian Feminist Studies* 29, no. 81 (2014), p. 284. But also, similarly, Alexander Schwarz, *Das Völkerrechtliche Sexualstrafrecht: Sexualisierte Und Geschlechtsbezogene Gewalt Vor Dem Internationalen Strafgerichtshof*, (hereafter "*Das Völkerrechtliche Sexualstrafrecht*") Beiträge Zum Internationalen Und Europäischen Strafrecht 36 (Berlin: Duncker & Humblot, 2019), p. 288; Kai Ambos, "Crimes against Humanity," in *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing*, by Kai Ambos (Oxford: Oxford University Press, 2014), p. 103; Tanja Altunjan, "The International Criminal Court and Sexual Violence: Between Aspirations and Reality," (hereafter "The International Criminal Court and Sexual Violence") *German Law Journal* 22, no. 5 (2021), p. 892.
[15] Why "sexual violence" is preferred in more recent jurisprudence is further explained in chapter 5.2.1.
[16] Guénaël Mettraux, "Chapeau or Contextual Elements," in *International Crimes: Law and Practice: Volume II: Crimes Against Humanity*, by Guénaël Mettraux (Oxford: Oxford University Press, 2020), p. 196.
[17] See e.g., Gerhard Werle and Florian Jessberger, "General Principles," in *Principles of International Criminal Law*, by Gerhard Werle and Florian Jessberger, 4th ed. (Oxford: Oxford University Press, 2020), p. 210.
[18] See e.g., Guénaël Mettraux, "Underlying Offences," in *International Crimes: Law and Practice: Volume II: Crimes Against Humanity*, by Guénaël Mettraux (Oxford: Oxford University Press, 2020), p. 357, 787–793.
[19] See e.g., ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, Judgment pursuant to Article 74 of the Statute, (hereafter "*Bemba Trial Judgment*") No. ICC-01/05-01/08 (March 21, 2016). In the "*actus reus*" section, the Court only examines the underlying offense. The contextual element, examined in a different section, is not referred to as being a part of the *actus reus*.

acts which concern the perpetrator's intent and knowledge.[20] Procedural aspects regarding sexual violence as a crime against humanity are also not analyzed.

A preliminary remark concerning the contextual element of crimes against humanity must nonetheless be made. While the ICTY Statute states that an act must be committed in armed conflict to become a crime against humanity, the ICTR and the ICC require it to happen in an attack directed against a civilian population[21], reflecting customary international law[22]. Under these regimes, an "attack" may therefore occur in an armed conflict – with a link to it or not – or in peacetime.[23] Moreover, it can "precede, outlast, or continue during the armed conflict" [24]. Werle and Jessberger use the term "context of organized violence"[25] to summarize this contextual requirement. Thus, whenever this study refers to "conflict", it must not be understood as a synonym for "armed conflict"[26] but instead as a synonym for "context of organized violence", which includes all settings in which crimes against humanity can potentially occur.

It should also be noted that the *actus reus* of article 7(1)(g)-6 of the Rome Statute[27], as described in the Elements of Crime, also appears *mutatis mutandis* in articles 8(2)(b)(xxii)-6 and 8(2)(e)(vi)-6, the residual clauses for sexual violence in the context of war crimes. The same applies to the definitions of these crimes provided by the *ad hoc* tribunals in their case law. Similarly, terms used to describe the *actus reus* of sexual violence as a crime against humanity, such as "sexual nature" or "coercion or force", have also been interpreted by the tribunals and the Court in the context of specific offenses of sexual violence. Such case law is, therefore, also valuable for interpreting what is now punished under article 7(1)(g)-6 of the ICC Statute.

In the present paper, case law of the ICTY and the ICTR is examined in addition to case law of the ICC. These *ad hoc* tribunals are chosen since their creation and practice with regard to sexual violence not only had a great impact on the establishment of the ICC, but also on its decisions, as it heavily relies upon their extensive case law on sexual violence whenever its Statute allows it.[28] The Special Court for Sierra Leone as well as the Extraordinary Chambers in the Courts of Cambodia that also deal with crimes of sexual violence are not addressed since the ICC refers to them less frequently in the specific context analyzed.

The present study is divided into four parts. First, sexual violence in conflict is put into its context. The root causes for and the consequences of sexual violence in conflict are examined on the one hand, and the appearance and evolution of sexual violence and crimes against humanity in international law are described on the other hand. In a second step, the legal frameworks for crimes against humanity at the ICTR, the ICTY, and the ICC are outlined with a focus

[20] As required by "Rome Statute of the International Criminal Court," (hereafter "Rome Statute") July 1, 2002, 2187 U.N.T.S. 3, art. 30. Or as discussed in ICTY, The Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić aka "Vlado", Judgement, No. IT-95-16-T (January 14, 2000), para. 556.
[21] The full texts of the articles punishing crimes against humanity in the three regimes are listed in chapter 3.
[22] Mettraux, "Chapeau or Contextual Elements," p. 196.
[23] *Ibid.*, p. 198–199, 220–221.
[24] *Ibid.*, p. 221.
[25] Werle and Jessberger, "General Principles," p. 210.
[26] This is a requirement for the commission of war crimes rather than crimes against humanity: see e.g., "Rome Statute," art. 8 and "Elements of Crimes," art. 8.
[27] Synonym for "Statute of the International Criminal Court".
[28] Helen Brady, "The Power of Precedents: Using the Case Law of the Ad Hoc International Criminal Tribunals and Hybrid Courts in Adjudicating Sexual Violence and Gender-Based Crimes at the ICC," (hereafter "The Power of Precedents") *Australian Journal of Human Rights* 18, no. 2 (2012): p. 101–102.

on provisions regarding sexual violence. Third, each institution's relevant case law is explored chronologically, beginning with the groundbreaking Akayesu case. Finally, the scope and meaning of "any other form of comparable gravity" in the sense of article 7(1)(g) of the ICC Statute are addressed, by conducting an in-depth examination of each *actus reus* requirement. Drawing on the ICC's primary sources and other applicable law in accordance with article 21 of its Statute, case law of the ICC and *ad hoc* tribunals, and scholarship, a comprehensive overview of what this offense entails is provided in this fourth section.

2 Contextualizing Sexual Violence and its Appearance in International Law

2.1 Rationale and Consequences

Sexual violence in contexts of organized violence does not "happen in a vacuum"[29] but rather "reflects and may exacerbate existing vulnerabilities in a society"[30], according to Reis. Personal and contextual motivational factors for perpetrators specific to these contexts contribute to the elevated occurrence of sexual violence. The unlikeliness of facing consequences for committing sexual violence in conflict-affected settings – due to the exceptional circumstances inherent to conflict – makes for an opportunity for perpetrators.[31] Feelings of exasperation or thirst for retaliation might make this opportunity seem more tempting.[32] Moreover, other incentives for perpetrators within a group might exist, such as being allowed to have sex slaves as a reward or using joint commission of sexual violence to improve cohesion within the group.[33]

Beyond personal motivational factors, perpetrators commit crimes of sexual violence in conflict because of their impact on affected communities. Often, they are deliberately perpetrated in public.[34] In doing so, the victims embody their ethnic, religious, or political group, which is humiliated and degraded.[35] In strongly patriarchal societies, acts of sexual violence committed on women are, at the same time, indirect attacks against the men of their community as they have failed to protect "their" women.[36] Armed groups also use sexual violence in some cases as a strategy to spread terror and fear, ultimately forcing people to flee or disclose information.[37] Furthermore, in conflicts involving an ethnic component, sexual violence is seen as a means to demonstrate cultural superiority.[38] Given this context, victims of sexual violence not only suffer from repercussions of physical nature like pain, sexually transmitted diseases, or pregnancy but

[29] Chen Reis, "Ethical, Safety and Methodological Issues Related to Collection and Use of Data on Sexual Violence in Conflict," in *Sexual Violence as an International Crime: Interdisciplinary Approaches*, ed. Anne-Marie de Brouwer *et al.* (Cambridge: Intersenita, 2013), p. 190.
[30] *Ibid*.
[31] *Ibid*.
[32] Tanja Altunjan, *Reproductive Violence and International Criminal Law*, International Criminal Justice Series 29 (The Hague: T.M.C. Asser Press, 2021), p. 29.
[33] *Ibid.*, p. 29.
[34] Kristen Boon, "Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent," (hereafter "Rape and Forced Pregnancy under the ICC Statute") *Columbia Human Rights Law Review* 32, no. 3 (2001): p. 631–632.
[35] *Ibid*.
[36] Maria Eriksson Baaz and Maria Stern, *Sexual Violence as a Weapon of War? Perceptions, Prescriptions, Problems in the Congo and Beyond* (hereafter "*Sexual Violence as a Weapon of War?*")(London, New York: Zed Books, 2013), p. 21.
[37] Altunjan, *Reproductive Violence and International Criminal Law*, p. 30–31.
[38] Altunjan, "The International Criminal Court and Sexual Violence," p. 886–887.

also of social and psychological nature.[39] Rejection by the victims' families or community is common due to the widespread conception that sexual violence "sullies"[40] women for good.

2.2 Developments in International Humanitarian Law

There are various, early records of scholars and jurists who concluded that wartime rape is illegal. Among them are Lucas de Penna in the 1300s[41], Alberico Gentili in the 1500s[42], and Hugo Grotius in the 1600s[43]. The US military was first to codify international customary laws of land warfare for domestic use in the Lieber Code.[44] Its article 44 prohibited the rape of "persons in the invaded country"[45] under severe punishment, including death penalty. On the international level, the Hague Regulations of 1899 and 1907 were one of the earliest international treaties on armed conflict.[46] First and foremost created to regulate the conduct of hostilities, not the protection of civilians, article 46 of the 1907 convention nevertheless obliges parties of a conflict to respect the "[f]amily honour"[47], which has been understood as outlawing rape[48].

The four Geneva Conventions and their Additional Protocols I and II are today considered the essence of conventional international humanitarian law.[49] Although they do not explicitly prohibit sexual violence or sexual assault, they do so implicitly. Article 27 of the Geneva Convention IV states that "[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights", and that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[50] The Additional Protocol I further expands protection for women in international armed conflicts by stating that they "shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault"[51] under article 76(1). Rape, though, remains excluded from the grave breaches status,

[39] Human Rights Watch, "Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo" (Human Rights Watch, 2009), https://www.hrw.org/report/2009/07/16/soldiers-who-rape-commanders-who-condone/sexual-violence-and-military-reform, p. 16.
[40] Eriksson Baaz and Stern, *Sexual Violence as a Weapon of War?*, p. 21.
[41] Richard Shelly Hartigan, *The Forgotten Victim: A History of the Civilian* (Chicago: Precedent Publishing, 1982), 50.
[42] Alberico Gentili, *De Iure Belli Libri Tres*, trans. John C. Rolfe (Oxford: The Claredon Press, 1933), p. 258–259.
[43] Hugo Grotius, *De Jure Belli Ac Pacis Tres*, trans. Francis W. Kelsey (London: At the Claredon, 1925), p. 657.
[44] Edoardo Greppi, "The Evolution of Individual Criminal Responsibility under International Law," *International Review of the Red Cross* 81, no. 835 (1999): 353; "Treaties, States Parties, and Commentaries - Lieber Code, 1863," International Committee of the Red Cross, accessed November 22, 2022, https://ihl-databases.icrc.org/ihl/INTRO/110.
[45] General Orders No. 100 reprinted in United States War Department *et al., The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, vol. 3, 3 (Washington: Government Printing Office, 1891), p. 148–164.
[46] Gloria Gaggioli, "Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law," (hereafter "Sexual Violence in Armed Conflicts") *International Review of the Red Cross* 96, no. 894 (2014), p. 511.
[47] "Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land" (The Hague, October 18, 1907), 205 CTS 277, art. 46.
[48] Helen Durham, "Women and International Criminal Law: Steps Forward or Dancing Backwards," (hereafter "Women and International Criminal Law") in *International Criminal Justice: Legitimacy and Coherence*, ed. Gideon Boas, William A. Schabas, and Michael P. Scharf (Cheltenham: Edward Elgar, 2012), p. 259.
[49] Karima Bennoune, "Do We Need New International Law to Protect Women in Armed Conflict?," *Case Western Reserve Journal of International Law* 38, no. 2 (2007), p. 371.
[50] "Convention (IV) Relative to the Protection of Civilian Persons in Time of War" (Geneva, August 12, 1949), 75 UNTS 287, art. 27.
[51] "Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts" (Geneva, June 8, 1977), 1125 UNTS 3, art. 76(1).

except in cases where it "amounts to inhuman treatment or wilfully causing great suffering or serious injury to body or health" [52]. In the context of non-international armed conflicts, article 4(2)(e) of the Additional Protocol II classifies "outrages upon personal dignity, in particular, humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault" as acts "prohibited at any time and in any place whatsoever"[53].

Under customary international humanitarian law, "[r]ape and other forms of sexual violence are prohibited"[54] during international and non-international armed conflicts, according to the International Committee of the Red Cross.

2.3 First Mentions in International Criminal Law

The earliest recorded international criminal tribunal was set up in 1474 to try Sir Peter von Hagenbach for the crimes committed under his direction during the occupation of Breisach.[55] An *ad hoc* court charged von Hagenbach with, *inter alia*, rape and considered him to have "trampled under foot the laws of God and man."[56] This classification can be understood as a forerunner of crimes against humanity since most acts perpetrated occurred before the outbreak of hostilities.[57] However, the acts were only criminalized because he had not declared war.[58]

In an attempt to investigate the violations of the laws and customs of war committed in World War I[59], the War Crimes Commission appointed by the principal Allied Powers enumerated 32 non-exhaustive offenses in their report, among which "rape" and "abduction of girls and women for the purpose of forced prostitution" figured[60]. Although the Commission endorsed creating an international tribunal to try Axis power perpetrators, the Allies never proceeded to it.[61]

The Nuremberg Charter, the legal basis for prosecuting major war criminals in World War II, criminalized "crimes against humanity"[62] for the first time. Although neither this provision nor the other two offenses within its jurisdiction – "crimes against peace" and "conventional war crimes" – explicitly included sexual violence[63], the evidence put forward during the trial

[52] Rule 156: Definition of War Crimes in "Rules," International Humanitarian Law Databases, accessed May 16, 2023, https://ihl-databases.icrc.org/en/customary-ihl/v1.
[53] "Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts" (Geneva, June 8, 1977), 1125 UNTS 609, art. 4(2)(e).
[54] Rule 93: Rape and Other forms of Sexual Violence in "Rules." International Humanitarian Law Databases.
[55] Durham, "Women and International Criminal Law," p. 257.
[56] Greppi, "The Evolution of Individual Criminal Responsibility under International Law," p. 534.
[57] *Ibid.*, p. 535.
[58] Anne-Marie De Brouwer, "Introduction," in *Supranational Criminal Prosecution of Sexual Violence : The ICC and the Practice of the ICTY and the ICTR*, by Anne-Marie De Brouwer (Antwerp: Intersentia, 2005), p. 4.
[59] Kelly D. Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles," (hereafter "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law") *Berkeley Journal of International Law* 21, no. 2 (2003), p. 300.
[60] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalities, "Report Presented to the Preliminary Peace Conference," *American Journal of International Law* 14, no. 1–2 (1920), p. 112–115.
[61] Kelly D. Askin, "Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward," (hereafter "Treatment of Sexual Violence in Armed Conflicts") in *Sexual Violence as an International Crime: Interdisciplinary Approaches*, ed. Anne-Marie de Brouwer *et al.* (Cambridge: Intersentia, 2013), p. 29–30.
[62] Guénaël Mettraux, "Crimes Against Humanity Under General International Law," in *International Crimes: Law and Practice: Volume II: Crimes Against Humanity*, by Guénaël Mettraux (Oxford: Oxford University Press, 2020), p. 38.
[63] Charter annexed to "Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and

contained incidents of sexual violence. *Ergo*, they "can be considered subsumed within the […] Judgment" [64] of the International Military Tribunal. East Asia's counterpart to the tribunal as well refrained from including the punishment of sexual violence in its Charter, which reproduces the three Nuremberg offenses.[65] In spite of that, its indictment included accusations of rape under the "conventional war crimes" provision, more specifically as "inhumane treatment", "mistreatment", "ill-treatment", and a "failure to respect family honour and rights."[66] In 1948, the tribunal found three of the accused guilty, including for crimes of sexual violence.[67]

Although Control Council Law Number 10 – destined for the trial of "lesser war criminals"[68] at Nuremberg – went further, explicitly introducing rape as a crime against humanity for the first time, no such crimes ended up being prosecuted.

2.4 The Establishment of the *Ad Hoc* Tribunals and the International Criminal Court

The fact that sexual violence was committed during the conflicts in the former Yugoslavia and in Rwanda was no novelty. However, for the first time, the international community demanded that perpetrators of such acts be held accountable just as they are for other crimes.[69] This was, on the one hand, due to academia and civil society that had helped increase the prosecution rate of rape on the domestic level in the years leading up to the creation of the *ad hoc* tribunals.[70] On the other hand, and more importantly, numerous investigators and reporters disclosed information from survivors and witnesses of sexual violence speaking up about their experiences suggesting that such acts were committed systemically during these conflicts.[71]

Given this context, in its 1993 Resolution 798 formally establishing the ICTY, the United Nations (UN) Security Council was alarmed about the "systematic detention and rape of women."[72] Later, the ICTY later stated "that it was intended for the Tribunal to have jurisdiction for sexual offenses beyond rape"[73]. In 1994, UN Security Council Resolution 955 formally established the ICTR. Although the sexual violence committed in Rwanda was not explicitly mentioned as a reason for the tribunal's establishment, a report published shortly after, highlighting incidents of rape committed during the conflict, acknowledges its importance.[74]

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the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis" (London, August 8, 1945), 82 UNTS 279, art. 6(c).

[64] *Ibid*.

[65] Askin, "Treatment of Sexual Violence in Armed Conflicts," p. 38.

[66] Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law," p. 302.

[67] *Ibid*.

[68] Goldstone and Dehon, "Engendering Accountability," p. 141, fn. 19.

[69] Grace Harbour, "International Concern Regarding Conflict-Related Sexual Violence in the Lead-up to the ICTY's Establishment," in *Prosecuting Conflict-Related Sexual Violence at the ICTY*, ed. Serge Brammertz and Michelle J. Jarvis (Oxford: Oxford University Press, 2016), p. 19–24.

[70] Kelly D. Askin, "A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003," (hereafter "A Decade of the Development of Gender Crimes in International Courts and Tribunals") *Human Rights Brief* 11, no. 3 (2004), p. 16.

[71] Askin, "A Decade of the Development of Gender Crimes in International Courts and Tribunals," p. 16.

[72] UN Security Council, "Resolution 827 (1993)," May 25, 1993, S/RES/827 (1993), https://digitallibrary.un.org/record/166567, preamble.

[73] ICTY, The Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić, Judgement, Volume 1 of 4, (hereafter "*Milutinović et al. Trial Judgement*") No. IT-05-87-T (February 26, 2009), para. 184.

[74] UN Security Council, "Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), Annexed to the Letter Dated 9 December 1994 from the Secretary-General Addressed to

While these two tribunals were established in response to specific conflicts by UN Security Council resolutions, binding for all UN member states, the ICC is a treaty-based, permanent, and independent international organization. The ICTY and the ICTR nonetheless marked the negotiations of the Rome Statute held between 1995 and 1998.[75] Additionally, the thorough and unprecedented documentation of the acts of horror in the former Yugoslavia and Rwanda and the subsequent public response to them also influenced the creation of the ICC.[76] Moreover, women's rights organizations heavily criticized the initial drafting strategy to codify existing international law in the Rome Statute.[77] Thus, they lobbied for an explicit inclusion of more crimes of sexual violence than in the ICTY and ICTR Statutes.[78]

3 The Legal Framework for Crimes against Humanity

3.1 The Statute of the International Criminal Tribunal for the Former Yugoslavia

Article 5 of the ICTY Statute, establishing jurisdiction of the tribunal for crimes against humanity, reads as follows:

> "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts."[79]

3.2 The Statute of the International Criminal Tribunal for Rwanda

Contextual elements aside, article 3 of the ICTR Statute copies the ICTY definition of crimes against humanity. Under this article,

> "[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment ; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts."[80]

3.3 The Statute of the International Criminal Court and its Applicable Law

Unlike previous international criminal tribunals, the Rome Statute contains a provision regarding the law judges are bound to apply. As per article 21(1)(a) of its Statute, the ICC must, before all else, apply the Statute of the ICC, the Elements of Crimes, and the Rules of Procedure and Evidence, making them its primary sources.[81]

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the President of the Security Council," December 9, 1994, S/1994/1405, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/478/78/PDF/N9447878.pdf?OpenElement, paras. 136–146.

[75] Altunjan, "The International Criminal Court and Sexual Violence," p. 879.

[76] *Ibid*.

[77] Rana Lehr-Lehnardt, "One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court," (hereafter "One Small Step for Women") *Brigham Young University Journal of Public Law* 16, no. 2 (2002), p. 338.

[78] *Ibid.*, p. 338–342.

[79] UN Security Council, "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)," May 3, 1993, S/25704, https://digitallibrary.un.org/record/166504, art. 5.

[80] Statute of the International Criminal Tribunal for Rwanda, art. 3, annexed to UN Security Council, "Resolution 955 (1994)," November 8, 1994, S/RES/955 (1994), https://digitallibrary.un.org/record/198038.

[81] "Rome Statute," art. 21(1)(a).

Whereas article 5 of the Statute of the ICC pertaining to the crimes within the jurisdiction of the Court stipulates that crimes against humanity may be prosecuted, article 7 clarifies the definition of these offenses. A crime against humanity in the context of the ICC is an act figuring on the exhaustive list in article 7(1) letters (a) to (k), which is "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"[82]. Compared to the ICTY and the ICTR statutes, the Rome Statute includes two new categories of crimes against humanity, more precise definitions of the existing ones, and new underlying offenses. Accordingly, with regards to crimes of sexual violence, not only "rape" figures among the punishable acts, but also "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity"[83] under letter (g) of article 7(1), as mentioned in the introduction.

When interpreting the Rome Statute, the rules and principles of interpretation set out by the Vienna Convention of the Law of Treaties of 1969 (VCLT) have to be applied on a customary basis, as the Court has confirmed on several occasions.[84] Consequently, the general rule of article 31 of the VCLT according to which "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[85] must be followed, as well as the other provisions of articles 31 to 33. Grammatical, teleological, systematic, and – as a complementary means – historical interpretation may thus be used.[86]

The Elements of Crimes shall "be consistent with [the Rome] Statute"[87] and "assist the Court in the interpretation and application of articles 6, 7, 8, and 8 *bis*"[88]. For the crime against humanity of "any other form of sexual violence of comparable gravity", at the core of the present study, they outline the following elements:

> "1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
>
> 2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute.
>
> 3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
>
> 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
>
> 5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."[89]

[82] "Rome Statute," art. 7(1).
[83] *Ibid.*, art. 7(1)(g).
[84] See e.g., ICC, Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, No. ICC-01/04-168 (July 13, 2006), para. 6. Or ICC, The Prosecutor v. Omar Hassan Ahmad Al Bashir, Final Submissions of the Prosecution following the Appeal Hearing, No. ICC-02/05-01/09 (September 28, 2018), para. 6.
[85] "Vienna Convention on the Law of Treaties" (Vienna, May 23, 1969), 1155 UNTS 331, art. 31.
[86] Altunjan, *Reproductive Violence and International Criminal Law*, p. 14.
[87] "Rome Statute," art. 9(3).
[88] *Ibid.*, art. 9(1).
[89] "Elements of Crimes," art. 7(1)(g)-6.

While elements one and two are *actus reus* requirements, element three introduces an additional *mens rea* requirement[90], besides the general rule of article 30 of the Rome Statute[91]. The last two elements are contextual elements common to all crimes against humanity.

The Rules of Procedure and Evidence deal with procedural aspects. Since these are not relevant to answering the research question, the ICC regime's third primary source is not discussed in this chapter. Instead, relevant provisions are directly cited when referred to throughout the text.

In a subsidiary manner, "applicable treaties" and "the principles and rules of international law", which include "the established principles of the international law of armed conflict"[92], shall be applied by the Court, as stated in article 21(1)(b). Pursuant to article 21(1)(b), customary law may also be used to interpret the Statute of the ICC.[93]

Only if the sources in article 21(1)(a) and (b) are not sufficient general legal principles derived from domestic laws shall be applied if they are neither in conflict with the ICC Statute nor with international law or internationally recognized norms and standards.[94]

As per article 21(2), "[t]he Court may apply principles and rules of law as interpreted in its previous decisions"[95], indicating that it is not required to follow its previous interpretations. Given the context of this study, it should also be stressed that the ICC is certainly not bound to make decisions consistent with ICTY or ICTR jurisprudence. Decisions issued by *ad hoc* and hybrid courts, Brady suggests, could be used either as "a means to interpret primary sources"[96] or in case these sources "leave a *lacuna* or gap that must be filled by resort to principles or rules of international law"[97]. In reality, the ICC frequently refers to ICTY and ICTR decisions, especially in cases of sexual violence. Nonetheless, the ICC Pre-Trial Chamber II recalled that "the law and practice of the *ad hoc* tribunals […] cannot *per se* form a sufficient basis for importing into the Court's procedural framework remedies other than those enshrined in the Statute".[98]

References to decisions by human rights courts are common as well.[99] Article 21(3) encourages them, stating that interpretations by the Court and the application of the law within the

[90] As described in Mettraux, "Underlying Offences," p. 793.
[91] "Rome Statute," art. 30, mental element: "*1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct ; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.*"
[92] *Ibid.,* art. 21(1)(b).
[93] William A. Schabas, "Jurisdiction, Admissibility, and Applicable Law: Compétence, Recevabilité, Et Droit Applicable, Art.21 Applicable law/Droit applicable." in *The International Criminal Court: A Commentary on the Rome Statute*, ed. William A. Schabas, 2nd ed., Oxford Commentaries on International Law (Oxford: Oxford University Press, 2016), p. 521.
[94] "Rome Statute," art. 21(1)(c).
[95] *Ibid.,* art. 21(2).
[96] Brady, "The Power of Precedents," p. 78. (italics omitted)
[97] *Ibid.,* p. 78.
[98] ICC, Situation in Uganda, Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, No. ICC-02/04-01/05 (October 28, 2005), para. 19.
[99] William A. Schabas, "Art.7 Crimes against Humanity/Crimes Contre l'humanité," (hereafter "Art.7 Crimes against Humanity") in *The International Criminal Court: A Commentary on the Rome Statute*, ed. William A. Schabas, 2nd ed., Oxford Commentaries on International Law (Oxford: Oxford University Press, 2016), p. 528.

framework of article 21 must comply with "internationally recognized human rights"[100]. In addition to that, interpretations must "be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status"[101].

4 Sexual Violence in Case Law

4.1 Contributions by the International Criminal Tribunal for Rwanda

4.1.1 The Akayesu Case

The first international criminal tribunal to thoroughly discuss the notions of rape and sexual violence was the ICTR in the Akayesu case. In its judgment, after recalling that no common definition of rape has been established in international law[102], the Trial Chamber gives a definition, inspired by the definition of torture in the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.[103] The Chamber holds that rather than a list of specific acts, a conceptual definition is more practical given that rape, like torture, is perpetrated "for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person"[104]. Furthermore, both offenses constitute a violation of personal dignity. Therefore, rape is defined "as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive"[105] by the Chamber. It also specifies:

> "Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invation of the human body and may include acts which do not involve penetration or even physical contact."[106]

In addition to crimes against humanity of rape, Akayesu was found guilty of crimes against humanity of other inhumane acts for forced undressing of multiple women, some of which were also forced to march publicly or perform exercises while naked.[107] The acts above are explicitly classified as "acts of sexual violence"[108] by the Chamber.

4.1.2 The Niyitegeka Case

The Trial Chamber again considered sexual violence to amount to crimes against humanity of "other inhumane acts" in the Niyitegeka case.[109] The act in question – called sexual violence

[100] "Rome Statute," art. 21(3).
[101] *Ibid.*, art. 21(3).
[102] ICTR, The Prosecutor versus Jean-Paul Akayesu. Judgement, (hereafter "*Akayesu Trial Judgement*") No. ICTR-96-4-T (September 2, 1998), para. 596.
[103] ICTR, *Akayesu Trial Judgement*, para. 597 referring to "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (New York, December 10, 1984), 1465 UNTS 85, art. 1: "*'[T]orture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, it does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*"
[104] ICTR, *Akayesu Trial Judgement*, para. 597.
[105] *Ibid.*, para. 598.
[106] *Ibid*.
[107] *Ibid.*, para. 697.
[108] *Ibid.*, para. 692.
[109] ICTR, The Prosecutor v. Eliézer Niyitegeka, Judgement and sentence, (hereafter "*Niyitegeka Trial Judgement*") No. ICTR-96-14-T (May 16, 2003), para. 273.

by the Chamber – consisted in inserting a piece of sharpened wood into the genitalia of a dead Tutsi woman.[110] Considering that it causes "mental suffering"[111] to the Tutsi as well as "a serious attack on the human dignity"[112] of that same community, the Trial Chamber finds this form of mutilation to be of comparable seriousness to the other acts set forth by article 3 of the ICTR Statute. This "seriousness criterion" for "other inhumane acts" under the ICTR regime was previously introduced in the Kayishema and Ruzindana case and is determined case by case.[113]

4.1.3 The Kajelijeli Case

Shortly after the Niyitegeka trial judgment was rendered, Trial Chamber II issued its judgment in the Kajelijeli case, which also examined allegations of sexual violence. Although it concludes that individual criminal responsibility of the accused cannot be established[114], the Chamber holds that piercing a dead woman's sexual organs with a spear[115] and cutting off a women's breast and then licking it[116] reach the threshold of seriousness required for "other inhumane acts"[117]. As in the Niyitegeka case, it justifies this decision with the impact the perpetrated acts have on the victim's communities, namely the attack on the human dignity of the Tutsi community and the mental suffering of observers.[118]

In this case, the Trial Chamber II also explicitly confirms that acts of sexual violence falling short of rape can be prosecuted under the "other inhumane acts" provision.[119]

4.1.4 The Karemera *et al.* Case

More than a decade after the Akayesu landmark decision, Karemera and Ngirumpatse were found guilty of rape as a crime against humanity by the Trial Chamber.[120] It not only bases its charges on rape but also on acts that it classifies as "sexual assaults", such as cutting off breasts[121], genital mutilation[122], and forced undressing[123]. The Appeals Chamber, although not challenging the Trial Chamber's categorization of these acts as sexual assault, then states that the Trial Chamber was mistaken in partly basing its charges of rape as a crime against humanity on findings of sexual assault since "acts of sexual violence are broader than rape"[124]. As the Indictment did not contain charges of other inhumane acts as crimes against humanity, the acts of sexual assault could not be prosecuted.[125]

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[110] ICTR, *Niyitegeka Trial Judgement*, para. 467.
[111] *Ibid.*, para. 465.
[112] *Ibid*.
[113] ICTR, The Prosecutor vs. Clément Kayishema and Obed Ruzindana, Judgement, No. ICTR-95-1-T (May 21, 1999), para. 151.
[114] ICTR, The Prosecutor v. Juvénal Kajelijeli, Judgment and sentence, (hereafter "*Kajelijeli Trial Judgment*") No. ICTR-98-44A-T (December 1, 2003), para. 939.
[115] *Ibid.*, para. 677.
[116] *Ibid.*, para. 678.
[117] *Ibid.*, para. 936.
[118] *Ibid*.
[119] *Ibid.*, para. 916.
[120] ICTR, The Prosecutor v. Édouoard Karemera and Matthieu Ngirumpatse, Judgement and Sentence, (hereafter "*Karemera and Ngirumpatse Trial Judgement*") No. ICTR-98-44-T (February 2, 2012), para. 1684.
[121] *Ibid.*, paras. 1356, 1365, or 1404.
[122] *Ibid.*, paras. 1356 or 1366.
[123] *Ibid.*, para. 1387.
[124] ICTR, Édouard Karemera, Matthieu Ngirumpatse v. The Prosecutor, Judgement, (hereafter "*Karemera and Ngirumpatse Appeal Judgement*") No. ICTR-98-44-A (September 29, 2014), para. 611.
[125] *Ibid.*, para. 611.

4.2 Contributions by the International Criminal Tribunal for the Former Yugoslavia

4.2.1 The Furundžija Case

The Furundžija Trial Chamber set another significant precedent. After recalling the Akayesu Trial Chamber's definition of rape drawn up only three months prior[126] and upheld in the ICTY Mucić *et al.* case shortly after[127], the Trial Chamber holds that the question of whether to consider forced *fellatio* rape or sexual assault must be examined in the light of the general principle of respect for human dignity as its survey of national legislations shows that no consensus exists on this matter.[128] Since forced penetration of the mouth by the male sexual organ accounts for "a most humiliating and degrading attack upon human dignity"[129] in the Trial Chamber's view, it concludes it should be considered rape. It then states that:

> "[T]he following may be accepted as the objective elements of rape: (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person."[130]

Moreover, the Chamber states that serious sexual assaults short of rape proper are undoubtedly attacks on human dignity as defined in international standards on human rights.[131] Thus, it affirms that forms of serious sexual assaults less grave than rape – meaning "all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity" [132] – can amount to "other inhumane acts" covered by article 5(i) of the ICTY Statute[133].

4.2.2 The Kunarac *et al.* Case

In the Kunarac *et al.* case, the Trial Chamber went further, challenging the "coercion or force or threat of force" requirement of rape applied by international criminal tribunals thus far. The Chamber deems the Furundžija definition to lack a possibility to include "other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim"[134]. Furthermore, having conducted a survey of national legislations on rape, the Chamber asserts that the common denominator amongst them is that "serious violations of sexual autonomy are to be penalized"[135]. For these reasons, the Trial Chamber then modifies the requirement in question under (ii) in the Furundžija definition of the *actus reus* of rape to

> "where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances"[136].

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[126] ICTY, Prosecutor v. Anto Furundžija, Judgement, (hereafter "*Furundžija Trial Judgement*") No. IT-95-17/1-T (December 10, 1998), para. 176.
[127] ICTY, Prosecutor v. Zejnil Delalić, Zdravko Mucić aka "Pavo", Hazim Delić, and Esad Landžo aka "Zenga", Judgement, No. IT-96-21-T (November 16, 1998), para. 479.
[128] ICTY, *Furundžija Trial Judgement*, paras. 182-183.
[129] *Ibid*.
[130] *Ibid.*, para. 185.
[131] *Ibid.*, p. 69, fn. 201.
[132] *Ibid.*, para. 186.
[133] *Ibid.*, para. 175.
[134] ICTY, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Judgement, (hereafter "*Kunarac et al. Trial Judgement*") No. IT-96-23-T&IT-96-23/1-T (February 22, 2001), para. 438.
[135] *Ibid.*, para. 457.
[136] *Ibid.*, para. 460.

The Kunarac *et al.* Appeals Chamber upholds this definition.[137]

It should also be noted that Kovač, one of the accused in the Kunarac *et al.* case, was convicted of "outrages upon personal dignity" as a war crime for forcing multiple women to dance on a table naked on multiple occasions and pointing weapons at them while doing so in one case.[138]

4.2.3 The Kvočka *et al.* Case

In the Kvočka *et al.* case, the ICTY had to examine charges of sexual violence once more. After citing the Akayesu Trial Chamber which stated that sexual violence was "any act of a sexual nature which is committed on a person under circumstances which are coercive"[139], the Trial Chamber finds that Radić has personally committed such acts[140], whereas the other accused acted as co-perpetrators of the joint criminal enterprise in this matter.[141] More precisely, Radić was found guilty of persecution for sexual assault as a crime against humanity under article 5(h)[142] for "sexual intimidations, harassment, and assaults"[143], such as touching "female parts"[144], and attempted rape culminating in ejaculation over an individual[145]. Concerning the last of the aforementioned acts, the Appeals Chamber confirms that it must not be understood as an attempted rape ending with voluntary withdrawal.[146] Instead, Radić ejaculating over the victim already constitutes an act of sexual violence.[147]

It should also be noted that the Trial Chamber asserts that "[s]exual violence would also include such crimes as sexual mutilation, forced marriage, and forced abortion as well as the gender-related crimes explicitly listed in the ICC Statute"[148].

4.2.4 The Milutinović *et al.* Case

This case provides a threefold clarification concerning the definition of sexual assault. Firstly, the Trial Chamber specifies that rape can be included in the offense of "sexual assault".[149] Secondly, given that neither the ICTR nor the ICTY have identified a comprehensive definition of it thus far, the Milutinović Trial Chamber establishes the following conditions for the *actus reus* of sexual assault as a crime against humanity of persecution:

> "(a) The physical perpetrator commits an act of a sexual nature on another, including requiring that person to perform such an act. (b) That act infringes the victims's physical integrity or amounts to an outrage to the victim's personal dignity. (c) The victim does not consent to the act"[150].

[137] ICTY, Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Judgement, No. IT-96-23 & IT-96-23/1-A (June 12, 2002).
[138] ICTY, *Kunarac et al. Trial Judgement,* paras. 766–774.
[139] ICTR, *Akayesu Trial Judgement*, para. 598.
[140] ICTY, Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Žigić, Dragoljub Prcać, Judgement, (hereafter "*Kvočka et al. Trial Judgement*")No. IT-98-30/1-T (November 2, 2001), para. 740.
[141] *Ibid* (Kvočka: para. 715; Prcać: para. 723; Kos: para. 728; Žigić: para. 747).
[142] *Ibid.*, para. 761.
[143] *Ibid.*, para. 559.
[144] *Ibid.*, para. 547.
[145] *Ibid.*, para. 548.
[146] ICTY, Prosecutor v. Miroslav Kvočka, Mlađo Radić, Zoran Žigić, Dragoljub Prcać, Judgement, (hereafter "*Kvočka et al. Appeal Judgement*") No. IT-98-30/1-A (February 28, 2005), para. 402.
[147] *Ibid*.
[148] *Ibid.*, para. 180, fn. 343.
[149] ICTY, *Milutinović et al. Trial Judgement,* para.183.
[150] *Ibid.*, para. 201.

Thirdly, the Trial Chamber confirms that acts of sexual assault may occur even if the perpetrator does not have physical contact with the victim.[151]

4.3 Contributions by the International Criminal Court

4.3.1 The Bemba Case

The "Prosecutor's Application for Warrant of Arrest under Article 58" for Jean-Pierre Bemba Gombo includes allegations of crimes against humanity of "any other forms of sexual violence"[152], making it the first time article 7(1)(g)-6 of the ICC Statute was considered. The Prosecution bases its assertions mainly on two incidents documented by Amnesty International[153]. Firstly, women combatants supposedly "ordered a government minister to strip naked" [154], telling him they wished to see a naked government minister for the first time. Causing humiliation seems to have been the women's objective in doing so, concludes the Prosecution.[155] Secondly, a man allegedly had to face sexual assault and was forced to undress by women combatants, failing which male combatants would beat him.[156]

Contrary to the Prosecution, after recalling that "article 7(1)(g) of the Statute requires other forms of sexual violence to be of comparable gravity to the crimes set forth in that subparagraph" [157], the Pre-Trial Chamber finds that "there are no reasonable grounds to believe that other forms of sexual violence of comparable gravity constituting crimes against humanity" [158] were committed. Therefore, the arrest warrant did not include charges of acts punishable under this provision.[159]

While examining charges of rape against Bemba, Trial Chamber III affirms that the legal elements of rape do not require the absence of consent of the victim.[160] Hence, if the Prosecution can prove force, threat of force or coercion, taking advantage of a coercive environment, as set out in the Elements of Crime, it is not obliged to demonstrate the victim's non-consent.[161] Furthermore, in case the victim of rape disposes of natural, induced, or age-related incapacity to give genuine consent, the Prosecution only has to prove that the victim's capacity to give genuine consent was affected by one of the three hypotheses above.[162] With regards to coercion, the Pre-Trial Chamber II in the Bemba case specified earlier in its confirmation of charges that no physical force is required for it. Instead, copying the Akayesu reasoning[163], it argues that

[151] ICTY, *Milutinović et al. Trial Judgement*, para. 199.
[152] ICC, Situation in the Central African Republic, Prosecutor's Application for Warrant of Arrest under Article 58, No. ICC-01/05-01/08-26-Red (May 9, 2008), count 2.
[153] Amnesty International, "Central African Republic: Five Months of War against Women," November 10, 2004, https://www.amnesty.org/en/documents/afr19/001/2004/en/.
[154] ICC, Situation in the Central African Republic, Prosecutor's Submission on Further Information and Materials, (hereafter "*Situation in the Central African Republic, Submission on Further Information and Materials*") No. ICC-01/05-01/08-29-Red (May 27, 2008), p. 8.
[155] *Ibid*.
[156] *Ibid*.
[157] ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, (hereafter "*Bemba Application for a Warrant of Arrest*") No. ICC-01/05-01/08-14-tENG (June 10, 2008), para. 40.
[158] *Ibid*.
[159] ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, Warrant of Arrest for Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08 (May 23, 2008).
[160] ICC, *Bemba Trial Judgment*, para. 105.
[161] ICC, *Bemba Trial Judgment*, para. 106.
[162] *Ibid.*, paras. 106-107.
[163] ICTR, *Akayesu Trial Judgement*, para. 688.

"threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence"[164].

4.3.2 The Kenyatta *et al.* Case

The ICC then had to deal with the application of article 7(1)(g)-6 of the Rome Statue again in the Kenyatta *et al.* case. In its request for the Pre-Trial Chamber II to issue summonses to appear, the Prosecution argues that there are reasonable grounds to believe that, *inter alia*, "other forms of sexual violence" within the meaning of article 7(1)(g)-6 have been committed against men of Luo ethnicity.[165] Although evidence supporting these claims was not made available to the public in the request, it became clear in a subsequent hearing that the Prosecution refers to alleged acts of forced nudity, forced circumcision, and penile amputation.[166] Concerning the allegations of forced circumcisions, the Pre-Trial Chamber II concludes in its summonses to appear that "the acts of forcible circumcision cannot be considered acts of a 'sexual nature' as required by the Elements of Crimes, but are to be more properly qualified as 'other inhumane acts' within the meaning of article 7(l)(k) of the Statute"[167]. This is, the Chamber argues, because forcible circumcision causes "serious injury to body"[168] and since its "character"[169] – meaning the nature and gravity of the act[170] – is similar the other acts listed in Article 7 paragraph 1 of the Statute. The allegations of penile amputations and forced nudity were, in turn, not addressed by the Chamber.

In its decision on the confirmation of charges of Muthaura and Kenyatta, the Pre-Trial Chamber II addresses the legal characterization of the acts as mentioned earlier again, recalling first the Prosecutor's submission for them to be qualified as "sexual violence" rather than "inhumane acts" on the basis "that these weren't just attacks on men's sexual organs as such but were intended as attacks on men's identities as men within their society and were designed to destroy their masculinity"[171]. The Chamber, nevertheless, states that "not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence"[172]. Furthermore, it considers knowing whether an act ought to be classified

[164] ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08 (June 15, 2009), para. 162.
[165] ICC, Situation in the Republic of Kenya, Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, No. ICC-01/09-31-Red2 (December 15, 2015), para. 30.
[166] ICC, The Prosecutor vs. Uhuru Muigai Kenyatta, Transcript of 22 Sept 2011, Pre-Trial Chamber II, No. ICC-01/09-02/11-T-5-Red-ENG CT WT 22-09-2011 1-108 NB PT (September 22, 2011), p. 91.
[167] ICC, The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, (hereafter "*Kenyatta et al. Summonses to Appear*") No. ICC-01/09-02/11 (March 8, 2011), para. 27.
[168] *Ibid*.
[169] *Ibid*.
[170] As defined in "Elements of Crimes," p. 8, fn. 30.
[171] ICC, The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, (hereafter "*Kenyatta and Muthaura Confirmation of Charges*") No. ICC-01/09-02/11-382-Red (January 23, 2012, para. 264 citing the confirmation of charges hearing ICC-01/09-02/11-T-5-Red-ENG p. 88, lines 9-15 (not available to the public).
[172] ICC, *Kenyatta and Muthaura Confirmation of Charges*, para. 265.

"of sexual nature" "inherently a question of fact" [173]. Accordingly, it concludes that in this instance

> "the evidence placed before [the Chamber] does not establish the sexual nature of the acts of forcible circumcision and penile amputation visited upon Luo men. Instead, it appears from the evidence that the acts were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other. Therefore, the Chamber concludes that the acts under consideration do not qualify as other forms of sexual violence within the meaning of article 7(l)(g) of the Statute"[174].

Unsatisfied with this classification, the Prosecution requests a re-characterization of "forcible circumcision" and "penile amputation" as "other forms of sexual violence" as the case reaches the Trial Chamber.[175] It supports this request with the following reasoning:

> "The harm caused by the amputation or disfigurement of one's sexual organs is not merely physical; it also attacks the victim's sexuality. This is particularly true in patriarchal societies, where an assault on a man's sexual organs also constitutes an assault on his masculinity and identity within society. It is simply impossible to divorce the physical harm caused by forcible circumcision and penile amputation from the harm caused to the victim's sexuality. It is this latter form of harm – to the victim's sexuality – that is inherently 'of a sexual nature'".[176]

Additionally, it contends such an approach to be recognized in case law, citing the *Kvočka* Trial judgment, and the Sesay *et al.* Trial judgment issued by the Special Court for Sierra Leone.[177] Moreover, references to scholars arguing that "genital mutilation is inherently sexual in nature"[178] are made to further support the Prosecution's position. Still, the updated list of charges included neither charges of sexual violence nor any reference to their occurrence.[179]

4.3.3 The Ongwen Case

In its recent judgments in the Ongwen case, the Court discusses a number of crimes of sexual violence, including sexual slavery as a crime against humanity and war crime. Just like article 7(1)(g)-6, these provisions require the perpetrator to "caused such person or persons to engage in one or more acts of a sexual nature". *In casu*, these "acts of a sexual nature" are solely based on rape. Nevertheless, the Ongwen Trial Chamber affirms in this regard that

> "[a]cts of a sexual nature in this context include acts of rape, but are not limited to them. Accordingly, they not need involve penetration or even physical contact. The term 'sexual' may refer to acts carried out through sexual means or by targeting sexuality. Whether an act is sexual in nature must be determined on a case-by-case basis, depending on the specific facts and circumstances of a given case".[180]

The Appeals Chamber upholds these precisions regarding "act of a sexual nature".[181]

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[173] ICC, *Kenyatta and Muthaura Confirmation of Charges*, para. 265.
[174] *Ibid.*, para. 266.
[175] ICC, The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Prosecution's application for notice to be given under Regulation 55(2) with respect to certain crimes charged, No. ICC-01/09-02/11 (July 3, 2012), para. 41.
[176] *Ibid.*, para. 19.
[177] *Ibid.*, para. 20
[178] *Ibid.*, para. 21.
[179] ICC, The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Decision on the content of the updated document containing the charges, No. ICC-01/09-02/11 (December 28, 2012).
[180] ICC, The Prosecutor v. Dominic Ongwen, Trial Judgment, (hereafter "*Ongwen Trial Judgment"*) No. ICC-02/04-01/15 (February 4, 2021), para. 2716.
[181] ICC, The Prosecutor v. Dominic Ongwen, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment", (hereafter "*Ongwen Appeals Judgment"*) No. ICC-02/04-01/15 (December 15, 2022), para. 2716.

5 The Interpretation of Article 7(1)(g)-6 of the Statute of the International Criminal Court

5.1 General Considerations

Having set the context for sexual violence in international criminal law and having examined relevant jurisprudence, this part delves into the specificities of "any other form of sexual violence of comparable gravity" under the ICC regime. At this point, it should be mentioned that since the first definition of sexual violence given in the Akayesu case, there is consensus across tribunals and among scholars that sexual violence is a broad category that includes specific acts such as rape.[182] It is also not contested that article 7(1)(g)-6 should be understood as a residual clause, meant to englobe acts failing to meet the criteria of the more specific crimes of article 7(1)(g), namely rape, sexual slavery, enforced prostitution, forced pregnancy, or enforced sterilization.[183]

5.2 *Actus Reus* Requirements

5.2.1 "Violence"

What had previously been referred to as sexual assault was called sexual violence in the ICC Statute. This was a deliberate choice made during the negotiations leading up to the creation of the Statue with the aim of including more potential acts.[184] "Violence" was understood to be broader than "assault" as it would not imply that physical force is a necessary requirement.[185]

Element one regarding article 7(1)(g)-6 of the Elements of Crime elaborates on how the term "violence" in the name of the offense should be interpreted by stating that the perpetrator must commit the act "by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent"[186]. Under the ICC Statute, these same five alternative conditions also figure in the Elements of Crime for other sexual violence crimes.[187] The Furundžija approach to defining rape, which was widely accepted in 1998 when the Rome Statue was adopted, inspired this requirement for sexual violence.[188] While other tribunals have developed their practice regarding sex crimes from requiring force and coercion towards lack of consent[189], the ICC Trial Chamber III in the Bemba case did not deviate from the interpretation provided in the Elements of Crime[190], as demonstrated above. Nevertheless, the ICC

[182] See e.g., Christopher K. Hall, Joseph Powderly, and Niamh Hayes, "Art. 7 Crimes against Humanity," in *Rome Statute of the International Criminal Court : A Commentary*, ed. Otto Triffterer and Kai Ambos, 3rd ed. (München: C.H. Beck, 2016), p. 216.
[183] See e.g., Mettraux, "Underlying Offences," p. 786. But also Anne-Marie De Brouwer, "Sexual Violence as a Crime against Humanity," in *Supranational Criminal Prosecution of Sexual Violence : The ICC and the Practice of the ICTY and the ICTR*, by Anne-Marie De Brouwer (Antwerp: Intersentia, 2005), p. 147. Or Schwarz, *Das Völkerrechtliche Sexualstrafrecht*, p. 274.
[184] Mettraux, "Underlying Offences," p. 785, fn. 1918.
[185] *Ibid*.
[186] "Elements of Crimes," art. 7(1)(g)-6, element 1.
[187] See *Ibid.*, art. 7(1)(g)-1, element 2; art. 7(1)(g)-3, element 1; art. 8(2)(b)(xxii)-1, element 1; art. 8(2)(b)(xxii)-3, element 1; art. 8(2)(b)(xxii)-6, element 1; art. 8(2)(e)(vi)-1, element 2; art. 8(2)(e)(vi)-3, element 1; art. 8(2)(e)(vi)-6, element 1.
[188] Mettraux, "Underlying Offences," p. 543.
[189] See ICTY, *Kunarac et al. Trial Judgement*, para. 460. See also *supra* chapter 4.2.2.
[190] ICC, *Bemba Trial Judgment*, para. 105.

interpretation of the "violence" element usually leads to a conclusion almost identical to the Kunarac approach, the reasons for which are discussed below.

"Force" and "threat of force" are to be understood in their traditional meanings and may be directed at third parties, for instance, the victim's close relatives.[191] Regarding "coercion" it should be recalled that no physical force is required and that it can result from "threats, intimidation, extortion and other forms of duress which prey on fear or desperation"[192] or that it naturally occurs in armed conflict or military presence. This understanding is also reflected in the notion of "coercive environment" which refers to the Court's comprehension that "genuine" consent is impossible in the context of an armed conflict.[193] Indeed, according to the Rules of Procedure, the Court must apply the principle that "[c]onsent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent"[194]. Hence, Ambos suggests there be a "presumption of non-consent"[195]. Finally, as Trial Chamber III highlights in the Bemba case, sexual violence punishable under the Rome Statute may also occur when persons fail to give genuine consent as they are affected by "natural, induced or age-related incapacity"[196].

Contrary to the ICTR jurisprudence in the Niyitegeka and Kajelijeli cases discussed above[197], a type of conduct that, according to scholars, typically fails to meet the "violence" requirement of article 7(1)(g)-6 in any case are sexual acts exercised on dead bodies.[198] This is due to the lack of will of deceased persons[199], which is a prerequisite for the commission of any form of force or coercion "against one or more persons"[200]. A reasoning focusing on the impact such acts have on the deceased persons' communities – as the ICTR judges did in the two cases of crimes against humanity of inhumane acts mentioned above – would, *ergo*, not be valid in the context of "any other form of sexual violence of comparable gravity".

Despite terminological changes concerning offenses of sexual violence since the initial ICTR definition of rape – the first international tribunal to define a crime of sexual violence – the understanding in international criminal law of what makes sexual acts violent has not substantially changed. The requirement in the Elements of Crime that force, threat of force, or coercion occurred or that the perpetrator took advantage of a coercive environment or the victim's incapacity to give genuine consent today only poses few problems in practice given the contexts in which alleged crimes against humanity occur and the ICC's broad understanding of "violence".

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[191] Mettraux, "Underlying Offences," p. 544.
[192] ICC, *Bemba Decision Pursuant to Article 61(7)(a) and (b)*, para. 162, citing ICTR, *Akayesu Trial Judgement*, para. 688.
[193] Ambos, "Crimes against Humanity," p. 96; Gerhard Werle and Florian Jessberger, "Crimes Against Humanity," in *Principles of International Criminal Law*, by Gerhard Werle and Florian Jessberger, 4th ed. (Oxford: Oxford University Press, 2020), p. 419.
[194] International Criminal Court, ed., "Rules of Procedure and Evidence" (The Hague, 2013), ICC-PIDS-LT-02-002/13_Eng, https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf, rule 70(a).
[195] Ambos, "Crimes against Humanity," p. 97.
[196] "Elements of Crimes.", p. 5, fn. 16.
[197] See *infra* chapters 4.1.2 and 4.1.3.
[198] Schwarz, *Das Völkerrechtliche Sexualstrafrecht*, p. 329; Werle and Jessberger, "Crimes Against Humanity," p. 423.
[199] Schwarz, *Das Völkerrechtliche Sexualstrafrecht*, p. 329. See similarly Werle and Jessberger, "Crimes Against Humanity," p. 423.
[200] As described in "Elements of Crimes," art. 7(1)(g)-6, element 1.

5.2.2 "Act of Sexual Nature"

For a crime against humanity of sexual violence within the meaning of article 7(1)(g)-6 to be carried out, the perpetrator must either commit "an act of sexual nature against one or more persons" [201] or cause them to engage in such an act. The Elements of Crime require this condition. They do not, however, further elaborate on what must be understood as "an act of sexual nature", which is also used in the Elements of Crime to characterize other offenses of sexual violence as a crime against humanity and war crimes.[202]

None of the applicable treaties in the sense of article 21(1)(b) of the Rome Statute or internationally recognized human rights instruments contain the term "sexual violence" or "sexual assault" and even less so define them.[203] Still, the elements of the offense of sexual violence established by the Milutinović Trial Chamber[204] and confirmed by subsequent chambers[205] reflect the definition of sexual violence in customary international law.[206] Thus, one can draw on customary international law to interpret the meaning of an "act of sexual nature" as it specifies that such an act "infringes on the victim's physical integrity or amounts to an outrage to the victim's personal dignity"[207]. Similarly, the general principle of international law of the respect of human dignity, referred to by the *ad hoc* tribunals in multiple instances[208], may also be considered.

The Court's understanding of "act of sexual nature" can partially be derived from its case law. By stating that violence being exercised on "parts of the body commonly associated with sexuality"[209] does not suffice for the act to be "of sexual nature", and that determining whether an act was of sexual nature to be "inherently a question of fact" [210], the Pre-Trial Chamber II in the Kenyatta case attributed enhanced discretionary power to Judges, but refrained from providing explanations. Subsequently, the Trial Chamber in the Ongwen case confirmed that a case-by-case basis analysis considering the facts and circumstances must be conducted to determine the sexual nature of a given act. But, it also specified that neither penetration nor physical contact is required for it[211], confirming what it suggests in its 2014 Policy Paper[212]. Moreover, it states that "acts carried out through sexual means or by targeting sexuality"[213] may be "sexual".

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[201] "Elements of Crimes," art. 7(1)(g)-6, element 1.
[202] See *Ibid.*, art. 7(1)(g)-2, element 2; art. 7(1)(g)-3, elements 1 and 2; art. 8(2)(b)(xxii)-2, element 2; art. 8(2)(b)(xxii)-3, element 2; art. 8(2)(b)(xxii)-6, element 1; art. 8(2)(e)(vi)-2, element 2; art. 8(2)(e)(vi)-3, element 2; art. 8(2)(e)(vi)-6, element 1.
[203] As concluded ICTY, *Milutinović et al. Trial Judgement*, para. 188 in 2009. This lack persists until today.
[204] See *supra* chapter 4.2.4.
[205] See e.g., ICTY, Prosecutor v. Vlastimir Đorđević, Public judgement with confidential annex, Volume I of II, No. IT-05-87/1-T (February 23, 2011), para. 1768. Or ICTY, Prosecutor vs. Radovan Karadžić, Public redacted version of Judgement issued on 24 March 2016, Volume I of IV, No. IT-95-5/18-T (March 24, 2016), para. 513.
[206] Mettraux, "Underlying Offences," p. 789.
[207] ICTY, *Milutinović et al. Trial Judgement*, para. 201.
[208] ICTY, *Furundžija Trial Judgement*, paras. 182–183; ICTR, *Niyitegeka Trial Judgement*, para. 465; ICTR, *Kajelijeli Trial Judgment*, para. 936.
[209] ICC, *Kenyatta and Muthaura Confirmation of Charges*, para. 265.
[210] *Ibid*.
[211] ICC, *Ongwen Trial Judgment*, para. 2716.
[212] The Office of the Prosecutor, "Policy Paper on Sexual and Gender-Based Crimes" (International Criminal Court, 2014), https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf, p. 3.
[213] ICC, *Ongwen Trial Judgment*, para. 2716.

There is indeed broad consensus among tribunals that no physical touch is required for an act to be of sexual nature, which was clarified early on by the ICTR in the Akayesu case by stating, "[s]exual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact"[214]. Subsequently, the ICTY also cited and upheld this interpretation on numerous occasions[215]. While scholars mostly concur that acts do not require physical touch for them to be of sexual nature[216], the debate regarding whether they qualify for article 7(1)(g)-6 becomes more controversial when applying the "comparable gravity" requirement. This is discussed in the subsequent chapter.

Another question that arises in this context, as Grey notes, is whether acts can objectively be qualified "of sexual nature" or whether such classifications are purely subjective, and if so, if more importance should be attributed to the perpetrator's or the victim's perspective.[217] In this regard, the Milutinovic Trial Chamber asserted that "it would be inappropriate to place emphasis on the sexual gratification of the perpetrator in defining the elements of 'sexual assault'"[218] as this motivational factor is of lesser importance than "the sexual humiliation and degradation of the victim"[219] in situations of armed conflict. Most scholars reject an interpretation based on the perpetrator's motives for that same reason.[220] To what extent the victim's apprehension of events should be taken into consideration when interpreting "of sexual nature" is disputed among scholars. While, for instance, Grey considers inputs from victims important when establishing the sexual nature of an act[221], Schwarz argues that the victim's subjective appreciation is not to be considered, the reasons for this being articles 22 and 24 of the Rome Statute[222]. These articles – establishing the principles of legality and non-retroactivity – would call for an assessment of the alleged conduct free from subjective factors so that a recognized offense could be applied to it.[223] This argumentation is convincing since including subjective perceptions would pave the way for excessive interpretations of the term.

From the above, it can be deduced that there must be acts that can objectively be qualified "of sexual nature" and that it is these acts that are covered by article 7(1)(g)-6.[224] Schwarz identifies three possibilities fulfilling this requirement that are primarily derived from the definition of sexual violence in the 1998 final report on "Systematic rape, sexual slavery and slavery-like practices during armed conflict"[225]. According to Schwarz, physical or psychological attacks

[214] ICTR, *Akayesu Trial Judgement*, para. 688.
[215] See e.g., ICTY, Prosecutor v. Radovan Karadžić, Decision on Karadžić's Appeal of Trial Chamber's decision on alleged holbrooke agreement, No. IT-95-5/18-AR73.4 (October 12, 2009), para. 512; ICTY, *Kvočka et al. Trial Judgement*, para. 180; ICTY, *Milutinović et al. Trial Judgement*, para. 199.
[216] See e.g., Hall, Powderly, and Hayes, "Art. 7 Crimes against Humanity," p. 216; De Brouwer, "Sexual Violence as a Crime against Humanity," p. 150; Mettraux, "Underlying Offences," p. 792–793.
[217] Grey, "Conflicting Interpretations of 'Sexual Violence' in the International Criminal Court," p. 276.
[218] ICTY, *Milutinović et al. Trial Judgement*, para. 199.
[219] *Ibid.*
[220] See e.g., Schabas, "Art.7 Crimes against Humanity," p. 193; Mettraux, "Underlying Offences," p. 791; Schwarz, *Das Völkerrechtliche Sexualstrafrecht*, p. 287–288. Schwarz nonetheless argues that a perpetrator's sexual motives may be an indicator that an act is of sexual nature.
[221] Grey, "Conflicting Interpretations of 'Sexual Violence' in the International Criminal Court," p. 282.
[222] Schwarz, *Das Völkerrechtliche Sexualstrafrecht*, p. 288.
[223] *Ibid.*, p. 287.
[224] As argued in Mettraux, "Underlying Offences," p. 791.
[225] UN Economic and Social Council, "Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, Final Report Submitted My Ms. Gay J. McDougall, Special

targeting sexual characteristics – such as male and female genitals, including testicles, or female breasts – are to be qualified of sexual nature.[226] Consistent with recent Ongwen Trial judgment[227], Schwarz further argues that the same goes for actions aiming to destroy masculinity, femininity, or virginity, thus targeting a person's sexuality, and which might be exercised through sexualized means, like genital mutilations or cutting off breasts or penises.[228] An attack on a person's sexual autonomy should also be regarded as sexual.[229] According to Schwarz such an objective examination of an act still needs to include cultural considerations, since certain body parts or practices might be more or less sexualized in a given context.[230]

Nonetheless, in the Kenyatta case, the Pre-Trial Chamber II opted for an approach based on the perpetrator's motives when claiming that forcible circumcision and penile amputations[231] fail to meet the sexual nature requirement since they "were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other"[232]. This holding is inconsistent with other tribunals' previous decisions in similar cases[233] and is heavily criticized by the majority doctrine[234]. Indeed, following Schwarz's definition – forcible circumcision and penile amputations indisputably being attacks on male sexual characteristics and sexuality – these acts clearly meet the "of sexual nature" criterion. In taking this decision, the Chamber not only follows an interpretation of acts of sexual violence that is too narrow, but it also appears to misunderstand the rationale behind sexual violence in conflict entirely. Precisely the desire to demonstrate cultural superiority is a common reason for committing sexual violence in situations of conflict.[235] In arguing that the sexual nature required is not fulfilled due to the absence of sexual motives of the perpetrator, the Chamber, therefore, makes a double mistake.[236] On a similar note, Grey criticizes the Pre-Trial Chamber's understanding that sexual violence cannot be linked to ethnic violence rather than seeing the former as a tool for perpetrating the latter.[237]

Rapporteur," June 22, 1998, E/CN.4/Sub.2/1998/13, https://digitallibrary.un.org/record/257682. In paragraphs 21-22 sexual violence is defined as "*any violence, physical or psychological, carried out through sexual means or by targeting sexuality. […] Sexual violence covers both physical and psychological attacks directed at a person's sexual characteristics, such as forcing a person to strip naked in public, mutilating a person's genitals, or slicing off a woman's breasts. […] Sexual violence also characterizes situations in which two victims are forced to perform sexual acts on one another or to harm one another in a sexual manner*." This report is also frequently cited by other scholars with regards definitions of acts of sexual violence. See e.g., Schwarz, *Das Völkerrechtliche Sexualstrafrecht*, p. 281; Hall, Powderly, and Hayes, "Art. 7 Crimes against Humanity," p. 209; Schabas, "Art.7 Crimes against Humanity," p. 186–187; De Brouwer, "Sexual Violence as a Crime against Humanity," p. 150.

[226] Schwarz, *Das Völkerrechtliche Sexualstrafrecht*, p. 287.

[227] ICC, *Ongwen Trial Judgment*, para. 2716.

[228] *Ibid.*, p. 287–288.

[229] *Ibid.*, p. 288. This affirmation is consistent with the Kunarac Trial Chamber's conclusion that serious violations of sexual autonomy must be punished (see *supra* chapter 4.2.2).

[230] Schwarz, *Das Völkerrechtliche Sexualstrafrecht*, p. 282.

[231] Note also that Altunjan, "The International Criminal Court and Sexual Violence," p. 887 suggests that enforced sterilization under article 7(1)(g)-5 would have been a more specific classification for these acts and that it is unknown why the Prosecutor chose not to charge them as such.

[232] ICC, *Kenyatta and Muthaura Confirmation of Charges*, para. 266.

[233] Cutting off breasts or female genital mutilation have been qualified as sexual assault by the ICTR (see *supra* chapters 4.1.3 and 4.1.4).

[234] See e.g., Schabas, "Art.7 Crimes against Humanity," p. 193; Schwarz, *Das Völkerrechtliche Sexualstrafrecht*, p. 287; Mettraux, "Underlying Offences," p. 791; Hall, Powderly, and Hayes, "Art. 7 Crimes against Humanity," p. 217.

[235] See *supra* chapter 2.1.

[236] See similarly, Mettraux, "Underlying Offences," p. 791; Grey, "Conflicting Interpretations of 'Sexual Violence' in the International Criminal Court," p. 283; Schwarz, *Das Völkerrechtliche Sexualstrafrecht*, p. 321–322.

[237] Grey, "Conflicting Interpretations of 'Sexual Violence' in the International Criminal Court," p. 283.

In addition to that, Pre-Trial Chamber II in the Kenyatta case also explains that it reached the conclusion that forcible circumcision fails to meet the sexual nature condition of article 7(1)(g)-6 "in light of the serious injury to body that the forcible circumcision causes".[238] Thus, it implies that there is a maximum gravity threshold concerning physical injuries included in the element "act of sexual nature" which it considers exceeded in this matter. Where the Chamber draws this requirement from remains unclear.[239] Following this same reasoning, female genital mutilation should also not be qualified as an "act of sexual violence"[240], which contradicts the jurisprudence of other Chambers[241] and contemporary literature[242].

Although the Court has indicated a better understanding of what should be considered "sexual" in the context of sexual slavery in its most recent jurisprudence in the Ongwen case, the definition of the "sexual nature" requirement is still incomplete. Given the above considerations, it should be considered that an act of sexual nature includes any conduct – physical or psychological – that objectively targets the victim's sexual characteristics, sexuality, or sexual autonomy, in consideration of the cultural context in which it takes place and without neglecting the rationale behind sexual violence in conflict, while infringing on the victim's physical integrity or amounting to an outrage to the victim's personal dignity.

5.2.3 "Of Comparable Gravity"

The Elements of Crime further specify that the act of sexual nature must be "of a gravity comparable to the other offenses in article 7, paragraph 1 (g), of the Statute"[243]. Thus, the conduct must be similarly severe to rape, sexual slavery, enforced prostitution, forced pregnancy, or enforced sterilization. This requirement for crimes against humanity of sexual violence is "jurisdictionally specific to the ICC"[244]. It must not be confused with the general gravity requirement of article 17 (1)(d) of the Rome Statute[245] regarding the admissibility of a case.

When the ICC considered article 7(1)(g)-6 in the Bemba case, the Pre-Trial Chamber was "of the opinion"[246] that the incidences of forced public nudity did not fulfill this condition. It omits, however, to provide explanations as to why it holds this opinion. Some scholars legitimately argue that the Chamber should have used this opportunity to identify criteria used when assessing the gravity, even more so as it had to examine this provision for the first time.[247]

According to Ambos, the element at issue introduces "a minimum threshold of (comparable) gravity and thereby exclud[es] lesser forms of sexual violence"[248]. Interestingly, under the ICTY regime, forms of sexual violence of lesser gravity than rape were regarded as implicitly

[238] ICC, *Kenyatta et al. summonses to appear*, para. 27.
[239] See similary, Schwarz, *Das Völkerrechtliche Sexualstrafrecht*, p. 319.
[240] Hall, Powderly, and Hayes, "Art. 7 Crimes against Humanity," p. 217.
[241] See e.g., chapters 4.1.3, 4.1.4 and 4.2.3.
[242] See e.g., Schwarz, *Das Völkerrechtliche Sexualstrafrecht*, p. 337; Mettraux, "Underlying Offences," p. 792.
[243] "Elements of Crimes," art. 7(1)(g)-6, element 2.
[244] Mettraux, "Underlying Offences," p. 789.
[245] "Rome Statute," art. 17(1)(d), Issues of admissibility: "*1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: […] (d) The case is not of sufficient gravity to justify further action by the Court.*"
[246] ICC, *Bemba Application for a Warrant of Arrest*, para. 40.
[247] See e.g., Altunjan, "The International Criminal Court and Sexual Violence," p. 886; Schwarz, *Das Völkerrechtliche Sexualstrafrecht*, p. 293.
[248] Ambos, "Crimes against Humanity," p. 103.

covered by article 5(i), punishing crimes against humanity of "other inhuman acts".[249] A part of scholarship contends this term to require an objective test, but without elaborating on what it would consist of.[250] Others assert that multiple factors must be considered when evaluating whether an act is "of comparable gravity".[251] Thus, Mettraux argues that besides the nature of the act, the number of victims, the repeated nature of the conduct, the nature of the protected interest, and whether the act was perpetrated in public – which one could qualify as "objective" criteria – the consequences and long-term effects upon the victim and the context in which it was committed are as well to be pondered.[252] Similarly, Grey highlights the importance of consulting the victims' communities, allowing for an assessment of gravity in a "culturally sensitive manner"[253]. Consequently, cultural context may matter when determining the sexual nature of an act[254] but also the gravity of a sexual act. Nevertheless, these considerations must not be confused with the victim's subjective apprehension of events which is not decisive.[255]

With respect to forced nudity, it is important to recall that it was classified as sexual violence amounting to a crime against humanity by other tribunals.[256] But whether such conduct meets the gravity requirement of article 7(1)(g)-6 is debatable. According to some scholars, the "comparable gravity" element specific to the ICC hinders convictions for acts not involving physical contact, like forced nudity.[257] This position aligns with the Court's decision in the Bemba case.[258] Nonetheless, others argue that "of comparable gravity" does not mean that acts without physical contact cannot qualify for "any other form of sexual violence".[259] Moreover, Oosterveld claims that the Rome Statute's drafters intended for this article to include forced nudity.[260]

Genital mutilation or mutilation of female breasts, according to Schwarz, may be punished under article 7(1)(g)-6 since the degree of humiliation and disregard of sexual autonomy, their comparable nature with other crimes listed in article 7(1)(g) and their impact on the victim make them "of comparable gravity".[261] De Brouwer, however, doubts whether sexual mutilation of breasts would meet the gravity requirement.[262]

Whether or not a given sexual act can qualify for article 7(1)(g)-6 cannot be said in a generalized way. While in some instances, the nature of an act already suffices for it to attain the level of gravity required by the ICC Statute – which should be the case for grave mutilation or amputation of sexual characteristics – the Court must resort to more criteria in others. Hence, the

[249] ICTY, *Furundžija Trial Judgement*, para. 175.
[250] See e.g., Ambos, "Crimes against Humanity," p. 103; Hall, Powderly, and Hayes, "Art. 7 Crimes against Humanity," p. 217.
[251] Mettraux, "Underlying Offences," p. 789–790.
[252] *Ibid*.
[253] Grey, "Conflicting Interpretations of 'Sexual Violence' in the International Criminal Court," p. 278.
[254] See *supra* chapter 5.2.2.
[255] For the same reason mentioned in chapter 5.2.2.
[256] See chapter 4.1.1. But also ICTY, The Prosecutor v. Radoslav Brđanin, Judgement, No. IT-99-36-T (September 1, 2004), para. 1013.
[257] See e.g., De Brouwer, "Sexual Violence as a Crime against Humanity," p. 150; Schwarz, *Das Völkerrechtliche Sexualstrafrecht*, p. 342.
[258] See chapter 4.3.1.
[259] Hall, Powderly, and Hayes, "Art. 7 Crimes against Humanity," p. 216–217.
[260] Valerie Oosterveld, "Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court," *New England Journal of International and Comparative Law* 12, no. 1 (2005), p. 124.
[261] Schwarz, *Das Völkerrechtliche Sexualstrafrecht*, p. 336.
[262] De Brouwer, "Sexual Violence as a Crime against Humanity," p. 150.

number of victims, the reiterative character or public commission of the conduct, the immediate or long-term impact on the victim, or the cultural context all may increase the gravity of a type of act which, as such, would fail to meet the gravity criterion, like forced nudity or ejaculating over a person. Yet, it must be stressed that the "of comparable gravity" criterion calls for a restrictive interpretation of acts punishable under article 7(1)(g)-6 since it is jurisdictionally specific to the Rome Statute. The will of the state representatives negotiating the Statute must therefore be respected. Excessive classifications of acts within the meaning of this provision would therefore be problematic with regard to the principle of legality.[263]

6 Conclusion

A widely accepted, consistent, and detailed definition of "sexual violence" is yet to be determined in international criminal law, as this study highlights. Notwithstanding their frequent occurrence and the nature of their use, the prosecution of crimes of sexual violence in contexts of organized violence was neglected until the end of the 20th century. Although not explicitly included in their Statutes, the ICTY and the ICTR have frequently punished sexual violence under different offenses, setting important precedents. Thus, they provided first definitions of its *actus reus* and subsequently expanded the scope of the term through case law.

The Elements of Crime reduce the judges' margin of interpretation in the ICC regime compared to the *ad hoc* tribunals and establish binding criteria for the *actus reus* of sexual violence. While the implications of the "violence" criterion are clear, a widely accepted definition of "act of sexual nature" – employed in definitions of sexual violence since Akayesu – remains nonexistent, as the above analysis shows. Although this study argues for a broad interpretation of "act of sexual nature", including the victim's perception when assessing this term goes too far. Conversely, it is also demonstrated that determining what is "sexual" on the basis of the perpetrator's motives fails to cover all potential acts and disregards the rationale behind sexual violence in the context of crimes against humanity. Decisive is what the perpetrator objectively targets. Concerning the "of comparable gravity" criterion – for which the ICC has also thus far refrained from providing explanations – this study calls for an interpretation in two steps. First, the nature of the act in question must be considered. Second, only when the nature of an act is not "grave" enough must one draw on more criteria proposed by scholars. In any case, the gravity criterion highlights that the Court's jurisdiction is restricted to the gravest forms of sexual violence.

Article 7(1)(g)-6 is a residual clause meant to punish acts of sexual violence not explicitly punished by the Statute. Hence, a contextual definition is indisputably the right approach since a mechanical description or, even less so, an exhaustive list of potential acts is impossible to draw up. It is nonetheless not just desirable but necessary that the Court clarifies the scope and meaning of the terms mentioned above in its future judgments, as the current ambiguity could pose a problem for the principle of legality, as already mentioned in the introduction. To achieve this, that the ICC must become more transparent about how it motivates its decisions as it was shown. There will undoubtedly be occasions where the Court can demonstrate this since, sadly, the problem of sexual violence in conflict does not seem to be solved anytime soon, given its longstanding history.

[263] See similarly, Schwarz, *Das Völkerrechtliche Sexualstrafrecht*, p. 276–278.

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