



# The Prosecution of Gender-based Sexualized Violence in War

International Humanitarian Law  
Human Rights Law,  
UN Ad hoc Tribunals,  
and the  
International Criminal Court

A Resource Manual

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This is the third revised and supplemented edition of medica mondiale's Resource Manual on the prosecution of sexualized violence in armed conflict. The first issue was finalized in autumn 2006, the second September 2007. The Manual intends to lay the foundation for a continuously growing documentation of international norms on and legal responses to sexualized war violence.

The manual intends to be a general source of information for women activists not specifically trained in law and can be used as a tool for training purposes.

It will be supplemented and updated on an annual basis. Proposals for supplementation of any kind are most welcome.

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## **Content**

### Section I

<b>Legitimate Women-stealing in War</b>	<b>06</b>
---	-----------

### Section II

<b>First Laws of War Prohibiting Rape</b>	<b>07</b>
---	-----------

### Section III

<b>Protection against War Rape in International Humanitarian and Human Rights Law</b>	<b>09</b>
---	-----------

A. International Humanitarian Law	09
-----------------------------------	----

B. International Human Rights Law	12
-----------------------------------	----

I. Universal Instruments	12
--------------------------	----

II. Regional Instruments	15
--------------------------	----

Sources	19
---------	----

### Section IV

<b>UN Declarations on Women in Armed Conflict</b>	<b>12</b>
---	-----------

Security Council Resolution 1325 and 1820	23
---	----

Sources	24
---------	----

### Section V

<b>Prosecution of Sexualized War Violence in World War II</b>	<b>25</b>
---	-----------

A. War Crime Trials of WW II in Germany	25
---	----

I. The Nuremberg Tribunal	25
---------------------------	----

II. Control Council Law No 10	27
-------------------------------	----

III. Follow-up Trials in Western Germany	28
--	----

B. War Crime Trials of WW II in the Far East	29
--	----

I. The Trial against General Yamashita	29
--	----

II. The International Military Tribunal for the Far East	29
--	----

III. The Batavia Military Tribunal	30
------------------------------------	----

IV. The Women's War Crime Tribunal	31
------------------------------------	----

Sources	32
---------	----

Section VI	
<b>United Nations Ad Hoc-Tribunals</b>	<b>33</b>
A. The International Tribunal for the former Yugoslavia	33
I. The Statute	33
II. Rules of Procedure and Evidence	34
III. Rape Cases before the ICTY	35
Sources	44
B. The International Tribunal for Rwanda	45
I. The Statute	45
II. Rules of Procedure and Evidence	46
III. Rape Cases before the ICTR	46
Sources	49
Section VII	
<b>The International Criminal Court</b>	<b>50</b>
A. Basic Facts on the ICC	50
B. Jurisdiction	53
C. Situations before the ICC	54
I. Democratic Republic of Congo	55
II. Northern Uganda	58
III. Dafur, Sudan	59
IV. Central African Republic	62
D. Definitions of gender based crimes	63
I. Genocide	63
II. Crimes against Humanity	64
III. War Crimes	69
E. Gender Provisions of the ICC	70
I. Statute	70
II. Rules of Procedure and Evidence	72
F. Gender Reality at the ICC	74
G. Victim and Witness Rights	76
I. Definition of Victims	76

II. Participation	76
III. Protection	81
IV. Reparations	84
Sources	86

# Section I

## Legitimate Woman-stealing in War

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### Ancient Times (Examples)

Rape was considered to be a property crime against men or family, and as legitimate booty in war.

#### Mosaic Law:

The Bible, Deuteronomy 20.13: “and when the LORD your God gives it into your hand you shall put all its males to the sword, 14: but the women and the little ones, the cattle, and everything else in the city, all its spoil, you shall take as booty for yourselves; and you shall enjoy the spoil of your enemies, which the LORD your God has given you.”

#### Homer’s Iliad, Book 1 and 9:

During the Trojan War, the Spartan besiegers captured Trojan women dividing them among each other. The quarrel over two of them between King Agamemnon and the famous warrior Achilles nearly resulted in a defeat of the Spartans.

### European Middle Ages (Example)

#### Trial of Sir Peter Hagenbach 1474:

The trial against Sir Peter Hagenbach, a knight serving Charles the Bold, Duke of Burgundy, is said to be the first known international military court. At the beginning of the Burgundian Wars, Hagenbach tried in vain to crush the rebellion of several independent cities against Burgundy. For the reign of terror he instituted in one of these cities he was tried and sentenced to death. The charges explicitly included rape committed by his soldiers. However, Hagenbach was not accused of the crimes as such but of having committed them in an *undeclared* war. Had he properly declared war all acts would have been proper according to contemporary law, including rape.

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#### Sources:

The Holy Bible: <http://etext.virginia.edu/rsv.browse.html>

The Iliad: [www.perseus.tufts.edu/cgi-bin/ptext?doc=Perseus%3Aabo%3Atlg%2C0012%2C001&query=1%3A1](http://www.perseus.tufts.edu/cgi-bin/ptext?doc=Perseus%3Aabo%3Atlg%2C0012%2C001&query=1%3A1)

Hagenbach: [http://en.wikipedia.org/wiki/Charles\\_the\\_Bold](http://en.wikipedia.org/wiki/Charles_the_Bold)

## Section II

# First Laws of War Prohibiting Rape

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Examples:

### European Middle Ages

#### Decree of Richard II of England (1385):

The 24 “Articles of War” by Richard II belong to the earliest documents on the regulation of war activities and the conduct of soldiers. One of them states:

“That none be so hardy as to ... **force any woman**, upon pain of being hanged.”

### Bilateral Treaties

#### Treaty of “Amity and Commerce” between the United States and Prussia (1785):

The treaty stipulates:

“[i]f war should arise between the two contracting parties ... **all women and children** ... **shall not be molested** in their persons.”

### The Mexican War

#### General Winfield Scott’s General Orders No 20 (1847):

Art. 2 provided for the punishment of:

“Assassination; murder; malicious stabbing or maiming; **rape**; malicious assault and battery; robbery; theft; the wanton desecration of churches, cemeteries of other religious edifices and fixtures; and the destruction, except by order of a superior officer, of public or private property....”

### The America Civil War

#### Lieber Code (1863):

“Instructions for the Government of the United States in the Field by Order of the Secretary of War.” The Lieber Code is said to be the first codification of international customary laws of land warfare. It was drafted by Francis Lieber during the American Civil War (1861-65) and became the official U.S. Army regulation guide on the laws of land warfare.

Art. 37: The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; ... the persons of the inhabitants, especially those of women: and the **sacredness of domestic relations**. Offenses to the contrary shall be rigorously punished.

Art. 44: All wanton violence against persons in the invaded country, ...all **rape**, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

Art. 47: Crimes punishable by all penal codes, such as arson, murder, maiming assaults, highway robbery, theft, burglary, fraud, forgery, and **rape**, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.

The Lieber Code formed the basis of the Hague Conventions on Land Warfare 1899 and 1907.

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Sources:

Kelly Askin, War Crimes Against Women. Prosecution in International War Crimes Tribunals, Kluwer Law International 1997, Chapter I

Lieber Codes: <http://www.civilwarhome.com/liebercode.htm>

## Section III

# Protection against War Rape in International Humanitarian and Human Rights Law

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International Humanitarian Law and International Human Rights Law are complementary. Humanitarian Law applies in situations of armed conflict restricting warfare and imposing duties on all parties to a conflict. Human Rights Law is tailored primarily for peacetime and aims to protect individuals from arbitrary actions by their own governments. While the first aims to protect people who do not or are no longer taking part in hostilities, the latter applies to everyone without distinction between war and peace. However, some human rights treaties permit governments to derogate from certain rights in situations of public emergency. No such derogations are permitted under International Humanitarian Law because it was conceived for emergency situations, namely armed conflict.

International Humanitarian Law forms the basis of International Criminal Law. In practice, international criminal courts also refer to Human Rights Law where it was established through international recognition as customary law.

### A. International Humanitarian Law

International Humanitarian Law (IHL) or the “Law of War” constitutes a set of international rules in times of armed conflict to restrict the means and methods of warfare and to protect civilians and soldiers who are no longer taking part in the hostilities. They do not restrict the right of sovereign states to go to war.

IHL is based on the Hague Conventions and the Geneva Conventions drawing their names from the cities where each was initially codified. Both form two of the major pillars of today’s International Criminal Law.

#### **The Hague Conventions of 1899 and 1907:**

The Hague Convention establishes the rights and obligations of belligerents in the conduct of military operations, and limits the means of harming the enemy. The Hague Conventions apply to *international* armed conflicts only.

Rape is not named explicitly. The protected goods are “family honor and rights”:

Art 46: “**family honor and rights**, the lives of persons, and private property, as well as religious convictions and practice must be respected”

## The Four Geneva Conventions (1949)

The Geneva Convention of 1864 dealt exclusively with care for wounded soldiers. In 1949 the Convention was revised and expanded

- on wounded soldiers on the battlefield (1<sup>st</sup> Convention)
- on wounded and shipwrecked at sea (2<sup>nd</sup> Convention)
- on prisoners of war (3<sup>rd</sup> Convention)
- on civilians under enemy control (4<sup>th</sup> Convention)

With the exception of Common Art. 3 the Conventions apply to *international* armed conflicts (including wars of national liberation). Art. 3, common to all four Conventions, sets a minimum humanitarian standard in the treatment of civilians and non-combatants in *non-international* armed conflicts and prohibits:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Rape and forced prostitution are named explicitly only in the 4<sup>th</sup> Convention. The protected good is female honor.

Art 27 of 4th convention: “Women shall be especially protected against any **attack on their honor**, in particular against **rape, enforced prostitution**, or any form of **indecent assault**.”

The Geneva Conventions distinguish between “prohibited acts” and “grave breaches”. Only “**grave breaches**” fall under universal jurisdiction and individual responsibility. (art. 49f of 1<sup>st</sup> Conv., art. 50f of 2<sup>nd</sup> Conv., art. 129f of 3<sup>rd</sup> Conv., art. 146f of 4<sup>th</sup> Conv.), i.e.:

- Willful killing, torture or inhuman treatment
- Willfully causing great suffering or serious injury to body or health
- Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly
- Compelling a prisoner of war or civilian to serve in the forces of the hostile power

- Willfully depriving a prisoner of war or protected civilian of the rights of a fair and regular trial
- Unlawful deportation or transfer of a protected civilian
- Unlawful confinement of a protected civilian

The Geneva Conventions have been acceded to by 194 States and enjoy universal acceptance. However, only “**grave breaches**” fall under the principle of universal jurisdiction, i.e. they **must be prosecuted in all times and all places** by States in their own courts, irrespective of the nationality of the perpetrator or the place where the offense was committed.

Art. 49., 1<sup>st</sup> Conv.: The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention (...).

Until the late 1990ties **rape was not considered as a “grave breach”** of the Geneva Conventions. The first conviction of rape as torture and thus as a “grave breach” took place in 1998 before the International Criminal Court for the Former Yugoslavia. (see Section VI, A. III.)

“**Grave breaches**” also constitute the core of “**war crimes**”, supplemented in 1977 by two Additional Protocols.

### **Additional Protocols of the Geneva Conventions (1977):**

Rape and enforced prostitution are explicitly named in both Additional Protocols.

Art. 75, Prot. I prohibits for *international* armed conflicts

“outrages upon personal dignity, in particular humiliating and degrading treatment, **rape, enforced prostitution** and any form of indecent assault”

Art 4, Prot. II prohibits the same for *internal* armed conflicts

Chapter II stipulates special measures for women and children. Art. 76 calls for protection of women:

1. Women shall be the object of special respect and shall be protected in particular against **rape, forced prostitution** and any other form of indecent assault.
2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.
3. To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

## B. International Human Rights Law

The following list is not exhausting. It intends to highlight provisions referring to gender and/or sexualized violence or to mark their absence.

### I. Universal instruments

#### Universal Declaration of Human Rights (1948)

Art. 2 prohibits discrimination based on sex:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, **without distinction of any kind**, such as race, colour, **sex**, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

#### Convention on the Prevention and Punishment of Genocide (1948):

Art. 2 defines Genocide as

“acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.

Art 3 enumerates the following “acts”:

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

Rape is not mentioned, and genocide on the basis of gender may not warrant protection within this definition.

Art. 6 limits prosecution of persons charged with genocide only to either states in the territory of which the act was committed or to international penal tribunals.

In practice, genocide falls under universal jurisdiction and must be prosecuted by any state.

Rape was the first time convicted as genocide in 1994 before the International Criminal Tribunal for Rwanda. (See Section VI, B.)



## Slavery Convention (1927)

Art. 1 of the Convention defines slavery as

“the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”

Sexualized forms of enslavement are not mentioned.

## Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery (1956)

Art. 1 of the Supplementary Convention expands the definition of slavery, among others, to

(c) Any institution or practice whereby:

(i) **A woman**, without the right to refuse, is **promised or given in marriage on payment** of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the **right to transfer her to another person for value** received or otherwise; or

(iii) **A woman** on the death of her husband is **liable to be inherited by another person**;

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labor.

## International Covenant on Civil and Political Rights (1966)

The Convention and protects the liberty and the security of persons

“without distinction of any kind, such as race, colour, **sex**, language, religion, political or other opinion, national or social origin, property, birth or other status.” (Art. 2)

Art. 7. and 8 prohibit torture, cruel, inhumane or degrading treatment or punishment as well as slavery. Rape is not mentioned.

## Convention on the Elimination of all forms of Discrimination Against Women (1981)

The Convention aims to ensure women’s equal access to, and equal opportunities in, political and public life as well as education, health and employment.

Art. 1 defines discrimination against women as

“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and

women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

Art. 6 requires States Parties to

“take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

Neither rape nor any other form of sexualized violence against women are mentioned.

Art. 17 stipulated the establishment of the United Nations **Commission on the Elimination of Discrimination against Women (CEDAW)**

“for the purpose of considering the progress made in the implementation of the present Convention”.

In 1992 the Commission published a “General Recommendation” addressing for the first time the link between “discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms”:

“Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.”

Art. 16 of the “Recommendations” stated that

“[w]ars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.”

## **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

Art. 1 defines torture as

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

The Convention does not specify the “acts” inflicting pain or suffering and does not mention rape or any other form of sexualized violence.

## II. Regional Instruments

### European Convention on Human Rights (1950)

Art.14 . prohibits discrimination:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured **without discrimination on any ground** such as **sex**, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other.

Art. 19 stipulates the establishment of the **European Commission of Human Rights** and the **European Court of Human Rights**. Until Protocol 11, which came into force in 1998, individuals did not have direct access to the European Court; they had to apply to the Commission, which then decided whether to launch a case in the Court. Protocol 11 abolished the Commission, enlarged the Court, and allowed individuals to take cases directly to it.

The Court has jurisdiction over breaches of the provisions of the European Convention on Human Rights and the protocols thereto. State Parties can refer cases to the Court, individuals, non-governmental organizations or group of individuals can bring in applications. However, the court may only deal with the matter after all domestic remedies have been exhausted.

### American Convention on Human Rights (1969)

Art. 1 and 2 of the Convention read as follows:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, **without any discrimination** for reasons of race, color, **sex**, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

Art. 6.1 prohibits slave trade and trafficking:

No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the **slave trade and traffic in women**.

Art 17.3 prohibits forced marriages:

No marriage shall be entered into without the free and full consent of the intending spouses.

The Convention was adopted by the nations of the Americas meeting in San Jose, Costa Rica, in 1969 and came into force in 1978. The bodies responsible for overseeing compliance with the Convention are the Inter-American

Commission on Human Rights and the Inter-American Court of Human Rights, both of which are organs of the Organization of American States (OAS).

The main task of the **Inter-American Commission of Human Rights (IACHR)** is to promote the observance and defence of human rights in the Americas, in particular by

- Receiving, analyzing, and investigating individual petitions alleging violations of the Convention
- Monitoring the human rights situation in OAS's member states and publishing country-specific reports
- Conduction on-site visits to investigate specific cases or general situation
- Raising awareness and issuing recommendations to member states
- Referring cases to the Inter-American Court of Human Rights, and litigating those cases before the court

The IACHR established three specialized monitoring mandates, among them the **Special Rapporteur on the Rights of Women**.

Cases to the **Inter-American Court of Human Rights** can be referred by either the Commission or a state party, but not directly by individuals.

### **African Charter of Human and Peoples' Rights (1981)**

The Charter was adopted 1981 by the Organization of African Unity (OAU) and came into effect in 1986. Oversight and interpretation of the Charter is tasked to the African Commission on Human and Peoples' Rights, set up in 1987. In 1998 the creation of an African Court on Human and Peoples' Rights was decided in a protocol to the Charter. It's first judges were elected in 2006.

Art. 2 reads:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter **without distinction of any kind** such as race, ethnic group, colour, **sex**, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

Art 18.3 confirms:

The State shall ensure the **elimination of every discrimination against women** and also **ensure the protection of the rights of women** and the child as stipulated in international declarations and conventions.

The African Commission on Human and Peoples' Rights is tasked with the promotion and protection of human and peoples' rights as well as with the interpretation of the Charter and the preparation of cases for submission to the Court's jurisdiction.

The Commission has 6 specialized mechanisms, among them the **Special Rapporteur for the Rights of Women in Africa**.

### **Cairo Declaration of Human Rights**

In 1990 the Islamic Conference of Foreign Ministers adopted the **Cairo Declaration of Human Rights** subjecting all rights and freedoms to the Islamic Shariah. The Declaration was officially endorsed by the Organization of the Islamic Conference in 2000.

Art. 1(a) prohibits discrimination based on sex:

All human beings form one family whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, **without any discrimination** on the grounds of race, colour, language, **sex**, religious belief, political affiliation, social status or other considerations. True faith is the guarantee for enhancing such dignity along the path to human perfection.

Art. 6(a) stipulates:

(a) **Woman is equal to man in human dignity**, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage.

(b) The husband is responsible for the support and welfare of the family.

### **Arab Charter on Human Rights (1994)**

In 1994 the League of Arab States adopted the **Arab Charter of Human Rights** while reaffirming the Charter of the United Nations, the Universal Declaration of Human Rights, the UN International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the Cairo Declaration on Human Rights in Islam.

Article 2 stipulates:

Each State Party to the present Charter undertakes to ensure to all individuals within its territory and subject to its Jurisdiction the right to enjoy all the rights and freedoms recognized herein, **without any distinction** on grounds of race, colour, **sex**, language, religion, political opinion, national or social origin, property, birth or other status and **without any discrimination between men and women**.

The revision of the Charter in 2004 is not yet in force. There is no English version available. The Charter now explicitly prohibits

- trafficking in human beings for the purposes of prostitution or sexual exploitation, exploitation of the prostitution of others (art. 10)
- all forms of violence or abuse within the family, in particular against women and children (art. 33)

## Sources:

### International Humanitarian Law:

Geneva Conventions: [www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions](http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions)

Genocide Convention: [www.unhchr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhchr.ch/html/menu3/b/p_genoci.htm)

### International Human Rights Law:

Universal Declaration of Human Rights: [www.un.org/Overview/rights.html](http://www.un.org/Overview/rights.html)

Slavery Convention: [www.unhchr.ch/html/menu3/b/f2sc.htm](http://www.unhchr.ch/html/menu3/b/f2sc.htm)

Supplementary Slavery Convention: [www.unhchr.ch/html/menu3/b/30.htm](http://www.unhchr.ch/html/menu3/b/30.htm)

Covenant on Civil and Political Rights: [www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)

“Women’s Convention”: [www.un.org/womenwatch/daw/cedaw/text/econvention.htm](http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm)

CEDAW, General Recommendation N. 19:

[www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19](http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19)

Declaration on Elimination of Violence Against Women:

[www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.48.104.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.48.104.En)

Torture Convention: [www.hrweb.org/legal/cat.html](http://www.hrweb.org/legal/cat.html)

European Convention on Human Rights:

<http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/The+European+Convention+on+Human+Rights+and+its+Protocols/>

European Court of Human Rights: <http://www.echr.coe.int/echr/>

American Convention on Human Rights:

[www.cidh.org/Basicos/English/Basic3.American%20Convention.htm](http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm)

Special Rapporteur on the Rights of Women of the IACHR:

[www.cidh.oas.org/women/Default.eng.htm](http://www.cidh.oas.org/women/Default.eng.htm)

Inter-American Court of Human Rights: <http://www.corteidh.or.cr/>

African Charter on Human and Peoples’ Rights:

[http://www.achpr.org/english/info/charter\\_en.html](http://www.achpr.org/english/info/charter_en.html)

African Commission on Human and Peoples’ Rights: <http://www.achpr.org/>

Special Rapporteur on the Rights of Women in Africa:

[http://www.achpr.org/english/info/index\\_women\\_en.html](http://www.achpr.org/english/info/index_women_en.html)

African Court on Human and Peoples’ Rights:

Arab Charter of Human Rights:

<http://www1.umn.edu/humanrts/instree/arabhrcharter.html>

Revised Arab Charter of Human Rights (Arabic only):

[www.bibalex.org/arf/ar/Files/CSC.pdf](http://www.bibalex.org/arf/ar/Files/CSC.pdf)

Cairo Declaration of Human Rights:

<http://www1.umn.edu/humanrts/instree/cairodeclaration.html>

## Section IV

# UN Declarations on Women in Armed Conflict

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### **Declaration on the Protection of Women and Children in Emergency in Armed Conflict (1974)**

The declaration identifies women and children as “most vulnerable members of the population” during armed conflict. Art. 5 defined as a criminal act:

“[a]ll forms of repression and cruel and inhuman treatment of women and children, including imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings and forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal.”

Rape is not expressly mentioned as a prohibited act.

### **Declaration on the Elimination of Violence against Women (1993)**

The CEDAW Recommendations from 1992 (see above) formed the basis of the declaration adopted by the UN General Assembly end of 1993.

Art. 1 defined violence against women as

“Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such act, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”

Art: 2 identified three main areas of gender-based violence, including rape, sexual harassment and abuse: the family, the community, and violence perpetrated or condoned by the State.

The declaration asserted that violence against women is a

“manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men”

The declaration recognized that women in conflict situations are especially vulnerable to violence.

No enforcement mechanisms or penal sanctions were established

## **Vienna Declaration and Action Program (1993)**

The Vienna Declaration, following the World Conference on Human Rights in Vienna 1993 stated that

"violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law".

Art. 18 declared:

"The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.

Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support.

The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women."

With Art. 28 a UN body addressed for the first time systematic rape in war:

"The World Conference on Human Rights expresses its dismay at massive violations of human rights especially in the form of genocide, "ethnic cleansing" and systematic rape of women in war situations, creating mass exodus of refugees and displaced persons. While strongly condemning such abhorrent practices it reiterates the call that perpetrators of such crimes be punished and such practices immediately stopped."

## **Special Rapporteur on Violence Against Women**

Following the Vienna Declaration the Human Rights Commission appointed a Special Rapporteur on Violence against Women to

(a) seek and receive information on violence against women, its causes and its consequences from Governments, treaty bodies, specialized agencies, other special rapporteurs responsible for various human rights questions and intergovernmental and non-governmental organizations, including women's organizations, and to respond effectively to such information;

(b) recommend measures, ways and means, at the national, regional and international levels, to eliminate violence against women and its causes, and to remedy its consequences;

Until 2006 the Special Rapporteur issued over 50 reports.

## **Special Rapporteur on Systematic Rape and Sexual Slavery and Slavery-like Practices during Wartime**

In 1996, the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a Special Rapporteur in reaction to the increasing international recognition of the scope and character of the Japanese military “comfort stations” system. The Special Rapporteur identified three main purposes of the mandate:

- to reiterate the call for a response to the use of sexual violence and sexual slavery during armed conflict.
- to emphasize the true nature and extent of the harms suffered by women who are raped, sexually abused and enslaved by parties to an armed conflict.
- to examine prosecutorial strategies for penalizing and preventing international crimes committed against women during armed conflict. (Final Report 1998, § 9-11)

To date the Special Rapporteur has issued 3 reports.

## **Cairo Population Conference (1994)**

The Action Program passed on the conference recognized the empowerment and autonomy of women as essential for the achievement of sustainable development and urged all states to eliminate all forms of discrimination against women, including all forms of violence against women.

### **Art. 4.10 urged States**

“to identify and condemn the systematic practice of rape and other forms of inhuman and degrading treatment of women as a deliberate instrument of war and ethnic cleansing and take steps to assure that full assistance is provided to the victims of such abuse for their physical and mental rehabilitation.”

## **Fourth World Conference on Women, Beijing (1995)**

Women in armed conflict became one of the four critical areas of the Beijing Plan of Action. The Platform

- addressed all forms of gender-based violence against women in wartime, including systematic rape, sexual slavery, forced pregnancy and forced abortion
- stated that women and girls are particularly affected by armed conflicts and terrorism “because of their status in society and their sex”
- stated the particular vulnerability of female refugees constitution 80 % of the world’s refugee population

- requests an increase of women's participation in conflict resolution at decision-making levels and promotion of women's contribution to fostering a culture of peace
- request protection and assistance to refugee and displaced women

## **Security Council Resolution 1325 (2000)**

Resolution 1325 called for

- increased representation of women at all decision-making levels for the prevention, management, and resolution of conflict
- the integration of a gender perspective into peacekeeping operations
- training guidelines on the protection, rights and particular needs of women
- the integration of a gender perspective in peace negotiations in regard to special needs of women and girls, support of local women's peace initiatives, and the protection of and respect for human rights of women and girls
- to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse
- to put an end to impunity and to exclude these crimes, where feasible from amnesty provisions
- to consider different needs of female and male ex-combatant

Following resolution 1315 the Secretary-General carried out a study on the impact of armed conflict on women and girls, the role of women in peacebuilding and the gender dimensions of peace processes and conflict resolution

## **Security Council Resolution 1820 (2008)**

Resolution 1820

- recognizes that women and girls are particularly targeted during war, and sexual violence is used as a weapon to instil fear and humiliation, dominate, disperse and/or forcibly relocate civilian members of a community or ethnic group,
- emphasizes that such violence could significantly exacerbate conflicts of armed conflict and impede peace processes - underlining that, as a security issue, it deserves a security response and therefore rightly belongs on the Council's agenda,
- notes the recognition of sexual violence in conflict as a war crime, crime against humanity and constituent act of genocide, and hence a matter that can be referred to the sanctions committee,
- reaffirms that all parties to armed conflict bear the primary responsibility and to immediately take appropriate measures to protect civilians, from all forms of sexual violence, which could include, inter alia, enforcing appropriate military disciplinary measures, and to train troops on the "categorical prohibition" of sexual violence,

- calls upon Member States to comply with their obligations for prosecuting persons responsible for such acts, and stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes,
- states that it has a "zero-tolerance policy" for sexual violence perpetrated by UN Peacekeepers,
- asserts the importance/ necessity of including women's participation in all processes related to stopping sexual violence in conflict, including their participation in peace,
- request a report from the Secretary General on situations in which sexual violence is being widely or systematically employed against civilians and on strategies for ending the practice.

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## Section V

# Prosecution of Sexualized War Violence in World War II

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### A. War Crime Trials of WW II in Germany

#### I. The Nuremberg Tribunal, Nov. 1945 – Okt. 1946:

##### No prosecution of rape

The Trial of the major war criminals was set up by the governments of the USA, the USSR, France and Great Britain.

The Tribunal had jurisdiction over

- **CRIMES AGAINST PEACE:** namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- **WAR CRIMES:** namely, violations of the laws or customs of war. Such as murder, ill-treatment, deportation to slave labor, plunder of public or private property, wanton destruction of cities, devastation not justified by military necessity
- **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Rape or any form of sexualized violence was listed neither under war crimes nor under crimes against humanity.

Based on the Hague Conventions (violation of family honor, ill-treatment) and based on Crimes against Humanity (inhumane treatment), rape could have been prosecuted.

During trial, the French and the Soviet prosecutors presented evidence of wide spread rape but did not include these crimes in the charges.

- The French Prosecutor produced evidence of rape, including mass rape of 54 young women and girls by German soldiers in June 1944 in the small town of Saint Donat:

On 15 June 1944, attack by German troops at St. Donat. I quote, "The Maquis had evacuated the town several days earlier... 54 women or young girls from 13 to 50 years of age were raped by the maddened soldiers."

The losses caused by these bombings among the civilian population are rather high, for in most cases the inhabitants, caught by surprise, had no time to seek shelter... 2 women were raped at Crest ... 3 women were raped at Saillans....

A young girl of twelve, who was wounded and pinned down between beams, awaited death for 6 long days unable either to sit down or sleep, and without receiving any food, and that under the eyes of the Germans who were occupying the village."-A medical certificate from Doctor Nicolaides, who examined the women who were raped in this region. (IMT Docs, Vol. VI, pp 404)

- The Soviet Prosecutor, citing from official notes of V. M. Molotov, People's Commissar for Foreign Affairs in the U.S.S.R., produced evidence of widespread rape, including mass rapes in several cities and villages and forced prostitution in Smolensk by the German army:

The bestial acts of violence perpetrated against the women everywhere testify to the profound moral corruption of the criminals. I shall quote from that passage in the note which Your Honors will find on Page 4, Paragraph 4, of the document book:

Women and young girls are vilely outraged in all the occupied areas.

In the Ukrainian village of Borodayevka (...) the fascists violated every one of the women and girls.

In the village of Berezovka (...) drunken German soldiers assaulted and carried off all the women and girls between the ages of 16 and 30.

In the city of Smolensk the German Command opened a brothel for officers in one of the hotels into which hundreds of women and girls were driven; they were mercilessly dragged down the street by their arms and hair:

Everywhere the lust-maddened German gangsters break into the houses, they rape the women and girls under the very eyes of their kinfolk and children, jeer at the women they have violated, and then brutally murder their victims.

In the city of Lvov, 32 women working in a garment factory were first violated and then murdered by German storm troopers. Drunken German soldiers dragged the girls and young women of Lvov into Kesciuszko Park, where they savagely raped them. (...).

Near the town of Borissov in Bielorussia, 75 women and girls attempting to flee at the approach of the German troops, fell into their hands. The Germans first raped and then savagely murdered 36 of their number. By order of a German officer named Hummer, the soldiers marched L. I. Melchukova, a 16-year-old girl, into the forest, where they raped her. A little later some other women who had also been dragged into the forest saw some boards near the trees and the dying Melchukova nailed to the boards. The Germans had cut off her breasts in the presence of these women, among whom were V. I. Alperenko, and V. H. Bereznikova.

On retreating from the village of Borovka, in the Zvenigorod district of the Moscow region, the fascists forcibly abducted several women, tearing them away from their lithe children in spite of their protests and prayers.

In the town of Tikhvin in the Leningrad region, a 15-yearold girl named H. Koledetskaya, who had been wounded by shell splinters, was taken to a hospital (a former monastery) where there were wounded German soldiers. Despite her injuries the girl was raped by a group of German soldiers and died as a result of the assault."

(IMT Docs, Vol VII, pp 455; see also pp 454-456)

- Witness Claude Vaillant-Couturier, member of the French Résistance, imprisoned in Auschwitz and Ravensbrück mentioned forced abortions and sterilization on Jewish women in her testimony, as well as brothels in both camps:

"At Auschwitz there was a brothel for the SS and also one for the male internees of the staff, who were called "Kapo." Moreover, when the SS needed servants, they came accompanied by the Oberaufseherin, that is, the woman commandant of the camp, to make a choice during the process of disinfection. They would point to a young girl, whom the Oberaufseherin would take out of the ranks. They would look her over and make jokes about her physique; and if she was pretty and they liked her, they would hire her as a maid with the consent of the Oberaufseherin, who would tell her that she was to obey them absolutely no matter what they asked of her." (IMT Docs, Vol. VI, p 213)

There were no female judges or prosecutors at the Nuremberg Tribunal.

## II. Control Council Law No 10 (1945-1950)

From 1945 until 1948 the Allied Control Council (composed of the Four Powers – United States, United Kingdom, Soviet Union and France) using its governmental powers issued several laws for Germany.

Control Council Law No 10 dealt with the prosecution of Crimes against Peace, War crimes and Crimes against Humanity. Art. 2 included rape in the list of acts constituting Crimes against Humanity:

Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, **rape**, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

Under Control Council Law 10 a total of 501 trials took place against 1,856 accused in the three Western Occupation Zones. To date, there is no gender-specific analysis of those trials.

### III. Follow-up Trials in Western Germany (1950-2007)

Since 1950 German courts in the Federal Republic of Germany (West Germany) received full jurisdiction over crimes committed under the NS regime. Until 1952 5,678 accused were sentenced. Then number of trials decreased from 44 in 1954 to 20 in 1956, and to a handful afterwards.

The most prominent trials were:

- 1950/51: trial against Ilse Koch, wife of the commander of Buchenwald concentration camp: She received life sentence on appeal for instigating murder and ill-treatment of prisoners
- 1957: trial against chief of police in Memel and 10 members of Special Task Force troops. They were sentenced from 3 – 15 years for murder and aiding and abetting to murder in 4000 cases.
- 1963-65; 1. Auschwitz trial against 20 SS-members for mass murder in Auschwitz concentration camp. They were sentenced from 10 years to life.
- 1965/66, 2. Auschwitz trial against 3 SS-members for crimes committed in Auschwitz concentration camp. One was sentenced to life.
- 1975-81: Majdanek trial against 17 SS-members, among them 5 female guards, for mass murder and other crimes committed in Majdanek concentration Camp. Hermine Ryan, sub-commander of the women camp in Majdanek was sentenced to life, the others from 3 to 12 years, five were acquitted.

To date, there is no gender-specific analysis of these trials.

## B. War Crime Trials of WW II in the Far East

### I. The Trial against General Yamashita (1945)

A US military commission in Manila, Philippines, charged Yamashita was with commanding responsibility for mass atrocities committed by his troops against Philippine civilians, including murder and **rape**, as violations of the laws of war. He was sentenced to death.

The verdict is considered as milestone in prosecuting commanding responsibility.

### II. The International Military Tribunal for the Far East in Tokyo (1946-48):

**Rape prosecuted as “inhuman treatment”, “ill-treatment”, “Violation of the rights and honor of the family” (Hague Convention)**

The trial was held by the Allied and took place in Tokyo from May 3, 1946, until November 4, 1948.

The Tribunal had jurisdiction over

- **CRIMES AGAINST PEACE:** namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- **Conventional WAR CRIMES:** namely, violations of the laws or customs of war;
- **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Summary of rape charges in indictment:

1. **Inhumane treatment**, contrary to Article 4 of the Annex to the Hague Convention IV of 1907 and the whole of the Geneva Convention of 1029 and the said assurances. (...) and **female prisoners were raped** by members of the Japanese forces.

5. **Mistreatment** of the sick and wounded, medical personnel and female nurses:  
(c) **Female nurses were raped**, murdered and ill-treated;

12. **Failure to respect family honour and rights**, individual life, private property and religious convictions (...) Large numbers of the inhabitants of such territories were murdered, tortured, **raped** and otherwise till-treated (...). (Askin 1997)

All charges referred to the crimes committed during the occupation of the Chinese city of Nanking. According to the indictment 20,000 women and girls were raped by Japanese Soldiers.

No female victim witness was heard. The main witnesses were two male eye-witnesses: a member of a charitable society and a church minister, both prominent in rescue actions.

#### The Verdict:

Out of 28 defendants 7 were sentenced to death, 2 of them were found guilty for command responsibility for the atrocities committed in Nanking, including rape: General Iwane Matsui and Foreign Minister Koki Hirota.

The trial did not deal with any other rapes or the “comfort station system”, i.e. the systematic enslavement of over 200.000 Asian women by the Japanese Army.

All judges were male, the prosecution counsel, however, included three female assistants.

### **III. The Batavia Military Tribunal (1948)**

#### **Rape and forced prostitution prosecuted as violation of the Hague Conventions**

In 1948 a colonial Dutch court martial in Batavia, Indonesia, (today: Jakarta) charged 13 members of the Japanese Army for rape and forced prostitution of women in different sites in Semarang, Indonesia. In spring 1944, 35 Dutch women had been removed by force from various detention camps. They were kept captive and sexually enslaved in four Japanese officers' clubs in Semarang on Java. The verdict qualified these crimes as “war crimes, in defiance of the laws and customs of war”. Eleven defendants were sentenced, three of them to death.

To date the trial is the only official international criminal trial that has addressed the “comfort station system”. However, it took into account only crimes committed against Dutch women and ignored the fact that at least 100 Asian women had been forcibly recruited to the Semarang brothels as well.

The names of both accused and victims are under seal until 2025. The records of the trial were opened to the public in 1992.

#### **IV. The Women's War Crimes Tribunal for the Trial of Japan' Military Sexual Slavery (2000)**

In 2000 a network of Asian women's organizations organized a mock trial in Tokyo dealing exclusively with the "comfort station system". International lawyers and judges with high reputation from all countries concerned participated in the trial. The trial was held post mortem against ten high-ranking Japanese militaries and politicians, including Emperor Hirohito

The international Panel found in it's judgment that the evidence presented was sufficient for the conviction of the ten accused based on the international law applicable at the time when the crimes were committed. The accused were found guilty for rape and sexual slavery as crimes against humanity.

In the qualification of the crimes as "sexual slavery" rather than "forced prostitution", and based on the 1926 Slavery Convention the Panel defined sexual slavery as:

"the right of ownership over a person by exercising sexual control over a person or depriving a person of sexual autonomy. Thus, we consider that control over a person's sexuality or sexual autonomy may in and of itself constitute a power attaching to the right of ownership." (§ 620)

That control over sexuality is an indicium of slavery regardless of whether the enslavement encompasses the usage of a person as sexual property or for forced sexual labour. Otherwise, the definition of enslavement would erroneously exclude one of the most Common forms of servitude imposed upon women, sexual servitude. (§ 626)

The Judges also found that the present Japanese government is liable for the harm inflicted by the Japanese military sexual slavery system and obliged to reparations, including satisfaction, official acknowledgement, preservation of memory, judicial redress, restitution, compensation and rehabilitation.

See also Section IV, the appointment of a UN Special Rapporteur for on the Question of Systematic Rape and Sexual Slavery as a late reaction to the issue.

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## Section VI

# United Nations Ad hoc-Tribunals

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### A. The International Tribunal for the former Yugoslavia (ICTY)

The ICTY was established in 1993 pursuant Resolution 827 by the Security Council to prosecute war crimes committed on the territory of the former Yugoslavia since 1991.

#### I. The Statute

The Tribunal has jurisdiction over

- Art. 2: Grave breaches of the Geneva Conventions of 1949
- Art. 3: Violations of the laws or customs of war (Hague Conventions)
- Art. 4: Genocide
- Art. 5: Crimes against humanity
  - murder;
  - extermination;
  - enslavement;
  - deportation;
  - imprisonment;
  - torture;
  - **rape**;
  - persecutions on political, racial and religious grounds;
  - other inhumane acts

For the first time in history, rape is expressly mentioned in the statutes of an international criminal tribunal as a criminal act.

To date, rape and other forms of sexualized violence have been prosecuted successfully under Art. 5 as well as under Art. 2 and 3. For the latter it was necessary to prove that rape fulfills the same elements that constitute either torture, inhuman treatment, willfully causing great suffering or serious injury on body or health.

## II. Rules of Procedure and Evidence:

Only two Rules deal specifically with rape cases:

### Rule 96: Evidence in Cases of Sexual Assault

In cases of sexual assault:

- (i) **no corroboration** of the victim's testimony shall be required;
- (ii) **consent shall not be allowed as a defence** if the victim
  - (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
  - (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
- (iv) **prior sexual conduct of the victim shall not be admitted** in evidence.

### Rule 34: Victims and Witnesses Section

- (A) There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to:
  - (i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and
  - (ii) provide counselling and support for them, in particular in cases of rape and sexual assault.
- (B) Due consideration shall be given, in the appointment of staff, to the employment of qualified women.

### III. Rape Cases before the ICTY

#### Landmark trials before the ICTY with rape charges:

##### **1998/2001 (“Celebici”): First legal recognition for rape as a Grave Breach of the Geneva Conventions**

CASE IT/96/21, Zravko MUCIC Hazim DELIC, Esad LADZO, Zejnil DELALIC:  
Rape as torture

All four accused worked as either commander, deputy commander or guards at the Celebici prison camp established by the Bosnian Muslim and Croat Forces. While the town of Konjic was surrounded and shelled by Bosnian Serb forces by mid- April 1992 Bosnian Muslim and Croat Forces took control of the town and surrounding villages. From May to November 1992 Bosnian Serb people were detained in the Celebici camp, a former Yugoslav National Army facility in the village of Celebici. The detainees were killed, tortured, sexually assaulted, beaten and otherwise subjected to cruel and inhuman treatment. At sometime beginning around 27 May 1992 and continuing until the beginning of August 1992, Delic and others **subjected two women to repeated rapes**. On one occasion, one of them was raped in front of other persons, and on another occasion she was raped by three different persons in one night.

The Chamber found that the rapes took place in the context of interrogations, to terrorize other camp detainees and to extract information of the husband of one of the rape victims. The rapes therefore fulfilled the elements of torture and thus constituted grave breaches of the Geneva Conventions.

In 1998 (confirmed on appeal in 2001) Mucic was sentenced to nine years’ and granted early release in 2003; Delic was sentenced to 18 years to be served in Finland; and Landzo was sentenced to 15 years to be served in Finland. Delalic was acquitted on all counts.

##### **1998/2000 (“Furundzija”): First conviction for rape as War Crime in violation of the Hague Conventions**

Case IT/95/17/1, Anto FURUNDZIJA: Rape as Torture and Outrage upon personal dignity

Furundzija was a local commander of the “Jokers”, a unit of the Croatian Defence Council (HVO) in Vitez municipality, central Bosnia and Herzegovina. Between 15 May 1993 and an unknown date in July 1993, a Bosniak woman was arrested and later confined in a house called “the bungalow”.

During the arrest she was interrogated by Furundzija and **raped in front of him** by Miroslav Bralo (see below) and by other members of the "Jokers" while her male friend was forced to watch.

The Chamber recognized the rape as an act of torture and outrage upon personal dignity constituting war crimes. In 1998 Furundzija was sentenced as co-perpetrator and aider and abettor to 10 years' imprisonment to be served in Finland. The sentence was confirmed 2000 in appeal. 2004 Furundzija was granted early release.

### **1999/2002 ("Foca"): First conviction for rape and enslavement as Crime against Humanity**

Case IT/96-23 and 23/1: Dragoljub KUNARC, Radomir KOVAC, Zoran VUKOVIC: Rape and Enslavement as Crimes against Humanity

The "Foca Trial" was the first and to date the only trial dealing exclusively with widespread and systematic rape during the war in Bosnia and Herzegovina. It was also the first trial to deal with sexualized violence in the context of enslavement. "Sexual slavery" or "sexual enslavement" was not a crime under the Statute of the Tribunal; the acts had to be charged separately.

The original indictment named eight accused who participated in mass rape and enslavement of Bosnian Muslim women and girls in the municipality of Foca, Eastern Bosnia. Two were killed in attempts of arrest, three were tried later (see below: Stankovic, Jankovic, Zelenovic). Kunarac was leader of a reconnaissance unit of the Bosnian Serb Army at the time, Kovac and Vukovic were sub-commanders of the military police in Foca. All three had participated in the attack on the non-Serb population in the area.

Vukovic was charged with the rape of a 15-year old girl. Both Kovac and Kunarac were charged with rapes of several women and girls, in particular with continued rape of two women they claimed ownership over and held detained for the purpose of rape. Kunarac was sentenced to 28 years to be served in Germany, Kovac to 20 years to be served in Norway, and Vukovic to 12 years to be served in Norway. All three sentences were confirmed in appeal 2002.

### **Other trials before the ICTY with specific rape charges:**

Case I/96-23/2, ("Foca"), Dragan ZELENOVIC: Rape as Crime against Humanity

Zelenovic was a Bosnian Serb soldier and military policeman, and one of the "Foca Eight" indicted together with Kunarac et al. He was arrested in 2005

and accused of personally raping and gang-raping several Muslim women and girls held in detention sites in the Foca municipality.

Plea agreement: In December 2006 Zelenovic pleaded guilty in seven counts of the indictment, i.e. in personally raping two women and in co-perpetrating in their rapes by others as torture and rape as crimes against humanity. He was sentenced to 15 years' imprisonment.

#### CASE IT/95/12, Ivica RAJIC: Rape as grave breach of Geneva Convention

Ivica Rajic was commander of units of the Croatian Defence Council (HVO) in Bosnia and Herzegovina. He was charged among others with wilful killing, inhumane treatment, and extensive destruction as grave breaches of the Geneva Convention.

On the morning of 23 October 1993, HVO forces under Rajic's command attacked the village of Stupni Do. After gaining control of various parts of the village, HVO soldiers forced the civilians out of their homes and hiding places, robbed them of their valuables and **sexually assaulted several Bosniak women** and wilfully killed at least thirty-one men, women and children. During and following the attack, almost the entire village was extensively and wantonly destroyed.

In plea agreement Rajic pleaded guilty to four out of 10 charges, including sexual assaults, and gave a statement of apology. On 8 May 2006, he was sentenced to 12 years' imprisonment to be served in Spain.

#### CASE IT/95/17, Miroslav BRALO: Rape as grave breach of Geneva Conventions and violation of the laws and customs of war

Bralo was a member of the "Jokers", a unit of the Croatian Defence Council (HVO) in Vitez municipality, central Bosnia and Herzegovina. He was indicted among others with murder in several cases, and with **imprisonment, rape and torture** of a Bosnian Muslim woman.

Plea agreement: Bralo pleaded guilty to all charges and gave a statement of apology. On 7 December 2005, he was sentenced to 20 years' imprisonment, confirmed in appeal on 2 April 2007.

#### Case IT/94/2, Dragan NIKOLIC: Rape as crime against humanity

Nikolic was commander of the Susica detention camp in Vlasenica. The indictment considers that from early June until about 15 September 1992 many female detainees at Susica camp were subjected to sexual assaults, including rapes and degrading physical and verbal abuse. The **sexual assaults were committed by camp guards, special forces, local soldiers and**

**other men** who were allowed to enter the camp frequently to take women out of the hangar at night. When the women returned, they were often in a traumatized state and other detainees observed that the women were distraught. He was sentenced to 23 years, on appeal 2005 to 20 years.

CASE IT/97/24 (“Prijedor”), Milomir STAKIC: Rape as persecution

M. Stakic, as President of the Prijedor Crisis Staff and head of the Prijedor Municipal Council for National Defence instigated the military attacks which began in May 1992 in the Prijedor Municipality, inhabited principally by Bosniak and Bosnian Croats. The indictment charged him with genocide, including being a co-perpetrator in rape. As leading political figure in the Prijedor municipality he was also responsible for the Omarska, Keraterm, and Trnopolje prisoner camps. In all three Bosnian Muslim and Bosnian Croat people were mistreated, tortured and murdered. Rapes and sexual assaults occurred there as well on a daily basis. In many instances, women and girls were taken from the camp and were raped, tortured, or sexually abused at other locations.

Stakic was acquitted of genocide but sentenced to 40 years for persecution and extermination as crimes against humanity and war crimes.

CASE IT/98/30/1 (“Omarska & Keraterm”), Miroslav KVOCKA, Draguljub PRCAC, Milojka KOS, Mlado RADIC and Zoran ZIGIC: Rape as a crime against humanity

Kvocka, Prcac, Kos, Radic and Zigic held positions of responsibility at the prisoner camps of Omarska, Keraterm and Trnopolje. All were held responsible for persecution, murder and torture, Radic in particular for rape and sexual intimidation.

Kvocka was sentenced to 7 years, Prcac to 5 years, Kos to 6 years, Radic to 20 years and Zigic to 25 years' imprisonment. Prcac and Kos have served their sentences.

CASE IT99/36, (“Krajina”), Radoslav BRDJANIN: Rape as a crime against humanity

Radoslav Brdanin was President of the Krajina Crisis Staff and indicted with genocide. He was accused of genocide, i.e. of planning and ordering a campaign designed to destroy Bosnian Muslims and Croats in whole or in part, as national, ethnical, racial, or religious groups, including sexual assaults, rape, brutal beatings, and other forms of severe maltreatment in 13 differ-

ent municipalities. The rapes occurred during attacks on non-Serb towns or villages and in camps and other detention sites.

The Trial Chamber acquitted Brdjanin of genocide but sentenced him to 32 years for crimes against humanity, violations of the Hague Conventions and grave breaches of the Geneva Conventions. Upon appeal in 2004 the sentence was reduced to 30 years.

Case IT-05-87) (“Kosovo”), Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC, Nebojsa PAVKOVIC, Vladimir LAZAREVIC, Sreten Lukic: Rape as persecution and crime against humanity

Milutinovic (President of Serbia), Sainovic (Deputy Prime Minister of the FR Yugoslavia), Ojdanic (Chief of General Staff of the Yugoslav Army), Pavkovic (Commander of the 3<sup>rd</sup> Army), Lazarevic (Chief of Staff of the Pristina Corps) und Lukic (Head of Serbian Ministry of Internal Affairs) are accused of forming a joint criminal enterprise to modify the ethnic balance in Kosovo and to ensure continued Serbian control over the province. It is alleged that forces of the FR Yugoslavia and Serbia, in a deliberate and widespread or systematic manner, forcibly expelled and internally displaced hundreds of thousands of Kosovo Albanians from their homes across the entire province of Kosovo. In the course of this many rapes and sexual assaults took place.

The Trial Chamber Judgement is scheduled to be rendered on 26 February 2009.

Case IT-04-84, (“Kosovo”): Ramush HARADINAJ, Idriz BALAJ, Lahi BRAHIMAJ: Rape as a crime against humanity and a violation of the laws and customs of war

Haradinaj was one of the senior leaders of the Kosovo Liberation Army (KLA), Brahimaj was a deputy commander and Balaj a member of the KLA and commander of the special unit “Black Eagles”. The indictment charges them as co-perpetrators in a joint criminal enterprise to ensure total control of the KLA over the operational zone of Dukagijn by the unlawful removal and mistreatment of Serb civilians and of Kosovar Albanians, Kosovar Roma/Egyptian civilians and other civilians, who were perceived as collaborators with Serbian Forces. All three are charged with **rape as persecution** (crimes against humanity) and **rape as violation of the laws or customs of war**. However, only Balaj was accused of having personally raped one Roma woman.

On 3 April 2008 the Trial Chamber found Haradinaj and Balaj not guilty and sentenced Brahimaj to 6 years of prison for cruel treatment of two male victims. He, too, was acquitted of rape.

CASE IT/04/83, (“Kamenica Camp”) RASIM DELIC: Rape as Violation of the laws and customs of war

R. Delic was Commander of the Main Staff of the Army of Bosnia and Herzegovina and subsequently responsible for the Kamenica Camp run by the “El Mujahed” Detachment. According to the indictment three women from Vozuca were subjected to rape and cruel treatment in Kamenica Camp.

On 15 September 2008 the Trial Chamber sentenced Delic to 3 years of prison but acquitted him of all rape charges.

Case IT-04-74 (“Herceg-Bosna”), Jadranko PRLIC, Bruno STOJIC, Slobodan PRALJAK, Milivoj PETKOVIC, Valentin CORIC, Berislav PUSIC

Prlic (highest political official in the Croatian wartime entity “Herceg-Bosna”), Stojic (Head of Department of Defence of the Croatian Defence Council (HVO), Praljak (Senior Croatian Army officer), Petkovic (Military head of Herceg-Bosna/HVO forces), Coric (Deputy for Security and Commander of the HVO Military Police), and Pusic (HVO liaison officer to UNPROFOR) are accused of forming a joint criminal enterprise to politically and military subjugate, permanently remove and ethnically cleanse Bosnian Muslims and other non-Croats living in the territory of “Herceg-Bosna”. In the course of this widespread killing, inhuman treatment, unlawful deportations, destructions of villages and towns took place as well as systematic rapes and sexual assaults. All three are charged with persecution, including rape, as crimes against humanity.

The trial commenced 26 April 2006 and is ongoing.

### **Convictions for male sexual assault:**

Case IT 94/1, (“Prijedor”), Dusko TADIC: First conviction for male sexual assault

The indictment accused the above persons of participating in the attack, destruction and plunder of Bosniak and Croat residential areas in Prijedor and Korac, the deportation and guard of camps located in Omarska, Keraterm and Trnopolje, between May 1992 and 31 December 1992. Inside and outside the camps a campaign of terror included **sexual assaults against women and men**. In one case a male prisoner was forced to lick the bottom and suck the penis of another male prisoner and to bite of his testicles.

The Prosecutor dropped the charges concerning the rape of one woman when the main witness withdrew her testimony. The charge with sexual assault on one man resulted in first conviction for male sexual assault under international law.

It was the only case to date for a witness to receive full anonymity: the male victim of sexual assault.

On 26 January 2000, Tadic was sentenced to twenty years' imprisonment.

#### Case IT/95/9/1-S, ("Bosanski Samac"), Stevan TODOROVIC: Male sexual assault

From April 1992 until December 1993 Todorovic was chief of police and member of the Serb crisis staff in Bosanski Samac in north-eastern Bosnia and Herzegovina. He was indicted for beating men in the police station, ordering torture, and of **ordering six men to perform fellatio on each other**.

In plea agreement he pleaded guilty on all charges. He was sentenced to 10 years, received early release in 2005, and died in 2006.

#### CASE IT/95/10/1, ("Brcko"), Ranko CESIC: Male sexual assault

Ranko Cesis was a member of the Bosnian Serb Territorial Defence in the municipality of Brcko in north-eastern Bosnia and Herzegovina. He was indicted with murder and "rape which includes other forms of sexual assault" as Crimes against humanity. On around 11 May 1992, at Luka camp, R. Cesis forced, at gunpoint, two brothers to beat each other and **perform sexual acts on each other** in the presence of others.

Plea agreement: Cesis pleaded guilty to all counts and agreed to testify in other proceedings before the Tribunal. On 11 March 2004 he was sentenced to 18 years imprisonment to be served in Denmark.

#### Case IT-98-33, ("Srebrenica"), Radilav Krstic: Rape in context of genocide

Krstic was Chief-of-Staff and Deputy Commander of the Bosnian Serb Army Drina Corps and played a leading role in the attack on Srebrenica. While most male prisoners were later killed women and children were first detained in Potocari, a nearby settlement of Srebrenica, and then deported. In Potocari they were subjected to rapes, sexual assaults and other mistreatments. The Trial Chamber found Krstic guilty of genocide, including rapes as cruel and inhuman treatment, and sentenced Krstic in 2001 to 46 years. However, the Appeal Chamber revised the judgement in 2004 and acquitted Krstic of genocide as a principal perpetrator, but found him guilty as aider and abettor to genocide.

## Cases with rape charges enumerated:

### Case IT/95/13, (“Vukovar”), Mile MRKSIC, Miroslav RADIC, Veselin SLJIVAN-CANIN

All three participated as members of the Yugoslav People’s Army in the removal of about 400 non-Serbs from the Vukovar Hospital after the three-month siege of the town in 1991. The detainees were eventually transferred to a farm where at least 264 were killed. According to the indictment at least one female detainee was sexually assaulted. The three pleaded “not guilty” to all counts.

On 27 September 2007 Mrksic was sentenced to 20 years, Slivancanin to 5 years of imprisonment, and Radic was acquitted. All sexual assault allegations were dismissed because of lack of evidence.

### Case IT02/65/1, (“Omarska & Keraterm”), Predrag BANOVIC

Banovic was a guard at the Keraterm camp and along with Meakic et al (see below) accused of persecution, murder, and ill-treatment of prisoners, including sexual assaults. Banovic pleaded guilty to count 1, persecution and was sentenced to 8 years to be served in France.

### Radovan KARADZIC

Karadzic was the leading head of all Bosnian Serb organisations. He became President of the so-called Serbian Republic of BiH in March 1992. From 17 December 1992 he was sole President of the Republika Srpska and Supreme Commander of the armed forces. Until July 1996 he was President of the SDS. He was arrested in July 2008 and charged with Genocide, Crimes Against Humanity and War Crimes. Rape and sexual assault charges are enumerated under Genocide and Persecution. As of February 2009 the trial has not commenced.

Several other high-ranking politicians and military were accused and sentenced for participating in a joint criminal enterprise and for being responsible for the acts or omissions of subordinates, including rapes and sexual abuse:

Biljana PLAVCIC, member of the collective Presidency of Bosnia and Herzegovina, of the Presidency of the Serbian Republic and the Supreme Command of the armed forces of the Serbian Republic. She pleaded guilty and was sentenced in 2003 to 11 years of imprisonment to be served in Sweden.

Momcilo KRAIJSNIK, member of the National Security Council, the Expanded Presidency of the “Serbian Republic of Bosnia and Herzegovina”, the Main Board of the Serbian Democratic Party and President of the Bosnian Serb Assembly. He was sentenced in 2006 to 27 years’ imprisonment. Appeal judgement is scheduled for March 2009.

Mico STANISIC, Serbian Minister of Internal Affairs in Bosnia and Herzegovina, and Stojan Zupljanin, Chief of the Regional Security Services Centre in Banja Luka. Main trial is pending.

Vojislav SESELJ, President of the Serbian Radical Party of Serbia and Montenegro. Main trial is pending.

Ratko MLADIC was from May 1992 onward appointed Commander of the Main Staff of the Bosnian Serb Army; charged with genocide and still at large.

### **Rape charges dropped:**

Case IT/95/8, Dusko SIKIRICA, Damir DOSEN, Dragan KOLUNDZIJA: Rape as persecution

The above persons participated in the persecution of Bosniak, Bosnian Croats and other non-Serbs in the Prijedor area, and specifically in the Keraterm camp. Many of the women detained at the Trnopolje camp were raped, sexually assaulted, or otherwise tortured by camp personnel, who were both police and military personnel, and by others, including military units from the area who came to the camp for that specific purpose. In many instances, **the women and girls were taken from the camp and raped, tortured, or sexually abused** at other locations. The charges included **forced fellatio** on one case.

In plea agreement all specific rape charges were dropped. Sikirica was sentenced to 15 years, Dosen to 5 years, Kolundzija to 3 years, and Pregrag Banovic to 8 years.

### **Cases referred to the State Court of Bosnia and Herzegovina**

Pursuant to Rule 11*bis* of the Tribunal’s Rules of Procedure and Evidence the Referral Bench has to refer a case to the State Court of Bosnia and Herzegovina unless the level of responsibility of the accused or the gravity of the crimes alleged in the indictment would make a referral to national authorities inappropriate. The first referral cases focused or dealt with rape charges:

Case I/96-23/2, (“Foca”), Radovan STANKOVIC, Gojko JANKOVIC: Rape and Enslavement as Crimes against Humanity

Jankovic and Stankovic belong to the “Foca Eight” of the Kunarac et al indictment (see above). Jankovic was sub-commander of military police and one of the main Bosnian Serb paramilitary leaders in Foca. Stankovic was a member of a Bosnian Serb paramilitary unit in Foca. Both were accused of personally raping and gang-raping several Bosnian Muslim women and girls held in detention in Foca. Stankovic had been in charge of a house in which women and girls were constantly raped for months by many different soldiers. In addition, he was charged with enslavement

In 2006, both cases were referred to the State Court of Bosnia and Herzegovina. On 16 February 2007 Jankovic was sentenced to 34 years, on 28 March 2007 Stankovic was sentenced on appeal to 20 years.

Case IT/95/4, (“Omarska”), Zeljko MEAKIC, Momcilo GRUBAN, Dusko KNEZEVIC: Sexual assaults as Crimes against Humanity

Following the indictment, from about 25 May to about 30 August 1992, more than 3,000 Bosniak and Bosnian Croats from the municipality of Prijedor were taken, in inhumane conditions, under armed guard, to the Omarska camp, located in a former mining complex approximately fifteen kilometres from the town of Prijedor. **Female and male prisoners were beaten, tortured, raped, sexually assaulted, and humiliated.** In addition to regular beatings and abuse, there were incidents of multiple killings and special terror. Many, whose identities are known and unknown, did not survive the camp. The case was transferred to the Court of Bosnia and Herzegovina last 9 May 2006.

2007 the case was referred to the War Crime Chamber of the State Court of Bosnia and Herzegovina.

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Sources:

ICTY cases: <http://www.un.org/icty/cases-e/index-e.htm>

Rules of Procedure and Evidence: [www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev39e.pdf](http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev39e.pdf)

Statute of the ICTY: <http://www.un.org/icty/legaldoc-e/index.htm>

State Court of Bosnia and Herzegovina: <http://www.sudbih.gov.ba/?jezik=e>

## B. International Tribunal for Rwanda (ICTR)

The ICTY was established in 1994 pursuant Security Council Resolution 955 to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States between 1 January and 31 December 1994.

### I. The Statute

The Tribunal has jurisdiction over

- Art. 2: Genocide

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

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group

- Art. 3: Crimes against humanity

- murder;
- extermination;
- enslavement;
- deportation;
- imprisonment;
- torture;
- **rape**;
- persecutions on political, racial and religious grounds;
- other inhumane acts

- Art. 4: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

- violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- collective punishments;
- taking of hostages;
- acts of terrorism;
- outrages upon personal dignity, in particular humiliating and degrading treatment, **rape, enforced prostitution and any form of indecent assault**;
- pillage;
- the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
- threats to commit any of the foregoing acts.

## II. Rules of Procedure and Evidence

The ICTR adopted the same rules on sexualized violence cases as the ICTY with only slight changes:

### Rule 96: Evidence in Cases of Sexual Assault

In cases of sexual assault:

- (i) Notwithstanding Rule 90 (C), **no corroboration** of the victim's testimony shall be required;
- (ii) **consent shall not be allowed as a defence** if the victim
  - (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
  - (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
- (iv) **prior sexual conduct of the victim shall not be admitted** in evidence.

### Rule 34: Victims and Witnesses Section

- (A) There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to:
  - (i) recommend the adoption of protective measures for victims and witnesses in accordance with Article 21 of the Statute;
  - (ii) ensure that they receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault;
  - (iii) develop short term and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family
- (B). A gender sensitive approach to victims and witnesses protective and support measures should be adopted and due consideration given, in the appointment of staff within this Unit, to the employment of qualified women

### III. Rape Cases before the ICTR

(as of 2004)

#### Landmark trials before the ICTR with rape charges:

##### **1998/2001(“Akayesu”): Rape as instrument of Genocide**

ICTR-96-4-T Jean-Paul AKAYESU: Rape in Genocide

Akayesu was the bourgmestre (mayor) of Taby commune. He was charged with genocide, crimes against humanity, and war crimes for the murder, extermination, torture, and cruel treatment committed throughout Taba. The original Indictment did not contain and rape charges.

During trial, two witnesses spontaneously testified about rape and gang rape by Interahamwe soldiers. The indictment was amended with rape charges as crimes against humanity and war crimes, and a reference to these acts was added to the genocide counts.

The Trial Chamber found that rape and sexual violence

“constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. (...) In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, (...). These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.” (§ 731)

Akayesu was sentenced to life imprisonment, confirmed by the Appeals Chamber in 2001.

##### **Further Rape Cases before the ICTR**

ICTR-97-20, Laurent SEMANZA: Rape as a crime against humanity

Semanza was Bourgmestre (mayor) of Bicumbi commune for over 20 years. He was accused of organizing and executing several massacres in different places. He was also accused of instigating, ordering and encouraging others to rape Tutsi women before they kill them.

In 2003, Semanza was sentenced to 25 years for genocide and for rape as a crime against humanity. The Appeal Chamber increased the sentence by 10 years for ordering the murder, torture and rape of Tutsi civilians in 2004.

ICTR-20012-64-T, Sylvestre GACUMBITSI: Rape as a crime against humanity

Gacumbitsi was Bourgmestre (mayor) in Rusumo commune and a member of the ruling party prior to the genocide. He played a major role in panning the genocide at a local level: participating in meetings with military leaders, distributing weapons, inciting the population to kill Tutsis and to rape Tutsi women.

The Trial Chamber found him guilty of genocide and of rape as a crime against humanity and sentenced him in 2004 for 30 years' imprisonment.

### **Acquittals for Rape:**

ICRT-96-13, Alfred MUSEMA: Rape as part of Genocide and crime against humanity.

In 1994, Musema was the Director of a Tea Factory in Kibuye Prefecture. He was charged with killing, raping Tutsi women and ordering the rape of Tutsi women in different areas as acts of Genocide. The Trial Chamber found

that on the basis of the evidence presented, it emerges that acts of serious bodily and mental harm, including rape and other forms of sexual violence were often accompanied by humiliating utterances, which clearly indicated that the intention underlying each specific act was to destroy the Tutsi group as a whole. The Chamber notes, for example, that during the rape of Nyiramusugi Musema declared: "The pride of the Tutsis will end today". In this context, the acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such. Witness N testified before the Chamber that Nyiramusugi, who was left for dead by those who raped her, had indeed been killed in a way. Indeed, the Witness specified that "what they did to her is worse than death".

Therefore, the Chamber is satisfied beyond a reasonable doubt that at the time of commission of the above-mentioned acts, which the Chamber considers to have been established, Musema had the intent to destroy the Tutsi ethnic group as such. (933f)

Musema was sentenced to life imprisonment. In 2001 the Appeals Chamber confirmed the genocide verdict but rejected Musema's conviction for rape as a crime against humanity "in the light of additional evidence admitted into the record".

ICTR-98-44A-T, Juvenal KAJELIJELI: Rape as a crime against humanity

Kajelijeli was Bourgmestre (major) of Mukingo commune. He was accused to have commanded, organized supervised and participated in the attacks where Tutsi men, women and children were abducted, raped and massacred

in their residences or at their places of shelter within the Mukingo commune. For these acts he was charged with Genocide and crimes against humanity. The Trial Chamber sentenced Kajelijeli for genocide but acquitted him for rape as a crime against humanity by majority with one (female) judge dissenting. The Prosecutor's appeal was filed too late and dismissed.

#### ICTR-96-14, Eliezer NIYITEGEKA: Rape as a crime against humanity

Niyitegeka, former Minister of Information of Rwanda's Interim Government in 1994, and member of the Mouvement Démocratique Républicain (MDR) political party played a major role in murder and extermination of Tutsi citizens in the Kibuye prefecture. He led several attacks against Tutsi refugees. The Trial Chamber found him guilty of genocide but acquitted him for rape as a crime against humanity. The rape charges were based on one incident of rape and the Chamber found the evidence in that case insufficient.

Niyitegeka was sentenced to life in 2003, confirmed on appeal in 2004.

#### ICTR-99-54, Jean de Dieu KAMUHANDA: Rape as a crime against humanity

Kamuhanda was a high-ranking member of Mouvement Révolutionnaire National pour le Développement (MRND) political party in Kigali-rural Prefecture. He played a major part in instigating and ordering Interahamwe militias, soldiers and policemen to kill Tutsis and to rape Tutsi women before killing them.

In 2004 the Trial Chamber sentenced him to life for genocide but acquitted him for rape as a crime against humanity because of insufficient evidence. The Appeals Chamber confirmed the judgement in 2005.

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#### Sources:

##### Overview:

Binaifer Nowrojee: "Your Justice is Too Slow". Will the ICTR Fail Rwanda's Rape Victims? [www.unrisd.org/publications/opgp10](http://www.unrisd.org/publications/opgp10)

ICTR Statute: <http://69.94.11.53/ENGLISH/basicdocs/statute.html>

ICTR Rules of Procedure: <http://69.94.11.53/ENGLISH/rules/060702/060702.pdf>

ICTR Judgements: <http://69.94.11.53/default.htm>

# Section VII

## The International Criminal Court

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### A. Basic Facts on the ICC

#### Chronology

June 1989	Trinidad and Tobago resurrects plans for an ICC to combat drug trafficking
1994	UN General Assembly establishes ad hoc committee to draft an ICC statute
1995	UN GA establishes a Preparatory Committee to finalize the draft statute
<b>17 July 1998</b>	Adoption of the Rome Statute of the ICC by 120 State Parties
1998 – 2000	Negotiations of Preparatory Committee on Elements of Crimes, Rules of Procedure and Evidence, [Crime of Aggression unresolved]
<b>01 July 2000</b>	Establishment of the ICC; Rome Statute enters into force with its ratification of the requisite 60 states
07 February 2003	Election of 18 judges (11 male, 7 female, serving 3, 6 and 9 years) by the Assembly of State Parties (ASP)
16 June 2003	Election of the Chief Prosecutor by the ASP
24 June 2003	Appointment of the Registrar
26 January 2006	Election of 3-year-term judges: now 8 female, 10 male in total
10 April 2006	The ICC and the EU conclude a cooperation and assistance agreement
25 Jan.-1 Feb. 2007	5 <sup>th</sup> session of Assembly of States Parties discussed Crime of Aggression

## State Parties

As of February 2009:

139 Signatories, 107 Ratifications

62 signatures and 58 ratifications on Agreement on Privileges and Immunities (for ICC staff)

## Opponents

Chief opponent:	USA
06 May 2002	US government withdraws signature under the ICC treaty
12 June 2002	UN Security Council Resolution 1422 grants immunity from ICC jurisdiction for UN peacekeepers; renewed as Res. 1487 in June 2003. In 2004 US efforts to renew resolution failed.
02 August 2002	American Servicemember's Protection Act becomes binding national law (authorization of use of military to free US citizen held by the ICC; restriction of US participation in UN peacekeeping unless immunity is guaranteed; withdrawal of military assistance to ICC State Parties – all provisions can be waived by the President)
23 June 2004	US withdraws request for renewal of SC Resolution 1487 exempting UN peacekeepers from the ICC jurisdiction
08 December 2004	US adopts amendment to Foreign Operations Appropriation Bill threatening allies to cut assistance under the Economic Support Fund (ESF) unless they have signed a BIA.
28 November 2006	President Bush waived ESF prohibitions to 14 State Parties

US Bilateral Immunity Agreements (BIA) as of December 2006:

102 Signatories (46 ICC State Parties)

54 countries refused publicly

24 State Parties lost US aid in 2005 after refusal, all regained aid after President Bush's waiver in November 2006 except Ireland, Brazil, and Venezuela

Other Non-Signatories Azerbaijan, Belarus, China, Cook Islands, Cuba, Dem. People's Rep. of Korea, Equatorial Guinea, Ethiopia, India, Irak, Israel, Kazakhstan, Kiribati, Lebanon, Lybia, Mauritania, Micronesia, Nicaragua, Niue, Pakistan, Palau, Papua New Guinea, Rwanda, Saudi Arabia, Somalia, Swasiland, Suriname, Togo, Tonga, Tunesia, Turkey, Turkmenistan, Tuvala, Qatar, Vanuatu, Viet Nam

## B. Jurisdiction

### a) What?

- Genocide
- Crimes Against Humanity
- War Crimes
- [Crime of Aggression] not yet!

### b) Since when?

- Crimes committed since 1 July 2000

### c) Where and Who?

- Crimes committed on territory of State Parties
- Alleged perpetrator is Citizen of State Parties (not victim!)
- Referral by Non-State-Parties in specific cases
- Referral by the UN Security Council (no limits)

### d) Limitations

- Principle of complementarity (national prosecution has priority: Prosecutor can only act on his own initiative if state in question is neither able nor willing to prosecute)
- No jurisdiction over citizens of Non-State-Parties unless the later committed crimes on territory of State-Parties

## C. Situations before the International Criminal Court

(as of September 2007)

### Communications to the OTP (2003-2006)

- 1918 from 107 countries (63 % from Germany, France, USA) on crimes in 153 countries
- 80 % dismissed as outside the jurisdiction of the court
- 10 situations were subjected to intensive analysis:
  - 2 cases (Irak, Venezuela) dismissed
  - 3 cases in Pre-trial stage (DR Congo, Uganda, Sudan)
  - 5 cases remain under analysis (among them Ivory Coast and Colombia)

### Referrals

	referred	by	investigation opened
DR Congo	19.04.2004	state	23 June 2004
North. Uganda	29.01.2004	state	29 July 2004
Centr. Afr. Republic	06.01.2005	state	22 May 2007
Sudan	31.03.2005	UN SC	6 June 2005

# Indictments, Arrest Warrants & Trials

As of January 2009

## I. Democratic Republic of Congo

### The Prosecutor vs. Thomas Lubanga Dyilo: (Case ICC 01/04-01/06)

Lubanga is the alleged founder of the Union des Patriotes Congolais (UPC) and the Forces patriotiques pour la liberation du Congo (FPLC), the alleged Commander-in-Chief of the FPLC and the alleged President of the UPC.

**Current Status:** on trial

#### Counts:

Lubanga is charged with War Crimes as co-perpetrator for:

- Enlisting and conscripting of children under the age of 15 years into the Forces patriotiques pour la libération du Congo [Patriotic Forces for the Liberation of Congo] (FPLC) and using them to participate actively in hostilities in the context of an international armed conflict from early September 2002 to 2 June 2003 (punishable under article 8(2)(b)(xxvi) of the Rome Statute);
- Enlisting and conscripting children under the age of 15 years into the FPLC and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 2 June 2003 to 13 August 2003 (punishable under article 8(2)(e)(vii) of the Rome Statute).

The indictment contains **no rape charges**.

For the first time in history **victims participate** through legal representatives in proceedings.

#### Chronology:

Warrant of arrest issued under seal	10 February 2006
Unsealed	17 March 2006
Transferred to The Hague	17 March 2006
Confirmation of charges	20 January 2007
Commencement of Trial	26 January 2009

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**The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (Case ICC-01/04-01/07)**

**Germain Katanga**, also known as "Simba" is the alleged commander of the Force de résistance patriotique en Ituri (FRPI). **Mathieu Ngudjolo Chui** is the alleged former leader of the Front des nationalistes et intégrationnistes (FNI).

**Current status:** pre-trial

**Counts:**

Germain **KATANGA** and Mathieu **NGUDJOLO CHUI** jointly committed through other persons, within the meaning of article 25(3)(a) of the Statute:

**War crimes:**

- a. using children under the age of fifteen to take active part in the hostilities, under article 8(2)(b)(xxvi) of the Statute;
- b. directing an attack against a civilian population as such or against individual civilians not taking direct part in hostilities under article 8(2)(b)(i) of the Statute;
- c. wilful killings under article 8(2)(a)(i) of the Statute;
- d. destruction of property under article 8(2)(b)(xiii) of the Statute;
- e. pillaging under article 8(2)(b)(xvi) of the Statute;
- f. **sexual slavery and rape** under article 8(2)(b)(xxii) of the Statute.

**Crimes against Humanity:**

- a. murder under article 7(1)(a) of the Statute;
- b. rape and sexual slavery under article 7(1)(g) of the Statute

**Chronology:**

**Germain KATANGA**

Warrant of arrest issued under seal	2 July 2007
Unsealed	18 October 2007
Transferral to The Hague	17 October 2007
Confirmation of indictment	26 September 2008

**Mathieu NGUDJOLO CHUI**

Warrant of arrest issued under seal	6 July 2007
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Unsealed  
Transferral to The Hague  
Confirmation of charges

7 February 2008  
7 February 2008  
26 September 2008

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**Case: The Prosecutor v. Bosco Ntaganda (ICC-01/04-02/06)**

**Bosco Ntaganda**, also known as “the Terminator”, is alleged Deputy Chief of the General Staff of the Forces Patriotiques pour la Libération du Congo (FPLC) and alleged Chief of Staff of the Congrès national pour la défense du peuple (CNDP) armed group, active in North Kivu in the DRC.

Alleged to have committed war crimes of enlistment and conscription of children under the age of 15 and of using them to participate actively in hostilities in Ituri from July 2002 until December 2003.

**Current status:** at large, arrest warrant issued

**Chronology:**

Warrant of arrest issued under seal	22 August 2006
Unsealed	28 April 2008

## II. Northern Uganda

**The Prosecutor vs. Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen (Case ICC 02/04-01/05)**

**Current status:** all at large, arrest warrant issued

**Joseph Kony** is alleged Chairman and Commander-in-Chief of the Lord's Resistance Army (LRA). He is charged in 12 counts for crimes against humanity and in 21 counts for war crimes, including **rape** (2 counts), murder, enslavement, **sexual enslavement** (1 count), forced enlisting of children.

**Vincent Otti** is alleged Vice-Chairman and 2<sup>nd</sup> in Command of the LRA. He is named in 11 counts for crimes against humanity and in 21 counts for war crimes, including **rape** (1 count), murder, enslavement, **sexual enslavement** (1 count), forced enlisting of children.

**Okot Odhiambo** is alleged Deputy Army Commander in the LRA. He is named in 3 counts for crimes against humanity and in 7 counts for war crimes.

**Dominic Ongwen** is alleged Brigade Commander in the LRA. He is named in 3 counts for crimes against humanity and in 4 counts for war crimes.

### **Chronology:**

Warrant of arrest issued under seal 8 July 2005

Unsealed

13 October 2005

### III. Darfur/Sudan

**The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (ICC 02/05-01/07)**

**Current status:** at large, arrest warrants issued

**Ahmad Harun**, former Minister of state for the Interior of the Government of Sudan and currently Minister of State for Humanitarian Affairs, was allegedly in charge of the management of the ‘Dafur Security desk’ and thereby coordinating the different bodies of the Government (Armed Forces, Police, National Security, Intelligence Service and the Militia/Janjaweed) involved in the counter-insurgency, including attacks on several towns in 2003 and 2004.

He is charged on the basis of individual criminal responsibility in 22 counts of crimes against humanity, including **rape**, murder, persecution, forcible transfer, inhumane acts, torture, and in 22 counts of war crime, including **rape**, murder, destruction, pillaging and outrage upon personal dignity.

**Ali Kushayb** is alleged to have been one of the most senior leaders in the Militia/Janjaweed and a member of the Popular Defence Force (PDF) and as such the “mediator” between the Janjaweed and the Government of Sudan.

He is charged on the basis of individual criminal responsibility with 22 counts of crimes against humanity, including murder, deportation, imprisonment, torture, persecution and inhuman acts, and with 28 counts of war crimes including **rape**, outrage upon personal dignity, attacks against a civilian population, pillaging, and destroying of property.

#### **Chronology:**

31 March 2005	UN Security Council (SC) refers situation of Dafur to ICC pursuant Res. 1593
06 June 2005	<u>Investigation</u> opened
29 June 2005	1 <sup>st</sup> Progress Report to SC: OTP received thousands of documents and list with 51 names of persons potentially responsible. Information “suggests a <u>pervasive pattern of rape and sexual violence</u> ... including .. gang rape”
13 December 2005	2 <sup>nd</sup> Progress Report to SC identifies grave events like mass killings and <u>mass rapes “and other forms of extremely serious gender violence”</u> and selected

	incidents for further investigation. Ongoing violence, problems of witness protection and security. Hundreds of witnesses screened in 17 countries
14 June 2006	3 <sup>rd</sup> Progress Report to SC mentions <u>hundreds of rape cases registered</u> , “a number” of rape victims interviewed, expert studies commissioned. No significant crimes before Special Courts, no investigations of Committee on Rape in Darfur. All national judicial mechanisms lack witness protection; harassment is reported “particularly prevalent in the context of rape allegations”
14 December 2006	4 <sup>th</sup> Progress Report to SC
02 May 2007	ICC issued arrest warrants for Ahmad Harun and Ali Kushayb
07 June 2007	5 <sup>th</sup> Progress Report to SC in which the Prosecutor refers, among others, to the involvement of Ali Kushayb in notorious episodes in Arawala with particular brutal <u>multiple rapes</u> under his command. The Prosecutor mentions monitoring <u>current reports of rape</u> against internally displaced women.
16 June 2007	Transmission of request to execute the arrest warrants to the Government of Sudan
05 December 2007	6 <sup>th</sup> Progress Report to SC: Government of Sudan does not comply with its legal obligations to execute the warrants; announcement of two new investigations: one focusing on forced displacement of 2.5 million people, the other on attacks against African Union Peacekeepers
05 June 2008	7 <sup>th</sup> Progress Report to SC emphasizing the overall involvement of the entire Sudanese state apparatus in the alleged crimes, and comparing the deliberate attack of the Sudanese Government on the civil population with the Nazi Regime
14 July 2008	Prosecutor requests arrest warrant against President Omar Al Bashir, on charges of genocide, crimes against humanity and war crimes. Decision of Pre-Trial Chamber I to be announced on 4 March 2009.
20 November 2008	Prosecutor requests arrest warrants against several (unnamed) rebel commanders. The charges include attacks against Peacekeeper including murder.

03 December 2008

8<sup>th</sup> Progress Report reiterates all complaints against the Government of Sudan

## IV. Central African Republic (CAR)

**Case:** The Prosecutor v. Jean-Pierre Bemba Gombo (ICC-01/05 -01/08)

**Current status:** in detention in The Hague; Pre-trial

Jean-Pierre Bemba Gombo is a National of DR Congo and alleged President and Commander-in-chief of the Mouvement de libération du Congo (Movement for the Liberation of Congo) (MLC). He allegedly allied with a segment of the national armed forces of Patassé, at that time President of the CAR, during an armed conflict in the CAR from October 2002 to March 2003.

Bemba is held responsible for the crimes committed by members of MLC including **rape of women and men on a large scale**.

### Counts:

- three counts of crimes against humanity: **rape** (article 7(1)(g)), torture (article 7(1)(f)), and murder (article 7(1)(a));
- five counts of war crimes: **rape** (article 8(2)(e)(vi)), torture (article 8(2)(c)(i)), committing outrages upon personal dignity, in particular humiliating and degrading treatment (article 8(2)(c)(ii)), pillaging a town or place (article 8(2)(e)(v)), and murder (article 8(2)(c)(i)).

### Chronology:

23 May 2008	Arrest Warrant issued under seal
24 May 2008	Arrest Warrant unsealed
3 July 2008	Bemba surrenders and is transferred to the ICC
27 May 2008	ICC requests the Portugal to obtain the freeze and seizure of assets of Bemba
12 December 2008	54 victims have been granted to participate in proceedings.

## D. Definitions of gender based crimes

### I. Genocide

#### Article 6

- Killing
- Causing serious bodily or mental harm
- Deliberately inflicting conditions of life calculated to bring about physical destruction
- Imposing measures intended to prevent births
- Forcibly transferring children

Rape or any form of sexualized violence not explicitly mentioned as element.

#### Qualification for genocide:

- Perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such
- 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.

## II. Crimes Against Humanity

### Art. 7 of the Rome Statute:

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

1 (h) **Persecution** against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, **gender** as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

2 (c) "**Enslavement**" means the exercise of any or all of the **powers attaching to the right of ownership over a person** and includes the exercise of such power in the course of **trafficking** in persons, in particular women and children;

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

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

## Elements of Crime

### Article 7 (1) (g): Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, Sexual Violence

#### Rape

1. The perpetrator invaded<sup>15</sup> the body of a person by conduct resulting in **penetration, however slight, of any part** of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with **any object** or any other part of the body.
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.<sup>16</sup>
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

<sup>15</sup> The concept of “invasion” is intended to be broad enough to be **gender-neutral**.

<sup>16</sup> It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 7 (1) (g)-3, 5 and 6.

#### Sexual slavery<sup>17</sup>

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.<sup>18</sup>
2. The perpetrator caused such person or persons **to engage in one or more acts of a sexual nature**.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

<sup>17</sup> Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

<sup>18</sup> 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 Institutions 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**.

## Enforced prostitution

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 or such person's or persons' incapacity to give genuine consent.
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.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

## Forced pregnancy

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.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

## Enforced sterilization

1. The perpetrator deprived one or more persons of biological reproductive capacity.<sup>19</sup>
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.<sup>20</sup>
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

<sup>19</sup> The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

<sup>20</sup> It is understood that “genuine consent” does not include consent obtained through deception.

## Sexual violence

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

## General Definition of Crimes against Humanity in the

### a) Statute (Art. 7):

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

### b) Elements (Art. 7 Introduction):

3. "Attack directed against a civilian population" in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that "policy to commit such attack" requires that the State or organization **actively promote or encourage** such an attack against a civilian population.

### III. War Crimes - Elements

#### Art. 8 of the Rome Statute

##### International conflicts:

2 b (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

##### Non-international conflicts:

2 e (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

##### Qualification as war crime:

Conduct took place in context of and was associated with an international or non-international armed conflict

Perpetrator was aware of factual circumstances that established the existence of an armed conflict.

## E. Gender Provisions of the ICC

### I. Statute:

#### Antidiscrimination:

##### Art. 21 Applicable Law

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as **gender** as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

#### Staff with expertise for sexual and gender violence:

##### Art. 42 Office of the Prosecutor

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, **sexual and gender violence** and violence against children.

##### Art. 54 Duties and powers of the Prosecutor with respect to investigations

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, **respect the interests and personal circumstances of victims and witnesses**, including age, **gender** as defined in article 7, paragraph 3, and health, and take into account the **nature of the crime**, in particular where it involves **sexual violence, gender violence** or violence against children;

##### Art. 43 The Registry

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include **staff with expertise in trauma, including trauma related to crimes of sexual violence**.

## Protection in cases of sexual violence

### Art. 68 Protection of the victim and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the **Court shall have regard to** all relevant factors, including age, **gender** as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves **sexual or gender violence** or violence against children. **The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes.** These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an **exception** to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the **proceedings in camera** or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a **victim of sexual violence** or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counseling and assistance as referred to in article 43, paragraph 6.

## II. Rules of Procedure and Evidence

### Protection:

#### Rule 88: Special Measures

1. Upon the motion of the Prosecutor or the defense, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, (...) a Chamber may (...) order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence (...). **The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure.**
2. A Chamber may hold a hearing on a motion or a request under subrule 1, if necessary *in camera* or *ex parte*, to determine whether to order any such special measure, including but not limited to an order that **a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness.**
5. Taking into consideration that violations of the privacy of witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to **avoid any harassment** or intimidation, **paying particular attention to attacks on victims of crimes of sexual violence.**

### Evidence:

#### Rule 70: Principles of evidence in cases of sexual violence

In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
- (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

## Rule 71: Evidence of other sexual conduct

In the light of the definition and nature of the crimes within the jurisdiction of the Court, (...), a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.

## Rule 72: *In camera* procedure to consider relevance or admissibility of evidence

1. Where there is an intention to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witness as referred to in principles (a) through (d) of rule 70, notification shall be provided to the Court which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case.
2. In deciding whether the evidence (...) is relevant or admissible, a Chamber shall hear *in camera* the views of the Prosecutor, the defence, the witness and the victim or his or her legal representative, if any, and shall take into account whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause, (...).
3. Where the Chamber determines that the evidence (...) is admissible in the proceedings, the Chamber shall state on the record the specific purpose for which the evidence is admissible. (...)

# F. Gender Reality at the ICC

Source:  
 Women Initiatives for Gender Justice, Gender Charts 2005 and 2006  
 Women Initiative for Gender Justice: Advance Preliminary Report (October 2008)

	Proportion of Women		
	2005	2006	2008
Overall Staff	47%	46%	48%
Professional posts	42%	44%	48
General services	52%		

Office of the Prosecutor:			
	2005	2006	2008
Overall staff	45%	39%	42%
Chief Prosecutor	0	0	0
Heads of Division	67%	67%	67%
	2 out of 3	2 out of 3	
Executive Committee	50%	50%	50%
	2 out of 4	2 out of 4	
Head of Sections	0%	20%	21%
	0 out of 5	1 out of 5	

There is no Gender Legal Adviser on a senior position.

Chambers:			
	2005	2006	2008
Judges	39%	44%	
	7 out of 18	8 out of 18	
Overall staff	50%	48%	

**Registry:**

	<b>2005</b>	<b>2006</b>	<b>2008</b>
Registrar	0%	0%	0%
Heads of Division	0%	0%	0%
Heads of Sections:	44%	37%	47%

**List of Legal Councils**

	<b>2005</b>	<b>2006</b>	<b>2008</b>
Overall	16%	16%	19%
Western European/others	9%	15%	19%
Africa	29%	17,9%	16%
Eastern Europe	43%	43%	43%
Latinamerica/Caribik	0%	0%	0%
Asia	0%	0%	0%

# G. Victim and Witness Rights

## Participation, Protection, Reparations

### I. Definition

#### Rule 85: Definition of Victims

- (a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court
- (b) Victims may include organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

### II. Participation

#### When?

- opening of investigation of a situation
- jurisdiction
- admissibility
- pre-trial
- trial
- appeal
- reparations

#### Who?

- All victims during general investigation stage
- Victims personally and closely linked to the case of accused

#### How?

- by application (written, audio, video)
- through a legal representative
- information and notification through the Court
- make observations
- apply to question witnesses, experts, accused
- opening and closing statements

#### Limits

- no right to file motions
- no full right of legal representative

- Chamber rules on the way of participation (attendance of legal representative in court, questioning, opening and closing statements) on case by case basis
- prosecutor and defense can make observations to any form of participation, can appeal the Chamber's decision

## Statute:

### Art. 15: Prosecutor

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. **Victims may make representations to the Pre-Trial Chamber**, in accordance with the Rules of Procedure and Evidence.

### Art. 19: Challenges to the jurisdiction of the Court or the admissibility of a case

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as **victims, may also submit observations to the Court.**

### Art. 68: Protection of the victims and witnesses and their participation in the proceedings

(3) Where the **personal interests** of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims **where the Court considers it appropriate**, in accordance with the Rules of Procedure and Evidence.

## Subsection 3 of Rules of Procedures and Evidence:

### Participation of Victims in the Proceedings

#### Rule 89: Application for Participation of Victims in the Proceedings

1. In order to present their views and concerns, victims shall make written applications to the Registrar

#### Rule 102: Communications other than in writing

Where a person is unable, due to a disability or illiteracy, to make a written request, application, observation or other communication to the Court, the person may make such request, application, observation or communication in audio, video or other electronic form.

2. (...) A victim whose application has been rejected may file a new application later in the proceedings.

3. An application ... may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled.

4. Where there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision.

#### Rule 90: Legal Representatives of Victims

1. A victim shall be free to choose a legal representative.

2. Where there are a number of victims, the Chamber may (...) request the victims (...) to choose a common legal representative or representatives. (...)

3. If the victims are unable to choose a common legal representative or representatives within a time limit (...), the chamber may request the Registrar to choose one or more common legal representatives.

5. A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court **may receive** assistance from the Registry, including, as appropriate, **financial assistance**.

## Rule 91: Participation of Legal Representatives in the Proceedings

2. A legal representative of a victim shall be entitled to **attend and participate** in the proceedings in accordance with the terms of the ruling of the Chamber and any modification 2 thereof given under rules 89 and 90. This shall include participation in hearings unless (...) the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims.

3 (a) When a legal representative (...) wishes to question a witness, (...) an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.

3 (b) The Chamber shall then issue a ruling on the request (...) The Chamber may (...) put the question to the witness, expert or accused on behalf of the victim's legal representative.

## Rule 92: Notification to Victims and their Legal Representatives

1. This rule on notification to victims and their legal representatives shall apply to all proceedings before the Court, except in proceedings provided for in Part 2. [jurisdiction, admissibility, applicable law]

2. (...) the Court shall notify victims concerning the decisions of the Prosecutor not to initiate an investigation or not to prosecute (...) Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the situation or case in question. (...)

3. In order to allow victims to apply for participation in the proceedings (...) the Court shall notify victims regarding its decision to hold a hearing to confirm charges (...).

4. When a notification for participation (...) has been given, any subsequent notification (...) shall only be provided to victims or their legal representatives who may participate in the proceedings (...).

5. (...) victims or their legal representatives (...) shall (...) be notified by the Registrar in a timely manner of:

- (a) Proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision;

(b) Requests, submissions, motions and other documents relating to such requests, submissions or motions.

6. Notification as referred to in sub-rules 5 and 6 [trial participation] shall be in writing or, where written notification is not possible, in any other form as appropriate. (...)

7. For notification as referred to in sub-rule 3 [all victims] (...) the Registrar shall take necessary measures to give **adequate publicity** to the proceedings. In doing so, the Registrar may seek (...) the cooperation of relevant States Parties, and seek the assistance of intergovernmental organizations.

### III. Protection

#### Statute:

##### Art. 43 Registry

(6) The Registrar shall set up a Victims and Witnesses Unit (s. above).

##### Art. 68 Protection of the victim and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the **Court shall have regard to** all relevant factors, including age, **gender** as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves **sexual or gender violence** or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an **exception** to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the **proceedings in camera** or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a **victim of sexual violence** or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

#### Rules of Procedure and Evidence:

##### Rule 87: Protective measures

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness (...). The Chamber shall seek to obtain, whenever possible, the consent of the person in respect to whom the protective measure is sought prior to ordering the protective measure.
2. (...)

3. A Chamber may (...) hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, inter alia:
  - a. That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;
  - b. That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;
  - c. That testimony be presented by electronic or other special means, including the use of technical means enabling the alternation of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;
  - d. That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or
  - e. That a Chamber conduct part of its proceedings *in camera*.

### Rule 88: Special measures

See above, F. Gender Provisions in the Rules of Procedure and Evidence, p 70

### Rule 73: Privileged communications and information

2. (...), communications made in the context of a class of **professional or other confidential relationships** shall be regarded as privileged, and consequently not subject to disclosure, (...) if a Chamber decides in respect of that class that:

- (a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;
- (b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and
- (c) Recognition of the privilege would further the objectives of the Statute and the Rules.

3. (...) the Court shall give particular regard to recognizing as privileged those communications made in the context of the professional relationship between a person and his or her **medical doctor, psychiatrist, psychologist or counsellor**, in particular those related to or involving victims, or between a person and a member of a religious clergy; and in the latter case, the Court shall recognize as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion.

## IV. Reparations

### Statute:

#### Art. 75: Reparation to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, (...) the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including **restitution, compensation and rehabilitation**.

Where appropriate, the Court may order that the award for reparations be made through the **Trust Fund** (...).

3. (...) the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. (...) the Court may (...) seek measures under article 93, paragraph 1 [assistance of States in tracing, freezing or seizing property etc.]

#### Art. 79: Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

### Rules of Procedure and Evidence:

#### Rule 91: Participation of legal representatives in the proceedings

4. For a hearing limited to reparations (...), the restrictions on questioning by the legal representative (...) shall not apply. ... the legal representative may, with the permission of the Chamber concerned, question witnesses, experts and the person concerned.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

#### Board of Directors

- Queen Rania Al-Abdullah of Jordan
- Simone Veil, France
- Tadeusz Mazowiecki, Poland
- Archbishop Desmond Tuto, South-Africa
- Arthur Raymond Robinson, Trinidad and Tobago

#### Sources of funds

- Fines, forfeitures, awards of reparations ordered by the Court
- Contributions by governments, international organizations or individuals

As of 26 April 2006: 1.310.237.20 Euro received, 275.000.00 Euro pledged

#### Functions

- Seek voluntary contributions
- Establish transparent procedures for receipt and managements of funds
- Implement reparation orders from the Court
- Determine appropriate uses for voluntary contributions for victims and their families
- Outreach to victims groups as possible beneficiaries of the Trust Fund

#### Beneficiaries

- Individuals or collectives
- Victims/witnesses participating in Court's proceedings following Court's orders (fines, forfeiture, awards for reparations)

- Victims of crimes within the jurisdiction of the Court (other resources of the Trust Fund)

### Policy

- Is predominantly active in countries with ICC cases
- Funds innovative projects on income-generating activities, medical treatment for victims, psychological healing, memorials, counseling for families to accept abducted children or raped women and girls
- Supports projects which target the most vulnerable and marginalized survivors
- Favors reparations activities which are directed to groups of survivors
- Funds projects with outreach components to ensure understanding of community and sustainability
- Implements projects for the benefit of victims, as and when requested by the Court

### Sources:

ICC: <http://www.icc-cpi.int/>

Coalition for the ICC: <http://www.iccnw.org/>

Women's Initiatives for Gender Justice: <http://www.iccwomen.org/>