Gender-based crimes

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A. Introduction

1 Gender-based crimes, particularly those involving sexual and reproductive violence, have been progressively articulated through statute norms, judicial decisions, and institutional policies, reflecting an expanding consensus on their legal recognition in international law. While sexual and reproductive violence have long occurred in armed conflict and other contexts of systemic oppression, the legal recognition and prosecution of these acts have developed unevenly across international statutes and tribunals. This entry provides a structured analysis of how gender-based crimes, specifically those involving sexual violence and reproductive harm, are conceptualized and prosecuted under international law.

2 This entry begins by conceptualizing 'gender-based crimes'. The discussion then proceeds in two major parts. The first examines sexual violence crimes, including the legal definition of rape from early jurisprudence such as *Prosecutor v Akayesu* (1998), through to the codification in the International Criminal Court's 'Elements of Crimes'. It outlines the various ways these crimes have been prosecuted: as → *crimes against humanity*, → *war crimes*, and → *genocide*. The second part

addresses reproductive violence crimes, tracing their recognition and adjudication under → *international criminal law*. It also discusses the various ways such crimes can be prosecuted: as crimes against humanity, war crimes, and genocide. The entry also examines the procedural framework and modes of liability applicable to gender-based crimes (→ *Criminal Responsibility, Modes of*). It concludes with a critical assessment, situates the issue within broader scholarly debates, and affirms the centrality of gender-based crimes to the evolution of international law, while identifying key trajectories for future legal development.

B. Conceptualizing Gender-Based Crimes

3 Gender-based crimes are acts of violence or harm committed against individuals on account of their gender, as determined by societal norms and expectations rather than solely biological attributes. Central to the notion of 'gender-based crimes' is the term 'gender'. While often conflated with biological sex, the term 'gender' is widely understood in contemporary discourse to encompass identity, expression, roles, and behaviours as shaped by cultural and social norms. Gender-based crimes can therefore target individuals because of their gender identity, gender expression, or perceived sexual orientation (ICC Office of the Prosecutor, 'Policy on Gender-Based Crimes: Crimes Involving Sexual, Reproductive and Other Gender-Based Violence' (2023) 10).

4 The Rome Statute of the International Criminal Court ('Rome Statute'), adopted in 1998, was the first international criminal law statute to explicitly define 'gender'. Article 7(3) states: '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 inclusion of the phrase 'within the context of society' was the result of politically sensitive negotiations during the Rome Conference, which aimed to balance traditional understandings of gender with calls for a broader, socially constructed interpretation (Chappell (2016)). These debates revealed deep divisions—while some states pushed for a biologically fixed definition, others advocated for a flexible, socially grounded concept. The resulting language was intentionally ambiguous, a diplomatic compromise designed to leave space for interpretive evolution while preserving consensus. Scholars have since described the definition as odd and a product of political tension, yet one that allows for progressive interpretation by the ICC (Grey (2025); Oosterveld (2005)).

5 The Office of the Prosecutor has since embraced this interpretive latitude, adopting an expansive interpretation of 'gender' as a socially constructed concept (→ *Office of the Prosecutor: International Criminal Court (ICC)* [MPEiPro]). In its 2023 Policy on Gender-Based Crimes, the Office affirms that gender encompasses 'sex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviours, activities and attributes' (para 16 at 10). This interpretive approach recognizes that gender extends beyond binary sex categories and includes constructs related to gender identity, gender expression, and sexual orientation. Although Article 7(3) Rome Statute defines gender as referring to 'the two sexes, male and female, within the context of society', and does not

explicitly mention sexual orientation or gender identity, its silence on exclusion has been understood as permitting flexibility in interpretation (ibid.).

6 Judicial reasoning at the ICC has also progressively favoured a socially constructed understanding of gender. For instance, in *Prosecutor v Abd-Al-Rahman*, the Pre-Trial Chamber found that the victims' Fur ethnicity, combined with the socially constructed presumption that males are combatants, shaped the perpetrators' perception of them as rebels or sympathisers ((Decision on the Confirmation of Charges against Abd-Al-Rahman) (2021) paras 80, 116). Similarly, in *Prosecutor v Al Hassan*, the ICC considered how armed groups imposed specific 'roles and expectations' on women, recognizing these as instruments of gender persecution ((Trial Chamber Judgment) (2024) para 1572) (→ *Sexual Orientation and Gender Identity, Persecution on Grounds of*). This interpretive trajectory was further reinforced in January 2025, when the Office of the Prosecutor filed applications for arrest warrants against the Supreme Leader of the Taliban, Haibatullah Akhundzada, and the Chief Justice of the 'Islamic Emirate of Afghanistan', Abdul Hakim Haqqani, for the crime against humanity of persecution on gender grounds under Article 7(1)(h) Rome Statute. The applications are pending before the ICC Pre-Trial Chamber, but the charging documents explicitly frame the Taliban's conduct as targeting individuals based on socially constructed gender roles and expectations (ICC Office of the Prosecutor, 'Situation in the Islamic Republic of Afghanistan' (2025) Section F.2.e.), underscoring the continued recognition of gender as a relational and contextual category.

7 Institutions and legal frameworks have frequently identified women as disproportionately affected by gender-based crimes due to entrenched social and structural inequalities. For instance, the → *Committee on the Elimination of Discrimination Against Women (CEDAW)* [MPEiPro] defines gender-based violence as 'violence which is directed against a woman because she is a woman or that affects women disproportionately' (CEDAW, 'General Recommendation No 35 on Gender-Based Violence against Women' (2017) para 1). The → *World Health Organization (WHO)* echoes this, noting that approximately one in three women globally experience sexual or other forms of violence, and that women are disproportionately affected (WHO (2024)). Crimes such as forced pregnancy—unique to individuals with specific reproductive anatomy—underscore the heightened vulnerability of women. However, this disproportionate impact has at times led to 'gender-based violence' and 'violence against women' being used interchangeably. But it is crucial to note that they are not synonymous. The Declaration on the Elimination of Violence against Women (UNGA, Resolution 48/104 (1993)) distinguishes violence against women as a specific subset of gender-based violence (Art 1).

8 This recognition of women's disproportionate exposure to gender-based violence has shaped much of the international legal discourse; however, it is equally important to acknowledge that gender-based violence is not inherently limited to female victims and may disproportionately affect men, boys and other genders in specific conflict-related contexts. The 1995 Srebrenica genocide, in which thousands of Bosniak Muslim males were systematically executed, exemplifies

gender-selective targeting and illustrates how men can be disproportionately affected. The → *International Criminal Tribunal for the former Yugoslavia (ICTY)* confirmed in *Prosecutor v Krstić* that the mass executions of Bosniak males constituted genocide, noting that the intent to destroy the group was evident in the systematic killings and the psychological trauma inflicted on surviving families ((Trial Chamber Judgment) (2001) paras 595–98, 612–15). Jurisprudence from the ICTY has further recognised sexual violence against men across several cases. In *Prosecutor v Tadić* (1997), the Trial Chamber detailed the forced mutilation of male genitalia, describing one detainee being compelled to bite off another's testicles (paras 206–7). In *Prosecutor v Delalić and Others* (*Čelebići* case) (Trial Chamber Judgment) (1998), male detainees were subjected to genital torture, establishing such acts as grave breaches under international law (paras 1019, 1035-1039). Complementing this, the ICC has affirmed that gender-based crimes can affect any gender. In *Prosecutor v Bemba* ((Trial Chamber Judgment) (2016) para 100) and *Prosecutor v Ntaganda* ((Trial Chamber Judgment) (2019) para 933), the Trial Chambers clarified that '[t]he concept of 'invasion' is intended to be broad enough to be gender-neutral', reinforcing the principle that gender-based crimes are not confined to female victims.

9 These developments reflect a growing recognition that gender-based crimes are not limited to female victims. By expanding jurisprudence and prosecutorial frameworks to encompass diverse experiences of gendered harm—including those of men and boys—international criminal law acknowledges that such crimes may target individuals across the gender spectrum. This interpretive evolution moves beyond a strictly binary understanding of gender, recognizing that socially constructed roles and expectations shape how individuals are perceived and targeted in conflict and repression. The following sections undertake a focused examination of sexual and reproductive violence as manifestations of gender-based crimes within the framework of international law.

C. Sexual Violence Crimes

10 Crimes of sexual violence have long been a pervasive feature of armed conflict, yet their codification in international law has historically lagged behind their prevalence. For much of history, such acts were treated as inevitable by-products of war, with early legal frameworks offering limited or indirect recognition.

1. Sexual Violence Crimes in Hague and Geneva Laws

11 One of the earliest attempts to codify sexual violence in armed conflict emerged during the → *American Civil War* through the → *Lieber Code* (Lieber, 'Instructions for the Government of Armies of the United States in the Field'), issued in 1863. Article 44 explicitly prohibited rape, prescribing death as punishment, while Article 37 instructed occupying forces to protect 'the persons of the inhabitants, especially those of women' alongside religion, morality, and private property. These provisions framed sexual violence primarily as a violation of honour and property, with women positioned as symbolic bearers of familial and societal integrity.

12 The Lieber Code later influenced the drafting of the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land. However, Article 1 of the Convention does not enumerate specific violations, including rape or other forms of sexual violence. Instead, the Annexed Regulations, particularly Article 46, require respect for 'family honour and rights,' which has been interpreted to encompass sexual violence, especially during periods of occupation when martial law applies. This indirect framing marked a semantic regression from the explicit prohibition in the Lieber Code, shifting from 'rape' to more euphemistic references to honour. Nevertheless, rape with a nexus to armed conflict remained a violation under → *customary international law*. For example, the Tokyo War Crimes Tribunal prosecuted rape as a war crime, relying on Article 46's protection of 'family honour' as its legal basis (→ *International Military Tribunals*).

13 The Geneva Conventions further developed protections against sexual violence. While the 1929 Geneva Convention relative to the Treatment of Prisoners of War did not explicitly mention rape, Article 3 required that 'women shall be treated with all consideration due to their sex', placing a duty on detaining powers to prevent sexual violence against female prisoners. This provision laid the groundwork for more explicit protections in the → *Geneva Conventions I–IV (1949)* and their 1977 Additional Protocols (→ *Geneva Conventions Additional Protocol I (1977)*; → *Geneva Conventions Additional Protocol II (1977)*). Article 3, common to all four 1949 Conventions, prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment,' applicable to non-international armed conflicts (→ *Armed Conflict, Non-International*; see also → *Armed Conflict, International*). Article 27 Geneva Convention IV, which protects civilians, explicitly states that 'women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'. Additional Protocol I (Article 75) and Protocol II (Article 4) reinforce these protections, with Protocol II notably reintroducing the term 'rape' as a prohibited act.

14 The reappearance of 'rape' in the Geneva Conventions and their Protocols reflects a gradual shift toward more explicit recognition of sexual violence in international humanitarian law (→ *Humanitarian Law, International*). However, the framing often remains gendered, with women predominantly cast as victims. This emphasis, while historically grounded, risks obscuring the broader spectrum of sexual violence and its impact on individuals of all genders. A comprehensive understanding of sexual violence in armed conflict requires acknowledging its multiple forms and diverse victims, moving beyond reductive gender binaries to ensure inclusive accountability.

2. Sexual Violence Crimes before ad hoc *Tribunals and the ICC*

15 The jurisprudence surrounding sexual violence in international criminal law has evolved from implicit recognition to explicit codification. Early post-war tribunals grappled with how to legally characterize such acts within existing frameworks. The perceived absence of legal treatment has since been reassessed through detailed

judgments and scholarly analysis. This section traces that evolution from the International Military Tribunal ('IMT') and International Military Tribunal for the Far East ('IMTFE') to modern tribunals such as the ICTY, → *International Criminal Tribunal for Rwanda (ICTR)*, and the → *International Criminal Court (ICC)* (→ *International Criminal Courts and Tribunals* [MPEiPro]; see also → *International Residual Mechanism for Criminal Tribunals (IRMCT)* [MPEiPro]).

16 Historically, foundational international criminal law instruments were largely silent on sexual violence as a distinct category of crime. For instance, neither the London Agreement of 8 August 1945 nor the Charter of the IMTFE of 19 January 1946 explicitly codified sexual violence as a standalone offence. However, both the IMT and IMTFE adjudicated acts of sexual violence under broader categories such as 'inhumane acts' and 'ill-treatment' (Askin (1997); Sellers (2011)). In addition, the Tokyo Judgment of the IMTFE, particularly Chapter 8, provides substantive analysis of sexual violence committed by Japanese forces during World War II. The Tribunal found that rape, enforced prostitution, and other forms of sexual violence were systematically perpetrated across occupied territories and adjudicated these acts as violations of the laws and customs of war. The judgment recognized that such atrocities were either ordered or wilfully permitted by military and political leadership (*Tokyo War Crimes Trial* (Judgment) (1948) Chapter 8, 1001–3). Although the IMT did not prosecute sexual violence as a distinct crime, trial transcripts and witness testimonies document instances of sexual violence though these were not reflected in the final judgments (Moodrick-Even Khen and Hagay-Frey (2013)). These early legal engagements have influenced subsequent developments in international criminal law (Askin (1997); Sellers (2011)).

17 A marked departure from this subtle engagement with sexual violence crimes emerged with the establishment of the ICTY, the ICTR, and the ICC. The statutes governing these tribunals explicitly codified sexual violence crimes, including rape, sexual slavery, enforced prostitution, and forced pregnancy, under the categories of war crimes, crimes against humanity, and genocide. Despite this codification, prosecutorial practice has not always reflected the centrality of sexual violence. In *Akayesu* (1998), the original indictment did not include charges of sexual violence. It was only through witness testimony during trial that evidence of rape and sexualized violence emerged, prompting the Trial Chamber to invite the Prosecutor to amend the indictment. The amended charges ultimately led to the landmark recognition of rape as an act of genocide (*Akayesu* (Trial Chamber Judgment) (1998) paras 731–34). Similarly, in *Prosecutor v Lubanga*, the initial charges omitted sexual violence crimes despite extensive documentation of rape and sexual slavery committed by Lubanga's forces. Although sexual violence was not charged, the judgment discusses it ((Trial Chamber Judgment) (2012) paras 599–631, 890), and Judge Odio Benito's Separate and Dissenting Opinion elaborates on the intrinsic connection of sexual violence to the use of child soldiers (paras 15–21). In *Prosecutor v Ntaganda* the initial arrest warrant issued in 2006 did not include sexual violence charges. These were only added in 2012, following further investigation and advocacy ((Warrant of Arrest) (2006); *Prosecutor v Ntaganda* (Pre-Trial Chamber Decision) (2014) para 50). The Trial Chamber found Ntaganda

guilty of rape and sexual slavery, including against child soldiers ((Judgment) (2019) paras 1004–12, 1034–40, and 1052–58).

(a) Sexual Violence Crimes as Crimes Against Humanity

18 Sexual violence is recognized as a grave violation of human rights and has been increasingly incorporated into international criminal law frameworks. The jurisprudence of the ICTY, ICTR and the ICC demonstrates significant development in how these crimes are prosecuted as crimes against humanity.

19 In terms of enumerated sexual violence crimes, the ICTY, ICTR, and ICC Statutes enumerate sexual violence, particularly rape, as crimes against humanity. Article 5 ICTY Statute, Article 3 ICTR Statute, and Article 7 Rome Statute each list rape among the acts that qualify when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. It is important to note that sexual violence need not itself be widespread or systematic; rather, it must form part of an attack that possesses such characteristics. This principle was affirmed in *Akayesu* where the Trial Chamber found that rape and other forms of sexual violence occurred within a broader pattern of systematic and widespread attacks on the civilian population (para 695). The Rome Statute includes a wider range of sexual violence crimes than its predecessors. Article 7(1)(g) lists rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity. This expansive inclusion resulted from sustained advocacy by women's rights organizations during the Rome Statute's drafting process, which sought to overcome historical neglect and under-prosecution of such crimes (Policy on Gender-Based Crimes (2023); Altunjan (2021)). Several of these offences are defined to include acts 'of a sexual nature' (Elements of Crimes (2013) Arts 7(1)(g)-2, 7(1)(g)-3 and 7(1)(g)-6), requiring the prosecution to prove the sexual character of the act. The residual clause 'any other form of sexual violence of comparable gravity' in Article 7(1)(g) Rome Statute allows for prosecution of additional sexual offences not explicitly listed, such as forced nudity or sexual mutilation, provided they meet requisite gravity and context.

20 Forced pregnancy and forced marriage have been prosecuted as crimes against humanity by the ICC. In *Prosecutor v Ongwen* (Trial Chamber Judgment) (2021), the ICC prosecuted forced pregnancy for the first time under Article 7(2)(f) Rome Statute. The Appeals Chamber clarified its scope, particularly in relation to reproductive autonomy and intent to alter ethnic composition, in paragraph 1055 of the judgment (*Prosecutor v Ongwen* (Appeals Chamber Judgment) (2022)) (see also → *Reproductive Rights, International Regulation*). Forced marriage was also prosecuted in *Ongwen*, classified as an 'other inhumane act' under Article 7(1)(k) Rome Statute. Earlier tribunals treated the issue differently. The Special Court for Sierra Leone ('SCSL') at some point categorized forced marriage as sexual slavery (*AFRC* (Appeals Chamber Judgment) (2008) para 195), whereas the → *Extraordinary Chambers in the Courts of Cambodia (ECCC)* in *Chea and Samphan* categorized it as an inhumane act ((Trial Chamber Judgment) (2018) para 3694). *Ongwen* clarified this ambiguity and contributed to affirming forced marriage as an

'other inhumane act' under the Rome Statute (Maloney, O'Brien, and Oosterveld (2023)).

21 Sexual violence, particularly rape, may constitute torture under international criminal law when specific legal elements are satisfied (→ *Torture, Prohibition of*). While customary law and Article 8 Rome Statute (war crimes) recognize torture for purposes such as extracting confessions, this requirement is not applicable to Article 7 Rome Statute (crimes against humanity). As a war crime, the ICC's Elements of Crimes further clarify that the act must be committed 'for such purposes as: obtaining information or a confession …' (Elements of Crimes (2013) Article 8(2)(c)(i)-(4)). The *ad hoc* tribunals initially referenced customary law purposes (*Prosecutor v Furundžija* (Trial Chamber Judgment) (1998) para 163). However, in subsequent decisions such as *Prosecutor v Delalić* (Trial Chamber Judgment) (1998) (para 496) and *Prosecutor v Semanza* ((Trial Chamber Judgment) (2003) paras 482–85), rape was found to constitute torture where it was intentionally inflicted to cause severe pain or suffering, with no requirement of a state official or motive to extract information. Similarly, the ICC, in *Al Hassan*, acknowledged that torture may be committed by members of non-state armed groups exercising control over territory and population, provided they act in a capacity that enables them to wield authority (para 1129). This reflects the evolving understanding that *de facto* authority in conflict settings can satisfy the 'official capacity' threshold under international criminal law.

22 The Rome Statute includes gender among the grounds for persecution under Article 7(1)(h), representing a milestone in international criminal law. In *Al Hassan*, the ICC examined persecution on gender grounds. Although the majority found that women and girls were targeted because of their gender (para 1566), Al Hassan was acquitted of this charge because Judge Akane dissented on a number of issues including the Chamber's conclusion that the Timbuktu population was targeted on gender grounds (para 1574).

(b) Sexual Violence Crimes as War Crimes

23 Sexual violence committed in the context of armed conflict has garnered increasing recognition as constituting war crimes within international criminal law. Central to this classification is the requirement that the act be sufficiently connected to an armed conflict. This nexus does not demand a pattern of widespread commission—single instances may suffice provided the contextual link to conflict is established, as affirmed in *Furundžija* (para 172).

24 The treatment and enumeration of sexual violence crimes under the war crimes category varies across international criminal law statutes. Notably, the ICTY Statute does not explicitly list rape or other sexual violence crimes among war crimes. In contrast, the ICTR Statute provides more specific codification. It enumerates sexual violence offences under the war crime of 'outrages upon personal dignity', including humiliating and degrading treatment, rape, enforced prostitution, and indecent assault (Art 4(e)). This broader delineation reflects an evolution from the ICTY's narrower statutory language, providing greater scope for prosecution of sexual violence crimes.

25 The Rome Statute represents a more expansive and progressive framework. Article 8 includes a comprehensive catalogue of sexual violence offences under war crimes: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and 'any other form of sexual violence also constituting a grave breach of the Geneva Conventions'. The inclusion of the residual clause significantly broadens prosecutorial reach, enabling accountability for offences not explicitly enumerated but comparable in gravity. This expansive codification owes much to the sustained advocacy of women's rights organizations during the drafting of the Rome Statute, which sought to rectify historic underrecognition of gender-based crimes. Furthermore, several war crimes enumerated under Article 8 may subsume acts of sexual violence based on their factual context. Rape and other forms of sexual violence may be prosecuted, for example, as torture under Article 8(2)(c)(i)-4 Elements of Crimes (2013) when intentionally inflicted for purposes such as obtaining information, punishment, intimidation, coercion, or discrimination. This interpretive flexibility highlights the evolving recognition that sexual violence, when committed under specific conditions, can meet the threshold of serious international crimes such as torture, thereby reinforcing its prosecutability within established legal frameworks.

(c) Sexual Violence Crimes as Genocide

26 Under Article 6 Rome Statute, genocide comprises acts including: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting conditions of life calculated to bring about the physical destruction of the group; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group. These acts must be perpetrated with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.

27 While sexual violence is not explicitly enumerated in the statutory definitions of genocide, judicial interpretation by international criminal tribunals has progressively affirmed its relevance under enumerated acts such as 'causing serious bodily or mental harm' and 'imposing measures intended to prevent births within the group'. Jurisprudence from the ICTR and ICTY demonstrates that rape, sexual mutilation, and other forms of sexual violence, when committed with the requisite genocidal intent, may amount to acts of genocide. For example, in *Akayesu,* the ICTR held that rape and sexual violence constituted genocide under the category of causing serious bodily and mental harm, noting that such acts inflicted profound trauma intended to contribute to group destruction (para 731). The Chamber observed that rape is 'one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm' (ibid.). Similarly, in *Niyitegeka* the Trial Chamber considered an act of sexual torture—ordering a sharpened stick to be inserted into a Tutsi woman's genitalia—as contributing to genocidal intent (para 416).

28 This interpretation has been affirmed across tribunals. In *Furundžija* the ICTY recognized that rape may amount to genocide when committed with genocidal intent, noting that '[r]ape may also amount to…an act of genocide…if the requisite

elements are met' (para 172). The ICC has since adopted this approach. The ICC Elements of Crimes explicitly list rape and sexual violence as examples of acts capable of causing serious bodily or mental harm to members of a protected group (Art 6(b), fn 3), affirming their relevance within the scope of genocidal conduct.

29 In addition, sexual violence may qualify as genocide under the category of imposing measures intended to prevent births within the group. The ICTR in *Prosecutor v Musema* (Trial Chamber Judgment) (2000) clarified that such measures may be both physical and mental, citing forced birth control, enforced sterilization, prohibition of marriages, sexual mutilation, and the forced separation of males and females as qualifying examples (para 158). These forms of sexual violence serve not only to harm individuals but to target the group's biological continuity and identity.

30 Beyond the commission of sexual violence, international courts have recognized that sexualized rhetoric and propaganda may contribute to genocidal incitement. In *Prosecutor v Nahimana, Barayagwiza, and Ngeze* (the *Media* Case), the ICTR held that direct and public incitement to commit genocide was supported in part by broadcasted content that dehumanized Tutsi women through sexually violent and ethnically charged narratives ((Trial Chamber Judgment and Sentence) (2003) para 1079). The Chamber noted specifically that 'the Accused in this case used the print and radio media systematically, not only for their own words but for the words of many others, for the collective communication of ideas and for the mobilization of the population on a grand scale' (para 979). Such propaganda served to normalize and encourage acts of sexual violence as tools of collective destruction, reinforcing the gendered dimension of incitement in genocidal campaigns.

31 All considered, while sexual violence is not expressly enumerated in the statutory definition of genocide, international criminal jurisprudence has consistently interpreted acts such as rape, sexual torture, and enforced sterilization as falling within the recognized categories of genocide—particularly those causing serious bodily or mental harm and imposing measures intended to prevent births. Case law from the ICTR and ICTY affirms that when committed with genocidal intent, sexual violence may constitute genocide or serve as compelling evidence of such intent. This interpretive approach reflects a substantive recognition of the role sexual violence plays in the physical and biological destruction of targeted groups.

3. Defining the Sexual Violence Crime of Rape: From **Akayesu** *to the ICC Elements of Crime*

32 Rape has long been recognized as a serious violation under international law, yet its legal definition was absent from foundational statutes. Although both the ICTY and ICTR recognized rape among the acts prosecutable as war crimes and crimes against humanity, it was not defined. At the time of their proceedings, rape was widely acknowledged as a breach of the Geneva Conventions and customary international law, but its contours remained unmapped (Oosterveld (2005)).

33 The first authoritative definition emerged in *Akayesu*, where the Trial Chamber defined rape as 'a physical invasion of a sexual nature, committed on a person under

circumstances which are coercive' (para 688). This definition was notable for its conceptual framing: it did not require proof of lack of consent as a separate element. Instead, the presence of coercive circumstances was deemed sufficient to infer non-consent, particularly in contexts of armed conflict, genocide, or crimes against humanity. The Chamber explained that '[t]hese rapes resulted in physical and psychological destruction of Tutsi women… contributing to their destruction and to the destruction of the Tutsi group as a whole' (para 731). The definition also avoided anatomical particularization, focusing instead on the coercive nature of the act.

34 The ICTY adopted a more particularized approach in *Furundžija*, where rape was defined as 'the sexual penetration, however slight…[effected] by coercion or force or threat of force against the victim or a third person' (para 185). This definition introduced specific references to body parts and objects, diverging from *Akayesu*'s conceptual model. While it retained the notion of coercion, it limited its scope to physical or threatened force, potentially narrowing the evidentiary basis for establishing lack of consent in conflict settings.

35 A more integrative approach was taken in *Prosecutor v Kunarac, Kovac, and Vukovic* where the ICTY Trial Chamber defined rape as sexual penetration occurring 'without the consent of the victim', with consent understood as 'given voluntarily…assessed in the context of the surrounding circumstances' ((Judgment) (2001) para 460). The *mens rea* required both intent to penetrate and knowledge of the absence of consent. Although force was not listed as a formal element, it remained evidentially relevant. The Appeals Chamber later clarified that 'true consent will not be possible' in most cases involving war crimes or crimes against humanity due to the inherently coercive environment (*Prosecutor v Kunarac* (Appeals Chamber Judgment) (2002) para 130).

36 This reasoning was affirmed by the ICTR Appeals Chamber in *Prosecutor v Gacumbitsi* which held that '[t]he Prosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible' ((Appeals Chamber Judgment) (2006) para 155). The Chamber further noted that it is not legally necessary to introduce evidence of the victim's words, conduct, or relationship to the perpetrator, nor to prove the use of force. Instead, lack of consent may be inferred from contextual factors such as an ongoing genocide campaign (ibid. para 155). Subsequent jurisprudence has demonstrated that the definitions in *Akayesu* and *Kunarac* are not incompatible. For example, in *Prosecutor v Muhimana* (Judgment and Sentence) (2005) the ICTR Trial Chamber noted that both definitions allow for the inference of lack of consent from coercive circumstances (para 550). Other ICTR decisions, such as *Niyitegeka*, followed the conceptual model of *Akayesu*, while cases like *Semanza* and *Prosecutor v Kamuhanda* (Trial Chamber Judgment) (2004) adopted the *Kunarac* approach.

37 The ICC has adopted a composite definition in its Elements of Crime, drawing on the jurisprudence of the ICTY and ICTR. Rape is defined as an act where 'the perpetrator invaded the body of a person…resulting in penetration…committed by force, or by threat of force or coercion…or by taking advantage of a coercive

environment…or against a person incapable of giving genuine consent' (Article 7(1)(g)-1). This formulation incorporates the particularization of *Furundžija* and *Kunarac*, while retaining *Akayesu*'s emphasis on coercive circumstances. The ICC Trial Chamber in *Ongwen* confirmed that '[i]t is not necessary to prove the victim's lack of consent and there is no requirement of resistance on the part of the victim' (para 2709). Under the Rome Statute, rape is listed among the enumerated acts prosecutable as war crimes and as crimes against humanity. The ICC Elements of Crime provide a unified definition applicable to rape as a war crime, crime against humanity and genocide. Importantly, the definition does not specify any gender, thus recognizing that all genders may be victims or perpetrators of rape.

38 The evolution of the legal definition of rape in international criminal law reflects a progressive shift from anatomical particularization to contextual and coercive frameworks. Beginning with *Akayesu,* which defined rape as a coercive physical invasion without requiring proof of non-consent, tribunals have increasingly recognized the inherent coerciveness of conflict environments. Subsequent jurisprudence, including *Furundžija, Kunarac*, and *Gacumbitsi*, introduced varying emphasis on penetration, consent, and coercion, yet converged on the principle that meaningful consent is often unattainable in contexts of armed violence and mass atrocity. The ICC's Elements of Crime synthesize these approaches, offering a comprehensive definition that incorporates both physical and environmental coercion. This doctrinal trajectory underscores a growing consensus that rape, as a crime under international law, must be understood through the lens of power, vulnerability, and systemic violence, rather than narrow evidentiary thresholds of force or resistance (Sellers (2007)).

D. Reproductive Violence Crimes

39 Gender-based violence encompasses a wide spectrum of harms, among which sexual violence has received significant attention. However, reproductive violence, defined as acts that violate an individual's reproductive autonomy, constitutes a distinct and equally grave category. Like sexual violence, reproductive violence infringes upon the rights to dignity, bodily integrity, and self-determination (Grey (2017)). The Policy on Gender-Based Crimes (2023) now recognizes reproductive violence as a distinct category of gender-based crimes, addressing gaps in earlier frameworks such as the 2014 policy (at 5–6). This shift reflects growing momentum towards accountability for reproductive violence crimes and their recognition as gender-based crimes.

40 Reproductive violence has been documented across numerous historical and contemporary conflicts. Examples include the use of 'rape camps' in the former Yugoslavia, forced pregnancy in Uganda and Sierra Leone, and coerced abortion and contraception in Colombia (Grey (2017) 907–8, 924). During the Rwandan genocide, Tutsi women were subjected to forced impregnation by Hutu perpetrators, with some subsequently killed for carrying Hutu children (Human Rights Watch, 'Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath' (1996)). In the context of the Islamic State's campaign against

the Yazidis, women were subjected to forced sterilization, miscarriage, and abortion, often as part of a broader genocidal strategy targeting their reproductive capacity (UN HRC, '"They Came to Destroy": ISIS Crimes Against the Yazidis' (2016)).

41 Despite its prevalence, reproductive violence has historically lacked explicit recognition as a distinct crime under international criminal law. Foundational instruments such as the 1863 Lieber Code, the 1899 and 1907 Hague Conventions, and the Charter of the International Military Tribunal did not codify reproductive violence. Nonetheless, witness testimonies during the Nuremberg Trials referenced such acts, albeit only as evidence supporting other charges such as persecution of the Jewish population (Grey 2017) 910–11).

42 The statutes of the ICTY, ICTR, and SCSL similarly omitted reproductive violence as a distinct crime. However, these tribunals demonstrated flexibility on occasion by using enumerated crimes to prosecute reproductive violence. Notably, the ICTY and ICTR Statutes did include the genocide provision of 'measures intended to prevent births', which formed the basis of charges in cases such as the ICTY's Srebrenica proceedings (*Krstić* paras 540–41). However, there have been instances where reproductive violence has not been prosecuted despite evidence to support charges. Grey has submitted that 'accountability for conflict-related reproductive violence has been patchy at best, and that there has been little recognition of the harms that such violence causes to individual victims' (Grey (2017) 905). In *Lubanga*, for instance, testimonies revealed evidence of forced abortions, yet no charges were brought under war crimes or crimes against humanity provisions ((2012) para 896).

43 The Rome Statute represents a significant development in the codification of reproductive violence within international criminal law. It explicitly classifies forced pregnancy and enforced sterilization as prosecutable acts under both crimes against humanity and war crimes (Arts 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi)). Moreover, it incorporates genocide through measures intended to prevent births within a national, ethnic, racial, or religious group under Article 6(d). However, this latter provision is not novel to the Rome Statute. The prohibition of birth-prevention measures as a form of genocide was first codified in Article II(d) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and subsequently reflected in the statutes of the ICTY and ICTR. These instruments laid the foundational framework for recognizing reproductive violence as a mechanism of group destruction under international law.

44 Recent jurisprudence has begun to recognize the reproductive dimension of gender-based crimes. In *Ongwen*, the ICC Trial Chamber clarified that forced pregnancy is grounded in a woman's right to personal and reproductive autonomy, and that its impact is primarily reproductive rather than sexual ((2021) para 2717). The Appeals Chamber further emphasized that the unlawful confinement of pregnant women impedes access to healthcare and decision-making, thereby violating reproductive rights ((2022) para 1055). *Ongwen* thus represents a landmark in recognizing reproductive violence as a distinct gender-based crime. This doctrinal shift reflects

a growing commitment to recognizing and prosecuting reproductive violence as a core component of gender-based atrocity crimes.

E. Modes of Liability and Accountability for Gender-Based Crimes

45 International criminal tribunals have employed a range of legal doctrines and modes of liability to attribute individual responsibility for acts of sexual and reproductive violence. This section examines key approaches adopted in jurisprudence to hold individuals accountable for such crimes. Instigation was addressed in *Akayesu*, where the Trial Chamber concluded that Akayesu had instigated rape and other inhumane acts against Tutsi women by encouraging them through his public statements. The Tribunal ruled: 'the Accused, by his own words, specifically ordered, instigated, aided and abetted the following acts of sexual violence' (para 692), recognizing verbal provocation as sufficient to meet the legal threshold for instigation.

46 Joint criminal enterprise ('JCE') liability was central in *Prosecutor v Karemera et al.* (Trial Chamber Judgment and Sentence) (2012) and *Karadžić* (Trial Chamber Judgment) (2016). In *Karemera et al.,* the Trial Chamber applied the extended form of JCE to hold senior political leaders accountable for crimes committed by others in furtherance of a genocidal plan. The Chamber found that

> the rape and sexual assault of Tutsi women and girls by soldiers, *gendarmes*, and militiamen, including the MRND *Interahamwe*, was a natural and foreseeable consequence of the JCE to destroy the Tutsi ethnicity because the perpetrators were participating in the campaign to exterminate Tutsis in Rwanda (para 1477).

It further concluded that the accused

> willingly took the risk of facilitating further rapes and sexual assaults on Tutsi women and girls because he continued to participate in the JCE to destroy the Tutsi population of Rwanda despite the widespread occurrence of rapes and sexual assaults on Tutsi women and girls (para 1483).

These findings satisfy the legal threshold for extended JCE liability, which requires that the additional crimes be foreseeable and that the accused accepted the risk of their commission. In *Karadžić*, the Trial Chamber found that Radovan Karadžić participated in four JCEs, including the 'Overarching JCE,' which aimed to permanently remove Bosnian Muslims and Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina through crimes such as genocide, persecution, extermination, and forcible transfer (para 3463). The Chamber concluded that Karadžić, in his capacity as President of Republika Srpska and Supreme Commander of its armed forces, made a significant contribution to the implementation of this common plan (para 3465). His involvement included planning, coordination, and oversight of operations that led to the commission of crimes by Bosnian Serb forces (para 3466). The Trial Chamber held him

individually responsible under Article 7(1) ICTY Statute for crimes committed in furtherance of the JCE, including acts of sexual violence (paras 3463–66).

47 Aiding and abetting was clarified in *Furundžija*, where the Trial Chamber concluded that Furundžija's presence during interrogations, while rape was being committed, contributed to the perpetrator's actions. The Court observed

> [the accused] did not personally rape Witness A, nor can he be considered, under the circumstances of this case, to be a co-perpetrator. The accused's presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him (para 273).

Effectively, the Court established that contribution without direct physical involvement suffices under international law.

48 Commission as a mode of liability was applied in *Ongwen* (2021), where the Trial Chamber found Ongwen guilty of several gender-based crimes including rape, forced marriage, and forced pregnancy. The Trial Chamber applied commission liability under Article 25(3)(a) Rome Statute, finding that Ongwen was individually responsible for crimes including rape, forced marriage, and forced pregnancy. Notably, the Trial Chamber found that Ongwen committed, as an individual, within the meaning of Article 25(3)(a) Rome Statute, gender-based crimes including rape, sexual slavery, and forced pregnancy (paras 3043, 3049, 3062). The Chamber clarified that commission encompasses direct perpetration, joint perpetration, and indirect perpetration, and found Ongwen liable under all three forms (paras 3043, 3049, 3062, 3088, 3100).

49 The ICC has developed co-perpetration under Article 25(3)(a) Rome Statute, notably in *Lubanga* (2012) and *Prosecutor v Germain Katanga* (Trial Chamber Judgment) (2014), adopting the 'control over the crime' theory from German jurist Claus Roxin (1963). The Trial Chambers interpreted the provision—'commits such a crime, whether as an individual, jointly with another or through another person'—to encompass individual, direct co-perpetration, and indirect co-perpetration. Both forms require a common plan and an essential contribution. In *Katanga*, the Court added that indirect co-perpetration involves control over an organization used to commit the crime. This approach has drawn criticism: SáCouto, Sadat, and Sellers (2020) argue it departs from *ad hoc* tribunal jurisprudence and risks distorting the text of Article 25(3)(a). Judge Fulford, in *Lubanga* (2012) ((Separate Opinion of Judge Adrian Fulford) para 10), warned against importing domestic theories without textual support, while Judge Van den Wyngaert, in *Prosecutor v Ngudjolo* ((Trial Chamber Judgment) (Concurring Opinion of Judge Van den Wyngaert) (2012) paras 7–13), questioned its appropriateness at the international level. These critiques highlight the need for doctrinal restraint, especially in gender-based prosecutions where evidentiary burdens are already high.

50 → *Command responsibility*, which addresses the liability of military and political leaders for crimes committed by subordinates, is enshrined in Article 28 Rome Statute. This principle was significantly developed in *Bemba*, where the Trial Chamber held Bemba responsible for crimes committed by his troops in the Central African Republic. The Court found Bemba criminally responsible under Article

28(a) for rape as a crime against humanity and as a war crime (para 742) and affirmed that the accused 'were aware of the crimes being committed by the MLC troops and that Mr Bemba failed to take all necessary and reasonable measures to prevent or repress the crimes, or to submit the matter to the competent authorities' (para 684). These findings demonstrate that knowledge of subordinate conduct combined with inaction constitutes a breach of command responsibility under international criminal law. Although the conviction in *Bemba* was later overturned on appeal due to evidentiary issues concerning the standard of proof (*Prosecutor v Bemba* (Appeals Chamber Judgment) (2018)), which acquittal has been criticized (SáCouto and Sellers (2019)), the Trial Chamber's articulation remains a touchstone for leadership accountability, particularly with regard to gender-based crimes.

F. Rules of Procedure and Evidence in Gender-Based Crimes

51 The legal frameworks governing the ICTY, ICTR and the ICC, including their respective Statutes and Rules of Procedure and Evidence, contain provisions aimed at facilitating the effective investigation and prosecution of gender-based crimes. Rule 96 ICTR and ICTY Rules of Procedure and Evidence, which are identical in formulation, stipulates that corroboration of the victim's testimony shall not be required. This provision is particularly significant given the context in which gender-based crimes typically occur, namely, armed conflict and systemic violence, where corroborative evidence is often unavailable due to the passage of time, the destruction of physical evidence, and the psychological trauma experienced by survivors. Similarly, Rule 63(4) ICC Rules of Procedure and Evidence affirms that corroboration is not a prerequisite for the admissibility of evidence in cases of sexual violence.

52 The Rules also contain safeguards to protect victims from prejudicial evidentiary practices. Rule 96 of the ICTR and ICTY, and Rules 70 and 71 of the ICC, prohibit the admission of evidence concerning the prior or subsequent sexual conduct of a victim or witness. This exclusion is critical to preventing the discrediting of victims based on irrelevant and potentially stigmatizing information, thereby reinforcing the dignity and credibility of survivor testimony.

53 Rule 70 of the ICC and Rule 96 of the ICTR and ICTY clarify that consent cannot be inferred in circumstances where force, threat of force, coercion, or exploitation of a coercive environment vitiates the victim's ability to give voluntary and genuine consent. Moreover, the conduct or silence of a victim who is incapable of giving genuine consent—due to age, mental incapacity, or coercive circumstances—cannot be relied upon to infer consent. These provisions are essential in recognizing the inherently coercive contexts in which sexual violence as an international crime is perpetrated, and they underscore the legal presumption of non-consent in such settings.

54 Finally, Article 68 Rome Statute mandates that both the Office of the Prosecutor and the Court adopt measures to safeguard the safety, dignity, privacy, and psychological well-being of victims and witnesses, particularly in proceedings

involving gender-based crimes. Protective measures may include the use of pseudonyms, image and voice distortion, testimony via audio-visual link, redaction of identifying information, and the presence of support persons during testimony. These procedural safeguards are vital to mitigating re-traumatization and ensuring that survivors can participate in judicial processes without undue harm.

G. Assessment

55 Gender-based crimes remain unevenly prosecuted, despite their formal recognition in statutes and jurisprudence. While significant strides have been made in recognizing gender-based crimes as violations of international humanitarian and criminal law, persistent gaps in interpretation, prosecution, and conceptual clarity remain.

56 The foundational instruments of international humanitarian law—namely, the Hague and Geneva Conventions—have long proscribed acts of sexual violence, though historically this prohibition was articulated through indirect and euphemistic language, often framing such violations as offences against honour or dignity (Sellers and Rosenthal (2015)). This conceptual framing, as scholars have argued obscured the gendered dimensions of the harm and contributed to the longstanding marginalization of sexual violence within war crimes jurisprudence (Askin (1997)). While early international criminal law instruments, including those governing the IMT and the IMTFE, did not explicitly codify sexual or reproductive crimes as distinct crimes, their limited engagement with gender-based crimes nonetheless laid a jurisprudential foundation for later developments. But a significant doctrinal shift occurred with the establishment of the *ad hoc* tribunals, particularly the ICTY and ICTR, which began to systematically address sexual violence as a core component of international crimes. The landmark *Akayesu* judgment at the ICTR redefined rape as a physical invasion of a sexual nature committed under coercive circumstances, thereby embedding sexual violence within the legal frameworks of crimes against humanity and genocide (de Brouwer (2005)). Building on this momentum, the SCSL introduced further conceptual innovation by recognizing forced marriage as a distinct crime, thereby expanding the legal and analytical boundaries of gender-based violence in international criminal law (Doherty (2013)).

57 Despite these advances, the ICC's treatment of sexual and reproductive violence has been uneven. The *Bemba* Appeals Chamber judgment, which overturned the Trial Chamber's conviction for command responsibility, has been widely criticized for its narrow interpretation of Article 28 Rome Statute and its failure to engage with the gendered dimensions of the crimes (SáCouto and Sellers (2019)). As SáCouto, Sadat, and Sellers (2020) argue, the ICC's modes of liability doctrine remain ill-equipped to address collective criminality in the context of gender-based crimes, often requiring evidentiary thresholds that are incompatible with the realities of gender-based crimes. Lubaale ('The Defence of Duress' (2025)) echoes this in her engagement with defence of duress in the *Al Hassan* case (2024) where the accused was acquitted for all gender-based crimes. This doctrinal rigidity risks perpetuating impunity and undermines the Rome Statute's gender-sensitive

aspirations. To address these shortcomings, future jurisprudence must recalibrate the evidentiary and liability standards applied to gender-based crimes, ensuring that legal doctrines reflect the collective and coercive contexts in which such violence occurs, and thereby uphold the Rome Statute's commitment to gender justice.

58 The ICC's jurisprudence on reproductive violence, while promising in cases such as *Ongwen*, still reflects conceptual ambiguity. The Trial and Appeals Chambers in *Ongwen* affirmed that forced pregnancy implicates reproductive autonomy rather than sexual autonomy, thereby distinguishing reproductive violence from sexual violence. This distinction is critical, as conflating the two categories risks obscuring the specific harms involved (Grey (2017)). The ICC's 2023 Policy on Gender-Based Crimes represents a step in this direction, but its implementation remains to be tested. Future jurisprudence must develop a coherent doctrinal framework that recognizes reproductive violence as a distinct and systematic form of harm, particularly where it is weaponized to enforce ethnic, political, or patriarchal control. This requires courts to move beyond abstract categorizations and adopt survivor-informed interpretations that reflect the structural and intersectional nature of such crimes.

59 Institutional strategies and prosecutorial practices also warrant scrutiny. Brammertz and Jarvis (2016), reflecting on the ICTY's experience, highlight the importance of early investigative prioritization, gender-sensitive interviewing techniques, and strategic charging decisions. These insights are echoed in Oosterveld and Sellers' (2016) analysis of the ECCC, where the failure to adequately investigate and prosecute sexual violence outside the context of forced marriage reveals enduring blind spots. The → *Charles Taylor Case* at the SCSL, as Oosterveld (2012) demonstrates, illustrates both the potential and limitations of cumulative charging strategies in capturing the full spectrum of gender-based crimes.

60 To conclude, while international criminal law has made commendable progress in recognizing and prosecuting gender-based crimes, the field remains marked by doctrinal fragmentation, evidentiary challenges, and institutional inertia. A more coherent and expansive approach, one that integrates feminist legal theory, intersectional analysis, and survivor-centred practices, is essential to advancing accountability for gender-based crimes (→ *Feminism, Approach to International Law*; → *Feminist Approaches to International Adjudication*). As the literature suggests, this requires not only legal reform but also a shift in how gender is conceptualized within international criminal justice (Rosenthal, Oosterveld, and SáCouto (eds) (2020)). Such a shift is not merely aspirational but foundational to the legitimacy and effectiveness of international criminal law as a normative system. Future jurisprudence must build upon these foundational insights to ensure that gender-based crimes are not merely codified in legal instruments but are also substantively and consistently adjudicated. This imperative is particularly salient given that the evolving jurisprudence and operational practices of international criminal tribunals exert a direct normative and procedural influence on domestic accountability mechanisms. With the ICC being complementary, it is national jurisdictions that bear the primary responsibility for prosecuting the bulk of gender-based crimes. Strengthening international jurisprudence is therefore not only a

matter of global justice but a strategic necessity for enhancing domestic enforcement and harmonizing legal standards across jurisdictions (Lubaale 'The Conviction and Sentencing of Ex-rebel, Thomas Kwoyelo, 15 Years On' (2025)).

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