

Legal requirements

Sexual and Gender-Based Violence Crimes

Case Matrix Network

The Case Matrix Network ('CMN') provides knowledge-transfer and capacity development services to national and international actors in the fields of international criminal and human rights law. We seek to empower those working to provide criminal accountability for violations of core international crimes and serious human rights violations, by providing access to legal information, legal expertise and knowledge tools. The CMN is a department of the Centre for International Law Research and Policy ('CILRAP'), which is an international non-profit organisation, registered in Belgium.

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1. Introduction

Sexual violence – committed against females and males – remains a persistent hallmark on numerous armed conflicts, atrocities and national emergencies. Achieving accountability – particularly with regard to individual criminal responsibility – for such violence remains limited in many jurisdictions. The reasons for this are manifold: in many instances, sexual and gender-based violence crimes (‘SGBV’) are veiled with social stigmas, frequently under-reported and inadequately reflected in social and public health policies as well as in domestic criminal law, while criminal justice actors may require additional resources, skills and training to respond appropriately to the complexity and sensitivities of SGBV crimes.

However, the prevalence of sexual violence in conflict and atrocity has gained visibility in recent years.¹ Political momentum from international and domestic spheres has enabled various actors to tackle its causes and effects.² Institutional and policy reforms have enabled more coherent approaches to providing accountability to sexual violence in conflict and atrocity,³ while several milestone judgments have been rendered in international and national jurisdictions, building on the legacies of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’), the International Criminal Tribunal for Rwanda (‘ICTR’) and the Special Court for Sierra Leone (‘SCSL’), the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’) and the International Military Tribunal (‘IMT’).⁴ Opportunities to strengthen national accountability options for SGBV crimes can be seen alongside engagement with and by the International Criminal Court (‘ICC’).⁵ They also include the establishment of the Special Criminal Court in CAR,⁶ the adoption of the Protocol for the Investigation of Sexual Violence by the Colombian Attorney General’s Office (‘AGO’)⁷ and its role in the prospective Special Jurisdiction for Peace⁸, and the adoption of ICC implementing

- 1 A number of initiatives and academic publications have focused on addressing sexual and gender-based violence: see UN Women, [UNiTE to End Violence Against Women Campaign](#); UN Action against Sexual Violence in Conflict, Stop Rape Now; Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, OUP, 2016; Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, TOAEP, Beijing, 2012; Morten Bergsmo, Alf Butenschön Skre and Elisabeth J. Wood (eds.), *Understanding and Proving International Sex Crimes*, TOAEP, Beijing, 2012.
- 2 A Global Summit to End Sexual Violence in Conflict, held in London in June 2014, resulted in the adoption of the Foreign & Commonwealth Office, [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law](#) (1st ed.), London, June 2014 (‘PSVI Protocol’). The second edition of the Protocol was published in March 2017.
- 3 See ICC, Office of the Prosecutor (‘OTP’), [Policy Paper on Sexual and Gender-Based Crimes](#), June 2014; Government of the CAR and the United Nations, [Joint Communiqué of the Government of the Central African Republic and the United Nations](#), 12 December 2012; CAR, [Décret n°15.007 du 8 janvier 2015 portant création d’une unité mixte d’intervention rapide et de répression des violences sexuelles faites aux femmes et aux enfants](#); Tessa Khan and Jim Wormington, “Mobile Courts in the DRC: Lessons from Development for International Criminal Justice”, in *Oxford Transitional Justice Research Working Paper Series*, 2011; International Legal Assistance Consortium (‘ILAC’) and International Bar Association (‘IBA’), [Re-building courts and trust: An assessment of the needs of the justice system in the Democratic Republic of the Congo](#), August 2009.
- 4 ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, TC III, Judgment, Case No. ICC-01/05-01/08, 21 March 2016; DRC, High Military Court, Case *Kakwavu*, Judgment, 7 November 2014; Colombia, Constitutional Court, Order no. 092/08, 14 April 2008; Colombia, Constitutional Court, Order no. 009/15, 27 January 2015; Senegal, Extraordinary African Chambers, *The Prosecutor v. Hissène Habré*, Judgment, 30 May 2016.
- 5 See, for example, communications submitted to the ICC regarding SGBV crimes committed against Yazidi women and girls by the Global Justice Center or SGBV crimes committed during the Colombian conflict by the European Center for Constitutional and Human Rights (‘ECCHR’), Sisma Mujer and the Colectivo de Abogados José Alvear Restrepo (‘CAJAR’). See also ICC, *The Prosecutor v. Bosco Ntaganda*, TC VI, [Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9](#), Case No. ICC-01/04-02/06-1707, 4 January 2017, paras. 47 and 52-53, which asserted that SGBV crimes could be committed against members of the same armed forces, regardless of any possible status as combatants.
- 6 See [Loi organique No 15.003 portant création, organisation et fonctionnement de la Cour Pénale Spéciale](#), 3 June 2015.
- 7 Colombia, AGO, [Protocol for the Investigation of Sexual Violence](#), June 2016.
- 8 [Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace](#), November 2016.

legislation in DRC, which substantially replicates ICC crimes and liabilities into domestic legislation and enables all conflict-related SGBV crimes to be heard in the ordinary courts.⁹

These Guidelines aim to support the application of such initiatives by providing a concise overview of the legal requirements of seven underlying acts of SGBV proscribed under the ICC Statute: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, other forms of sexual violence and genocide by measures intended to prevent births.

1.1. Purpose

The Guidelines are directed to practitioners who wish to familiarise themselves with the legal requirements of SGBV crimes under international criminal law. Emblematic international case law as well as commentaries of independent human rights experts and leading publicists that address the seven SGBV crimes under the ICC Statute are reviewed, in order to provide:

- An overview of the legal requirements of underlying acts of SGBV crimes under the ICC Statute;
- Access to the relevant paragraphs of case law and commentaries that address SGBV crimes under the ICC Statute;
- Understanding of the interpretive developments, trends and divergences of underlying acts of SGBV crimes under the ICC Statute.

The Guidelines also provide an outline of the legal requirements of genocide, crimes against humanity and war crimes.

SGBV crime/Underlying act	International crime/Contextual requirement			
	Genocide (ICC Art.6)	CAH (ICC Art.7)	WC - IAC (ICC Art. 8(2)(b))	WC - NIAC (ICC Art. 8(2)(e))
Rape	Bodily or mental harm (ICC Art. 6(b))	✓	✓	✓
Sexual slavery		✓	✓	✓
Enforced prostitution		✓	✓	✓
Forced pregnancy		✓	✓	✓
Enforced sterilisation		✓	✓	✓
Other forms of sexual violence		✓	✓	✓
Genocide (measures intended to prevent births)	✓			

Table 1: Underlying acts and contextual requirements of SGBV crimes under the ICC Statute.

CAH: crimes against humanity | WC: war crimes | IAC: international armed conflict | NIAC: non-international armed conflict

9 Laws implementing the Rome Statute of the ICC were adopted in January 2016: *Loi n° 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal, Loi n° 15/023 du 31 décembre 2015 modifiant la Loi n° 024-2002 du 18 novembre 2002 portant Code pénal militaire 31 December 2015 and Loi n° 15/024 du 31 décembre 2015 modifiant et complétant le Décret du 06 août 1959 portant Code de procédure pénale 31 December 2015*. See also CMN, *National Legal Requirements: Prosecution of Sexual and Gender-Based Violence in the Democratic Republic of Congo*, March 2017.

How can the Guidelines assist practitioners?

- Research aid on the legal requirements of the SGBV crimes in main international cases;
- Structural support for prosecution strategies;
- Structural support for calls for legal reform, where national legal requirements are ill-suited to conflict-related sexual violence;
- Available in English, French and Spanish.

The Guidelines are accompanied by the International Criminal Law Guidelines: Means of Proof of Sexual and Gender-Based Violence¹⁰, which provide single-page summaries of the legal requirements, means of proof and evidence typologies of each SGBV crime under the ICC Statute.¹¹

1.2. Methodology

The Guidelines are a compilation of the case law of 25 emblematic international cases addressing conduct that amounts to SGBV crimes,¹² drawn from the ICC, ICTY, ICTR, SCSL, ECCC and IMT, as well as selected historic domestic cases from the Netherlands Temporary Court-Martial at Batavia, the District Court of Jerusalem and the Supreme National Tribunal of Poland.¹³ Commentaries of 25 independent human rights experts and leading publicists have been used to supplement the legal requirements of SGBV crimes with limited jurisprudence. Quotations of case law and commentaries are organised according to the legal requirements of the seven crimes, using the Legal Requirements Framework for Core International Crimes and Modes of Liability ('Legal Requirements Framework').

The Legal Requirements Framework: a structure to identify unlawful behaviour under international criminal law

The Legal Requirements Framework provides a structure to aid the interpretation and analysis of the crimes and liabilities found within the ICC Statute, as well as its Elements of Crimes ('EoC')¹⁴. It helps to understand two fundamental dimensions of unlawful behaviour under international criminal law: the *structure* and the *composition* of international crimes and liabilities.

Structure of SGBV crimes and liabilities: legal requirements

International SGBV crimes consist of two parts: the *contextual requirement* (genocide, crimes against humanity or war crimes) and the *underlying act/s* (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, other forms of sexual violence or genocide by imposing measures intended to prevent births within the group). The underlying act/s become an international crime by 'being embedded'¹⁵ in this contextual part. In addition

10 CMN, *International Criminal Law Guidelines: Means of Proof of Sexual and Gender-Based Violence*, November 2017.

11 Subsequent volumes will address alternative charges for SGBV and the relevant modes of liabilities.

12 The Guidelines include selected cases where alternative charges were used for conduct amounting to SGBV crimes.

13 Logistical restrictions of the current volume have prevented review of a broader number of domestic jurisprudence with substantial jurisprudence on conflict-related SGBV crimes, such as Bosnia and Herzegovina.

14 A subsidiary legal source of the ICC; see ICC Art. 21.

15 Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, para. 880.

to proving the context and underlying acts, the liability of individual perpetrators for these crimes must also be established. Each of these parts can be referred to as a *legal requirement*.

Composition of SGBV crimes and liabilities: components of the legal requirements

As Table 2 shows, each legal requirement consists of two elements, which together establish the structure of prohibited acts and criminal behaviour defined by the ICC Statute: *actus reus* (material elements) and *mens rea* (mental elements).

<i>Actus reus</i>	The act or omission of each crime and mode of liability, that comprise the physical element of the crime, such as the conduct, consequences and circumstances, which are objective in their nature
<i>Mens rea</i>	The psychological state of a perpetrator that requires proof of intent and knowledge for the respective <i>actus reus</i> , which is subjective in nature

Contextual requirement		Underlying act/s		Mode of liability
<i>actus reus</i>		<i>actus reus</i>		<i>actus reus</i>
	+		+	
<i>mens rea</i>		<i>mens rea</i>		<i>mens rea</i>

Table 2. Criminal behaviour in international criminal law according to its legal requirements and components.

Under the ICC Statute, each of the current crimes and their underlying acts are further defined in the Elements of Crimes. However, the *mens rea* of ICC Art. 30 does not have a similar subsidiary source to clarify its application to the contextual requirements and their underlying acts. The Elements of Crimes specifies that ICC Art. 30 should apply as a “default rule”¹⁶ to each of the *actus reus*. However, the document limits its assessment of the *mens rea* requirements to selected elements of crimes.

To address this gap, the Legal Requirements Framework adapts the logic of the Elements of Crimes and applies it to the *mens rea* of ICC Art. 30, to provide a complete structure of the legal requirements of all ICC Statute crimes, underlying acts and liabilities. ICC Art. 30 requires that individual criminal responsibility be found only where the *actus reus* are committed with *intent* and *knowledge*:¹⁷ it connects intent to the *actus reus* that establish *conduct* or *consequences*¹⁸, whereas knowledge is connected to *actus reus* that require *awareness* of a *consequence* or a *circumstance*.¹⁹

¹⁶ According to the General Introduction of the EoC: “As stated in article 30, 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”, *ICC Elements of Crimes*, para. 2 of General introduction.

¹⁷ ICC Art. 30(1).

¹⁸ ICC Art. 30(2).

¹⁹ ICC Art. 30(3).

The Legal Requirements Framework adopts four types of *mens rea* that are consistent to ICC Art. 30:

Conduct	[ICC Art.30(2)] Intent in relation to conduct
	Intent of the perpetrator to engage in the criminal conduct of the <i>actus reus</i> (criminal act or omission)
Consequence I	[ICC Art.30(2)] Intent in relation to a consequence
	Intent of the perpetrator to cause the consequence of the <i>actus reus</i> – the perpetrator meant to cause the consequence
Consequence II	[ICC Art.30(2) and (3)] Intent or knowledge in relation to a consequence
	Intent or awareness of the perpetrator that the consequence of the <i>actus reus</i> will occur in the ordinary course of events
Circumstance	[ICC Art.30(3)] Knowledge in relation to a circumstance
	Awareness of the perpetrator that a specific circumstance exists or will occur in the ordinary course of events

By combining the structure of SGBV crimes and liabilities, as well as their composition, it is possible to provide a rigorous and coherent framework for SGBV crimes, as well as alternative charges and liabilities²⁰ that can be used for multiple investigative, prosecutorial and adjudicative functions.

To provide an example for the SGBV crime of rape, the Elements of Crimes document identifies two *actus reus* but it does not assign *mens rea* to these elements. Table 3 below shows how the Legal Requirements Framework deconstructs the elements of rape into its *actus reus* and *mens rea*, while also breaking each requirement down into its component parts.

Organising decisions and judgments of international criminal tribunals

The Legal Requirements Framework can also be used to identify and organise relevant paragraphs of international or national judgments and decisions, according to the crimes and liabilities of the ICC Statute.²¹ This supports the development of methodologically rigorous collections of jurisprudence, organised according to the elements of each crime, underlying act and liability as well as their means of proof.²² Information is sought for its elucidation of the definition and scope of a specific crime or mode of liability. It is then analysed for relevance or repetition of earlier jurisprudence. Finally, once review procedures are complete, data management solutions enable texts to be quickly filtered, accessed and translated. It is the same methodological structure that underpins the Case Matrix²³ and the Core International Crimes Database (CICD).²⁴ This provides a clear and consistent framework to interpret

²⁰ Subsequent volumes will address alternative charges for SGBV and the relevant modes of liabilities.

²¹ This is completed by (i) deconstructing the leading judgments, decisions and opinions; (ii) linking the paragraphs with deliberations on the admitted or insufficient evidence to the corresponding legal requirements and elements of international crimes and liabilities; (iii) identifying the evidence or means of proof; (iv) clustering the evidence or means of proof.

²² See CMN, *International Criminal Law Guidelines: Command Responsibility* (2nd ed.), December 2016 and CMN, *International Means of Proof Charts: Sexual and Gender-Based Violence*, June 2017.

²³ Case Matrix is a software platform that provides users with legal information on international criminal law, helps organise case files and manage evidence and contains a database structure for the meeting of law and fact in core international crimes cases. See the [ICC Case Matrix](#) page of the CMN website and Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer*, TOAEP, 2011.

²⁴ CICD is an online directory that classifies and deconstructs case law and doctrine, according to the means of proof and elements of core international crimes. It consists of three parts: (i) elements of crimes; (ii) means of proof and (iii) modes of liability. See the [CMN ICJ Toolkits Project Blog](#).

the crimes in the ICC Statute, which can guide practitioners, including prosecutors, defence attorneys or judges in the evaluation of available evidence, development of legal arguments and legal analyses.

Legal requirements and components of rape under the ICC Statute			
Actus reus 1	The perpetrator invaded 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 <i>[The concept of “invasion” is intended to be broad enough to be gender-neutral (Elements of Crimes Art. 7(1)(g)-1, footnote 15)]</i>	
Actus reus 2	The perpetrator invaded the body of a person by conduct resulting in penetration, however slight:	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 <i>[It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity (EoC Art. 7(1)(g)-1, footnote 16)]</i>	
Mens rea 1	Conduct	The perpetrator meant to invade the body of a person	
	Consequence	[Consequence I] The perpetrator meant to cause the invasion of the body of a person [OR] [Consequence II] The perpetrator was aware that the invasion of the body of a person would occur in the ordinary course of events	
Mens rea 2	Circumstance	The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person’s incapacity to give genuine consent	
Possible charges for rape under the ICC Statute			
	Genocide	Crimes against humanity	War crimes
Rape	-	Rape (ICC Art. 7(1)(g))	Rape (ICC Art. 8(2)(b); ICC Art. 8(2)(e))
Alternative charges	Bodily or mental harm <i>*Footnote 3 under ICC Art. 6(b) Elements of Crimes lists rape as a potential conduct of bodily or mental harm</i>	Torture Persecution	Torture Inhuman treatment Cruel treatment

Table 3. Actus reus and mens rea of, and possible charges for, rape under the ICC Statute.

Contextual requirements for SGBV Crimes

While focusing on underlying acts of SGBV crimes, the Guidelines also include the contextual requirements under which these can be perpetrated (see Table 1):

- Genocide (ICC Art. 6)
- Crimes against humanity (ICC Art. 7)
- War crimes: International armed conflict ('IAC') – serious violations (ICC Art. 8(2)(b))
- War crimes: Non-international armed conflict ('NIAC') – other serious violations (ICC Art. 8(2)(e))

Additional materials

- CMN, International Criminal Law Guidelines: Crimes Against Humanity, February 2017 (English, Georgian, Spanish)
- CMN, International Means of Proof: Crimes Against Humanity, August 2017 (English, Georgian, Spanish)

1.3. Structure

Section 1 establishes the purpose, structure and methodology adopted in these Guidelines. It also includes a glossary of key terms.

Section 2 provides the legal requirements charts of the **contextual requirements** of genocide, crimes against humanity and war crimes, according to the Elements of Crimes and Legal Requirements Framework.

Section 3 provides international case law for the legal requirements of **rape**.

Section 4 provides international case law for the legal requirements of **sexual slavery**.

Section 5 provides international case law and commentaries for the legal requirements of **enforced prostitution**.

Section 6 provides international case law and commentaries for the legal requirements of **forced pregnancy**.

Section 7 provides international case law and commentaries for the legal requirements of **enforced sterilisation**.

Section 8 provides international case law and commentaries for the legal requirements of **other forms of sexual violence**.

Section 9 provides international case law and commentaries for the legal requirements of **genocide by imposing measures intended to prevent births within the group**.

Section 10 provides an **index** of the international cases and commentaries which have been cited.

Layout: ICL Guidelines

Sections 3 to 9 are organised according to the following stylistic and formal constraints:

Case law	Quotations are chronologically ordered to show the jurisprudential evolution of each of the legal requirements (and components) of the specific SGBV crimes. The legal issue or relevance of each quotation is introduced and identified by the tribunal, the chamber that issued the decision or judgment and the case name. The tribunal is referenced by its acronym and cases are referenced by the formal case name . Where popular case names exist, they appear in brackets in the first reference and are then adopted subsequently.
Commentaries	Quotations are clustered together thematically. The legal issue or relevance of each quotation is introduced and identified by the author(s) surname(s). If there is more than one author, only the surname of the first author will be written, followed by expression ' <i>et al.</i> '
References	The Guidelines adopt abbreviated references to the crimes and underlying acts, as adopted in the National Implementing Legislation Database ('NILD') of the ICC Legal Tools Database.
Hyperlinks to the ICC Legal Tools Database	Most documents are hyperlinked to the source document, recorded in the ICC Legal Tools Database, through the footnote reference. Readers using an electronic version can access the document whenever they have an internet connection.
Footnotes	Decisions or judgments are fully referenced when mentioned for the first time within the footnotes: including the institution acronym, the case name (<i>in italics</i>), the acronym of chamber, the type of decision or judgment, the case number, the date it was issued and the paragraph number. Every subsequent mention includes the institution acronym, the case name following the ICC naming convention, a <i>supra</i> reference and the paragraph number. When two successive quotations come from the same decision, the second footnote will not contain all the details of the decision or judgment – except for the paragraph number – but will instead use the term ' <i>Ibid</i> '. If there is more than one accused person, only the surname of the first accused will be written, followed by the expression ' <i>et al.</i> '. Where the case law quotation includes footnotes, they will be indicated. This is a discretionary practice: those references that were deemed of little relevance have been removed and acknowledged as such ('citations omitted').
Alternative charge	The Guidelines include selected cases where alternative charges were used for conduct amounting to SGBV crimes. This is indicated below the relevant quotations, through the following reference: international crime/underlying act/Article, Statute.
Similar legal requirements	Similar legal requirements: Reference to similar legal requirements of other SGBV crimes are noted at the end of the relevant subsection, with the following reference: SGBV crime/specific legal requirement/page number.

1.4. Glossary of terms

AC: Appeals Chamber.

Actus reus: material element of a criminal offence.

Ad hoc tribunals: the two tribunals established by the United Nations Security Council to prosecute persons responsible for committing international crimes in the Former Yugoslavia since 1991 and in Rwanda in 1994. They are also referred to as the ICTY and the ICTR.

Case Matrix digests: a software platform that provides users with legal information on international criminal law, helps organise case files and manage evidence and contains a database structure for the meeting of law and fact in core international crimes cases. Case Matrix digests are part of the ICC Case Matrix application.

Circumstantial evidence: a fact that can be used to infer another fact.

Core International Crimes Database ('CICD'): an online directory that classifies and deconstructs case law and doctrine, according to the means of proof and elements of core international crimes. It consists of three parts: (i) elements of crimes; (ii) modes of liability and (iii) means of proof.

De facto: in fact, whether by right or not; actual.

De jure: according to law.

ECCC: Extraordinary Chambers in the Courts of Cambodia.

Elements: see legal requirements.

Gender: used as defined in ICC Art. 7(3) and referring to the two sexes, male and female, within the context of society. This definition acknowledges social construction of gender and accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys.

Gender-based crimes: crimes committed against persons because of their sex and/or socially constructed gender roles - such crimes are not always a form of sexual violence.

Gender perspective requires understanding differences in status, power, roles, and needs between males and females, and the impact of gender on opportunities and interactions.

Jurisprudence: case law, legal decisions, and legal precedents, which have developed in a particular system or court, such as the ICC.

ICC: International Criminal Court.

ICC Pre-Trial Chamber ('PTC'): the first chamber of the ICC, which decides on issues preceding the trial.

ICTR: International Criminal Tribunal for Rwanda.

ICTY: International Criminal Tribunal for the former Yugoslavia.

International(ised) criminal courts and tribunals: term used to refer to international criminal courts and tribunals and to courts and tribunal with an international feature. This term encompasses the ECCC and the SCSL, *inter alia*.

International case law: international criminal jurisprudence.

International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: a non-binding Protocol containing basic standards of best practice on the documentation of sexual violence as a crime under international law, first published in June 2014. The second edition of the PSVI Protocol was published in March 2017.

Legal requirements: material and mental elements that need to be proven to find an accused guilty of a particular crime.

Legal Requirements Framework: a structure to aid the interpretation and analysis of the crimes and modes of liability found within the ICC Statute and its Elements of Crimes document, which has been used in the process of analysis.

Material facts: facts that need to be proven in order to fulfil all legal requirements of a crime.

Mens rea: mental element of a crime.

Means of proof: material method, source or evidence used to establish the existence of a fact.

National Implementing Legislation Database ('NILD'): a relational database created by the Human Rights Law Centre ('HRLC') of the University of Nottingham, which forms part of the [ICC Legal Tools Project](#).

SCSL: Special Court for Sierra Leone.

Sexual crimes/sexual violence/sexual and gender-based violence: can be and are often used interchangeably. 'Sexual crimes' cover both physical and non-physical acts with a sexual element. Sexual crimes falling under subject-matter jurisdiction of the ICC are listed under articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Statute, and described in the Elements of Crimes.

TC: Trial Chamber.

Underlying acts: the acts or offences that are perpetrated within the context of genocide, crimes against humanity or war crimes.

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2. Contextual requirements of sexual and gender-based violence crimes

SGBV crimes (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, other forms of sexual violence or genocide by imposing measures intended to prevent births within the group) are penalised in international criminal law under different contexts (genocide, crimes against humanity or war crimes). It is by ‘being embedded’²⁵ in this contextual part that the SGBV crimes become an international crime. This section shows the contextual requirements of the international crimes of genocide, crimes against humanity and war crimes in international and non-international armed conflict according to the ICC Statute. In addition to proving the context and underlying acts, the liability of individual perpetrators for these crimes must also be established.²⁶

2.1. Genocide (ICC Art. 6)

Components	Genocide
Belonging	The victim or victims belonged to a particular national, ethnical, racial or religious group
Specific <i>mens rea</i>	The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such
Nexus/Context	The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction
Specific <i>mens rea</i>	The perpetrator was aware that the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction

Table 4. Contextual requirements of genocide under the ICC Statute.

25 Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, 2014, para. 880.

26 See FCO, International Protocol, *supra* note 2, Chapter 4, ‘Individual Criminal Responsibility’, pp. 43-44.

2.2. Crimes against humanity (ICC Art. 7)

Components	Crimes against humanity
Attack	A course of conduct involving multiple commission of acts
Policy	Pursuant to or in furtherance of a State or organisational policy
Object of the attack	Directed against any civilian population
Character of the attack	Widespread or systematic
Nexus	As part of
Mens rea	With the knowledge of the attack

Table 5. Contextual requirements of crimes against humanity under the ICC Statute.

2.3. War crimes: international armed conflict – serious violations (ICC Art. 8(2)(b))

Components	War crimes in international armed conflict
Context	The conduct took place in the context of and was associated with an international armed conflict
Specific mens rea	The perpetrator was aware of factual circumstances that established the existence of an armed conflict

Table 6. Contextual requirements of war crimes - serious violations in international armed conflict under the ICC Statute.

2.4. War crimes: non-international armed conflict – other serious violations (ICC Art. 8(2)(e))

Components	War crimes in non- international armed conflict
Context	The conduct took place in the context of and was associated with an armed conflict not of an international character
Specific mens rea	The perpetrator was aware of factual circumstances that established the existence of an armed conflict

Table 7. Contextual requirements of war crimes - serious violations in international armed conflict under the ICC Statute.

3

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3. Rape

Legal requirements and components of rape under the ICC Statute			
Actus reus 1	The perpetrator invaded 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	
		<i>[The concept of “invasion” is intended to be broad enough to be gender-neutral (Elements of Crimes Art. 7(1)(g)-1, footnote 15)]</i>	
Actus reus 2	The perpetrator invaded the body of a person by conduct resulting in penetration, however slight:	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	
		<i>[It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity (EoC Art. 7(1)(g)-1, footnote 16)]</i>	
Mens rea 1	Conduct	The perpetrator meant to invade the body of a person	
	Consequence	[Consequence I] The perpetrator meant to cause the invasion of the body of a person [OR]	[Consequence II] The perpetrator was aware that the invasion of the body of a person would occur in the ordinary course of events
Mens rea 2	Circumstance	The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person’s incapacity to give genuine consent	
Possible charges for rape under the ICC Statute			
	Genocide	Crimes against humanity	War crimes
Rape	-	Rape (ICC Art. 7(1)(g))	Rape (ICC Art. 8(2)(b); ICC Art. 8(2)(e))
Alternative charges	Bodily or mental harm <i>*Footnote 3 under ICC Art. 6(b) Elements of Crimes lists rape as a potential conduct of bodily or mental harm</i>	Torture Persecution	Torture Inhuman treatment Cruel treatment

Table 8. Actus reus and mens rea of, and possible charges for, rape under the ICC Statute.

3.1. Definition

Keywords: Conceptual definition – Mechanical definition

The ICTR Trial Chamber in *Akayesu* introduced a conceptual definition of rape:

[R]ape is a form of aggression and [...] the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts²⁷.

[R]ape [i]s a physical invasion of a sexual nature, committed on a person under circumstances which are coercive²⁸.

The ICTY Trial Chamber in *Furundžija* opted for a mechanical definition by identifying the following 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 person²⁹.

The ICTR Trial Chamber in *Musema* concurred with the conceptual approach set forth in *Akayesu*:

[T]he essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion³⁰.

[T]he distinction between rape and other forms of sexual violence drawn by the *Akayesu* Judgement [...] is “a physical invasion of a sexual nature” as contrasted with “any act of a sexual nature” which is committed on a person under circumstances which are coercive is clear and establishes a framework for judicial consideration of individual incidents of sexual violence and a determination, on a case by case basis, of whether such incidents constitute rape³¹.

The ICTY Trial Chamber in *Kunarac et al.* added the component of consent to an otherwise mechanical definition:

[T]he Trial Chamber understands that the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim³².

²⁷ ICTR, *The Prosecutor v. Jean-Paul Akayesu*, TC I, Judgement, Case No. ICTR-96-4-T, 2 September 1998, para. 687 (*P. v. Jean-Paul Akayesu TJ*).

²⁸ *Ibid.*, para. 688.

²⁹ ICTY, *The Prosecutor v. Anto Furundžija*, TC II, Judgement, Case No. IT-95-17/1-T, 10 December 1998, para. 185 (*P. v. Anto Furundžija TJ*).

³⁰ ICTR, *The Prosecutor v. Alfred Musema*, TC I, Judgement and Sentence, Case No. ICTR-96-13-A, 27 January 2000, para. 226 (*P. v. Alfred Musema TJ*).

³¹ *Ibid.*, para. 227 (citations omitted).

³² ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, TC II, Judgement, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 460 (*P. v. Dragoljub Kunarac et al. TJ*).

The ICTR Trial Chamber in *Muhimana* considered that the elements of rape in *Akayesu* (conceptual definition) and *Kunarac* (mechanical definition with the additional element of consent) are not incompatible or substantially different in their application:

[W]hereas Akayesu referred broadly to a “physical invasion of a sexual nature”, Kunarac went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape.³³

The ICC Trial Chamber in *Bemba*, followed the Elements of Crimes, which combines conceptual and mechanical components:

Rape requires “invasion” of a person’s body 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.”³⁴

[F]or the invasion of the body of a person to constitute rape, it has to be committed under one or more of four possible circumstances: (i) by force; (ii) 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; (iii) by taking advantage of a coercive environment; or (iv) against a person incapable of giving genuine consent.³⁵

The Chamber notes that the victim’s lack of consent is not a legal element of the crime of rape under the Statute.³⁶

3.2. [Actus reus 1] The perpetrator invaded 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 the anal or genital opening of the victim with any object or any other part of the body

Keywords: Invasion – Penetration

The ICTR Trial Chamber in *Akayesu* concluded that rape is not limited to an invasion by/of a sexual organ or object:

[W]hile rape has been historically defined in national jurisdictions as non-consensual sexual intercourse, variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.³⁷

The ICC Trial Chamber in *Bemba* reaffirmed that the invasion of the victim’s body or the perpetrator’s body constituted rape:

The second material element of rape details the circumstances and conditions which give the invasion of the victim’s or perpetrator’s body a criminal character.³⁸

33 ICTR, *The Prosecutor v. Mikaeli Muhimana*, TC III, Judgment and Sentence, Case No. ICTR-95-1B-T, 28 April 2005, para. 550 (*P. v. Mikaeli Muhimana TJ*).

34 ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, TC III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, 21 March 2016, para. 99 (citations omitted) (*P. v. Jean-Pierre Bemba Gombo TJ*).

35 *Ibid.*, para. 102 (citations omitted).

36 *Ibid.*, para. 105.

37 ICTR, *P. v. Jean-Paul Akayesu TJ*, *supra* note 27, para. 686.

38 ICC, *P. v. Jean-Pierre Bemba Gombo TJ*, *supra* note 34, para. 102.

Citing the Elements of Crimes, the same Chamber further argued that invasion was intended to be gender-neutral, therefore:

[I]nvasion, in the Court’s legal framework, includes same-sex penetration, and encompasses both male and/or female perpetrators and victims.³⁹

Furthermore, the Chamber considered that invasion includes the penetration of victim’s mouth by a sexual organ:

[A]s supported by the jurisprudence of the [ICTY⁴⁰], oral penetration, by a sexual organ, can amount to rape and is a degrading fundamental attack on human dignity which can be as humiliating and traumatic as vaginal or anal penetration.⁴¹

The ICTY Trial Chamber in *Furundžija* drew a distinction between rape and any other forms of sexual violence on the basis of penetration:

[I]nternational criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration.⁴²

The ICTY Trial Chamber in *Prlić et al.* came to the same conclusion as *Furundžija*:

Rape is thereby prohibited, as well as all forms of sexual violence not including penetration.⁴³

Similarly, the ICC Trial Chamber in *Bemba* required the invasion to amount to penetration:

Rape requires “invasion” of a person’s body 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”.⁴⁴

3.3. [Actus reus 2] 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

Keywords: Force – Threat of Force – Coercion – Consent

The ICTY Trial Chamber in *Furundžija* sought to restrict the invasive character of rape to circumstances where force, threat of force or coercion existed:

Thus, the Trial Chamber finds that the following may be accepted as the objective elements of rape:

³⁹ *Ibid.*, para. 100 (citations omitted).

⁴⁰ Refers to ICTY, *P. v. Anto Furundžija TJ*, *supra* note 29, paras. 183-185 and ICTY, *Zejnir Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, TC, Judgement, Case No. IT-96-21-T, 16 November 1998*, para 1066 (*P. v. Zdravko Mucić at al. TJ*).

⁴¹ ICC, *P. v. Jean-Pierre Bemba Gombo TJ*, *supra* note 34, para. 101 (citations omitted).

⁴² ICTY, *P. v. Anto Furundžija TJ*, *supra* note 29, para. 186.

⁴³ ICTY, *Jadranko Prlić, Bruno Vuković, Slobodan Prljak, Milivoj Petrović, Valentin Ćorić and Berislav Pušić*, Judgement (Volume 1), Case No. IT-04-74-T, 29 May 2013, para. 116 (citations omitted) (*P. v. Jadranko Prlić et al. TJ vol. 1*).

⁴⁴ ICC, *P. v. Jean-Pierre Bemba Gombo TJ*, *supra* note 34, para. 99 (citations omitted).

(i) the sexual penetration, however slight:

[...]

(ii) by coercion or force or threat of force against the victim or a third person.⁴⁵

The ICTY Trial Chamber in *Kunarac et al.* broadened the earlier interpretation in *Furundžija*:

In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the *Furundžija* definition does not refer to other factors which would render an act of sexual penetration *non-consensual* or *non-voluntary* on the part of the victim.⁴⁶

Citing the Elements of Crimes, the ICC Trial Chamber in *Bemba* identified four circumstances in which rape occurs:

[F]or the invasion of the body of person to constitute rape, it has to be committed under one or more of four possible circumstances: (i) by force; (ii) 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; (iii) by taking advantage of a coercive environment; or (iv) against a person incapable of giving genuine consent.⁴⁷

The ICTY Appeals Chamber in *Kunarac et al.* further explained the relationship between force and consent:

[I]n explaining its focus on the absence of consent as the *conditio sine qua non* of rape, the Trial Chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape. In particular [...] there are "factors other than force which would render an act of sexual penetration *non-consensual* or *non-voluntary* on the part of the victim". A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.⁴⁸

[I]n some domestic jurisdictions, neither the use of a weapon nor the physical overpowering of a victim is necessary to demonstrate force. A threat to retaliate "in the future against the victim or any other person" is a sufficient *indicium* of force so long as "there is a reasonable possibility that the perpetrator will execute the threat". While it is true that a focus on one aspect gives a different shading to the offence, it is worth observing that the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.⁴⁹

45 ICTY, *P. v. Anto Furundžija TJ*, *supra* note 29, para. 185.

46 ICTY, *P. v. Dragoljub Kunarac et al. TJ*, *supra* note 32, para. 438 (citations omitted).

47 ICC; *P. v. Jean-Pierre Bemba Gombo TJ*, *supra* note 34, para. 102 (citations omitted).

48 ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković. AC, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002*, para. 129 (citations omitted) (*P. v. Dragoljub Kunarac et al. AJ*).

49 *Ibid.*, para. 130 (citations omitted)

The ICTY Trial Chamber in *Prlić et al.* accepted that coercive circumstances remove any possibility to resist or refuse to consent:

[I]n lieu of physical force, the perpetrator may be able to exploit specific circumstances which the victim experiences as so constraining that they render physical resistance instantly impossible.⁵⁰

By way of example, the same Chamber found that the victim’s detention at the time of the events may constitute such a circumstance:

In the *Kunarac* Case, the Appeals Chamber made it clear that the argument that “nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts.”⁵¹

The ICC Trial Chamber in *Bemba* considered factors that may contribute towards a coercive environment:

The Chamber does not exclude the possibility that, in addition to the military presence of hostile forces among the civilian population, there are other coercive environments of which a perpetrator may take advantage to commit rape. Further, the Chamber considers that several factors may contribute to create coercive environment. It may include, for instance, the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation, or is committed together with other crimes”. In addition, the Chamber emphasises that, in relation to the requirement of the existence of a “coercive environment”, it must be proven that the perpetrator’s conduct involved “taking advantage” of such a coercive environment.⁵²

The ICTY Trial Chamber in *Furundžija* held that any form of captivity removes the possibility for the victim to consent:

The elements of rape, as discussed in paragraph 185 of this Judgement, were met when Accused B penetrated Witness A’s mouth, vagina and anus with his penis. Consent was not raised by the Defence, and in any case, Witness A was in captivity. Further, it is the position of the Trial Chamber that any form of captivity vitiates consent.⁵³

The Trial Chamber in *Kunarac et al.* considered that the loss of autonomy of a victim inherent during captivity would negate any possibility to consent:

The basic principle which is truly common to legal systems is that serious violations of sexual *autonomy* are to be penalised. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.⁵⁴

The same Chamber further identified factors that negate true consent:

In practice, the absence of genuine and freely given consent or voluntary participation may be *evidenced* by the presence of the various factors specified in other jurisdictions – such

50 ICTY, *P. v. Jadranko Prlić et al. TJ vol. 1*, *supra* note 43, para. 70.

51 *Ibid.*, para. 71 (citations omitted).

52 ICC, *P. v. Jean-Pierre Bemba Gombo TJ*, *supra* note 34, para. 104.

53 ICTY, *P. v. Anto Furundžija TJ*, *supra* note 29, para. 271.

54 ICTY, *P. v. Dragoljub Kunarac et al. TJ*, *supra* note 32, para. 457.

as force, threats of force, or taking advantage of a person who is unable to resist. A clear demonstration that such factors negate true consent is found in those jurisdictions where absence of consent is an element of rape and consent is explicitly defined not to exist where factors such as use of force, the unconsciousness or inability to resist of the victim, or misrepresentation by the perpetrator.⁵⁵

Correspondingly, the Chamber described the circumstances in which consent must be given:

Consent for this purpose must be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.⁵⁶

The ICC Trial Chamber in *Bemba* affirmed the absence of any requirement to determine the victim's lack of consent where one or more of the three preceding components had been met:

[It] is not a legal element of the crime of rape under the Statute. The [...] drafters chose not to require that the Prosecution prove the non-consent of the victim beyond reasonable doubt, on the basis that such a requirement would, in most cases, undermine efforts to bring perpetrators to justice.⁵⁷

Therefore, where "force", "threat of force or coercion", or "taking advantage of coercive environment" is proven, the Chamber considers that the Prosecution does not need to prove the victim's lack of consent.⁵⁸

In relation to the victim's capacity to give genuine consent, the Trial Chamber returned to the Elements of Crimes to clarify that:

[A] person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity". In such cases, the Prosecution will only have to prove that the victim's capacity to give genuine consent was affected by natural, induced, or age-related incapacity.⁵⁹

[N]either the Statute nor the Elements of Crimes, [however], set out a specific age under which a person would be considered as "incapable of giving genuine consent" [...].⁶⁰

Similar legal requirements

Enforced prostitution / *Actus Reus* 1, p. 45

Other forms of sexual violence / *Actus reus* 1, p. 66

3.4. [Mens rea 1]

[Conduct] The perpetrator meant to invade the body of a person

No jurisprudence in the dataset.

⁵⁵ *Ibid.*, para. 458 (citations omitted).

⁵⁶ *Ibid.*, para. 460.

⁵⁷ ICC, *P. v. Jean-Pierre Bemba Gombo*, *supra* note 34, para. 105 (citations omitted).

⁵⁸ *Ibid.*, para. 106.

⁵⁹ *Ibid.*, para. 107.

⁶⁰ *Ibid.*, para. 108.

[Consequence I] The perpetrator meant to cause the invasion of the body of a person

No jurisprudence in the dataset.

[Consequence II] The person was aware that the invasion of the body of a person would occur in the ordinary course of events

The ICC Trial Chamber in *Bemba* referred to the ICC Art. 30 requirements of intent and knowledge, specifying that:

As the Statute and the Elements of Crimes do not provide a particular mental element for the crime of rape, the Article 30 requirements of intent and knowledge apply.⁶¹

As to the requirement of “intent”, it must be proven that the perpetrator intentionally committed the act of rape. Intent will be established where it is proven that the perpetrator meant to engage in the conduct in order for the penetration to take place.⁶²

As to the requirement of “knowledge”, it must be proven that the perpetrator was aware that the act was committed by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent.⁶³

3.5. [Mens rea 2]

[Circumstance] The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person’s incapacity to give genuine consent

The ICTY Trial Chamber in *Kunarac et al.* established that knowledge of the absence of consent to be one of the components of rape:

The *mens rea* is the intention to effect [...] sexual penetration, and the knowledge that it occurs without the consent of the victim.⁶⁴

The ICTR Appeals Chamber in *Gacumbitsi* concurred and developed this approach:

Knowledge of non-consent may be proven, for instance, if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent.⁶⁵

Similar legal requirements

Enforced prostitution / *Mens rea 1* / Circumstance, p. 46

Other acts of sexual violence / *Mens rea 1* / Circumstance, p. 73

61 ICC, *P. v. Jean-Pierre Bemba Gombo TJ*, *supra* note 34, para. 110.

62 *Ibid.*, para. 111.

63 *Ibid.*, para. 112 (citations omitted).

64 ICTY, *P. v. Dragoljub Kunarac et al. TJ*, *supra* note 32, para. 460.

65 ICTR, *The Prosecutor v. Sylvestre Gacumbitsi, AC, Judgement*, Case No. ICTR-2001-64-A, 7 July 2006, para. 157 (*P. v. Sylvestre Gacumbitsi AJ*).

4

4. Sexual slavery 30

- 4.1. [Actus reus 1] The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty 32
- 4.2. [Actus reus 2] The perpetrator caused such person or persons to engage in one or more acts of a sexual nature 35
- 4.3. [Mens rea 1] 38
 [Conduct] The perpetrator meant to exercise powers attached to the right of ownership over one or more persons
- 4.4. [Mens rea 2] 38
 [Conduct] The perpetrator meant to engage in conduct causing such person or persons to engage in acts of a sexual nature
 [Consequence I] The perpetrator meant to cause such person or persons to engage in acts of a sexual nature [OR]
 [Consequence II] The perpetrator was aware that such person or persons would engage in acts of a sexual nature in the ordinary course of events

4. Sexual slavery

Legal requirements and components of sexual slavery under the ICC Statute			
Actus reus 1	The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty	<p>Exercise of the right of ownership</p> <p>Impossibility of the person to take decisions voluntarily</p> <p>Exercise of all types of control over the person</p> <p>Use or threat of violence</p> <p><i>[It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children (EoC Art. 7(1)(g)-2, footnote 18)]</i></p>	
Actus reus 2	The perpetrator caused such person or persons to engage in one or more acts of a sexual nature	<p>Causation by the perpetrator</p> <p>Engagement in acts of a sexual nature</p> <p>Acts of a sexual nature</p>	
Mens rea 1	Conduct	The perpetrator meant to exercise powers attached to the right of ownership over one or more persons	
Mens rea 2	Conduct	The perpetrator meant to engage in conduct causing such person or persons to engage in acts of a sexual nature	
	Consequence	<p>[Consequence I] The perpetrator meant to cause such person or persons to engage in acts of a sexual nature [OR]</p> <p>[Consequence II] The perpetrator was aware that such person or persons would engage in acts of a sexual nature in the ordinary course of events</p>	
Possible charges for sexual slavery under the ICC Statute			
	Genocide	Crimes against humanity	War crimes
Sexual slavery	-	Sexual slavery (ICC Art. 7(1)(g))	Sexual slavery (ICC Art. 8(2)(b); ICC Art. 8(2)(e))
Alternative charges	Bodily or mental harm	<p>Enslavement</p> <p>Other inhumane acts</p>	-

Table 9. Actus reus and mens rea of, and possible charges for, sexual slavery under the ICC Statute.

4.1. [Actus reus 1] The perpetrator exercised any or all of the powers attached to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty

Keywords: Definitions – Right of ownership – Control as an indicator of ownership – Consent – Purchasing/selling/lending/bartering – Deprivation of liberty

The *UN Special Rapporteur on systemic rape, sexual slavery and slavery-like practices during armed conflict* referred to customary international law to identify criteria that could define sexual slavery:

[B]ased on customary law interpretations of the crime of slavery, and thus sexual slavery, there are no requirements of any payment or exchange; of any physical restraint, detention or confinement for any set or particular length of time; nor is there a requirement of any legal disenfranchisement. [...] It is the status or condition of being enslaved which differentiates sexual slavery from other crimes of sexual violence, such as rape. One respect in which slavery differs from imprisonment or arbitrary detention is that the limitations on autonomy can be solely psychological or situational, with no physical restraints.⁶⁶

The ICTY Trial Chamber in *Kunarac et al.* considered the factors that may establish the existence of ownership and control as criteria of enslavement:⁶⁷

[I]ndications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exacting of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.⁶⁸

The same Chamber considered that the ability to exercise rights of ownership over a person was insufficient without such actions taking place:

The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor. The Trial Chamber considers that the mere ability to do so is insufficient, [while] such actions actually occurring could be a relevant factor.⁶⁹

Alternative charge

Crimes against humanity / Enslavement [ICTY Art. 5(c)]

66 UNCHR, *Update to the Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, E/CN.4/Sub.2/2000/21, 6 June 2000, para. 50.

67 As the ICTY Statute does not proscribe sexual slavery as a distinct underlying act, the offences adjudicated in *Kunarac et al.* were tried as enslavement.

68 ICTY, *P. v. Dragoljub Kunarac et al. TL*, *supra* note 32, para. 542.

69 *Ibid.*, para. 543 (citations omitted).

The ICC Trial Chamber in *Katanga* considered the relationship between the right of ownership and the deprivation of liberty:

[T]he various examples which the Elements of Crimes enumerate are not exhaustive, inasmuch as the right of ownership and the powers attaching to it may take many forms. Powers attaching to right of ownership must be construed as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy.⁷⁰

[F]actors may include detention or captivity and their respective duration; restrictions on freedom to come and go or on any freedom of choice or movement; and, more generally, any measure taken to prevent or deter any attempt at escape. The use of threats, force or other forms of physical or mental coercion, the exaction of forced labour, the exertion of psychological pressure, the victim's vulnerability and the socioeconomic conditions in which the power is exerted may also be taken into account.⁷¹

The ICTY Trial Chamber in *Kunarac et al.* considered that the exercise of different forms of control could amount to powers of ownership:

These are the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, [...], assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.⁷²

The ECCC Appeals Chamber in *Kaing Guek Eav ("Case 001")* adopted a similar approach while limiting the purpose of control to the powers of ownership:

Clearly, the exercise over a person of powers attaching to ownership requires a substantial degree of control over the victim. There is no enslavement, however, where the control has an objective other than enabling the exercise of the powers attaching to ownership.⁷³

Alternative charge

Crimes against humanity / Enslavement [ECCC Art. 5]

The ICC Trial Chamber in *Katanga* considered the description of victims as *wives* of the perpetrators to indicate the exercise of the right of ownership by the perpetrators over the victims as well as the existence of a coercive environment:

[T]he term "wife", as used by the attackers of the raped witnesses to make their fate clear to them, obviously had, given the circumstances, a very specific meaning. [T]hree persons who testified before the Court as victims of sexual violence used the term, which is of particular importance to analysis of the crime of sexual slavery. The Chamber is of the view that in the specific context of the immediate aftermath of the attack on Bogoro, the statement that someone was "taken as a wife" by a combatant or that she was to "become his wife" is a clear

⁷⁰ ICC, *The Prosecutor v. Germaine Katanga*, TC II, Judgement pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 975 (citations omitted) (*P. v. Germaine Katanga TJ*).

⁷¹ *Ibid.*, para. 976 (citations omitted).

⁷² ICTY, *P. v. Dragoljub Kunarac et al. TJ*, *supra* note 32, para. 543.

⁷³ ECCC, *The Prosecutor v. Kaing Guek Eav*, AC, Appeal Judgement, Case No. 001/18-07-2007-ECCC/SC, 3 February 2012, para. 156 (*P. v. Kaing Guek Eav AJ*).

reference to a coercive environment entailing almost certain engagement in acts of a sexual nature.⁷⁴

The ICTY Appeal Chamber in *Kunarac et al.* held that evidence of the lack of consent is not required to determine ownership:

[T]he Appeals Chamber rejects the Appellants' contention that lack of resistance or the absence of a clear and constant lack of consent during the entire time of the detention can be interpreted as a sign of consent. Indeed, the Appeals Chamber does not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from claimed rights of ownership; accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime. [...] In this respect, the Appeals Chamber considers that circumstances which render it impossible to express consent may be sufficient to presume the absence of consent. In the view of the Appeals Chamber, the circumstances in this case were of this kind.⁷⁵

The SCSL Trial Chamber in *Sesay et al.* concurred with the Appeal Chamber in *Kunarac et al.*, while concluding that consent might be relevant to the exercise of powers attached to the right of ownership:

[W]hether or not there was consent may be relevant from an evidentiary perspective in establishing whether or not the Accused exercised any of the powers attaching to the right of ownership.⁷⁶

The ICTY Trial Chamber in *Kunarac et al.* accepted that the trade of persons for financial or other forms of compensation could amount to the right of ownership:

The "acquisition" or "disposal" of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement. Detaining or keeping someone in captivity, without more, would, depending on the circumstances of a case, usually not constitute enslavement.⁷⁷

In contrast, the ICC Trial Chamber in *Katanga* considered that the exercise of ownership need not entail commercial transactions:

In the view of the Chamber [...] the Elements of Crimes are framed such that the exercise of the right of ownership over someone need not entail a commercial transaction. In fact, the Chamber considers that the notion of servitude relates first and foremost to the impossibility of the victim's changing his or her condition.⁷⁸

74 ICC, *P. v. Germaine Katanga TJ*, *supra* note 70, para. 1000 (citations omitted).

75 ICTY, *P. v. Dragoljub Kunarac et al. AJ*, *supra* note 48, para. 120 (citations omitted).

76 SCSL, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, TC I, Judgement, Case No. SCSL-04-15-T, 2 March 2009, para. 163 (citations omitted) (*P. v. Issa Hassan Sesay et al. TJ*).

77 ICTY, *P. v. Dragoljub Kunarac et al. TJ*, *supra* note 32, para. 542.

78 ICC, *P. v. Germaine Katanga TJ*, *supra* note 70, para. 976 (citations omitted).

The SCSL Trial Chamber in *Sesay et al.* considered that the deprivation of liberty need not be constrained to a fixed geographic location:

[T]he expression ‘similar deprivation of liberty’ may cover situations in which the victims may not have been physically confined, but were otherwise unable to leave as they would have nowhere else to go and feared for their lives.⁷⁹

The ICC Trial Chamber in *Katanga* considered the subjective nature of the deprivation of liberty:

that is, the person’s perception of his or her situation as well as his or her reasonable fear.⁸⁰

4.2. [Actus reus 2] The perpetrator caused such person or persons to engage in one or more acts of a sexual nature

Keywords: Dispute over forced marriage as a form of sexual slavery or other inhumane acts – Acts of a sexual nature – Consent

The SCSL Trial Chamber in *Brima et al.* sought to classify forced marriage as sexual slavery, rather than a form of ‘other inhumane acts’:

[T]he crime of ‘other inhumane acts’ exists as a residual category in order not to unduly restrict the Statute’s application with regard to crimes against humanity. “Forced marriage” as an ‘other inhumane act’ must therefore involve conduct not otherwise subsumed by other crimes enumerated under Article 2 of the [SCSL] Statute.⁸¹

[T]here is no lacuna in the law which would necessitate a separate crime of “forced marriage” as an ‘other inhumane act’.⁸²

The SCSL Appeal Chamber in *Brima et al.* overruled the Trial Chamber’s classification of forced marriage as sexual slavery, asserting the crime of forced marriage to be predominantly non-sexual in its nature:

Based on the evidence on record, the Appeals Chamber finds that no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery. While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife,” which could lead to disciplinary consequences for breach of this exclusive arrangement. These distinctions imply that

⁷⁹ SCSL, *P. v. Issa Hassan Sesay et al. TJ*, *supra* note 76, para. 161 (citations omitted).

⁸⁰ ICC, *P. v. Germaine Katanga TJ*, *supra* note 70, para. 977 (citations omitted).

⁸¹ SCSL, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, TC II, Judgement, Case No. SCSL-2004-16-T, 20 June 2007, para. 704 (citations omitted) (*P. v. Alex Tamba Brima et al. TJ*).

⁸² *Ibid.*, para. 713.

forced marriage is not predominantly a sexual crime. The Trial Chamber, therefore, erred in holding that the evidence of forced marriage is subsumed in the elements of sexual slavery.⁸³

Other related crimes referred to by the Chamber

Crimes against humanity / Other inhumane acts [SCSL Art. 2(i)]

The ICC Pre-Trial Chamber in *Katanga* held that forced marriage may amount to sexual slavery where sexual acts are imposed:

In the view of the Chamber, sexual slavery also encompasses situations where women and girls are forced into “marriage”, domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors. Forms of sexual slavery can, for example, be “practices such as the detention of women in ‘rape camps’ or ‘comfort stations’, forced temporary ‘marriages’ to soldiers and other practices involving the treatment of women as chattel, and as such, violations of the peremptory norm prohibiting slavery.⁸⁴

The ICC Pre-Trial Chamber in *Ongwen* concurred with the SCSL Appeal Chamber in *Brima et al*, holding that forced marriage may constitute ‘other inhumane acts’:

The Statute does not explicitly include “forced marriage” as a crime within the jurisdiction of the Court. The question before the Chamber is therefore whether the conduct attributed to [the accused] (i.e. to have forced women to serve as “conjugal partners” to himself and other LRA fighters in the Sinia brigade) constitutes an other inhumane act of a character similar to the acts set out in article 7(1)(a) to (j) intentionally causing great suffering, or serious injury to body or to mental or physical health. This is largely a question of fact, but the application of the gravity threshold of article 7(1)(k) of the Statute is also a question of law, as is the question of whether the conduct described as “forced marriage” is not otherwise subsumed by the crime of sexual slavery [...].⁸⁵

The Chamber agrees that forcing another person to serve as a conjugal partner may, per se, amount to an act of a similar character to those explicitly enumerated by article 7(1) of the Statute and may intentionally cause great suffering, and that forced marriage may, in the abstract, qualify as “other inhumane acts” under article 7 of the Statute rather than being subsumed by the crime of sexual slavery.⁸⁶

The same Chamber also elaborated factors that distinguished forced marriage as other inhuman acts from forced marriage as sexual slavery:

Indeed, the Chamber considers that forced marriage as an other inhumane act differs from the other crimes with which [the accused] is charged, and notably from the crime of sexual slavery, in terms of conduct, ensuing harm, and protected interests. It may be stated that forced marriage will generally be committed in circumstances in which the victim is also sexually or otherwise enslaved by the perpetrator. Moreover, restrictions on the freedom

83 SCSL, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Judgment, Case No. SCSL-2004-16-A, 22 February 2008, para. 195 (citations omitted) (*P. v. Alex Tamba Brima et al. AJ*).

84 ICC, *The Prosecutor v. Germaine Katanga*, TC II, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/07, 30 September 2008, para. 431 (citations omitted) (*P. v. Germaine Katanga DCC*).

85 ICC, *The Prosecutor v. Dominic Ongwen*, PTC II, Decision on the confirmation of charges against Dominic Ongwen, Case No. ICC-02/04-01/15-422-Red, 23 March 2016, para. 88 (*P. v. Dominic Ongwen DCC*).

86 *Ibid.*, para. 91.

of movement, repeated sexual abuse, forced pregnancy, or forced labour, in particular the forced performance of domestic duties, are all factors which indicate a situation of “forced marriage”. In the view of the Chamber, however, such facts, in addition to indeed being incriminated under other provisions of article 7(1) of the Statute, are not in themselves sufficient to establish forced marriage.⁸⁷

[T]he Chamber recognizes [...] that the victims of forced marriage suffer separate and additional harm to those of the crime of sexual slavery, or other crimes under the Statute.⁸⁸

It went on to consider the elements of a forced marriage, including duties, social status and sexual exclusivity:

According to the Chamber, the central element of forced marriage is the imposition of “marriage” on the victim, i.e. the imposition, regardless of the will of the victim, of duties that are associated with marriage, as well as of a social status of the perpetrator’s “wife”. The fact that such “marriage” is illegal and not recognised by, in this case, Uganda, is irrelevant. What matters is that the so-called “marriage” is factually imposed on the victim, with the consequent social stigma. The element of exclusivity of this forced conjugal union imposed on the victim is the characteristic aspect of forced marriage and is an element which is absent from any other crime with which [the accused] is charged. As held by the SCSL, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife”, which could lead to disciplinary consequences for breach of this exclusive arrangement and, therefore, is “not predominantly a sexual crime”.⁸⁹

The ICC Trial Chamber in *Katanga* considered that forced acts of a non-sexual nature may encompass acts of a sexual nature:

In the view of the Chamber, the second element concerns the victim’s ability to decide the conditions in which he or she engages in sexual activity. In that respect it considers that the notion of sexual slavery may also encompass situations where women and girls are forced to share the existence of a person with whom they have to engage in acts of a sexual nature.⁹⁰

The SCSL Trial Chamber in *Sesay et al.* rejected the need to prove the lack of consent in determining whether acts of a sexual nature occurred:

[T]he lack of consent of the victim to the enslavement or to the sexual acts is not an element to be proved by the Prosecution, although whether or not there was consent may be relevant from an evidentiary perspective in establishing whether or not the Accused exercised any of the powers attaching to the right of ownership.⁹¹

The ICC Trial Chamber in *Katanga* analysed issues of consent as the ability of the victim to take decisions on matters of their sexual activity:

The second element of the crime against humanity of sexual slavery requires that “the perpetrator caused such person or persons to engage in one or more acts of a sexual nature.” Thus, a particular parameter of the crime of sexual enslavement - in addition to limitations

87 *Ibid.*, para. 92.

88 *Ibid.*, para. 94.

89 *Ibid.*, para. 93 (citations omitted).

90 ICC, *P. v. Germaine Katanga TJ*, *supra* note 70, para. 978 (citations omitted).

91 SCSL, *P. v. Issa Hassan Sesay et al. TJ*, *supra* note 76, para. 163.

on the victim's autonomy, freedom of movement and power - is the ability to decide matters relating to his or her sexual activity.⁹²

Similar legal requirements

Enforced prostitution / *Mens rea 1* / Conduct, p. 46

Other forms of sexual violence / *Mens rea 1* / Conduct, p. 73

4.3. [Mens rea 1]

[Conduct] The perpetrator meant to exercise powers attached to the right of ownership over one or more persons

No jurisprudence in the dataset.

4.4. [Mens rea 2]

Keywords: Intent – Knowledge – ICC Art. 30

[Conduct] The perpetrator meant to engage in conduct causing such person or persons to engage in acts of a sexual nature

Similar legal requirements

Enforced prostitution / *Mens rea 1* / Conduct, p. 46

Other forms of sexual violence / *Mens rea 1* / Conduct, p. 73

[Consequence I] The perpetrator meant to cause such person or persons to engage in acts of a sexual nature [OR]

Similar legal requirements

Enforced prostitution / *Mens rea 1* / Consequence I, p. 47

Other forms of sexual violence / *Mens rea 1* / Consequence I, p. 73

[Consequence II] The perpetrator was aware that such person or persons would engage in acts of a sexual nature in the ordinary course of events

The ICC Trial Chamber in *Katanga* explained the intent and knowledge components of the *mens rea* requirement of sexual slavery:

[T]he perpetrator must have been aware of individually or collectively exercising one of the attributes of the rights of ownership over a person and forced such person to engage in one

⁹² ICC, *P. v. Germaine Katanga DCC*, *supra* note 84, para. 432 (citations omitted).

or more acts of a sexual nature. Therefore the perpetrator must have been aware that he or she was exerting such powers and have meant to engage in the conduct in order to force the person concerned to engage in acts of a sexual nature or have been aware that such a consequence would occur in the ordinary course of events.⁹³

The same Chamber also considered that the *mens rea* requirements must apply to each individual accused of collective liabilities – such as joint perpetration or common purpose:⁹⁴

[T]he Chamber considers that article 30 of the Statute must apply to each perpetrator in order to establish his or her individual responsibility for the commission of the crime of sexual slavery. Accordingly, whilst respecting the statutory requirement of intent and knowledge vis-à-vis each perpetrator, the Chamber will evaluate whether the first two constituent elements of the crime are established in respect of collective action.⁹⁵

Similar legal requirements

Enforced prostitution / *Mens rea* 1 / Consequence II, p. 47

Other forms of sexual violence / *Mens rea* 1 / Consequence II, p. 73

93 ICC, *P. v. Germaine Katanga TJ*, *supra* note 70, para. 981 (citations omitted).

94 ICC Arts. 25(3)(a) and (d).

95 ICC, *P. v. Germaine Katanga TJ*, *supra* note 70, para. 982 (citations omitted).

5

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[Consequence II] The person was aware that he/she or another person would obtain or expected to obtain pecuniary or other advantage	
[Circumstance] The person was aware that another person obtained or expected to obtain pecuniary or other advantage	

5. Enforced prostitution

Legal requirements and components of enforced prostitution under the ICC Statute		
Actus reus 1	<p>The perpetrator caused one or more persons to engage in one or more acts 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 another person, or by taking advantage of a coercive environment or such person's incapacity to give genuine consent</p>	<p>The perpetrator caused one or more persons to engage in an act of a sexual nature</p> <p>The perpetrator's or victim's acts of a sexual nature occurred through force, 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</p>
	Actus reus 2	<p>The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature</p>
Mens rea 1	Conduct	The person meant to engage in the conduct of causing one or more persons to engage in one or more acts of a sexual nature
	Consequence	<p>[Consequence I] The person meant to cause one or more persons to engage in acts of a sexual nature [OR]</p> <p>[Consequence II] The person was aware that one or more persons would engage in one or more acts of a sexual nature in the ordinary course of events</p>
	Circumstance	The person was aware of use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent
Mens rea 2	Consequence	<p>[Consequence I] The person meant to obtain or expected to obtain pecuniary or other advantage [OR]</p> <p>[Consequence II] The person was aware that he/she or another person would obtain or expected to obtain pecuniary or other advantage</p>
	Circumstance	The person was aware that another person obtained or expected to obtain pecuniary or other advantage

Possible charges for enforced prostitution under the ICC Statute

	Genocide	Crimes against humanity	War crimes
Enforced prostitution	-	Enforced prostitution (ICC Art. 7(1)(g))	Enforced prostitution (ICC Art. 8(2)(b); ICC Art. 8(2)(e))
Alternative charges	Bodily or mental harm	Sexual slavery Enslavement Other inhumane acts	Rape

Table 10. *Actus reus* and *mens rea* of, and possible charges for, enforced prostitution under the ICC Statute.

5.1. Commentary

Enforced prostitution is criminalised in several international criminal law treaties addressing war crimes and/or crimes against humanity⁹⁶ while the ‘exploitation’ of prostitution has been recognised within the context of human trafficking in international human rights law.⁹⁷ However, international criminal tribunals have not adjudicated on this offence. During the Tokyo Tribunal, evidence of sexual violence amounting to enforced prostitution perpetrated by Japanese and German soldiers was collected, but was excluded from trial.⁹⁸ Equally, acts of alleged forced prostitution of Greek Cypriot girls by Turkish troops during the 1974 invasion of the island were included in the Cypriot submission to the European Commission of Human Rights.⁹⁹ One case of conflict-related enforced prostitution was adjudicated upon before the Dutch Temporary Courts Martial in Batavia (Jakarta) in 1946 – Trial of Washio Awochi (‘Case No. 76’).¹⁰⁰

Due to the absence of international case law on enforced prostitution, this section draws upon *Case No. 76* alongside commentary of independent human rights experts and publicists. It also cites judgments of international criminal tribunals where consideration of the characteristics of enforced pregnancy have been made in cases involving similar conduct.

96 Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 27; Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, Arts. 75-77; Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts, Art. 4(2)(e); ICTR Statute, Art. 4; SCSL Statute, Arts. 2 and 3 and the ICC Statute, Arts. 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi).

97 United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; Convention on the Elimination of All Forms of Discrimination Against Women, Art. 6. See also Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

98 In what is euphemistically referred to as “comfort women”; see Anne Tierney Goldstein, “Recognising Forced Impregnation as a War Crime Under International Law”, in *Special Report of the Center for Reproductive Law and Policy*, 1993, p. 11; Richard J. Goldstone Hon., “Prosecuting Rape as a War Crime”, in *Case Western Reserve Journal of International Law*, vol. 34, 2002, p. 279.

99 European Commission of Human Rights, *Cyprus v. Turkey*, 6780/74 & 6950/75, Report (31), 10 July 1976.

100 Netherlands Temporary Court-Martial at Batavia, *Case No. 76*, Trial of Washio Awochi, Judgement delivered on 25 October 1946, as cited by UNWCC in *Law Reports of Trials of War Criminals*, 1 November 1997, p. 122 (‘Case No. 76’). For more, see Nina H. B. Jørgensen and Danny Friedmann, “Enforced Prostitution in International Law Through the Prism of the Dutch Temporary Courts Martial at Batavia”, in Morten Bergsmo, Wui Ling Cheah and Ping Yi (eds.), *Historical Origins of International Criminal Law: Volume 2*, TOAEP, 2014, pp. 331-354.

Keywords: Definition of enforced prostitution: Similarities with sexual slavery – Enslavement – Rape – Other inhumane acts – Continuing character of enforced prostitution

The *UN Special Rapporteur on systematic rape, sexual slavery and slavery like practices during armed conflict* shed some light on the definition of enforced prostitution:

The terms “forced prostitution” or “enforced prostitution” appear in international and humanitarian conventions but have been insufficiently understood and inconsistently applied. “Forced prostitution” generally refers to conditions of control over a person who is coerced by another to engage in sexual activity.¹⁰¹

Older definitions of forced prostitution focus either in vague terms on “immoral” attacks on a woman’s “honour”, or else they are nearly indistinct from definitions that seem more accurately to describe the condition of slavery. Despite these limitations, [...] the crime is clearly criminalized within the Geneva Conventions and the Additional Protocols.¹⁰²

Nevertheless, the Special Rapporteur expressed her perception of the limited potential of enforced prostitution, as a separate crime, for prosecution of conflict-related sexual violence:

[Enforced prostitution] remains a potential, albeit limited alternative tool for future prosecutions of sexual violence in armed conflict situations.¹⁰³

As a general principle it would appear that in situations of armed conflict, most factual scenarios that could be described as forced prostitution would also amount to sexual slavery and could more appropriately and more easily be characterized and prosecuted as slavery.¹⁰⁴

In contrast, the *UN Special Rapporteur for crimes against humanity* justified the inclusion of enforced prostitution in the ICC Statute:

It has been suggested that the crime of “enforced prostitution” was included in the Rome Statute “to capture those situations that lack slavery-like conditions [...]”.¹⁰⁵

The *UN Special Rapporteur on systematic rape, sexual slavery and slavery like practices during armed conflict* also considered that sexual slavery addresses most forms of enforced prostitution:

Sexual slavery [...] encompasses most, if not all forms of forced prostitution.¹⁰⁶

101 UNCHR, SubCommission on Prevention of Discrimination and Protection of Minorities, *Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final report submitted by Ms. Gay J. McDougall, Special Rapporteur*, 22 June 1998, E/CN.4/Sub.2/1998/13 (‘UNCHR Final Report McDougall’), para. 31.

102 *Ibid.*, para. 32.

103 *Ibid.*

104 *Ibid.*, para. 33.

105 UNGA, *First report on crimes against humanity*, prepared by Special Rapporteur Sean D. Murphy, 17 February 2015, A/CN.4/680, (‘UNGA First Report on CAH’), para. 164.

106 UNCHR Final Report McDougall, *supra* note 101, para. 31.

A similar view has been taken by **Boot**, who considers the factors of control and coercion to be decisive:

It has been argued that sexual slavery also encompasses most, if not all, forms of “forced prostitution,” a term that generally refers to conditions of control over a person who is coerced by another to engage in sexual activity.¹⁰⁷

Powderly and Hayes consider factual circumstances that distinguish enforced prostitution from definitions of sexual slavery or enslavement:

[T]he crime of enforced prostitution might cover a situation that does not amount to slavery or enslavement, but in which a person is compelled to perform sexual acts in order to obtain something necessary for survival or to avoid further harm. Such situations might also not be covered by rape if they do not meet the requirement of an element of coercion or force or threat of force.¹⁰⁸

Equally, **Demleitner** reflects that enforced prostitution has been adjudicated as rape:

Humanitarian law has developed its own approach towards forced prostitution occurring in times of war or civil strife. However, even if listed as a separate offence, in practice forced prostitution has often been subsumed under the analysis of rape that precedes or accompanies its practice.¹⁰⁹

The ICTY Trial Chamber in **Kunarac et al.** considered that prostitution could constitute an indicator of enslavement:

[I]ndications of enslavement include elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.¹¹⁰

The ICTY Trial Chamber in **Kupreškić et al.** considered that enforced prostitution could fall under the underlying act of other inhumane acts as a crime against humanity:

Less broad parameters for the interpretation of “other inhumane acts” can [...] be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966. Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity. [...] The expression

107 Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Intersentia, 2002, p. 514.

108 Joseph Powderly and Niamh Hayes, “Article 7”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed.), C.H. Beck/Hart/Nomos, 2016, p. 215.

109 Nora V. Demleitner, “Forced Prostitution: Naming an International Offense”, in *Fordham International Law Journal*, vol. 18, 1994, p. 180.

110 ICTY, *P. v. Dragoljub Kunarac et al. T.I*, supra note 32, para. 542 (emphasis added).

at issue undoubtedly embraces [...] enforced prostitution (indisputably a serious attack on human dignity pursuant to most international instruments on human rights).¹¹¹

Ambos has recognised the possible continuing character of enforced prostitution:

Enforced prostitution contains an element of continuity and may qualify as a continuing offence since the victim may be ‘forced’ for a prolonged period of time.¹¹²

Equally, **Powderly and Hayes** have recognised the possible continuing character of enforced prostitution as a distinguishing criteria from offences of sexual violence, including rape:

Enforced prostitution can either be a continuing offence or constitute a separate act. The continuing offences could also encompass crimes of rape and other forms of sexual violence. To prove sexual slavery or enforced prostitution as a continuing offence, there is nevertheless no need to prove rape.¹¹³

5.2. [Actus reus 1] The perpetrator caused one or more persons to engage in one or more acts 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 of such person or persons’ incapacity to give genuine consent

The perpetrator caused such person or persons to engage in one or more acts of a sexual nature

Similar legal requirements

Sexual slavery / *Actus reus* 2, p. 35

Other forms of sexual violence / *Actus reus* 1, p. 66

The perpetrator’s or victim’s acts of a sexual nature occurred through force, 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

Powderly and Hayes consider the coercive character of acts of enforced prostitution alongside the challenges posed by the term ‘prostitution’:

The term ‘prostitution’, indeed, misleadingly may suggest that sexual services are provided as part of an exchange albeit one coerced by the circumstances. Moreover, the term could be misunderstood to suggest sexual activity initiated by the victim instead of by the offender.¹¹⁴

¹¹¹ ICTY, *The Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić*, TC II, Judgement, Case No. IT-95-16-T, 14 January 2000, para. 566 (citations omitted).

¹¹² Kai Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing*, Oxford University Press, 2013, p. 101.

¹¹³ Powderly and Hayes, *supra* note 108, p. 215.

¹¹⁴ *Ibid.*, p. 214.

Similarly, *Cottier and Mzee* address the coercive character of enforced prostitution, distinguishing it from ordinary acts of prostitution:

The term ‘prostitution’ seems to suggest that sexual services are provided as part of an exchange and that the sexual activity may be offered and initiated by the victim and not necessarily by the perpetrator or a ‘client’. However, as the adjective ‘enforced’ makes clear, the victim is coerced or compelled to such exchange or offer, particularly to avoid harm to him or herself or someone else or to obtain something necessary for survival.¹¹⁵

However, *Cottier and Mzee* distinguish between the coercion evident during rape and the possible absence of coercion by ‘clients’ engaged in sexual activity of a victim of enforced prostitution:

In contrast for instance to rape, the ‘client’ engaging in an individual sexual act may not use any force or coercion or not even be aware of coercive circumstances.¹¹⁶

Similar legal requirements

Rape / *Actus reus* 2, p. 24

Other forms of sexual violence / *Actus reus* 1, p. 65

5.3. [Actus reus 2] The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature

The perpetrator obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of sexual nature [OR]

No jurisprudence in the dataset.

Another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of sexual nature

No jurisprudence in the dataset.

5.4. [Mens rea 1]

[Conduct] The perpetrator meant to engage in conduct of causing one or more persons to engage in one or more acts of a sexual nature

Similar legal requirements

Sexual slavery / *Mens rea* 2 / Conduct, p. 38

Other forms of sexual violence / *Mens rea* 1 / Conduct, p. 73

¹¹⁵ Michael Cottier and Sabine Mzee, “Article 8(2)(b)(xxii)”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed.), C.H. Beck/Hart/Nomos, 2016, p. 497 (footnote omitted).

¹¹⁶ *Ibid.*

[Consequence I] The perpetrator meant to cause one or more persons to engage in one or more acts of a sexual nature [OR]

Similar legal requirements

Sexual slavery / *Mens rea 2* / Consequence I, p. 38

Other forms of sexual violence / *Mens rea 1* / Consequence I, p. 73

[Consequence II] The perpetrator was aware that one or more persons would engage in one or more acts of a sexual nature in the ordinary course of events

Similar legal requirements

Sexual slavery / *Mens rea 2* / Consequence II, p. 38

Other forms of sexual violence / *Mens rea 1* / Consequence II, p. 73

[Circumstance] The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent

Similar legal requirements

Rape / *Mens rea 2* / Circumstance, p. 28

Other forms of sexual violence / *Mens rea 1* / Circumstance, p. 73

5.5. [*Mens rea 2*]

[Consequence I] The perpetrator meant to obtain or expected to obtain pecuniary or other advantage [OR]

No jurisprudence in the dataset.

[Consequence II] The person was aware that he/she or another person would obtain or expected to obtain pecuniary or other advantage

Similar legal requirements

Sexual slavery / *Mens rea 2* / Consequence II, p. 38

Other forms of sexual violence / *Mens rea 1* / Consequence II, p. 73

[Circumstance] The person was aware that another person obtained or expected to obtain pecuniary or other advantage

No jurisprudence in the dataset.

6

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[Consequence II] The perpetrator was aware that the confinement of one or more women forcibly made pregnant would affect the ethnic composition of any population or would enable to carry out other grave violations of international law in the ordinary course of events	
[Circumstance] The perpetrator was aware that one or more confined women had forcibly been made pregnant	

6. Forced pregnancy

Legal requirements and components of forced pregnancy under the ICC Statute			
Actus reus I	The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law	<p>The perpetrator confined one or more women [AND]</p> <p>One or more women had been forcibly made pregnant [AND]</p> <p>The perpetrator intended to affect the ethnic composition of any population [OR]</p> <p>The perpetrator intended to carry out grave violations of international law</p>	
	Conduct	The perpetrator meant to confine one or more women forcibly made pregnant	
	Mens rea I	<p>[Consequence I] The perpetrator meant to affect the ethnic composition of any population or to carry out other grave violations of international law by confining one or more women forcibly made pregnant [OR]</p> <p>[Consequence II] The perpetrator was aware that the confinement of one or more women forcibly made pregnant would affect the ethnic composition of any population or would enable to carry out other grave violations of international law in the ordinary course of events</p>	
	Circumstance	The perpetrator was aware that one or more confined women had forcibly been made pregnant	
Possible charges for forced pregnancy under the ICC Statute			
	Genocide	Crimes against humanity	War crimes
Forced pregnancy	-	Forced pregnancy (ICC Art. 7(1)(g))	Forced pregnancy (ICC Art. 8(2)(b); ICC Art. 8(2)(e))
Alternative charges	Bodily or mental harm Measures to prevent births	Rape	Rape

Table 11. *Actus reus* and *mens rea* of, and possible charges for, forced pregnancy under the ICC Statute.

6.1. Commentary

To date, no judgment on forced pregnancy has been rendered by international criminal law tribunals. The forced pregnancy of Muslim or Croatian Catholics by Serbian armed forces was documented by the UN, publicists, NGOs and journalists. The ongoing trial of Dominic Ongwen before the International Criminal Court marks the first occasion where charges of forced pregnancy have been confirmed before an international criminal tribunal. As such, this section draws upon the ICC's Decision on the Confirmation of Charges in *Ongwen* and supplements it with commentary of independent human rights experts and publicists.

Keywords: Emergence of forced pregnancy as a separate offence – Gender and ethnic dimensions – Dual dimensions

Cottier and Mzee consider the impact of forced pregnancy in the Yugoslavian conflict in defining forced pregnancy as a separate offence:

The notion of forced pregnancy became recurrently used in the UN system after reports from the conflict in the former Yugoslavia that Bosnian women were raped, impregnated and held in camps until it was too late for them to obtain an abortion, forcing them to bear the child of the rapist's ethnicity as part of a policy of 'ethnic cleansing'. The 1993 Vienna Declaration and Program of Action as well as the 1995 Beijing Platform of Action considered forced pregnancy as a violation of the fundamental principles of international human rights and humanitarian law and the Platform noted that grave violations of the human rights of women, including forced pregnancy, occur in particular under policies of ethnic cleansing.¹¹⁷

Powderly and Hayes reflect on the challenges faced to adopt forced pregnancy as a separate offence within the ICC Statute during the negotiations:

The inclusion of this crime was quite a controversial issue as a few delegations feared that policies not to provide abortion services might be interpreted as forced pregnancy.¹¹⁸

Askin addresses the gender and ethnic factors of forced pregnancy:

Forced impregnation and forced maternity, while possibly dependent on corresponding factors, are exclusively female gender specific crimes, since men cannot be [...] forcibly impregnated. These acts committed with an intent to destroy a particular ethnic, racial, religious group are distinguishable from most other forms of sexual assault because in most instances, women are raped primarily because of their gender. Yet in cases in which a woman of one group is raped by a member of another group with a specific intent to forcibly impregnate her with a different ethnic gene, both gender and ethnicity are critical determinants.¹¹⁹

The **Commission of Experts** recounted the dual character of the *actus reus* of forced pregnancy, consisting of rape followed by imprisonment or confinement:

At least 150 Muslim women and teenage girls who had crossed in Government-held areas of Sarajevo in recent weeks were said to be in advanced stages of pregnancy and had asserted that they became pregnant after being raped by Serbian nationalist fighters. They also said

¹¹⁷ Cottier and Mzee, *supra* note 115, p. 498 (footnote omitted).

¹¹⁸ Powderly and Hayes, *supra* note 108.

¹¹⁹ Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals*, Brill/Nijhoff, 1997, p. 275.

they had been imprisoned for months afterward in an attempt to keep them from having abortions.¹²⁰

Cottier and Mzee summarize the character of forced pregnancy as proscribed in the ICC Statute as well as its consequences on victims:

The Rome Statute is the first international, legally binding instrument that explicitly prohibits forced pregnancy, and criminalizes it as a war crime (and crime against humanity). The crime of forced pregnancy combines both (en)forced impregnation (pregnancy as a result of rape or some involuntary medical procedure) as well as (en)forced maternity (being forced to carry the pregnancy to term), the latter of which may have devastating consequences for the victim (social, financial, emotional, etc.) and has been used for reasons of ethnic cleansing.¹²¹

6.2. [Actus reus 1] The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law

The perpetrator confined one or more women

The **Commission of Experts** described the existence of specific detention sites for the rape or forced impregnation and confinement of women:

The fourth pattern of rape and sexual assault occurs in specific types of sites of detention. Survivors of some camps report that they believe that they were detained for the purpose of rape and sexual assault.¹²²

Cottier and Mzee elaborate the boundaries of the component of confinement:

The main element of the *actus reus* of forced pregnancy however consists of unlawfully confining a woman that has previously and forcibly been made pregnant. Confining should be understood broadly as any form of deprivation of physical liberty. The term unlawful should, similarly to its use in other parts of the Rome Statute, be interpreted as meaning contrary to international law and standards. Yet, the Preparatory Commission did not stipulate in element 1 for article 8 para. 2 (b) (xxii)-4 and article 7 para. 1 (g)-4 that the confining must be 'unlawful'. However, in view of the aim of the prohibition, confining a woman made forcibly pregnant in accordance with international humanitarian law (for instance as a prisoner of war) is insufficient to incur criminal responsibility under article 8 para. 2 (b) (xxii)-4, unless, it is submitted, the woman is prevented from accessing medical services and from a feasible abortion in time with the necessary special intent.¹²³

¹²⁰ Annexes to the Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/1994/674/Add. 2 (vol. II), 28 December 1994 ('Final Report of the Commission of Experts Add. 2 (vol. II)'), p. 336, para. 1021, citing John Burns, "150 Muslims Say Serbs Raped Them in Bosnia", New York Times, IHRLI Sarajevo Source File, 3 October 1992.

¹²¹ Cottier and Mzee, *supra* note 115, p. 497 (footnote omitted).

¹²² Final Report of the Commission of Experts Add. 2 (vol. II), *supra* note 120, p. 78, para. 486.

¹²³ Cottier and Mzee, *supra* note 115, p. 499 (footnote omitted).

One or more women had been forcibly made pregnant

The *Commission of Experts* recounted acts of rape leading to impregnation within specific detention sites:

In these sites, all of the women are raped and sexually assaulted, the raping is quite frequent, and it is often committed in front of other internees. In this context as well, beating and torture accompany rape and sexual assault.¹²⁴

The same *Commission of Experts* cited reports of captive women being raped by men of another ethnic group:

it is reported that women are raped in captivity by men of another ethnic group and only released when pregnancy was well advanced; at this point, it is not possible to bear children of the same ethnic origin as the women. The alleged mutilation of men's genitals prevents these men from procreating. In the above-mentioned examples, ethnic procreation will be achieved by the alleged perpetrators.¹²⁵

Cottier and Mzee provide a textual analysis of the characteristics of the component of forced pregnancy:

A first, circumstantial element pre-existing the confinement is that the woman concerned has been forcibly made pregnant, be it by the perpetrator or any other person. The adjective 'forcibly' refers to the use of force or other coercion, that is, the lack of consent, such as in the case of rape or insemination without consent.¹²⁶

The perpetrator intended to affect the ethnic composition of any population [OR]

The *Commission of Experts* recounted victim testimony regarding the intent of the perpetrators of specific detention sites where women were forcibly impregnated and confined:

In these sites, all of the women are raped and sexually assaulted, the raping is quite frequent, and it is often committed in front of other internees. In this context as well, beating and torture accompany rape and sexual assault. Often, the captors state that they are trying to impregnate the women, pregnant women are treated better than their non-pregnant counterparts, and pregnant women are detained until it is too late in the pregnancy to obtain an abortion.¹²⁷

In addressing the specific intent of forced pregnancy, *Cottier and Mzee* describe the two components as set out in the ICC Statute:

First, such intent can consist of affecting a population's ethnic composition, including ethnic cleansing or otherwise weakening an ethnic group. Secondly, intent to carry out 'other grave violations of international law' is sufficient even if rather vague. This second alternative may for instance cover medical experiments contrary to international law, while not covering

124 *Annexes to the Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/1994/674/Add. 2 (vol. I)*, 31 May 1995, ('Final Report of the Commission of Experts Add. 2 (vol. I)'), p. 78, para. 486.

125 The Commission of Experts considered this to satisfy the element of genocide of imposing measures to prevent births within the group. See *Final Report of the Commission of Experts Add. 2 (vol. I)*, *supra* note 120, p. 157, footnote 61.

126 *Cottier and Mzee*, *supra* note 115, p. 499 (footnote omitted).

127 *Final Report of the Commission of Experts Add. 2 (vol. I)*, *supra* note 120, p. 78, para. 486.

pure sadism or, apparently, the mere intention that the child always reminds the woman and her family or community of what happened.¹²⁸

Askin provides a detailed summary of acts or forcible rape that would not satisfy the intent criteria of forced pregnancy:

[W]hen small children or elderly women are raped the intent cannot be forced pregnancy. When women are raped orally or rectally, the intent is not impregnation. When women are killed immediately after the rape, the intent is not to impregnate the woman. When members of the victim's own family or ethnic group are forced to rape the victim, the intent is not to impregnate with a different gene. When women are raped with bottles and guns, the intent is not forcible impregnation. When men are raped, there can be no intent of pregnancy. When women of the perpetrators' own ethnic group are raped, the intent is not to impregnate her with a different ethnic gene.¹²⁹

Salzman recounted a witness statement (made outside of a formal criminal proceeding) attesting to the use of gynaecologists within the detention centre to determine impregnation:

One woman, detained at a rape camp in the northern Bosnian town of Dobojo, reported that women who became pregnant had to remain in the camp for seven or eight months. Gynecologists examined the women and those women found pregnant were segregated from the rest and received meals and other "special privileges." Only after it was too late for these women to get an abortion were they released and usually taken to Serbia. The frequently reported intent of Serbian soldiers to impregnate Muslim and Catholic Croats, the presence of gynecologists to examine the women, and the intentional holding of pregnant women until it was too late to legally or safely procure and abortion all point to a systematic, planned policy to utilize rape and forced impregnation as a form of ethnic cleansing.¹³⁰

The perpetrator intended to carry out other grave violations of international law

Powderly and Hayes analyse the purpose of this component within the ICC Statute, considering the reservations of some states as well as its impact on national laws:

The last sentence of paragraph 2 (f) is included to ensure that the definition of this crime will not affect national laws regarding pregnancy. The fact that the crime of forced pregnancy would be included in the Rome Statute made some delegations fear that national laws prohibiting abortion would have to be deemed being in violation of international law because that would constitute the crime of forced pregnancy. National laws which prohibit abortion do not amount to forced pregnancy as defined under the Statute, unless they are intended to affect the ethnic composition of any population or to carry out grave violations of international law.¹³¹

¹²⁸ Cottier and Mzee, *supra* note 115, p. 499 (footnote omitted).

¹²⁹ Askin, *supra* note 119, p. 276 (footnotes omitted).

¹³⁰ Todd A. Salzman, "Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia", in *Human Rights Quarterly*, vol. 20, 1998, p. 359

¹³¹ Joseph Powderly and Niamh Hayes, "Article 7", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed.), C.H. Beck/Hart/Nomos, 2016, p. 275 (footnotes omitted)

Boot reflected on the similarities between the specific intent of forced pregnancy and that of genocide:

The specific intent required for forced pregnancy, however, is simultaneously broader and narrower than that required for genocide. The intent for forced pregnancy is broader than that for genocide because the perpetrator need not intend to destroy the ethnic group in whole or in part—it is sufficient to only attempt to affect the ethnic composition of the population. However, the intent for forced pregnancy is also narrower than that for genocide because only the intent to affect the ethnic composition of a group—and not the national, racial, or religious composition of the group—is sufficient [...].¹³²

Cottier and Mzee focus on the insertion of the term ‘other’ which they consider to be a drafting error:

The term ‘other’ actually does not appear correct, as affecting the ethnic composition of any population is not as such a violation of international law.¹³³

The ICC Pre-Trial Chamber in **Ongwen** clarified that it is the act of confinement rather than the act of forcible impregnation that must be carried out with specific intent:

[T]he act of confinement [...] must be carried out with the required special intent. Indeed, the crime of forced pregnancy does not depend on the perpetrator’s involvement in the woman’s conception; it is only required that the perpetrator knows that the woman is pregnant and that she has been made pregnant forcibly. It is apparent that the essence of the crime of forced pregnancy is in unlawfully placing the victim in a position in which she cannot choose whether to continue the pregnancy.¹³⁴

6.3. [Mens rea 1]

[Conduct] The perpetrator meant to confine one or more women forcibly made pregnant

No jurisprudence in the dataset.

[Consequence I] The perpetrator meant to affect the ethnic composition of any population or carry out other grave violations of international law by confining one or more women forcibly made pregnant [OR]

The ICC Pre-Trial Chamber in **Ongwen** considered the interpretation of the specific intent without consideration of the different *mens rea* standards of ICC Art. 30:

[I]t is not necessary to prove that the perpetrator has a special intent with respect to the outcome of the pregnancy, or that the pregnancy of the woman is in any way causally linked to her confinement. While the first alternative of the special intent requirement (intent of “affecting the ethnic composition of any population”) would typically include such component,

¹³² Machteld Boot, “(f) Forced Pregnancy”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observer’s Notes, Article by Article*, Nomos, 1999, art. 7, margin no. 110.

¹³³ Cottier and Mzee, *supra* note 115, 2016, p. 499 (footnote omitted).

¹³⁴ ICC, *P. v. Dominic Ongwen DCC*, *supra* note 85, para. 99.

the second alternative (intent of “carrying out other grave violations of international law”) does not call for any such restrictive interpretation.¹³⁵

[Consequence II] The perpetrator was aware that the confinement of one or more women forcibly made pregnant would affect the ethnic composition of any population or would enable to carry out other grave violations of international law in the ordinary course of events

No jurisprudence in the dataset.

[Circumstance] The perpetrator was aware that one or more confined women had forcibly been made pregnant

No jurisprudence in the dataset.

135 *Ibid.*, para. 100.

7

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7.4. [Mens rea 1]	62
[Conduct] The perpetrator meant to engage in conduct which deprived one or more persons of biological reproductive capacity	
[Consequence 1] The perpetrator meant to cause the deprivation of one or more persons of biological reproductive capacity [OR]	
[Consequence 2] The perpetrator was aware that one or more persons would be deprived of biological reproductive capacity in the ordinary course of events	
7.5. [Mens rea 2]	62
[Circumstance 1] The perpetrator was aware that the conduct was not justified by the medical or hospital treatment [AND]	
[Circumstance 2] The perpetrator was aware of absence of genuine consent	

7. Enforced sterilisation

Legal requirements and components of enforced sterilisation under the ICC Statute			
Actus reus 1	The perpetrator deprived one or more persons of biological reproductive capacity	<i>[The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice, Elements of Crimes: Art. 7(1)(g)-5, footnote 19]</i>	
	The conduct was:	Not justified by the medical or hospital treatment of the person or persons concerned [AND]	Not carried out with their genuine consent
Actus reus 2		<i>[It is understood that genuine consent does not include consent obtained through deception (EoC Art. 7(1)(g)-5, footnote 20)]</i>	
	Conduct	The perpetrator meant to engage in conduct which deprived one or more persons of biological reproductive capacity	
Mens rea 1	Consequence	<p><i>[Consequence I]</i> The perpetrator meant to cause the deprivation of one or more persons of biological reproductive capacity [OR]</p> <p><i>[Consequence II]</i> The perpetrator was aware that one or more persons would be deprived of biological reproductive capacity in the ordinary course of events</p>	
	Circumstance	<p><i>[Circumstance I]</i> The perpetrator was aware that the conduct was not justified by the medical or hospital treatment [AND]</p> <p><i>[Circumstance II]</i> The perpetrator was aware of absence of genuine consent</p>	
Possible charges for enforced sterilisation under the ICC Statute			
	Genocide	Crimes against humanity	War crimes
Enforced sterilisation	-	Enforced sterilisation (ICC Art. 7(1)(g))	Enforced sterilisation (ICC Art. 8(2)(b); ICC Art. 8(2)(e))
Alternative charges	Measures to prevent births	-	-

Table 12. Actus reus and mens rea of, and possible charges for, enforced sterilisation under the ICC Statute.

7.1. Commentary

The ICC Statute is the only international legal instrument to proscribe enforced sterilisation as a crime against humanity: its explicit prohibition as a war crime in both international and non-international armed conflicts has been welcomed for providing clarity and removing the need to resort to alternative or more obscure charges.¹³⁶ Enforced sterilisation may also constitute genocide where the specific intent requirement is met¹³⁷ and is recognised as a human rights violation under international human rights treaties and before regional human rights bodies.¹³⁸

The International Military Tribunal at Nuremberg adjudicated acts of enforced sterilisation as a war crime in the case *USA v. Karl Brandt et al* (*Medical Case*), where civilians and prisoners of war were subjected to medical experiments of forced sterilisation during World War II. This section cites the *Medical Case* alongside commentary of independent human rights experts and publicists. It also cites decisions of international criminal tribunals where consideration of conduct that may amount to acts of enforced sterilisation have been analysed, albeit under different charges.

7.2. [Actus reus 1] The perpetrator deprived one or more persons of biological reproductive capacity

Keywords: Castration – Removal of genitalia or severe genital mutilation – Rape – Non-permanent measures

The IMT Trial Chamber in the *Medical Case* accepted that acts of castration amounted to the denial of reproductive capacity:

Surgical sterilization was of course known in Germany and applied; this included castration. For mass application, however, this procedure was considered as too slow and too expensive. It was further desired that a procedure be found which would result in sterilization that was not immediately noticeable.¹³⁹

Powderly and Hayes have considered that forced castration or severe genital mutilation could satisfy the *actus reus* of enforced sterilisation:

It is also worth emphasizing that forcible castration or other forms of severe genital mutilation carried out against men would be capable of satisfying the elements of enforced sterilisation.¹⁴⁰

¹³⁶ Anne Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: the ICC and the Practice of the ICTY and the ICTR*, Intersentia, 2005, pp. 200, 217.

¹³⁷ Powderly and Hayes, *supra* note 108, p. 216: “Sterilisation without consent could constitute genocide when committed with the requisite intent to destroy a particular group in whole or in part. Enforced sterilisation in particular is a form of ‘imposing measures intended to prevent births within the group’ within the meaning of article 6 (e) of this Statute”.

¹³⁸ See enforced sterilisation cases brought before the ECtHR regarding Roma and traveler communities: *V.C. v. Slovakia* (application no. 18968/07), 8 November 2011; *N.B. v. Slovakia* (application no. 29518/10), 12 June 2012; *I.G., M.K. and R.H. v. Slovakia* (application no. 15966/04), 13 November 2012; *R.K. v. the Czech Republic* (application no. 7883/08), settled in October 2012 and as a pre-requisite for gender re-assignment in Turkey: *Y.Y. v. Turkey* (application no. 14793/08), 10 March 2015, and before the Inter-American Commission of Human Rights for non-consensual sterilization of an HIV positive woman in *F.S. v. Chile* (Petition 112-09): *Litigation Briefing*.

¹³⁹ IMT, *The United States of America vs. Karl Brandt et al. (Case No. 1) (Medical case)* published in *Trials of war criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (Volume I)*, pp. 695-696 (*The USA vs. Karl Brandt et al. vol. I*).

¹⁴⁰ Powderly and Hayes, *supra* note 108, p. 216.

de Brouwer also accepts that the removal of genitalia should satisfy the deprivation of biological reproduction and considers that acts of rape or the insertion of objects may also satisfy this criterion:

While this may include the surgical removal of the reproductive organs (including the cutting off or taking out of genitals), it could also include cases where women have been raped so viciously that their reproductive system has been completely destroyed. In these instances, the penetration as provided for in the other enumerated crimes of Article 7(1)(g) is surely existent. In addition, the insertion of objects in order to sterilize a person can also be seen as penetration.¹⁴¹

The permanent character of the deprivation of biological reproductive capacity is emphasised in footnotes 19 and 54 of the *Elements of Crimes*:

The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.¹⁴²

Cottier and Mzee consider the footnotes to confirm that the deprivation of reproductive capacity must be permanent in character:

does not cover ‘birth-control measures which have non-permanent effect in practice’, such as birth-control pills which can be stopped to be taken and the impact of which can be reversed. The war crime of enforced sterilization thus requires intent to permanently deprive of reproductive capacity.¹⁴³

Other publicists challenge the consistency of the limitation, including **Powderly and Hayes**:

It is doubtful, however, whether the exception in footnote 19 is consistent with international law. Even imposing non-permanent measures intended to prevent births within a protected group could be used to commit genocide by reducing the birth rate within that group. In addition, such non-permanent measures could violate a wide variety of human rights to personal autonomy even when imposed on a non-discriminatory basis, including the right not to be subjected to arbitrary interference with one’s family.¹⁴⁴

7.3. [Actus reus 2] The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent

Keywords: Medical experimentation – Justifiability – Genuine consent

The IMT Trial Chamber in *Medical Case* identified ten principles that justify medical experiments on human beings:

1. The voluntary consent of the human subject is absolutely essential. This means that the

¹⁴¹ de Brouwer, *supra* note 136, pp. 148-149, footnote 291.

¹⁴² ICC *Elements of Crimes*.

¹⁴³ Cottier and Mzee, *supra* note 115, p. 500.

¹⁴⁴ Powderly and Hayes, *supra* note 108, p. 216.

person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person [...].

2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature.

3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiment.

4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.

5. No experiment should be conducted where there is an *a priori* reason to believe that death or disabling injury will occur; except, perhaps, [...] where the experimental physicians also serve as subjects.

6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment.

7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.

8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment [...].

9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end [...].

10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probably cause to believe, in the exercise of the good faith, superior skill and careful judgment required of him that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.

Of the ten principles which have been enumerated, our judicial concern, of course, is with those requirements which are purely legal in nature—or which at least are so clearly related to matters legal that they assist us in determining criminal culpability and punishment.¹⁴⁵

In analysing the second *actus reus*, **de Brouwer** breaks it down into two components:

The crime concerns the deprivation of a person's biological reproductive capacity without any justified medical reason or this person's genuine medical consent.¹⁴⁶

145 IMT, *The United States of America vs. Karl Brandt et al. (Case No. 1) (Medical case)* published in *Trials of war criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (Volume II)*, pp. 181-183 (*The USA vs. Karl Brandt et al. vol. II*).

146 de Brouwer, *supra* note 136, pp. 172-173.

The *UN Interagency Statement on eliminating forced, coercive and otherwise involuntary sterilization* does not consider sterilization to be justified on grounds of emergency procedure:

Neither contraceptive nor therapeutic sterilization (e.g. menstrual management) are emergency procedures. Sterilization for prevention of future pregnancy cannot be justified on grounds of medical emergency, which would permit departure from the general principle of informed consent.¹⁴⁷

Cottier and Mzee consider that sterilisation may be justified on health grounds, but would still amount to a crime if it were conducted without the consent of the victim:

However, a sterilization which is required and thus ‘justified’ in view of the health of the person concerned might still amount to the war crime of enforced sterilization insofar it is ‘forcible’ (including when occurring against the person concerned capable, voluntary and informed will); once more, the relationship between the Statute’s wording (‘enforced’) and the elements suggested by the Elements of Crimes is not entirely clear.¹⁴⁸

Turning to genuine consent, the *UN Interagency Statement on Eliminating forced, coercive and otherwise involuntary sterilization* has described consent in terms of autonomy in decision making:

Respect for dignity and the physical and mental integrity of a person include providing that person with the opportunity to make autonomous reproductive choices [...]. The principle of autonomy, expressed through full, free and informed decision-making, is a central theme in medical ethics, and is embodied in human rights law.¹⁴⁹

Footnotes 20 and 55 of the *Elements of Crimes* specify that:

It is understood that genuine consent does not include consent obtained through deception.¹⁵⁰

Cottier and Mzee analyse genuine consent in light of footnotes 55 and 51 of the Elements of Crimes:

Footnote 55 adds that ‘consent obtained through deception’ does not qualify as ‘genuine consent’, excluding for instance misinformation regarding the permanence or reversibility of the sterilization. The consent thus must be informed. Footnote 51 states that ‘a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity’. In addition, it is submitted that justifying consent would have to be voluntary, anything else making little sense, in particular in times of armed conflict.¹⁵¹

¹⁴⁷ World Health Organisation (‘WHO’), *Eliminating forced, coercive, and otherwise involuntary sterilisation: An interagency statement*, (‘WHO An Interagency Statement’), 2014, p. 15.

¹⁴⁸ Cottier and Mzee, *supra* note 115, p. 500.

¹⁴⁹ WHO An Interagency Statement, *supra* note 147.

¹⁵⁰ ICC Elements of Crimes.

¹⁵¹ Cottier and Mzee, *supra* note 115, p. 500 (footnote omitted).

7.4. [Mens rea 1]

[Conduct] The perpetrator meant to engage in conduct which deprived one or more persons of biological reproductive capacity

No jurisprudence in the dataset.

[Consequence 1] The perpetrator meant to cause the deprivation of one or more persons of biological reproductive capacity [OR]

No jurisprudence in the dataset.

[Consequence 2] The perpetrator was aware that one or more persons would be deprived of biological reproductive capacity in the ordinary course of events

No jurisprudence in the dataset.

7.5. [Mens rea 2]

[Circumstance 1] The perpetrator aware that the conduct was not justified by the medical or hospital treatment [AND]

No jurisprudence in the dataset.

[Circumstance 2] The perpetrator was aware of absence of genuine consent

No jurisprudence in the dataset.

8

8. Other forms of sexual violence of comparable gravity 64

- 8.1. [Actus reus 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 66
- 8.2. [Actus reus 2] Such conduct was of a gravity comparable to: 71
- [CAH, ICC Art. 7] the other offences in article 7, paragraph 1 (g) of the Statute [OR];
- [WC, ICC Art. 8(2)(b)(xxii)-6] that of a grave breach of the Geneva Conventions [OR];
- [WC, ICC Art. 8(2)(e)(vi)-6] that of a serious violation of article 3 common to the four Geneva Conventions
- 8.3. [Mens rea 1] 73
- [Conduct] The perpetrator meant to engage in committing an act of a sexual nature or causing a person or persons to engage in an act of a sexual nature
- [Consequence I] The perpetrator meant to commit an act of a sexual nature or to cause a person or persons to engage in an act of a sexual nature [OR]
- [Consequence II] The perpetrator was aware he or she would commit an act of a sexual nature or would cause a person or persons to engage in an act of a sexual nature in the ordinary course of events
- [Circumstance] The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent
- 8.4. [Mens rea 2] 74
- [Circumstance] The perpetrator was aware of the factual circumstances that established the gravity of the conduct

8. Other forms of sexual violence of comparable gravity

Legal requirements and components of other forms of sexual violence of comparable gravity under the ICC Statute	
<i>Actus reus 1</i>	<p>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</p> <p>Committed an act of a sexual nature against one or more person; [OR] Caused such person or persons to engage in an act of a sexual nature [OR] The perpetrator's or victim's acts of a sexual nature occurred through force, 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</p>
<i>Actus reus 2</i>	<p>Such conduct was of a gravity comparable to:</p> <p>[CAH, ICC Art. 7] the other offences in article 7, paragraph 1 (g) of the Statute [OR] [WC, ICC Art. 8(2)(b)(xxii)-6] that of a grave breach of the Geneva Conventions [OR] [WC, ICC Art. 8(2)(e)(vi)-6] that of a serious violation of article 3 common to the four Geneva Conventions</p>
<i>Mens rea 1</i>	<p>Conduct</p> <p>The perpetrator meant to engage in committing an act of a sexual nature or causing a person or persons to engage in an act of a sexual nature</p> <hr/> <p>Consequence</p> <p>[Consequence I] The perpetrator meant to commit an act of a sexual nature or to cause a person or persons to engage in an act of a sexual nature [OR] [Consequence II] The perpetrator was aware he or she would commit an act of a sexual nature or would cause a person or persons to engage in an act of a sexual nature in the ordinary course of events</p> <hr/> <p>Circumstance</p> <p>The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent</p>
<i>Mens rea 2</i>	<p>Circumstance</p> <p>The perpetrator was aware of the factual circumstances that established the gravity of the conduct</p>

Possible charges for other forms of sexual violence of comparable gravity under the ICC Statute

	Genocide	Crimes against humanity	War crimes
Sexual violence	-	Sexual violence (ICC Art. 7(1)(g))	Sexual violence (ICC Art. 8(2)(b); ICC Art. 8(2)(e))
Alternative charges	Bodily and mental harm <i>Footnote 3 of the elements of crimes for ICC Art.6(b) lists sexual violence as a potential conduct of serious bodily or mental harm</i>	Torture Persecution	Torture

Table 12. *Actus reus* and *mens rea* of, and possible charges for, sexual violence under the ICC Statute.

8.1. [Actus reus 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 consent¹⁵²

The perpetrator committed an act of a sexual nature against one or more persons [OR]

Keywords: Acts of a sexual nature – Absence of penetration – Sexual humiliation and degradation

The ICTY Trial Chamber in *Kvočka et al.* listed acts that may constitute sexual violence:

[S]exual violence is broader than rape and includes such crimes as sexual slavery or molestation.¹⁵³

Sexual 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 as war crimes and crimes against humanity, namely “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization” and other similar forms of violence.¹⁵⁴

¹⁵² “Any other form of sexual violence” was first codified in the ICC Statute. The ICTY and ICTR jurisprudence considered this crime as persecution or an inhumane act as a crime against humanity; an outrage upon personal dignity as a war crime or as causing serious bodily or mental harm to members of the group as a form of genocide (see e.g. OSCE, *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges*, 2014, pp. 53-54). This reflects in the selection of the excerpts below.

¹⁵³ ICTY, *The Prosecutor v. Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Milan Radi and Zoran Zigic*, TC I, Judgement, Case No. IT-98-30/1-T, 2 November 2001, para. 179 (citations omitted).

¹⁵⁴ *Ibid.*, para. 180, footnote 343.

The ICTY Trial Chamber in *Dorđević et al.* similarly held that sexual violence does not require sexual penetration:

The Chamber will interpret the term “sexual assault” as an offence that may include rape where there is evidence of sexual penetration, as well as other forms of sexual assault. While the narrower offence of rape requires sexual penetration, sexual violence other than rape can constitute “sexual assault”.¹⁵⁵

The ICTY Appeals Chamber in *Dorđević et al.* emphasised that acts of sexual violence sexual may be perpetrated to inflict sexual humiliation and degradation upon victims rather than to provide sexual gratification to the perpetrator:

[I]t would be inappropriate to place emphasis on the sexual gratification of the perpetrator [...]. In the context of an armed conflict, the sexual humiliation and degradation of the victim is a more pertinent factor than the gratification of the perpetrator” as it is precisely the sexual humiliation and degradation which “provides specificity to the offence”.¹⁵⁶

The *UN Special Rapporteur on systematic rape, sexual slavery and slavery like practices during armed conflict* has defined sexual violence as:

any violence, physical or psychological, carried out through sexual means or by targeting sexuality [... which] 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.¹⁵⁷

The *ICC Office of the Prosecutor* has adopted an internal definition of ‘sexual crimes’ which states:

[a]n act of a sexual nature if not limited to physical violence, and may not involve any physical contact – for example, forced nudity. Sexual crimes, therefore, cover both physical and non-physical acts with a sexual element.¹⁵⁸

Powderly and Hayes define the character of sexual violence:

Sexual violence is a broader term than rape. The term is used to describe any kind of violence carried out through sexual means, with a sexual motive or by targeting sexuality. Sexual violence is not limited to a physical invasion of the human body and may include acts that do not involve penetration or even physical contact. Sexual violence covers both physical and psychological attacks directed at a person’s sexual characteristics.¹⁵⁹

155 ICTY, *The Prosecutor v. Vlastimir Dorđević, Slobodan Milošević, Milan Milutinović, Nikola Sainović, Dragoljub Ojdanić and Vlatko Stojiljković, TC II, Public Judgement with Confidential Annex (Volume I of II)*, Case No. IT-05-87/1-T, 23 February 2011, para. 1766 (citations omitted) (*P. v. Vlastimir Dorđević et al. TJ*).

156 ICTY, *The Prosecutor v. Vlastimir Dorđević, Slobodan Milošević, Milan Milutinović, Nikola Sainović, Dragoljub Ojdanić and Vlatko Stojiljković, AC, Judgement*, Case No. IT-05-87/1-T, 27 January 2014, para. 852 (citations omitted) (*P. v. Vlastimir Dorđević et al. AJ*).

157 UNCHR Final Report McDougall, *supra* note 101, paras. 21-22.

158 ICC OTP, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, p.3.

159 Powderly and Hayes, *supra* note 108, pp. 216-217.

The perpetrator caused such person or persons to engage in an act of a sexual nature

Keywords: Causing persons to engage in sexual acts – Sexual humiliation and degradation – Forced nudity – Biting the penis – Oral sex – Forced castration – Genital mutilation – Forced contraception

The ICTY Trial Chamber in *Dorđević et al.* accepted that sexual violence may be caused by the perpetrator by requiring others to perform sexual acts:

The physical perpetrator commits an act of a sexual nature on another; this includes requiring that other person to perform such an act.¹⁶⁰

The ICTY Appeals Chamber in *Dorđević et al.* adopted a similar approach, considering that sexual violence may not require physical contact with the perpetrator where the acts constitute sexual humiliation or degradation:

It is evident that sexual assault requires that an act of a sexual nature take place. The Appeals Chamber notes that the act must also constitute an infringement of the victim's physical or moral integrity. Often the parts of the body commonly associated with sexuality are targeted or involved. Physical contact is, however, not required for an act to be qualified as sexual in nature. Forcing a person to perform or witness certain acts may be sufficient, so long as the acts humiliate and/or degrade the victim in a sexual manner.¹⁶¹

The Trial Chamber in *Akayesu* established that an incident of forced nudity constituted sexual violence:

Witness KK testified regarding an incident in which the Accused told the Interahamwe to undress a young girl named Chantal, whom he knew to be a gymnast, so that she could do gymnastics naked.¹⁶²

The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence.¹⁶³

The ICTY Trial Chamber in *Todorović* accepted that the perpetrator caused acts of sexual violence between other persons, including biting a victim's penis, kicking genitalia and forcing oral sex between prisoners:

Witness A described how he was taken to the police station in Bosanski Samac, where [the accused] began to beat him and kick him in the genital area. Witness A was then taken over to another man and ordered by [the accused] to "bit into his penis". After that he was beaten again and endured further mistreatment.¹⁶⁴

Witness C stated that [the accused] had telephoned and had required him to come to the police station in Bosanski Samac. There, Witness C was beaten for about half an hour. In Witness C's words: "Only [the accused] and me were present at the office and the beating

160 ICTY, *P. v. Vlastimir Dorđević et al. TJ*, *supra* note 155, para. 1768 (citations omitted).

161 ICTY, *P. v. Vlastimir Dorđević et al. AJ*, *supra* note 156, para. 852 (citations omitted).

162 ICTR, *P. v. Jean-Paul Akayesu TJ*, *supra* note 27, para. 429.

163 *Ibid.*, para. 686.

164 ICTY, *The Prosecutor v. Stevan Todorović*, TC, IT-95-9/1-S, Sentencing Judgment, Trial Chamber, 31 July 2001, (*P. v. Stevan Todorović TJ*), para. 38.

lasted for about half an hour. After that Witness D was brought to the office and he continued beating both of us. The beating lasted for another hour. After that he ordered us to perform oral sex on each other.”¹⁶⁵

Witness E described how he was arrested on 9 or 10 May 1992 and taken to the police station in Bosanski Samac. There he was beaten by [the accused], among others, for several hours. Witness E stated that: “After the beating [the accused] ordered us (Witness E and Witness F) to do a blow job on each other. He was laughing when we [were] doing it.”¹⁶⁶

The ICC Pre-trial Chamber in *Kenyatta et al.* issued a controversial decision, rejecting acts of penile amputation and forced circumcision as sexual violence:

Turning to the legal characterization of these acts, the Chamber recalls that it is essential for qualification of a certain act as other forms of sexual violence pursuant to article 7(l)(g) of the Statute that the act in question be of a sexual nature. The Chamber notes that at the confirmation of charges hearing, the Prosecutor submitted “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”.¹⁶⁷

Powderly and Hayes provide examples of the various acts that could constitute acts of sexual violence caused by the perpetrator:

Sexual violence can take many forms, some more obvious than others. It can include acts committed with a sexual motive or for the sexual gratification of the perpetrator; scenarios where two or more unwilling participants are forced to carry out sexual acts on each other; acts committed for the purpose of humiliation or degradation, such as forcible public nudity; or acts which target the victim’s sexual organs or sexual function, such as forcible castration, genital mutilation or sexualised torture.¹⁶⁸

In assessing the legal character of alleged acts of forced contraception of Yazidi women by ISIS, *de Vos* considers the conditions where forced contraception could meet the threshold of acts of a sexual nature:

Classifying forced contraception as “other forms of sexual violence” thus depends on what determines whether an act is of a sexual nature. The women and girls were forced to take contraception in order for them to “remain available for sex”. Suspending their reproductive capacity was thus a critical component of the conditions that enabled rape (i.e. an act of a sexual nature) to take place. As such, if we conceptualise the rationale for the specific act of forced contraception as the ‘sexual nature’ part of the definition, forced contraception could be charged as “other forms of sexual violence”.¹⁶⁹

Similar legal requirements

Sexual slavery / *Actus reus* 2, p. 35

Enforced prostitution / *Actus reus* 1, p. 45

¹⁶⁵ *Ibid.*, para. 39.

¹⁶⁶ *Ibid.*, para. 40.

¹⁶⁷ ICC, *The Prosecutor v. Uhuru Muigai Kenyatta and Mohammed Hussein*, PTC II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 23 January 2012, (*P. v. Uhuru Muigai Kenyatta et al. DCC*), para. 264.

¹⁶⁸ Powderly and Hayes, *supra* note 108, pp. 216-217.

¹⁶⁹ Dienneke de Vos, “Can the ICC Prosecute Forced Contraception?”, on *International Law Grrls Blog*, 14 March 2016.

The perpetrator's or victim's acts of a sexual nature occurred through force, 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.

Keywords: Forced contraception – Conditions where it would meet the threshold of acts of a sexual nature – Contraception led to forced sexual acts

The ICTY Trial Chamber in *Furundžija* considered serious sexual assault as an act of a sexual nature, regardless of whether penetration occurred:

It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat or force or intimidation in a way that is degrading and humiliating for the victim's dignity.¹⁷⁰

The ICTR Trial Chamber in *Akayesu* reiterated the requirement that sexual violence occur in coercive circumstances:

[A]ny act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and *may* include acts which do not involve penetration or even physical contact [...].¹⁷¹

The ICTY Appeals Chamber in *Dorđević et al.* explained the element of consent:

[...] With regard to the issue of consent, the Appeals Chamber considers that any form of coercion, including acts or threats of (physical or psychological) violence, abuse of power, any other forms of duress and generally oppressive surrounding circumstances, may constitute proof of lack of consent and usually is an indication thereof. In addition, a status of detention, particularly during armed conflict, will normally vitiate consent.¹⁷²

The same Chamber listed elements of a sexual assault as persecution:

- (a) The physical perpetrator commits an act of a sexual nature on another; this includes requiring that other person to perform such an act.
- (b) That act infringes the victim's physical integrity or amounts to an outrage to the victim's personal dignity.
- (c) The victim does not consent to the act.
- (d) The physical perpetrator intentionally commits the act.
- (e) The physical perpetrator is aware that the victim did not consent to the act.¹⁷³

Similar legal requirements

Rape / *Actus reus* 2, p. 24

Enforced prostitution / *Actus reus* 1, p. 45

¹⁷⁰ ICTY, *P. v. Anto Furundžija TJ*, *supra* note 29, para. 186.

¹⁷¹ ICTR, *P. v. Jean-Paul Akayesu TJ*, *supra* note 27, para. 688 (emphasis added).

¹⁷² ICTY, *P. v. Vlastimir Dorđević et al. AJ*, *supra* note 156, para. 852.

¹⁷³ ICTY, *P. v. Vlastimir Dorđević et al. TJ*, *supra* note 155, para. 1768 (citations omitted).

- 8.2. [Actus reus 2] Such conduct was of a gravity comparable to:**
[CAH, ICC Art. 7] the other offences in article 7, paragraph 1 (g) of the Statute
[OR];
[WC, ICC Art. 8(2)(b)(xxii)-6] that of a grave breach of the Geneva Conventions
[OR];
[WC, ICC Art. 8(2)(e)(vi)-6] that of a serious violation of article 3 common to the four Geneva Conventions

Keywords: Gravity – Denial or infringement of a fundamental human right

This requirement applies to the underlying acts of ‘other forms of sexual violence’ of crimes against humanity and war crimes and is adapted to the different conduct listed under each crime:

Crimes against humanity	War crimes – international armed conflict	War crimes – non-international armed conflict
ICC Statute Art. 7(1)(g):	Grave breaches of the Geneva Conventions	Serious violation of common article 3, Geneva Conventions
<ul style="list-style-type: none"> • Rape; • Sexual slavery; • Enforced prostitution; • Forced pregnancy; • Enforced sterilisation 	<ul style="list-style-type: none"> • Wilful killing; • Torture or inhuman treatment, including biological experiments; • Wilfully causing great suffering or serious injury; • Compelling a prisoner of war or a civilian to serve in the forces of a hostile power; • Unlawful deportation or transfer or unlawful confinement of a civilian; • Taking civilians as hostages 	<ul style="list-style-type: none"> • Violence to life and person: murder, mutilation, cruel treatment and torture; • Hostage taking; • Outrages upon personal dignity: humiliating and degrading treatment; • [Passing of sentences] • Collection and care of sick and wounded

The ICTY Trial Chamber in *Dorđević et al.* elucidated gravity considerations for a sexual assault as persecution:

“Sexual assault” per se is not listed in Article 5 of the Statute, while rape is listed under subparagraph (g). For those forms of sexual assault other than rape, it must be shown that the act denies or infringes upon a fundamental human right. In this respect, it is well established that sexual assault may amount to a denial of or infringement upon the fundamental right to physical integrity, depending on the specific circumstances.¹⁷⁴

¹⁷⁴ *P. v. Vlastimir Dorđević et al. TJ*, para. 1767 (citations omitted).

During the adoption of the ICC Statute, the *Women’s Caucus for Gender Justice* considered types of sexual violence that would be coherent with the ‘comparable gravity’ requirement:

The jurisprudence of the ad hoc Tribunals recognizes that there are degrees of sexual violence which may involve no touching at all. For example, the existing jurisprudence recognizes forced nudity as a crime against humanity. However, under the current elements, forced nudity may be read out of sexual violence because it does not involve physical invasion and therefore may not be considered comparable to the other sexual violence crimes in paragraph 7(1)(g).¹⁷⁵

Powderly and Hayes added:

The words ‘of comparable gravity’ should [...] not be understood to exclude acts that do not involve penetration or physical contact.¹⁷⁶

The same authors comment on the approach taken by the ICC Pre-trial Chambers in *Bemba* with regard to forced nudity:

The second non-contextual element is an objective test. [...] In the Bemba case at the ICC, however, the Pre-Trial Chamber refused to include factual allegations of women being forced to undress in public for the purposes of humiliation within the arrest warrant on the grounds that it did not believe those facts constituted other forms of sexual violence ‘of comparable gravity to the other crimes set forth in article 7(1)(g) of the Statute’.¹⁷⁷

Cottier and Mzee consider offences of comparable gravity applicable to international armed conflicts:

‘Any other form of sexual violence’ consequently must, in order to come under ICC jurisdiction, reach the minimum threshold of gravity comparable to a grave breach of the Geneva Conventions, such as torture, inhuman treatment, biological experiments, wilfully causing great suffering or serious injury to body or health, or, arguably, one of the five specific forms of sexual violence listed under article 8 para. 2 (b) (xxii), insofar these are deemed to per se constitute grave breaches.¹⁷⁸

Zimmerman and Geiß use textual interpretation to consider ‘other forms of comparable gravity’ relevant to non-international armed conflict:

It has to be understood as meaning that acts of sexual violence other than rape, sexual slavery, enforced sterilisation and enforced prostitution committed in internal armed conflict would only come within the jurisdiction of the ICC if, and to the extent, that they also constitute by the same token a serious violation of common article 3. This interpretation of the relevant formula is confirmed by the use of the term ‘also’, as well by the very fact that the second alternative ‘any other form of sexual violence’ is separated by a comma from the other alternatives,

¹⁷⁵ Women’s Caucus Advocacy in ICC Negotiations, *Recommendations and Commentary to the Elements Annex and Rules of Procedure and Evidence*, submitted to the Preparatory Commission for the International Criminal Court, 12 June 2000.

¹⁷⁶ Powderly and Hayes, *supra* note 108.

¹⁷⁷ *Ibid.*

¹⁷⁸ Cottier and Mzee, *supra* note 115, p. 503.

thus making it clear that the additional formula ‘constituting a serious violation of article 3 common to the four Geneva Conventions’ has to be understood as a qualifying element.¹⁷⁹

8.3. [Mens rea 1]

[Conduct] The perpetrator meant to engage in committing an act of a sexual nature or causing a person or persons to engage in an act of a sexual nature

Similar legal requirements

Rape / *Mens rea 2* / Circumstance, p. 28

Sexual slavery / *Mens rea 2* / Conduct, p. 38

Enforced prostitution / *Mens rea 1* / Circumstance, p. 46

[Consequence I] The perpetrator meant to commit an act of a sexual nature or to cause a person or persons to engage in an act of a sexual nature [OR]

Similar legal requirements

Sexual slavery / *Mens rea 2* / Consequence I, p. 38

Enforced prostitution / *Mens rea 1* / Consequence I, p. 46

[Consequence II] The perpetrator was aware he or she would commit an act of a sexual nature or would cause a person or persons to engage in an act of a sexual nature in the ordinary course of events

Similar legal requirements

Sexual slavery / *Mens rea 2* / Consequence II, p. 38

Enforced prostitution / *Mens rea 1* / Consequence II, p. 46

[Circumstance] The perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person’s incapacity to give genuine consent

Similar legal requirements

Rape / *Mens rea 2* / Circumstance, p. 28

Enforced prostitution / *Mens rea 1* / Circumstance, p. 46

¹⁷⁹ Andreas Zimmerman and Robin Geiß, “Article 8”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed.), C.H. Beck/Hart/Nomos, 2016, pp. 562-563.

8.4. [Mens rea 2]

[Circumstance] The perpetrator was aware of the factual circumstances that established the gravity of the conduct

Powderly and Hayes briefly interpreted the awareness of factual circumstances required of the perpetrator:

The third non-contextual element does not require the perpetrator to make any legal assessment of the gravity of the conduct.¹⁸⁰

¹⁸⁰ Powderly and Hayes, *supra* note 108, pp. 218.

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9. Genocide by imposing measures intended to prevent births within a group 76

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9. Genocide by imposing measures intended to prevent births within a group

Legal requirements and components of genocide by imposing measures intended to prevent births under the ICC Statute

<i>Actus reus 1</i>	The perpetrator imposed certain measures upon one or more persons	
<i>Actus reus 2</i>	The measures imposed were intended to prevent births within that group	The measures were imposed The measures were intended to prevent births Within the group
<i>Mens rea 1</i>	Conduct	The perpetrator meant to engage in conduct of imposing certain measures upon one or more persons
<i>Mens rea 2</i>	Consequence	<i>[Consequence I]</i> The perpetrator meant to prevent births within that group <i>[OR]</i> <i>[Consequence II]</i> The perpetrator was aware that the measures imposed would prevent births within that group in the ordinary course of events

Possible charges for genocide by imposing measures intended to prevent births under the ICC Statute

	Genocide	Crimes against humanity	War crimes
Genocide	Measures to prevent births (ICC Art. 6(2)(d))	-	-
Alternative charges	-	-	-

Table 13. *Actus reus* and *mens rea* of, and possible charges for, genocide by imposing measures intended to prevent births under the ICC Statute.

9.1. [Actus reus 1] The perpetrator imposed certain measures upon one or more persons

Keywords: Medical experiments – Biological measures – Physical or mental measures -
Castration – Sterilisation – Abortion – Medical experiments to effect sterilisation

The Supreme National Tribunal of Poland in *Poland v. Hoess* ('Case No. 38') accepted that four types of medical experiments were carried out for the purpose of preventing births within a group:

- (A) *Castration experiments.* They were performed on healthy, normal individuals of both sexes, and of different ages and nationalities, mostly Jews, without their voluntary consent.
- (B) *Experiments intended to produce sterilization.* Sterilization of women was carried out [...] Also sterilizing operations were performed, the uterus, tubes and even sometimes breasts being removed.
- (C) *Premature termination of pregnancy and other experiments on pregnant or child-bearing women.* Premature termination of pregnancy was carried out by the emptying of the uterus, injections of Abortus Bangserum or by laparotomy and extirpation of the uterus. [...]
- (D) *Experiments aimed at cancer research.* These consisted in excising parts of the uterine body, and the wound was sutured and frozen sections with the excised material made. [...] Incisions were in fact amputations of the cervical part of the uterus.¹⁸¹

The UN Economic and Social Council ('ECOSOC') in the *Draft Convention on the Crime of Genocide* enumerated three measures that may constitute biological genocide:

[Biological genocide] is characterized by measures aimed at the extinction of a group of human beings by systematic restrictions on births without which the group cannot survive. Such restrictions may be physical, legal or social.

Article I lists these processes as follows:

- (a) Sterilization and/or compulsory abortion: These are biological means.
- (b) Segregation of the sexes: This may be induced by various causes such as compulsory residence in remote places, or the systematic allocation of work to men and women in different localities.
- (c) Obstacles to marriage: These are legal restrictions.¹⁸²

The ICTR Trial Chamber in *Akayesu* listed a range of physical and mental measures aimed at preventing births within a group:

For purposes of interpreting Article 2(2)(d) of the Statute, the Chamber holds that the measures intended to prevent births within the group should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the

¹⁸¹ The Supreme National Tribunal of Poland, *Case No. 38 Poland v. Hoess*, 29 March 1947 in UN War Crimes Commission, *Law Reports on Trials of War Criminals, Volume VII*, 1948 ('Case No. 38'), pp. 14-15.

¹⁸² ECOSOC, *Draft Convention on the Crime of Genocide*, E/447, 26 June 1947, p. 26.

case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.¹⁸³

Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.¹⁸⁴

The Supreme National Tribunal of Poland in **Case No. 38** described the imposition of castration experiments through x-rays:

Men who were subjected to intensive X-ray treatment and had severe burns of the scrotum and thighs often died. Even if they survived, they were in constant danger of death. They were temporarily or permanently deprived of their fertility and even of their potency. [...]

Women subjected to intense X-rays were showing climacteric symptoms related to the atrophy of the ovaries. They soon showed senile changes and died. Even if they survived a temporary or permanent loss of fertility followed. Burns and necroses, the aftermath of X-ray treatment, made the use of genitalia impossible. Castration of women was also carried out by short waves, causing coagulation of the deeper layers of the tissue, severe burns and even death.¹⁸⁵

The same Tribunal also described the medical experiments perpetrated against women and men in order to impose sterilisation:

These experiments were performed on young and healthy Jewish women of 20-30 years of age, who had regular periods, a not too narrow cervix and who had borne at least one child. After the experiments they often lost their periods. Experiments were repeated from two to six times at intervals of from three to four weeks. In their course an X-ray control was carried on by screening and an X-ray was taken afterwards. The experiments aimed at the obliteration of the tubes. This was to be achieved through the inflammation of the mucous membrane of the uterus and of the tubes [...]. Men were also sterilized through suture of the vas deferens. The total number of sterilization experiments was estimated by witnesses at about 3,000 and of the test fluid experiments at about 1,000.¹⁸⁶

The same Tribunal recounted the use of insemination methods to test the effectiveness of sterilisation experiments:

Men and women previously subjected to castration and sterilization experiments were accommodated together. Four hundred men and 250 women were thus put into the same place and results of natural insemination were observed, while in other cases artificial insemination experiments were performed. Another camp for 3,500 of such human "guinea pigs" was also built.¹⁸⁷

183 ICTR, *P. v. Jean-Paul Akayesu* *TJ*, *supra* note 27, para. 507.

184 *Ibid.*, para. 508.

185 *Case No. 38*, pp. 14-15.

186 *Ibid.*, p. 15.

187 *Ibid.*

Moreover, the same Tribunal accepted that measures were taken to impose premature termination or delivery by pregnant women, including those impregnated through insemination experiments:

Premature termination of pregnancy was carried out by the emptying of the uterus, injections of Abortus Bangserum or by laparotomy and extirpation of the uterus.

Delivery was provoked by artificially causing contracture of the uterus musculature or by the use of a balloon. About 50 pregnant women were subjected to those experiments. Frequently blood of people suffering from typhus was injected before labour.¹⁸⁸

Finally, the Tribunal described surgical experimentation on the uterus or cervix of women members of the group:

These consisted in excising parts of the uterine body, and the wound was sutured and frozen sections with the excised material made. These experiments aimed at examining early stages of cancer. [...] Excisions were also made on completely healthy persons with no suspicion of cancer of the genital organs. Incisions were in fact amputations of the cervical part of the uterus.

Experiments of transplanting cancerous bodies to the uterus and cervical channel were also carried out. After a certain time the uterus was removed and results of the transplanting observed. As in most cases these experiments were successful, however, victims usually died within one-and-a-half years, or at least temporary illness followed.¹⁸⁹

9.2. [Actus reus 2] The measures imposed were intended to prevent births within that group

Keywords: Measures – Intent – Stable and permanent group characteristics – Subjective criteria – Negative and positive stigmatisation

The District Court of Jerusalem in *Eichmann* explained its understanding of the term ‘imposing measures’:

Section I (b) (4) of the Law says “imposing measures”, etc., following apparently Section 2(d) of the Convention on the Prevention and Punishment of the Crime of Genocide wherein the expression “imposing measures” is also used. The fourth Count of the indictment speaks of “the devising of such measures”. The word “devising” is a more accurate translation of the original Hebrew word in the text of the law. We construe “imposing measures” here to mean actually putting the measures into effect, at least to the point of giving orders to carry them out [...].¹⁹⁰

188 *Ibid.*

189 *Ibid.*

190 *Attorney-General of Israel v. Adolf Eichmann, Judgement* (District Court of Jerusalem), 36 ILR 5, 1968, para. 199.

The Supreme National Tribunal of Poland in **Case No. 38** accepted that the intent of the personnel conducting the experiments was hidden from the victims:

German personnel performing experiment often observed from hiding the behaviour of castrated Jewish men and women, who were especially accommodated in common. Thus they wanted to ascertain changes which may have occurred in their libido.¹⁹¹

The ICTR Trial Chamber in **Akayesu** followed the preparatory works of the Genocide Convention to apply the meaning of ‘a group’ to ‘any stable and permanent’ collective:

In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group.¹⁹²

Moreover, the same Chamber considered criterion that could establish the group’s permanent and stable character:

a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.¹⁹³

The ICTY Trial Chamber in **Jelisić** concurred, accepting that group membership be limited to stable and objectively defined groups:

The preparatory work of the Convention demonstrates that a wish was expressed to limit the field of application of the Convention to protecting “stable” groups objectively defined and to which individuals belong regardless of their own desires.¹⁹⁴

The same Chamber advocated subjective criterion to evaluate membership of national, ethnic or racial groups:

Although the objective determination of a religious group still remains possible, to attempt to define a national, ethnic or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a national, ethnic or racial group from the point of view of those persons who wish to single that group out from the rest of the community. The Trial Chamber consequently elects to evaluate membership in a national, ethnic or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnic or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnic or racial group in the eyes of the alleged perpetrators.¹⁹⁵

191 *Case No. 38*, p. 14.

192 ICTR, *P. v. Jean-Paul Akayesu TJ*, *supra* note 27, para. 515. (citations omitted).

193 *Ibid.*, para. 510. (citations omitted).

194 ICTY, *The Prosecutor v. Goran Jelisić*, TCI, Judgement, Case No. IT-95-10-T, 14 December 1999, (*P. v. Goran Jelisić TJ*), para. 69 (citations omitted).

195 *Ibid.*, para. 70 (citations omitted).

The Chamber argued that subjective criterion can be exercised through positive or negative stigmatisation by the perpetrators:

A group may be stigmatised in this manner by way of positive or negative criteria. A “positive approach” would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A “negative approach” would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group. The Trial Chamber concurs here with the opinion already expressed by the Commission of Experts and deems that it is consonant with the object and the purpose of the Convention to consider that its provisions also protect groups defined by exclusion where they have been stigmatised by the perpetrators of the act in this way.¹⁹⁶

9.3. [Mens rea 1]

[Conduct] The perpetrator meant to engage in conduct of imposing certain measures upon one or more persons

No jurisprudence in the dataset.

9.4. [Mens rea 2]

[Consequence 1] The perpetrator meant to prevent births within that group [OR]

No jurisprudence in the dataset.

[Consequence 2] The perpetrator was aware that the measures imposed would prevent births within that group in the ordinary course of events

No jurisprudence in the dataset.

¹⁹⁶ *Ibid.*, para. 71 (citations omitted).

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I-DOC

Investigation
Documentation
System



DOCF

Database on Open
Case Files



CICD

Core International
Crimes Database



CJAD

Cooperation and
Judicial Assistance
Database



CLICC

Commentary on the
Law of the International
Criminal Court



CM

Case Matrix

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