

## THE CRIME OF RAPE UNDER THE ROME STATUTE OF THE ICC: with a special emphasis on the jurisprudence of the Ad Hoc Criminal Tribunals

*Mag. Nicole Brigitte Maier\**

### Introduction

Rape has been used as an instrument in times of war for ages. It has been committed by soldiers and civilians, by enemies and allies, by men and by women during national and international conflicts as well as in post-war times. We can find historical traces in the bible<sup>1</sup> as well as in Greek mythology<sup>2</sup>; along with the Vikings who were known for their brutality in warfare.<sup>3</sup> The ancient cultures understood that the rape of women belonging to the enemies' family was a method to weaken the foe, a reward of winning the battle, and stealing foes' property by enslaving and owning them. The abduction of the Sabine women is a case in point. Even though this method of psychological warfare<sup>4</sup> has been known from the very beginning of armed conflicts, it took mankind an eternity to acknowledge this atrocity as a violation of human rights and against the laws of war.

A significant example of this immoral policy happened in our recent history: during World War II some American GIs raped German females; the crimes of rape committed by members of the German army were not prosecuted and punished at the Nuremberg Trials. The reasoning was that a crime cannot be punished on only one side. This is an absurd example of how rape has been justified as an act of warfare. However, there are also other events that were understood and punished in a different manner of common sense. The atrocities of Nanking that made the Japanese army infamous for its cruelty and lack of mercy, the war in Vietnam, the rape-camps in Yugoslavia and the more

---

\*Mag. Nicole Maier studied law at the University of Salzburg, the Vrije Universiteit, Amsterdam, the University of Oslo and the University of Vienna. At the latter she took postgraduate courses in international criminal law and human rights. Her master thesis 'Trafficking in Women – Measures taken by the European Union' was published in 2009. Currently she is working on her doctoral thesis dealing with the topic of the protection of victims of trafficking in women.

<sup>1</sup> "For I [God] will gather all the nations against Jerusalem to battle, and the city shall be taken and the houses looted and the women raped;..." Old Testament, Zechariah 14, 2.

<sup>2</sup> E.g. Ovid, *Methamorphoseon, liber secundus; the rape of Europa*, 850 ff.; Apollodorus libris 3.10.7, Leda and the swan; Tryphiodorus, Ajax and Cassandra, section 635.

<sup>3</sup> C. J. Saunders, *Rape and ravishment in the literature of medieval England*, D.S. Brewer: Cambridge, 2001, p. 140.

<sup>4</sup> The fact that the attack was meant to weaken the opponent fighter, which – despite the Amazons – mostly were men, and the factual assault (mainly) concentrated on women, who were – and in some countries still are – seen more as an object than a human being, leads to the assumption that the physical attacks against women which were supposed to affect men, must be on a mental or psychological level when it comes to weakening the enemy. See also: Alan Soble (Eds.), *Sex from Plato to Paglia: a philosophical encyclopaedia, Vol2 M-Z*, Westport: Greenwood Publishing Group 2006, p. 686.

recent incidents in Abu Ghraib and Darfur are all perfect examples. The incident of Abu Ghraib could lead to the conclusion that the humanisation of warfare and codification of the *ius in bello* as well as humanitarian regulations on the treatment of prisoners of war and civilians were once again of little or no use. This article delivers insight into the purposes and intentions of committing rape in times of war, its victims, its perpetrators, and, finally, under which circumstances the crime of rape is punishable as a crime against humanity.

In the first part a definition of the crime of rape will be given, referring in this regard to relevant literature and case law of both the Yugoslavia Tribunal and the Tribunal of Rwanda. On the topics of victims, perpetrators and purposes, related literature in the field of psychology, criminology and medical science will be taken into consideration. The discussion on the link between rape and the crime against humanity will focus on relevant cases, judgements and reports, largely of the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

## I. The Crime of Rape

### 1 Behaviour that Constitutes the Crime of Rape

To fully understand the problem, a definition needs to be given as the distinction between the crime of rape and other forms of sexual violence is necessary to avoid misinterpretations. The establishment of a gender-neutral definition of the crime of rape was heavily influenced by cases of the ICTY and ICTR, even though the approaches of the two ad-hoc tribunals towards the crime of rape differ. Especially when the attack constitutes a crime against humanity interpretations diverge.<sup>5</sup>

The definition used by the ICC set out in its document “Rules of Procedure and Evidence”<sup>6</sup> given below, is a combination of the elements of crime used in ICTY and ICTR case law, in particular the Akayesu<sup>7</sup>, Furundzija<sup>8</sup>, Kunarac, Kovac and Vokovic<sup>9</sup> cases. While the judgement in the Akayesu case showed a broader approach, the trial chamber of the Furundzija<sup>10</sup> case noted that a more specific

---

<sup>5</sup> K. Dörmann, ‘War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crime’, in: A. Bogdandy & Wolfrum (eds.), *Max Planck Yearbooks of United Nations Law*, Vol. 7, 2003, pp. 391.

<sup>6</sup> International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3, 9 Sept. 2002, Part B, Elements of Crime, pp. 119, 141.

<sup>7</sup> Case ICTR-96-4-T, Jean-Paul AKAYESU, Judgment of 2 Sept. 1998, paras. 596 ff.

<sup>8</sup> Case IT-95-17/1-T, Anto FURUNDZIJA, Judgment of 10 Dec. 1998 paras. 174 ff.

<sup>9</sup> Case IT-96-23 and IT-96-23/1, Dragoljub KURNARAC, Radomir KOVAC and Zoran VUKOVIC Judgment of 22 Feb. 2001.

<sup>10</sup> Case IT-95-17/1-T, Anton FURUNDZIJA, Judgment of 10 Dec. 1998, para. 176.

definition is needed.<sup>11</sup> The long process of negotiating and re-thinking resulted in the following definition:<sup>12</sup>

The perpetrator invaded<sup>13</sup> the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

The invasion was committed 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 another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>14</sup>

The first part of paragraph 1 is aimed at the conduct of the penetration of any part of the body with a sexual organ. It implies the penetration of the victim as well as the one of the perpetrator by the victim, or the forced sexual intercourse between victims. 'Any part of the body' may lead to the conclusion that also other body openings than genitals can be subject to penetration, such as mouth, nose, eyes and ears. Some might question that kind of interpretation regarding nose, ears and eyes since those parts of the body can more generally be said to be a lesser violation of the intimate sphere and should rather be seen as an act of sexual abuse or harassment, a degradation and humiliation, though, depending on the circumstances of each single case, it might constitute torture.

The second part of paragraph 1 covers circumstances where the victim is penetrated vaginally or anally, whatever might be used to this purpose. The scope of paragraph 1 is quite clear if one follows it literally: either penetration with sexual organs or of sexual organs constitutes rape. However, uncertainties arise regarding forced masturbation. Also unclear is whether forced sexual intercourse with animals is covered by this definition.

Paragraph 2 of the definition describes the conditions under which the behaviour set out in paragraph 1 becomes the crime of rape:

- Force, threat of force or coercion. The examples given in paragraph 2 are not exhaustive and make clear that physical violence is not necessarily needed; also psychological power is a possibility that falls under the scope.
- Taking advantage of the coercive environment.
- Against a person that is incapable of giving genuine consent —someone who is affected by naturally reduced or age-related incapacity, speaking of children,

<sup>11</sup> A. M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, Mortsels: Intersentia nv, 2005, pp. 103ff.

<sup>12</sup> Res. ICC-ASP/1/3, adopted at the 3rd plenary meeting, on 9 September 2002, p 119.

<sup>13</sup> The concept of 'invasion' is intended to be broad enough to be gender-neutral.

<sup>14</sup> It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.

elderly, disabled and persons that were drugged —the ‘factual’ impossibility of agreeing is meant here.

The expression of the definition regarding genuine consent was very unfortunate for its understanding. Does this mean that everyone else not being a child or an elderly person, drugged or disabled could not be a possible victim of rape? Here, it is important to point out that the fact constituting this crime primarily is force or coercion. When this is a given, the consent or will of the victim is not in question and therefore not subject to proof. Within the *mens rea* of rape this is a key subject: by committing the crime of rape the perpetrator acts whilst well aware of the lack of consent of the victim —if the victim assents then there is no rape.

To assume a lack of consent *a priori* not only eases the later procedure in court and the burden of proof, but also the victims’ situation of not being interrogated and questioned regarding his/her disagreement on the actions taken by the offender and thereby re-living and remembering painful experiences. This approach was taken in the Kunarac, Kovac and Vukovic cases.<sup>15</sup>

Regarding the above groups, consent is assumed to be not possible on a natural or biological basis. In those cases the presence of force or coercion is not required anymore for the act to constitute rape.<sup>16</sup> To summarise briefly: the elements of the crime in paragraph 1 as well as paragraph 2 are non-cumulative, any element of paragraph 1 combined with any one of the elements in paragraph 2 creates the crime of rape punishable under the Rome Statute of the International Criminal Court.

Regarding the distinction between rape and other forms of sexual violence the key element is penetration. The general term ‘sexual violence’ covers all kinds of acts of a sexual nature if committed under coercive circumstances. Rape, as well as lower forms of sexual abuse or harassment, are thereby included in this over-all term.<sup>17</sup> However, the crime of rape is acknowledged as the most severe attack on one’s sexual integrity. The physical and psychological consequences for the victims are enormous and cases that lead to forced pregnancies or venereal diseases may end fatally. The following paragraphs will deal with the purposes of rape, the victims and perpetrators.

## **1.2 The Purposes, the Victims and the Perpetrators**

One might argue that rape is driven by sexual needs and the desire for satisfaction. This may not be true—or it is at least not the only reason— for

---

<sup>15</sup> Cases IT-96-23 and IT-96-23/1, Dragoljub KURNARAC, Radomir KOVAC and Zoran VUKOVIC, Judgement of 22 Feb. 2001, paras. 453 ff.

<sup>16</sup> De Brouwer 2005, *supra* note 11, p. 129ff, see also: A. von Bogdandy, R. Wolfrum (eds.), *supra* note 5; K. Dörmann, *supra* note 5, pp. 341-407, pp. 391ff.

<sup>17</sup> Case ICTR-96-4-T, Jean-Paul AKAYESU, Judgment of 2. Sept. 1998, para. 688.

crimes punishable within national jurisdiction and even less for the crime committed in times of war.<sup>18</sup>

The main purpose of rape in armed conflicts is to empower, to shame, terrorise and humiliate the enemy. The thought behind it is to show the enemy community that their men are not able to take care of and protect their women anymore. This will be interpreted as a loss of manhood of the combatants and lower the feeling of safety within their group.<sup>19</sup>

The reason why rape is so common and popular in war times can be found by setting up a simple cost-benefit calculation: women and girls are easily accessible in times of war, they are unprotected and easy targets, since their men are occupied with fighting a war and cannot defend them as they would do in times of peace. Perpetrators have the possibility of a 'get-together' with every woman they want without facing consequences, at least not directly afterwards, showing high benefits at almost no costs.<sup>20</sup>

Killing the victim after raping him/her is a welcome measure to conceal the crime. Psychological profiles of military rapists show that they are different from regular rapists. An analysis of the mass rapes of German females by the Red Army in 1945 can perhaps provide insight into military rapes:

The attacks were divided chronologically into four stages. Firstly, Soviet soldiers committed very brutal (gang) rapes without any distinction of victims in the German territory they marched into at first. Secondly, when Berlin was occupied, victims were chosen by enemy soldiers, the selection was made personally, almost without violence as long as the victim did not show resistance. The third stage was characterised by prostitution: soldiers handed out food and cigarettes in exchange for sexual services. This, however, does not mean that sexual intercourse happened voluntarily since women still felt threatened by the earlier happenings and the actual power being in Soviet hands. In the last phase victims and perpetrators were living together in monogamy. This 'occupation of wives' was the only way for a victim to prevent several, different rapists.

Brutality and violence resulted from the feeling of revenge for cruelties committed by the German army as well as the feeling of victory and being privileged. Being drunk with power, without fear of punishment in the midst of a chaotic war situation allowed grown-up human beings to slip back into being brutal primitives. Even though all stages are dominated by power, by the change of manner the latter shows the aforementioned concept of rape as

---

<sup>18</sup> S. J. Scholz, 'War Rape's Challenge to Just War Theory', in S. P. Lee (Eds.), *Intervention, terrorism and torture: contemporary challenges to just war theory*, 4<sup>th</sup> Edition, Springer, 2007, pp. 273 – 288, p. 276.

<sup>19</sup> C. Steains, 'Gender Issues', in: S. Lee (Eds.), *The International Criminal Court: the making of the Rome Statute —issues, negotiations, results*, The Hague: Martinus Nijhoff Publishers, 1999, pp. 357 - 390, see also Scholz, 2007, supra note 18, pp. 273 – 288.

<sup>20</sup> R. Thornhill & C. T. Palmer, *A Natural History of Rape: Biological Bases of Sexual Coercion*, Cambridge: MIT Press, 2001, pp. 66, 194.

booty by choosing the selected woman as a prize of success.<sup>21</sup> The compulsive drive of 'customary' rapists is mostly not given in cases of military rape, although it cannot be excluded completely.

So why is it that different people act differently in the same extreme situation, namely war? In spite of everything said so far, there are also combatants who do not commit rape.

The possible factors influencing human behaviour in war times are:

1. the evolutionary heritage each of us has to carry: ethnocentrism, xenophobia, the desire for social dominance;
2. the individual identity based on cultural belief, moral disengagement and rational self-interest;
3. professional socialisation, binding factors of the group, harmonisation between individuals and the role one is expected to play in the group;
4. us-them thinking, the blame of victims followed by the dehumanisation of victims.

Whereas factors 1 and 2 depend on the person him/herself and are individual, 3 and 4 present outer influences, not controlled by the human but depending on personal character based again on factors 1 and 2 regarding the gravity of impact. Whether or not a person commits the crime of rape (amongst other cruelties) during war is a combination of factors set out in both explanations 1 and 2 and the impact of factors of 3 and 4.<sup>22</sup> Keeping this reasoning in mind might give some explanation as to why not only the enemy but also a person belonging to the community of victims or even someone belonging to peace forces can turn into a rapist during war times.<sup>23</sup>

Numerous cases also show that different situations can involve different intentions. Within religious or ethnically motivated wars, the rape of women belonging to the opponent mostly comes with forced impregnation, aiming at an interference or extinction of the opposing religious or ethnic group. The woman has to give birth to a child whose father is the enemy, whose ethnic origin is disturbed. The psychological pressure of facing the offender whenever she looks at her child never lets the mother forget about the violence she had to experience. Especially in Muslim cultures the rest of the group will abandon mother and child. A Muslim woman will hardly find a husband or a father for her child, since she has been disgraced by pre-matrimonial sexual intercourse. The shame she carries is immense.<sup>24</sup>

Since certain cultures criminalise abortion, women are kept detained and are forced to give birth. In other cases people, or even the mother herself, perform

---

<sup>21</sup> D. G. Dutton, *The psychology of genocide, massacres, and extreme violence: why "normal" people come to commit atrocities*, Westport: Greenwood Publishing Group, 2007, pp. 126f.

<sup>22</sup> *Ibid*, pp. 137f.

<sup>23</sup> S. Whitworth, *Men, militarism, and UN peacekeeping: a gendered analysis*, Colorado: Lynne Rienner Publishers 2004, p. 13.

<sup>24</sup> Scholz, 2007 *supra* note 18, p. 275.

abortions without medical education, under non-sterile conditions, which has the risk of injuries, infections and eventually death. For some females the situation forced upon them seems so hopeless that suicide is the only alternative left.<sup>25</sup> In case of forced impregnation not only the raped woman is the victim—one may not forget about the child that will be born with stigmatisation, rejected by society and family.<sup>26</sup>

Another qualified form of the crime of rape is committed with the intentional contagion with infectious diseases, in the worst case HIV. The reasons for this are again to destroy the rivals' ethnic or religious group, especially when the victim is not notified about the infection and carries it further to other members of the community. When informed, infected women will face the same consequences as described above in cases of forced impregnation, especially in male-dominated societies. In addition to the expulsion, the victim has to face serious health problems. To find proper medical care during and also directly after war is a challenge in itself, and the stigmatisation of the disease may turn out to be an additional obstacle and the basis for ignorance in the future.<sup>27</sup>

Rape during armed conflicts can be committed by a single person, by a group, in private or in public. It can be commanded, instructed or planned. Without taking the way of how rape is carried out into account, the conduct per se always destroys the victims' dignity. Attempts to control, degrade, weaken and/or destroy the enemy, are always the reasons for rape in times of war.

The post-war effects that rape victims will suffer from have to be mentioned in this context: the restoration of human dignity is the only way to keep the damage as limited as possible. The trauma experienced results in emotional and bodily dysfunctions as well as social incapability. Christina Doctare makes an excellent case for the restoration of dignity when she argues that we have to accept and care for war victims in an adequate and sufficient way and help them regain their dignity and trust in mankind. By ignoring the obvious, victims can easily turn into offenders and could be the actor of future atrocities in war.<sup>28</sup>

## II. When Does the Crime of Rape Constitute a Crime Against Humanity?

---

<sup>25</sup> Steains, 1999 *supra* note 19 pp. 366ff.

<sup>26</sup> Scholz, 2007 *supra* note 18 p. 275.

<sup>27</sup> G. M. Carter, 'Infectious Disease, HIV/AIDS, and War: Impact on Civilian Psychological Health', in: S. Krippner & T. M. McIntyre (Eds.), *The psychological impact of war trauma on civilians: an international perspective*, Westport, Greenwood Publishing Group, 2003, p. 86.

<sup>28</sup> Keynote Statements of the Swedish Representative of the Committee for the Prevention of Torture (CPT); C. Doctare, 'Implications and Consequences of Systematic Rapes for the Individual and the Society', in: M. Granditz, E. Wipler, K. Baker, E. Kokar (Eds.), *European Union Odysseus Project*, Conference held in Vienna 18 – 20 June 1999; 'Rape is a War Crime, how to support the Survivors, lessons from Bosnia – Strategies for Kosovo', International Centre for Migration Policy Development (ICMPD), 1999, pp. 54 – 60.

Rape as a crime against humanity was first mentioned under the Control Council Law No. 10.<sup>29</sup> Yet, what exactly constitutes the difference between rape as a regular crime, as a war crime or as a crime against humanity? Obviously, the conduct stays the same: the factual rape of the victim as pointed out earlier. So, does it depend on the number of victims, on the number of acts, or on the intention of the perpetrator? Does it require the situation of an armed conflict, or must it be based on discrimination?

The Erdemovic judgement states that the core element of a crime against humanity is the attack of humanity. Humanity is set above the individual, meaning that not every assault against individuals is a crime against humanity. But in order to attack humanity an individual has to be attacked.<sup>30</sup>

## II. 1 The International Criminal Court <sup>31</sup>

Article 7 of the Rome Statute lists the crime of rape as a crime against humanity.<sup>32</sup> The abovementioned ICC document on Rules of Procedure and Evidence adds elements to the definition of the crime set out above in order to clarify the situation: "(...) the conduct was committed as part of a widespread or systematic attack directed against a civilian population. 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."<sup>33</sup> In addition to the above-defined elements of the crime, the two key elements — (1) a widespread or systematic attack (2) directed against a civilian population

<sup>29</sup> Control Council Law (CCL) No. 10 of 20 Dec. 1945, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, available at: <http://avalon.law.yale.edu/imt/imt10.asp>, (14 March 2011)

<sup>30</sup> Case IT-96-22-T, Drazen ERDEMOVIC, Judgement of 29 November 1996 Section B, para. 19.

<sup>31</sup> Established by the Rome Statute of the International Criminal Court, adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome.

<sup>32</sup> Rome Statute of the International Criminal Court, 17 July 1998, (as corrected by the procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002), Article 7: Crimes against humanity

1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (...)

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; (...)

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack; (...)

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy; (...)

3. For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

<sup>33</sup> ICC-ASP/1/3, 9 Sept. 2002, p. 119.

—are the ones the prosecutor has to prove in order to take actions against rape as a crime against humanity, if not, it constitutes a crime under domestic law, and does not fall under the scope of the ICC.

An act is systematic or widespread when it reaches the concern or interest of the international community. At this point—in our case—rape takes place in such an extensive and methodical way and is no longer subject to national jurisdiction. This is the core element that establishes prosecution within international law. A widespread or systematic attack aiming at a civilian population means that within an armed conflict combatants cannot be victims of rape as a crime against humanity—if so, this constitutes rape as a war crime. The distinction between civilians and people actively taking part in the conflict is sometimes difficult. Even if it is recognised that civilians armed for the purpose of self—or family—defence do not lose their status as civilians, it is not clear in cases where authorities call on non-military personnel or low-ranking police officers to arm themselves.<sup>34</sup> Secondly, the term ‘population’ excludes crimes committed against one single person: the attack must aim at a significant number of victims—an exact number is not given, which seems logical, since it would mean that only one victim short of that number would mean the crime does not constitute a crime against humanity. However, a more precise guideline would be welcomed.

Another crucial element is the intention of the perpetrator: he/she has to know the act is a widespread or systematic attack against a civilian population. Furthermore, article 30 of the Rome Statute, dealing with the *mens rea* of crimes punishable under the ICC, points out: “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.”<sup>35</sup> This means that the perpetrator not only has to have knowledge about committing rape but also about the act being a part of a systematic or widespread plan. This can lead to major problems for the prosecution as to how shall it be proven that the accused had this knowledge when he/she denies such a fact. Article 7 of the Statute complicates the situation by saying that the attack has to be set in context with the policy of a State or organisation that intends to commit such acts. In which extent the actor has to know about this policy when committing the single crime is questionable.<sup>36</sup> It is arguably the case that this concrete knowledge would not have been the intention in the making of the law.

It is best to use *dolus eventualis* concerning the knowledge of the crime being committed as a part of a systematic or widespread attack of a state or

---

<sup>34</sup> UN Doc. S/1994/674, Final Report of the Commission of Experts Pursuant to Security Council Resolution 780, Letter dated 24 May 1994 from the Secretary General to the President of the Security Council, para. 78.

<sup>35</sup> Rome Statute of the International Criminal Court, Article 30 (1): Mental Element

<sup>36</sup> M. McAuliffe de Guzman, ‘The Road from Rome: The Developing Law of Crimes against Humanity’, *Human Rights Quarterly*, 2000- 22;2, pp. 335 – 403.

organisation against numerous civilians as sufficient when it comes to the crime of rape. Arguing that rape is commonly known as a systematic way of spreading fear and terror within the civilian population, the perpetrator —even if it is not his/her main intention to do so —accepts the consequence that he/she could be part of this policy, especially when committed in times of armed conflicts. Consequently, rape committed by a single person in wartime should always be seen as a crime against humanity when a general structured policy of an organisation or state can be proven. By reversing the burden of proof, the perpetrator could demonstrate that his/her behaviour did not constitute a crime against humanity. The above-explained construction of *dolus eventualis* demands a balancing counter-act due to the right to a fair trial and the presumption of innocence. The perpetrator has to be given the possibility of proving that he did not commit the rape with the intention of being part of a systematic or widespread attack against a civilian population.

The ICC formulation “state OR organisational policy” with respect to the crime of rape as a war crime ensures the prosecution of private offenders as well as officials. This is important when groups not belonging to any government, e.g. paramilitaries or rebels, instigated the violent conduct. These interpretations are the outcome of the experience gained by ICTY and ICTR case law. The main achievements will be discussed in the following chapters.

## **II.2 The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY)<sup>37</sup>**

Even though the case law<sup>38</sup> of the Tribunal for the former Yugoslavia has had a major impact on the development of a classification of rape that is valid and decisive for international prosecution, the ICTY had difficulties prosecuting rape as a crime against humanity. This results from the absence of a clear and steady definition on the elements of the crime for the crime of rape at this time and from the interpretation of elements of the crime that constitute a crime against humanity set out by the statute of the Tribunal.<sup>39</sup> The general key elements of the crime against humanity within the ICTY regarding rape are that: (a) rape is connected to an armed conflict geographically and temporally, (b) committed in a widespread or systematic manner, (c) directed against a civilian population,

---

<sup>37</sup> Established by Security Council Resolution 827 of 25 May 1993, S/RES/827 (1993) under Chapter VII of the Charter of the United Nations.

<sup>38</sup> Case IT-95-17/1-T, Anto FURUNDZIJA; Case IT-96-23 and IT-96-23/1, Dragoljub KURNARAC, Radomir KOVAC and Zoran VUKOVIC, Judgement of 22 Feb. 2001, paras. 453 ff.

<sup>39</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 as of September 2008, available at: [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept08\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf), Article 5: Crimes against humanity, (15 March 2011)

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: (...) (g) rape; (...).

and (d) the perpetrator knew that his action was a part of a widespread or systematic attack against a civilian population.

As already mentioned above, the criminal act committed as a crime against humanity falls within the jurisdiction of an international court when the offender targeted a certain number of civilians, the crime thereby becoming a matter of concern and significant to the international community. This central element of the crime against humanity establishes the jurisdiction of the Tribunal. If this element does not exist because the number of victims is not high enough and therefore a “civilian population” was not subject to the attack, the accused cannot be found guilty of a crime against humanity. Furthermore, the Commentary of the International Law Commission in its Draft Code of Crimes against Peace and Security of Mankind states that “(...) acts must be committed on a large scale meaning that the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim (...)”.<sup>40</sup> This was also the conclusion of the final judgement of the case Prosecutor vs. Haradinaj et al. that found the accused not guilty of committing rape as a crime against humanity since the number of victims was not high enough that it could be seen as an attack against a civilian population.<sup>41</sup>

So the perpetrator cannot be found guilty for committing rape as a crime against humanity when the crime was committed for entirely personal reasons, even though the Appeal Chamber of the Tadic case oppositionally stressed that this mental element is irrelevant and that a crime against humanity can be committed out of personal motives solely.<sup>42</sup> Proving that rape was committed deliberately as a part of a widespread or systematic attack against a larger number of civilians would be rather complex, especially when the perpetrator denies to have intended this. At this point it is important to refer to the above-mentioned reasoning of *dolus eventualis*. The required geographical and temporal connection of the crime to an armed conflict is the result of the particular situation the ICTY was created for. This was no obstacle to prosecuting rape as a crime against humanity since the term “conflict” was understood as either national or international.<sup>43</sup> This element of crime did not find its way to the Rome Statute, under which crimes against humanity can also be perpetrated in times of peace.

---

<sup>40</sup> UN Doc A/51/10, Report of the International Law Commission on the Work of its Forty-Eighth Session (1996) GAOR, 51st Session, Supp. No 10, pp 94-95.

<sup>41</sup> See e.g. Case IT-04-84-T ICTY, Ramush HARADINAJ, Idriz BALAJ, Lahi BRAHIMAJ, Judgement of 3 Apr. 2008, para. 122.

<sup>42</sup> Case IT-94-1-A, ICTY, Dusko TADIC, Judgement of 15 July 1999, paras. 248 and 252.

<sup>43</sup> Stojanka Mirceva, ‘Why the International Criminal Court is Different’, University for Peace, 2004, available at: [http://www.monitor.upeace.org/archive.cfm?id\\_article=133](http://www.monitor.upeace.org/archive.cfm?id_article=133), (18 March 2011).

### II.3 The International Criminal Tribunal for Rwanda (ICTR)<sup>44</sup>

As well as the Tribunal for the former Yugoslavia, the Rwanda Tribunal played an important role in the development of the definition of rape.<sup>45</sup> Yet, the ICTR has a different approach when prosecuting rape as a crime against humanity. In addition to the already discussed elements of crime the ICTR statute adds another requirement that deserves to be discussed. The statute of the Tribunal names the following elements for classifying the crime as one against humanity: Art. 3 says that “the 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: (...) (g) Rape; (...)”<sup>46</sup>

As one can see, the establishment of jurisdiction of the ICTR regarding rape as a crime against humanity does not demand a connection to war as the ICTY statute does. Indispensable, though, is the requirement of rape being committed because of discriminatory reasons. This leads to the question whether it is sufficient that the attack against the civilian population as a whole must be discriminatory or every single attack has to be committed on this ground, i.e. that every perpetrator must have committed the crime for discriminatory reasons. The latter —the so-called ‘discriminatory intent’ — would mean that the purpose rises above the single victim and that the victim has only been raped because the perpetrator wants to discriminate against the victim. The interpretation that the discriminatory purpose covers the attack instead of the offender allows the perpetrator to commit rape for personal reasons. By this, the widespread or systematic attack has to be concentrated on a specific national, political, ethnic, racial or religious group. This interpretation simplifies argumentation within a trial as well as qualifies more cases of rape as a crime against humanity.<sup>47</sup>

The difference between those two interpretations is essential: the ‘discriminatory intent’ as a mental element is hard to prove, especially when the accused claims that his intention was only to satisfy sexual needs. The requirement of ‘discriminatory grounds’, however, creates a jurisdictional element that does not depend on personal interest or intentions. The court can prosecute cases where the widespread or systematic attacks are evidently directed against members of one of the groups set out in Article 3.<sup>48</sup>

---

<sup>44</sup> Created by the Security Council resolution 955 of 8 November 1994, S/RES/955 (1994) under Chapter VII of the United Nations Charter.

<sup>45</sup> Case ICTR-96-4-T ICTR, Jean-Paul AKAYESU.

<sup>46</sup> Statute of the International Criminal Tribunal for Rwanda, Article 3: Crimes against Humanity, available at: <http://www.unictr.org/Portals/0/English/Legal/Statute/2010.pdf>

<sup>47</sup> McAuliffe de Guzman, 2000 *supra note 34 p. 365*.

<sup>48</sup> For a detailed discussion on the topic of ‘discriminatory intent’ and ‘discriminatory ground’, please see: Case IT-94-1-A ICTY, Dusko TADIC, Judgement of 15.7.1999, VII. The fourth ground of cross-appeal by the prosecution: the Trial Chamber’s finding that all crimes against humanity require a discriminatory intent, pp. 273 – 305.

So, which interpretation of the requirement of discrimination regarding crimes against humanity will be used in an individual case? To exemplify, in the case of the Prosecutor vs. Jean-Paul Akayesu the prosecutor stated in his grounds of appeal that the perpetrator must have known that his behaviour was a part of a widespread and systematic attack based on discrimination, meaning that 'discriminatory ground' is sufficient.<sup>49</sup> Also the Appeals Chamber concluded that discriminatory intent is not needed when it comes to crimes against humanity: "The meaning to be collected from Article 3 of the Statute is that even if the accused did not have a discriminatory intent when he committed the act charged against a particular victim, he nevertheless knew that his act could further be a discriminatory attack against a civilian population; the attack could even be perpetrated by other persons and the accused could even object to it."<sup>50</sup> From this, one can conclude that it falls within the margin of interpretation of the judges and probably is subject to appeal.

The requirement of discriminatory intent regarding crimes against humanity of course limits the jurisdiction of the Tribunal. Consequently, crimes against humanity which lack the discriminatory element do not fall within the scope of the ICTR. This paper will not seek to go so far as to discuss if such crimes are punishable under the Rome Statute or cannot be prosecuted at all.

## Conclusion

Humanity is the quality and characteristics of a human being; by definition it also means kindness and compassion. Some say this is the difference between humans and animals. By committing a crime against humanity the perpetrator acts ruthlessly and inhumanly, not recognising or treating the victim as an equal human being —the victim is denied the quality of human being and the perpetrator decides to give up his quality of being one. Assuming that when there is no humanity left it all comes down to instincts.

The crime of rape as a crime against humanity made enormous progress. At the time when the Security Council established the two ad-hoc Tribunals, no definition of the conduct of rape was given. It took years of trials, decisions, appeals and negotiations to finally reach a clear approach towards consolidated elements of this crime. Even though certain questions are still subject to interpretation, the picture is clearer, especially when it comes to the prosecution within the ICTY and ICTR.

When they established the Rome Statute, the lawmakers learned from the findings of the Tribunals. The requirement of discrimination as well as the nexus to war was left out regarding the crime of rape. This ensures an overall jurisdiction, not limited by outer influences, when the number of victims of

---

<sup>49</sup> Case ICTR-96-4-T, Jean-Paul AKAYESU, Judgement of 1 June 2001, Prosecution's ground of appeal, B. Third Ground of Appeal: Article 3 of the Statute (crimes against humanity), p. 449.

<sup>50</sup> *Ibid.*, pp. 464, 467.

rape reaches a certain critical mass. This 'critical mass', therefore, is the critical link between rape as a crime punishable under national legislation and the crime against humanity. It is, after all, uncertain at what point this number is reached and which circumstances —if any— allow the number of victims to be lower (or higher) so rape will still be considered as a crime against humanity. Though it would be seemingly unprofessional to set out a static number, the establishment of guidelines by evaluating judgements of the Tribunals and the ICC would be a very helpful and useful starting point to close this uncertain gap in the future.

The purpose of rape as a weapon of warfare mostly results in the fact that the enemy shall be intimidated or extinct. The victims mostly are just the means to this end, people who are at the wrong place at the wrong time: there is no personal connection between them and the perpetrators. It can be argued that rape is one of the most horrible (war) crimes imaginable. Compared to murder —even when cruel and violent enough that one can call it slaughter— victims of rape often have to live with their experiences, in cases of forced pregnancy they have to face it every day. It has a major impact on the rest of the victim's life. Rape does not only take away the victims dignity, self-respect and confidence, moreover, it rapes trust. The very dangerous side effect of this is that victims may become imprudent and insensible to right and wrong and, because of this, are liable to behave according to their experiences in the future. The establishment of international jurisdiction and the successful prosecution of these atrocities can probably restore a victim's faith in justice to the largest extent possible.