The Challenge of Prosecuting "Weapon of War" Conflict-Related Rape: The Case of Syria

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"Like all rapes, these rapes are particular as well as generic, and the particularity matters. This is ethnic rape as an official policy of war; not only a policy of the pleasure of male power unleashed; not only a policy to defile, torture, humiliate, degrade, and demoralize the other side; not only a policy of men posturing to gain advantage and ground over other men. It is rape under orders: not out of control, under control. It is rape unto death, rape as massacre, rape to kill or make the victims wish they were dead. It is rape as an instrument of forced exile, to make you leave your home and never come back. It is rape to be seen and heard by others, rape as spectacle. It is rape to shatter a people, to drive a wedge through a particular community. It is the rape of misogyny liberated by xenophobia and unleashed by official command. It is rape as genocide." (Catherine A. MacKinnon, Crimes of War, Crimes of Peace)

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Executive summary

The definition of rape and frame of rape as "weapon of war" have been the most debated and, at the same time, the most contested topics among scholars of different backgrounds. Feminist, legalists and international relations scholars have focused their discussions on whether rape shall include the consent element or coercion, whether rape shall be framed as "weapon of war" or only as rape-in-peace, and how "weapon of war" frame may be improved.

These debates have arisen from the inconsistent jurisprudence of the *ad hoc* tribunals which were the first ever courts prosecuting wartime sexual violence. Therefore, as a first step, the thesis explores case-law rendered by the international courts followed by various scholarly discussions.

The "weapon of war" framed as a security issue has proven to be very successful when prosecuting conflict-related rape. However, any framework for redressing complex problems is bound to be limiting. The thesis identifies "weapon of war" frame as being selective, unfair and politically oriented. The aim of the thesis is to not to be damning, but instead to assess the frame and to identify challenges when frame has been put on trial. The thesis will offer a contribution to considered reflections of rape as a "weapon of war".

Prosecutor's offices develop the scope of crimes already in the indictment, which means that they have major role in framing "weapon of war" on trial. In that sense, the thesis is written from prosecutor's office lenses when applying theory to the facts. The research focuses on critically exploring already available evidence on the wartime rape in Syria and on applying these facts to the challenges identified within the case-law of two jurisdictions. The aim of the thesis is to provide policy recommendation for the Syrian Public Prosecutors Office in order to tackle with the selective framing of rape as a "weapon of war".

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INTRODUCTION

International criminal law is an innovation of the contemporary era aimed at ending impunity for mass atrocities. This law has been focused on crimes committed on a large scale, and therefore excluded discrete acts committed by individuals outside the context of war. This exclusion of individual crimes characterizes a division between rape during peacetime and rape during wartime enshrined within laws since the modern era.[1] Historically, international criminal law did not include sexual violence within the its frame, thus maintaining a decade long impunity for perpetrators of mass atrocities.[2]

However, that has changed over time. Since the establishment of *ad hoc* tribunals, the international community has been slowly recognizing the importance of hearing the voices of victims who have suffered conflict-related sexual violence. With such recognition, rape began to be considered a weapon of political oppression rather than a byproduct of war. The urgency to redress sexual violence within global security policy created a universal framework, which seemed cohesive but was poorly applicable to complex war scenarios on the ground.[3]

As the initial responsibility of "framing" our understanding of what does and does not constitute a crime under criminal law falls to prosecutor's offices, this thesis examines challenges of prosecuting the universal framing of the wartime rape throughout the prosecutorial lenses. Questions - what are the challenges of prosecuting rape as "weapon of war" and how to overcome these challenges - this thesis will answer throughout three chapters.

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[1] Galina Nalareva, The Impact of Transnational Advocacy Networks on the Prosecution of the Wartime Rape and Sexual Violence: The Case of the ICTR, International Social Science Review 85, 2010, pp. 3-4

[2] Michelle Jarvis, An Emerging Gender Perspective on International Crimes, in International Criminal Law Development in the Case Law of the ICTY, Gideon Boas and William Schabas (eds.), Mertiuns Nijhoff Publishers, Leiden/Boston, 2003, p. 157.

[3] Maria Eriksson Baaz, Maria Stern, Sexual violence as a weapon of war? Perceptions, prescriptions, problems in the Congo and beyond, the Nordic Africa Institute, Zed books, London, 11 June 2013, p. 4.

Selectivity has been inherent in international justice system. However, the selectivity regarding wartime rape generates legitimacy problems for justice systems.[4] Three chapters are designed in a way which follows the prosecutorial mindset enlisting, firstly, available evidence, than legal and theoretical framework of the wartime rape and finally, providing a country specific legal framework applied to the available facts. Thus, the conclusion offers mitigating strategy for the Prosecutorial Office to diminish the frame's selectivity.

In order determine how the universalistic framework reflects the picture on the ground, this thesis examines the frame's application to the factual finding of the wartime rape in Syria. Syria's eight-year-long war has been one of the most documented conflicts in history, where evidence, even before the initial phase of the investigation, shows the complexity of the wartime rape record. Despite the clear focus on certain perpetrators by the media, NGOs, and the Commission of Inquiry on the Syrian Arab Republic, rape has been committed by all sides of the conflict.[5] Therefore, by highlighting rapes silenced in the main narrative, the thesis draws attention to additional ways of understanding rape relevant in belligerent contexts but left out of the leading discourse.

Chapter I demonstrates how different framing of wartime rape throughout the historical record influenced the prosecution of rape crimes. Before the advent of international criminal law there have been no prosecutions of wartime rape as women were seen as objects rather than subject under international law. The frame-change occurred several times. When the shift occurred from honor to human rights, and rape became recognized as a "weapon of war,"

[4] Mia Swart, National courts lead the way in prosecuting Syrian war crimes, Domestic prosecutions in Germany and other European countries offer some hope of justice to victims of war crimes, Aljazeera, 5 November 2019, available at https://bit.ly/2Cyp62w, last accessed on 10 November 2019.

[5] *See* Human Rights Council, "I lost my dignity": Sexual and gender based violence in the Syrian Arab Republic the Commission stated that applies international humanitarian law on human rights investigations, Conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc., A/HRC/37/CRP.3, 8 March 2018.

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successful prosecution increased. However, numerous scholars have been criticizing the current frame as selective, unfair and insufficient.[6] Despite severe criticism, "weapon of war" has proven to be the most successful frame when prosecuting wartime sexual violence. The chapter also demonstrates how changes in the material definition of rape – from coercion to consent – impact effective war-time prosecution. Namely, in warfare scenarios, women may be raped unintentionally by perpetrators (i.e. they believed there was consent); therefore the defendant's mistaken belief that the victim consented is used as a defense to rape allegation may be seen as problematic.

Following the prosecutorial technique, *Chapter II* links incidents with certain perpetrators. It presents challenges during the pre-prosecutorial phase, and critically assesses available evidence, as well as actors collecting them. The dominant narrative on sexual violence not only influences the prosecutorial view regarding wartime rape but also affects how and whether other actors report it. This narrative is demonstrated by the fact that there has been disproportionate focus on rape by perpetrators where a pattern of violence could be identified, such as governmental forces or ISIS. The dominant narrative creates the evidentiary gap for rapes committed out of other purposes than a conscious strategy. Although the evidence available before the initial court proceedings have commenced might not be directly used at the trial, it offers certain focus and framework for the future prosecutions.

Chapter III provides specific prosecutorial strategies within different systems. The chapter also applies the specific legal framework to the available factual findings listed in *Chapter I* in order to identify the possible prosecutorial challenges within various settings. The

[6] Supra fn. 3 (Baaz, Stern); Doris E. Buss, Rethinking 'Rape as a Weapon of War, Fem Leg Stud (2009) 17:145–163, 17 July 2009; Paul Kirby, How is rape a weapon of war? Feminist International Relations, modes of critical explanation and the study of wartime sexual violence, European Journal of International Relations 19(4), 2012, p. 807; etc.

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third jurisdiction - Syria - is framed in the format of policy recommendations as there is neither available online data on domestic prosecution of rape nor is there open access to case-law of the domestic courts. Therefore, solutions to challenges identified within the first two jurisdictions have been applied as recommendations directed to the Syrian Public Prosecutorial Office once the domestic laws are harmonized with international standards. Until then, no effective prosecution is possible.

Ultimately, *Conclusion* recognizes the power of prosecutorial influence on the framing of wartime rape and provides a mitigation strategy when prosecuting it. The strategy addresses the criticisms of different scholars to the "weapon of war" concept. It also acknowledges that the current legal framework when used together – rape-in-peace and rape-in-war – provides for adequate and inclusive prosecution of the crimes of rape committed during the war. However, its application depends on the prosecutorial strategy and attention given to the investigation of certain crimes.

Additionally, it seems that a simplified framing of conflict-related rape as a strategy to further military and political aims obstructs prosecution of other factors contributing to wartime rape. In particular, leading storyline of wartime rape reflects itself in practical interventions aimed at redressing sexual violence.[7] Therefore, prosecutor's office's decisions on framing certain crimes have immutable consequences not only on justice system but also on future measures taken for intervention.

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[7] Supra fn. 3 (Baaz, Stern), p.11.

CHAPTER 1: EVOLUTION OF RAPE IN INTERNATIONAL LAW

Introduction

This chapter demonstrates the evolution of the definition of rape and the contextual elements of crimes within international law. It elucidates the historical change of the framework of rape and how framing the definition of rape differently influenced the prosecution of wartime rape. The trajectory of wartime rape prosecution – from no prosecution to increased prosecution when rape was recognized as a "weapon of war" – is presented throughout various sub-chapters. Regardless of its success, numerous scholars have been criticizing the "weapon of war" framing as selective, unfair and insufficient. This chapter explains theoretical and legal framings of wartime rape that will be further applied in the *Chapter II and Chapter III.*

1.1. Sexual violence as a matter of male honour

Rape during periods of war is as old as war itself. Prosecution of rape and crimes of war as separate crimes dates to the pre-modern era.[8] Wartime rape may have been prosecuted under domestic law before 1863 but not as a war crime, so it created the potential for some rapes to go unprosecuted. [9] Laws of warfare have only been recognized as part of customary law since the enactment of the 1863 Lieber Code in the United States. Article 44 of the Code for the first time explicitly recognized rape as a conflict-related crime.[10] The Code was subsequently used as the basis for the 1899 and 1907 Hague Conventions. The Hague Conventions indirectly established

[8] Kelly Dawn Askin, War Crimes against Women: Prosecution in International War Crimes Tribunals. Martinus Nijhoff Publishers, 1997, p. 35-36.
[9] *Ibid.*, p.28.
[10] "All wanton violence committed 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. A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior."

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that rape was an offense against a woman's honor, which reflected the male gaze in international law of seeing women as commodities. Namely, Section III of the Hague Convention 1907 stipulates "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected."[11]

The same concept was followed by the third Geneva Convention of 1929, which states that prisoners of war are "in all circumstances entitled to respect for their persons and honour" and that "women shall be treated with all regard due to their sex."[12] The commentary to the third Geneva Convention mentions "honour" in relation to "weakness", "modesty", "pregnancy and childbearing" that must be taken into the account when considering the special status of women.[13] The latter Convention established an explicit linkage to rape, establishing "rape, enforced prostitution, or any form of indecent assault" as an attack on women's honor.[14] All of these instruments evidence the notion that honor had been an important constraint in war as a core of international humanitarian law.

A shift from honor to human rights, documented in the more recent 1977 Optional Protocols to the Geneva Conventions, points to an essential societal change within the international community. The Optional Protocols replaced "honor" with "human dignity" and offered a gender-neutral framing of "women's crimes." For example, Article 75(2)(b) of the first Optional Protocol prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault." The Commentary to

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[11] Peggy Kuo, Prosecuting Crimes Of Sexual Violence In An International Tribunal , Case Western Reserve Journal Of International Law, 34 19. 2010, p. 306.
[12] Third Geneva Convention Relative To The Treatment Of Prisoners Of War Of 12 August 1949, Article 14.
[13] Jean P. Pictet, Commentary to the Third Geneva Convention Relative To The Treatment Of Prisoners Of War Of 12 August 1949, International Committee of the Red Cross, Geneva, 1960, p. 147-148.
[14] Fourth Geneva Convention on the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 27.

the Optional Protocol makes clear that the provision must be applied to "everybody, regardless of sex."[15]

In the present international sphere, the notion of honor is considered very problematic regarding women's autonomy. On one hand, "honor" is a patriarchal invention assigned to women by men, leaving women dishonored by rape. On the other hand, failing to address sexual violence as a violation of bodily integrity trivializes such offences and continues making women commodities of men.[16] Gardam characterizes honor provisions as protective measures towards women in relationship with others (when pregnant or as mothers) rather than individuals in their own right to whom preventive measures could be applied.[17]

The treatment of women under different laws than men mirrors the attitude towards women during the history. Despite shift in international law, women and girls are still assaulted in the name of honor in almost every region of the world, particularly in Arab countries where such practices are still implemented within legal frameworks.[18] There, women and girls are frequently accused of bringing disgrace on their families and communities by their behavior.[19] As such, honor is a concept constructed by men for men to fulfil their own purposes and has little to do with women's perception of sexual violence.[20] Such marginalized perception of sexual violence renders prosecution of rape impossible regardless of its codification.

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[15] Commentary on the Additional Protocol of 8 June 1977 to the Geneva Convention of 12 August 1949, available at http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf, last accessed 1 December 2018.
[16] Un Women, Women 2000, Sexual Violence and Armed Conflict: United Nations Response, April 1998, available at http://www.un.org/womenwatch/daw/public/w2apr98.htm, last accessed on 1 December 2018
[17] Judith G. Gardam, Women and the Law of Armed Conflict: Why the Silence?, International and Comparative Law Quarterly, vol. 46, 1997, p. 55.
[18] For example, in the case of Syria women have been exposed to "honour crimes", which exempts man of penalty who kills his wife or sister, if he finds any of them committing adultery or illegitimate sexual acts, Penal Code of the Syrian Arab Republic, 1949, amended 1953, article 548.
[19] Amnesty International, Broken bodies, shattered minds: Torture and ill-treatment of women, 2001, p.10, available at https://bit.ly/2z1g38z, last accessed on 16 August 2019; Lama Abu-Odeh, Crimes of Honor and the Construction of Gender in Arab Societies, Comparative Law Review, Vol. 2, pp. 5-8.
[20] *See* Judith G. Gardam, An Alien's Encounter with the Law of Armed Conflict, in Sexing the Subject of Law, Ngaire Naffine and Rosemary Owens (eds.), Law Book Company - Sweet and Maxwell, 1997, p. 233.

1.2. Sexual violence at international criminal courts

Despite the international outrage against sexual violence in 1990s, the Statues of the International Criminal Tribunal for the former Yugoslavia (herainafter: ICTY) and the International Criminal Tribunal for Rwanda (hereinafter: ICTR) do not define sexual violence or rape. They only list rape as a crime *per se* under broad provisions of crimes against humanity.[21] Such vagueness by statutory laws left identification and interpretation of rape crimes to the discretion of international judges and prosecutors, who logically focused on framing rape mostly within the scope of a crime against humanity. Broad discretion and vagueness of statutes led to the ambiguous developments of the definition of rape throughout the jurisprudence of *ad hoc* tribunals, as well as to inconsistent prosecutions and sentences.[22]

1.2.1. Rape as a matter of coercion

The first international criminal law case defining sexual violence and rape was *Prosecutor v. Akayesu*, prosecuted at the ICTR in 1998. In the judgment, the Trial Chamber defined sexual violence as "any act of a sexual nature which is committed on a person under circumstances which are coercive".[23] Because this definition is very broad, the Trial Chamber specified "sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[24]

In an attempt to define the crime of rape, the Trial Chamber drew from national jurisdictions that define rape as a "non-consensual sexual intercourse."[25] However, the Trial

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[21] Statue of the International Criminal Tribunal for the former Yugoslavia, Article 5, Statue of the Intenrational Criminal Tribunal for Rwanda, Article 3.
[22] Hilmi M. Zawati, Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals, Oxford University Press, 2014, p. 82.
[23] ICTR, Prosecutor v. Akayesu, Case No. ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para.688.
[24] *Ibid.*
[25] *Ibid.*, para 687.

Chamber did not analyze the element of consent, but rather concluded that in cases of mass atrocities "the conceptual framework of state-sanctioned violence"[26] enshrined in the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment is a more reasonable option. The ICTR's Trial Chamber concluded that rape as a form of aggression, requiring a mechanical description of particular acts, objects, or body parts, does not grasp the actual crime of rape. And disclosing graphic, anatomical details would put too big a burden on victims who are reluctant even to speak. Therefore, the ICTR followed the Convention against Torture approach in which there is no definition of acts of torture but only circumstances, such as "intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person."[27]

The implementation of the concept of coercion in the context of warfare by the ICTR is also an important development at international courts. Namely, wars are loaded with coercive factors (victims seeing other victims being severely beaten if they offered resistance, presence of armed forces, and soldiers initiating sex with civilians), which make coercion effectively presumed.[28] Therefore, requiring proof of physical resistance to demonstrate coercion is unrealistic because victims are typically too frightened to resist.

To understand the delineation of coercion, it is important to define what constitutes coercive circumstances. The standard could be interpreted very broadly; therefore, the ICTR Trial Chamber clarified that not only physical force but also "threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion."[29] In addition, coercion might be an implied consequence of a given situation, such as armed conflict or military

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[26] *Ibid.*
[27] *Ibid.*
[28] Jonathan Crowe, Coercion, Consent and Sexual Violence in Wartime, Bond University, Speech, p.3.
[29] *Ibid.*, para 688.

presence. Contrary to the consent based approach that takes into the account one-on-one interactions, the ICTR Trial Chamber's focus on coercion defined rape under social and contextual circumstances in the sense of being group-based. The coercion definition sees rape as power, domination and violence.[30]

The ICTY followed the coercion standard in a judgment decided the same year – *Prosecutor v. Furundžija.* After an analysis of the domestic elements of rape in a number of countries, the Trial Chamber concluded that in a majority of jurisdictions the crime of rape entails "common denominators" of coercion and/or non-consent.[31] Although the Trial Chamber in the *Furundžija* case does not analyze the element of the consent in the default judgement, and instead followed the coercion approach, it nonetheless set a standard for future cases that transferred from coercion-focused to consent-focused.

1.2.2. Sexual violence as a matter of consent and autonomy

The ICTY's Trial Chamber in the *Kunarac* case moved further away from the coercion-based definition of rape found in the *Furundžija* case, stating that force is not an element of rape. Rather, it only provides a clear evidence of non-consent. The Trial Chamber's analysis of domestic definitions of rape found that coercion is corroborative evidence of non-consent and that non-consent is an element of rape.[32] Under the consent standard, sexual autonomy is violated whenever the person subjected to the act has not freely agreed to it or is not a voluntary participant in it.[33] The Appeals Chamber further elaborated the rationale behind consent as the

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[30] Catharine A. MacKinnon, Defining Rape Internationally: A Comment on Akayesu, 44 Colum. Journal of Transnational Law, 940, 2006, p. 941.
[31] ICTY, Prosecutor v. Furundžija, Case No.IT-95-17-1, Trial Chamber, Judgment, 10 December 1998, paras 180-183.
[32] ICTY, Prosecutor v. Kunarac and Others, Case No.IT-96-23&23/1, Trial Chamber, Judgment, 22 February 2001, para. 457.
[33] *Ibid.*

conditio sine qua non of rape by explaining the relation between force and consent. Namely, a narrow focus on threat or force would allow a perpetrator who committed sexual violence to avoid responsibility for acts to which the victim did not consent by simply taking advantage of coercive circumstances without relying on physical force. The Appeals Chamber took into account the notion of consent, but by giving prevalence to the coercion in this case, the perpetrator was convicted for raping women held detention camps, military headquarters, and soldiers' residences. The implicit coercion extant in this case, which precluded the possibility of physical resistance, was thus used as evidence of non-consent in the abscence of physical resistance. In such situations, where circumstances have been so coercive, consent to the sexual acts was impossible.[34]

The *Kunarac* non-consensual emphasis influenced a series of further cases, such as *Muhlimana, Gacumbitsi, Bosoroga, Brima, Gambutibisi, and Muvunyi.* In *Muhlimana,* the ICTR Trial Chamber decided that the *Akayesu* and *Kunarac* definitions of rapes are compatible, considering *Akayesu* referred to "physical invasion of a sexual nature," while *Kunarac* further defined what would constitute physical invasion amounting to rape.[35] Furthermore, the Trial Chamber accepted the analysis of the relationship between consent and coercion of the Appeals Chamber judgment in *Kunarac,* which explicitly established that force or threat of force provides evidence of non-consent, but that force *per se* is not an element of rape.[36] Additionally, the Trial Chamber elaborated that in cases of genocide, war crimes, or crimes against humanity

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[34] ICTY, Prosecutor v. Kunarac and Others, Case No.IT-96-23/1-A, Appeals Chamber, Judgment, 12 June 2002, paras.130-133.
[35]ICTR, Prosecutor v. Muvunyi, Case No. ICTR-00-55, Judgment, Trial Chamber, Judgment, 12 September 2006, paras. 517-18
[36] ICTR, Prosecutor v. Mikaeli Muhimana, Case No. ICTR-95-1B, Trial Chamber, Judgment, 28 April 2005, paras 544-546.

widespread circumstances are almost universally coercive, thus voiding the possibility of any real consent.[37]

The Appeals Chamber in *Gacumbitsi* endorsed the conclusion from the *Kunarac* case that non-consent is an element of rape as a crime against humanity, which means that the Prosecution must prove non-consent beyond reasonable doubt. The defendant, however, may not use consent as an affirmative defense.[38] In other words, the Rules of the Procedure and Evidence prevent defendants from asserting that they reasonably believed consent was given. The Appeals Chamber explained that non-consent may not be used to establish elements of crime but rather circumstances under which evidence of consent will be admissible.[39] Moreover, the Appeals Chamber elucidated that in proving non-consent beyond reasonable doubt the Prosecution is not obliged to tender evidence of the conduct of the victim, or relationship between victim and perpetrator, or evidence proving force. The Prosecution, however, must present, and therefore prove, background circumstances, such as a lasting genocidal campaign, simply to create a nexus to war or crime against humanity in order to bring the crime within the jurisdiction of the court.[40]

With such interpretations, the International Courts brought the debate about elements of rape to the scholarly sphere and received ample amounts of criticism from legal feminist scholars.[41] Kalosieh, along with the *ad hoc* tribunal jurisprudence, explains that there should be no consent element at all during an armed conflict, considering the consent has been implemented as a peacetime element of rape. Applying "peacetime law in a wartime trial" ignores rape being a

[37] *Ibid.*, para 546.
[38] ICTY, Rules of the procedure and evidence, Rule 96
[39] ICTR, Prosecutor v. Gacumbitsi, Case No.ICTR-2001-64-T, Appel Chamber, Judgment, 7 July 2006, para 152 - 155
[40] *Ibid.*
[41] Christine Chinkin, Rape and Sexual Abuse of Women in International Law, European Journal of International Law, 5 (1), 1994; Finniuala Ní Aoláin, Feminism Facing International Law, European Journal of Women's Studies 22 (4), 2015; Adrienne Kalosieh, Consent to Genocide?: The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foča." Women's Rights Law Reporter 24: 121–136, 2003, etc..

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war and not merely a crime committed during the war.[42] Facing this criticism, finally, the International Criminal Court established its position in the cases of Katanga and Bemba, stating that "the victim's lack of consent is not a legal element of the crime of rape under the Statute."[43]

1.2.3. Inconsistency and ambiguity of definition of rape

As seen in the previous sub-chapter, the definition of rape has changed throughout the historical record. National laws and societal attitudes are taken into account on the international level, so changes in those approaches towards women result in changes in law at the international level. For example, some national jurisdictions require vaginal penetration by penis while using force or threat of force, while others do not require penetration by genitalia.[44] More progressive jurisdictions do not require penetration element but only an act that satisfies perpetrator's sexual needs to find him or her guilty.[45] As the international courts resorted to domestic practices, contrary definitions of rape that conflated consent and coercion were rendered. The conclusion of no-need-for-the-consent-element by the ICC acknowledges the specificity of the wartime settings and should be accepted as final and binding in order to create a consistent and fair definition.[46]

In harmony with the ICC call for fixed definition legalistic fair labeling theory applied to international criminal law by Zawati justifies differentiation of rape in war from rape in peace. He claims that, for the purpose of "representing fairly the nature and magnitude of the lawbreaking," there must be a difference, for example, "between a single rape of a woman and a multiple rape of another with the purpose of impregnating her," despite the fact are crimes of

[42] Ibid (Kalosieh), pp. 132-133.
[43] ICC, Prosecutor v. Bemba Gombo, Case No. ICC-01/0501/08, 2016, Trial Chamber, Judgment, 21 March 2016, para. 105.; ICC, Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07-3436, Trial Chamber, Judgment, 7 March 2014, para. 965.
[44] Jurisdictions requiring the penial penetration, among others, Penal Code of the Socialist Republic of Bosnia and Herzegovina, 1991, Chapter XI, Article 88 (1), Swiss Penal Code, 1999, Article 190; while jurisdictions, such as Russia or California do not require such penetration, *see* the Criminal Code of the Russian Federation, 1996, Article 131 (1).
[45] Polish Criminal Code, 1995, Article 168 (1).
[46] Supra fn. 21 (Zawati), p.50

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sexual violence.[47] Namely, legalists claim that in warfare scenarios rape could be unintentionally committed. For instance, when the perpetrator obtains orders from high-ranking leaders to rape detainees in order to embarrass and "break" the victims.[48] In some peace-time jurisdictions, such as Syria, soldiers who rape because they were ordered to may lack the *mens rea* generally required to satisfy the elements of rape.[49] Therefore, in such cases there is a need for elasticity of *mens rea*.[50]

Despite advocating for a peace-war division, Zawati argues that repeatedly wrongful prosecutions of rape crimes by different prosecutors' offices reflects the vagueness and abstractness of the statutory laws, as well as inconsistencies created by the ICTR and the ICTY. This abstractness and incompatibility has led to very few charges of rape have been brought and few convictions rendered.[51] In order to address that issue, Zarwati argues that the definition of rape within international statutes should be clearer and narrower.[52] Other than these scholarly discussions about the definition of rape within the international sphere, the majority of contemporary scholarship on rape during war is centered on the concept of "weapon of war". Therefore, the next sub-chapter will explore what the "weapon of war" entails and how it has been received by the international community and international courts.

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[47] In theory a single crime of rape may be considered as CAH, for example, but would not reach gravity threshold to be prosecuted at international courts, *Ibid.,* p.27.
[48] Don Stuart, Supporting General Principles for Criminal Responsibility in the Penal Code with Suggestions for Reconsideration: A Canadian Perspective, 4 Buffalo Criminal Law Review 27, April 2000, p. 27.
[49] Syrian Penal Code, Article 184.
[50] *Ibid.*
[51] Supra fn. 21 (Zawati), p. 82.
[52] *Ibid.*,p. 155.

1.3. Sexual violence as a weapon of war

1.3.1. From honor to "weapon of war" framing

The political effort to address wartime rape as a crime against individual autonomy started after the conflicts in Yugoslavia and Rwanda outraged the global community. The systematic nature of sexual violence, designed to humiliate and biologically dominate enemies, created an urgency to recognize rape as a "weapon of war."[53]

As the notion of "weapon of war" is not enshrined in the legal texts the jurisprudence of the ICTY and ICTR marked a turning point towards conceptualizing sexual violence as a weapon of war by including rape as an aspect of genocide in some cases[54] and as a crime against humanity in others.[55] Before the re-conception of rape by *ad hoc* tribunals, for instance, the large number of rapes that resulted in death during the Rwandan war would only be labeled murder rather than a component of genocide. [56] Qualification as a component of genocide at the ICTR raised the seriousness of sexual violence in comparison to other forms of wartime violence. International courts also characterized rape as a powerful "tool of war" in Bosnia-Herzegovina, Croatia, and Rwanda.[57] Such characterization by the *ad hoc* tribunals was rendered in order to more effectively prosecute and convict high ranking officials under international humanitarian

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[53] Raphaelle Branche, Isabelle Delpla, John Horne, Pieter Lagrou, Daniel Palmieri, Fabrice Virgili, Writing the History of Rape in Wartime, in Rape in Wartime (eds) Raphaelle Branche and Fabrice Virgili, Palgrave Macmillan, New York, 2012, p. 42-47.
[54] ICTY, Prosecutor v. Furundžija, Case No. IT-95-17-1, Trial Chamber, Judgment, 10 December 1998; ICTR, Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, Case No. ICTR-98-41-T, Trial Chamber, Judgment, 18 December 2008.
[55] ICTR, Prosecutor v. Akayesu, Case No. ICTR-96-4, Trial Chamber, Judgment, 2 September 1998; ICTY, Prosecutor v. Kunarac and Others, Case No.I T-96-23&23/1, Judgment, Trial Chamber, 22 February 2001.
[56] Supra fn. 52 (Branche et al.), p. 7.
[57] *See* ICTY, Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chamber, Judgment, 7 May 1997; ICTY, Prosecutor v. Furundžija, Case No.IT-95-17-1, Trial Chamber, Judgment, 10 December 1998; ICTR, Prosecutor v. Akayesu, Case No. ICTR-96-4, Trial Chamber, 2 September 1998.

law. Other framings, such as rape committed without a recognized pattern, have not been as successful.[58]

Despite its recent adoption by international criminal courts, the concept of rape as a weapon of war has deep feminist roots. Acknowledgment of rape as such by feminists acquired legal significance at the Offices of the Prosecutor at *ad hoc* tribunals. This is evident from the fact that rape has mostly been prosecuted as crimes against humanity and genocide, which require rape to be committed as a part of a policy. Namely, following the prosecutorial framing the courts applied an instrumentality approach towards women in war, which is visible from wording, such as "[…] women were raped so they could give birth to a Serbian baby".[59] The court's approach labeled women as a direct interest of perpetrators which use them as means (weapon) to other ends.[60] In other words, rape against these women had been used for furtherance of a perpetrator's policy.[61]

Buss recognized that the Yugoslavian and Rwandan Tribunal's framework of rape as genocide and crime against humanity and/or an integral part of genocide "is continuous with some feminist analyses of rape in war as instrumental to the larger conflict."[62] Catherine MacKinnon, a founder of feminist legal theory, sharply advocated for the selective idea of rape of Bosnian Muslim women by the Serb forces within the context of genocide that was carried out with the intention of destroying the victims' religious group—the Bosnian Muslim community.[63] Furthermore, Brownmiller explained that although rape is used against women both in war and

[58] ICTR, Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-2001-64-A, Appeal Chamber, Judgment, July 2006, para. 225.
[59] Laura Smith-Spark, How did rape become a weapon of war?, BBC News, available at http://news.bbc.co.uk/2/hi/4078677.stm, last accessed on 24 September 2019.
[60] Paul Kirby, How is rape a weapon of war? Feminist International Relations, modes of critical explanation and the study of wartime sexual violence, European Journal of International Relations 19(4), 2012, p. 807.
[61] *Ibid.*, p. 807.
[62] Doris E. Buss, Rethinking 'Rape as a Weapon of War, Fem Leg Stud (2009) 17:145–163, 17 July 2009, p. 151.
[63] Karren Engle, Feminism and Its (Dis) Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina, 99:4 American Journal of International Law, 2005, p. 779.

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peace, wartime rape has been used as an attack on women as a part of an attack against the enemy and therefore, as a weapon of war.[64] Moreover, other feminist scholars use terms, such as "weapon of war," "strategy," "engine of war," or and "tactics," however, interchangeably with little or no differences in their meanings. [65] For that, feminist from different discourses have been largely advocating for the "weapon of war" frame.

Following the practice of *ad hoc* tribunals the "weapon of war" framework also emerged as a rhetorical tool for advocates in the United Nations and influential international non-governmental organization. UN Secretary-General Kofi Annan highlighted in his report on sexual violence in the Democratic Republic of Congo

> the tragic fact that civilians – especially women and children – have been the principal victims of the fighting. Terrible crimes have been committed against women, including the rape as a weapon of war.[66]

However, other advocates also criticized the concept. For example, Gita Sahgal, former head of Amnesty International's gender unit, stated that the weapon of war framing in international sphere derived exactly out of perpetrator's communitarian-honor-approach to women.[67] She further stated that in the Yugoslavian war "[…] women were raped so they could give birth to a Serbian baby," which is perceived to be the destruction of the whole opposing community.[68] The communitarian-honor-approach towards women goes against the women's autonomy framework found in the consent approach as applied in the *Kunarac* case and adopted by the ICC's clarification of the coercion element.[69]

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[64] Susan Brownmiller, Against our will: Men, women and rape. New York: Simon and Schuster, 1975, p.13.
[65] Supra fn. 61 (Buss), p. 149; Supra fn. 3 (Baaz, Stern), p. 46.
[66] United Nations Secretary General on the War in the Congo: Statement to the United Nations Security Council, New York, 21 February 2001.
[67] Supra fn. 58 (Smith).
[68] *Ibid.*
[69] Supra fn. 62 (Engle), p. 803.

The weapon of war concept was explained by Margot Wallström, the former UN Special Representative of the Secretary-General on sexual violence in conflict. She described

> sexual abuse as a weapon of war, targeting not only women and girls but also men and boys, as planned and systematic designed to control the territory, to instill fear, to terrorize the population.[70]

In other words, instead of seeing rape as a matter of honor, which views wartime rape as an incidental byproduct of war, "weapon of war" framing connects rape with military and political goals. The concept of "weapon of war" requires rape to be a part of a conscious policy implemented on a wide scale by armed groups to further their political or military goals, such as humiliation of opponents or destruction of a particular group.[71] Requiring conscious acts enabled the *ad hoc* tribunals to establish guilt (rape as a "war crime, crime against humanity") and as dissuade warring factions from employing such a weapon of war strategy.[72]

Evidence of the strategic characteristics of rape in the Bosnian (rape camps) and Rwandan (the hate media Radio) wars was established at both *ad hoc* tribunals and in policy research.[73] Nevertheless, most often the proof supporting an argument for rape being strategic has been its widespread incidence identified as a pattern.[74] Both *ad hoc* tribunals have found that rape was systematic and prevalent and that, because of its prevalence, it must be part of a conscious policy.[75]

Wartime rape theory developed in the international arena from notions of honor, coercion, consent, and autonomy, to weapon of war. The characterization of wartime rape as a "by-product

[70] Barbara Crossette, A new UN voice calls for criminalizing conflict rape, The Nation, 10 September 2010, available at www.thenation.com/article/154624/new-un-voice-callscriminalizing- conflict-rape, last accessed on 16 November 2019.
[71] Supra fn. 3 (Baaz, Stern), p.53.
[72] *Ibid.*, p. 54.
[73] Especially in brigades and battalions, lesser at lower levels, such as platioons, *see* Judith Verweijen, The ambiguity of militarization. The complex interaction between the Congolese armed forces and civilians in the Kivu provinces, eastern DRC, Doctoral dissertation in Conflict Studies, Utrecht University, 2013, p. 81.
[74] Supra fn. 3 (Baaz, Stern), p. 48.
[75] *See* Ruth Seifert, The Second Front: the logic of sexual violence in wars, Women's Studies International Forum, 19(1): 35–43, 1996.

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of war" rather than as "illegal acts that violate humanitarian law" resulted in officials in every instance, whether military or civilian, excusing perpetrators' actions or blaming victims.[76] For instance, Radovan Karadžić, a leader of Bosnian Serbs, denied systematic rape committed by soldiers and claimed that less than 12 rapes were committed and only "psychopaths" committed them.[77] Seeing rape as a random crime against individuals rather than a strategy of war led the international and national communities to ignore SGBV's impact in hindering peace.[78] The failure to recognize rape and sexual violence in wartime as a weapon of war led to decades-long impunity for perpetrators and increased the likelihood of future escalation of conflicts. In order to tackle this impunity, "weapon of war" framing has been strategically deployed in international rhetoric.[79] Namely, advocates had been speaking with the language politicians prioritize and understand – the language of security, and, consequently, wartime rape was recognized as an acute, global security problem that is not a by-product of war but an obnoxious condition that may be eliminated. Accordingly, wartime rape was given ample space in media and policy analysis.[80]

From everything mentioned, it may be seen that once advocates adopted the "weapon" framework rather than "gender" or "human rights" framing, the probability that states would respond increased. In that moment, advocates spoke with language politicians understand. They spoke about a "weapon" as a matter of security. A matter of framing of wartime rape as a security

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[76] Human Rights Watch, Global Report on Women's Human Rights, Human Rights Watch Women's Rights Project, 1994, p. 76., available at https://bit.ly/2GeIcPd, last accessed on 7 February 2019.
[77] Roy Gutman, Rape Camps: Evidence in Bosnia Mass Attacks Points to Karadžić's Pals, New York Newsday, 19 April 1993, pp. 7 and 31.
[78] Jennifer Park, Sexual Violence as a Weapon of War in International Humanitarian Law, International Public Policy Review, 2007, p. 13., *see also* Security Council Resolution 1820 (2008) "…sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security."
[79] Kerry K. Crawford, Wartime Sexual Violence, Georgetown University Press, Washington, DC, p. 25.,
[80] Supra fn. 3 (Baaz, Stern), p. 1.

issue prompted efforts to address wartime sexual violence.[81] Wartime rape became decidedly policy friendly. The "weapon of war" concept reached international attention, resulting in increased prosecutions and a sense of diminished impunity in comparison to thirty years earlier. However, in order to assess the prospect of rape prosecution it is important to understand how the concept "weapon of war" has been elaborated within international tribunals' jurisprudence.

1.3.2. Elements of "weapon of war" within jurisprudence

Rape as a "weapon of war" is neither enshrined in the law nor considered a legal concept, but it has attained legal relevance at the Yugoslavian and Rwandan Tribunals. Those tribunals prosecuted rape as a constituent element of those conflicts. The "weapon of war" concept calls for recognition of rape as instrumental to the armed conflict and not simply a by-product. What is the Tribunals' record on rape recognized as a weapon of war of crimes against humanity or genocide? Which approach did the Tribunals' take? This sub-chapter will analyze the legal requirements which rape as a weapon of war must fulfil in order to be considered an international crime.[82]

1.3.2.1. Rape as crime against humanity

Rape is a crime that is enshrined in most of domestic criminal jurisdictions, however committed under certain circumstances it is an international crime.[83] Crimes against humanity were initially formulated in the 1945 Nuremberg Charter, a document stipulating crimes of the Axis Powers, as international crimes that can be committed not only during war but also during

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[81] Kiran Grewal, Rape in Conflict, Rape in Peace: Questioning the Revolutionary Potential of International Criminal Justice for Women's Human Rights, Australian Feminist Law Journal, 33:1, 2010, p. 49.
[82] Mosty rape as weapon of war was considered under the crimes against humanity and genocide by international criminal tribunals. However, there are cases when rape was considered as a war crime as well.
[83] Sandra Fabijanić Gagro, The Crime of Rape in the ICTY's and the ICTR's Case-Law, Zbornik PFZ, 60, (3) 1309-1334, 2010, p. 1324.

peace.[84] The only exception to that rule is the ICTY Statute which requires the *actus reus* to be "committed in armed conflict."[85] However, the Trial Chamber of the ICTY has since elaborated that a nexus to an armed conflict is no longer essential requirement by customary law.[86]

Historically, in order to prove a causal link between perpetrator and crime, tribunals required higher levels of proof in cases of sexual violence than in other types of crimes. For example, ICTY and ICTR required evidence of a superior's direct knowledge of the subordinate's actions in the form of physical evidence or specific orders to be established with more than circumstantial evidence and witness testimony.[87] Under Article 5 of the Statue of the ICTY and Article 3 of the Statue of the ICTR, rape is a relevant criminal act constituting a crime against humanity. For that criminal act to be considered a weapon of war, it has to be committed as a part of a widespread and systematic attack against a civilian population.[88] Additional requirements to establish rape as a crime against humanity include an underlying sexual act described above and a mental element that the rape was committed as a part of a widespread or systematic attack against a civilian population.[89] Contrary to genocide, there is no need that crimes against humanity target

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[84] The Nuremberg Charter, Article 6, avaliable at https://bit.ly/2GiiUzA, last accesed on 8 February 2019.
[85] ICTY Statute, Article 5.
[86] ICTY, Prosecutor v. Duško Tadić, IT-94-1-T, Trial Chamber, Judgment, 7 May 1997, para. 627.
[87] Susana SáCouto, Katherine Cleary, Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court, 17 American University Journal of Gender, Sociology, Policy & Law 339, 2009, pp. 357–358.
[88] ICTY, Prosecutor vs. Kunarac, Case No.IT-96-23/1-A, Appeals Judgement, 12 June 2002, para. 96, *see also* Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, 2125, Trial Judgement, para. ; ICTR, Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, Appeal Chamber, Judgement, 28 November 2007, para. 920; ICTR, Prosecutor v. Ntakirutimana and Ntakirutimana, Cases Nos. ICTR-96-10-A & ICTR-96-17-A, Appeals Chamber, Judgment, 13 December 2004, para. 516.

[89] Margaret M. de Guzman, Crimes against humanity, in Research handbook on international criminal law, (ed.) Edgar Elgar, Temple University Legal Studies Research Paper No. 2010-9, 2011, p. 10.

a specific group. Instead, any civilian, irrespective of his or her affiliation or identity, may be targeted as victim.[90]

For the first time, the ICTY successfully convicted an individual for rape as a crime against humanity in the *Kunarac* case.[91] The Appeals Chamber opined that "widespread refers to the large-scale nature of the attack and the number of victims." while "systematic refers to the organized nature of the acts of violence and the improbability of their random occurrence."[92] In contrast to the current standard of the International Criminal Court (ICC) and the Extraordinary Chambers at the Courts of Cambodia (ECCC), the Trial Chamber of the ICTR concluded that "systematic" refers to an intentional pattern of conduct but does not necessarily require the proof of a plan or policy.[93] Regardless of the fact that the ICTY Trial Chamber in the *Tadić* case stated that the "policy" requirement possess a traditional or customary status,[94] further clarification by the ICTR Trial Chamber established that "policy or plan" is not an independent legal element but may be useful in proving the attack was systematic and widespread.[95] Jalloh, a legal scholar, criticized such approach by the tribunals, stating that the

> judges waved the magic wand in an attempt to wish away the State or organizational policy requirement, perhaps because of the normative belief that such an approach was better for the more effective criminalization of gross human rights violations.[96]

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[90] United Nations Office on Genocide Prevention and the Responsibility to Protect, Definitions, Crimes against Humanity, available at https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml#, last accessed on 26 September 2019.
[91] Mark Ellis, Breaking the Silence: Rape as an International Crime, Case Western Reserve Journal of International Law, Vol. 38, Issue 2, 2006-2007, p. 229.
[92] ICTY, Prosecutor vs. Kunarac, Case No.IT-96-23/1-A, Appeals Chamber, Judgement, 12 June 2002, para. 96.
[93] ICTR, Prosecutor v. Muhimana, Case No. ICTR- 95-1B-T, Trial Chamber, Judgment, 28 April 2005, para. 527.
[94] ICTY, Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Chamber, Judgment, 7 May 1997, para. 653
[95] ICTY, Prosecutor v. Kunarac, Trial Chamber, Judgment, 22 February 2001, para. 432; ICTR, Prosecutor v. Semanza, Case No. ICTR-97-20-A, Appeals Chamber, Judgment, 20 May 2005, para. 269.
[96] Charles Chernon Jalloh, What Makes a Crime against Humanity Crime against Humanity, (in) American University International Law Review, vol. 28, no. 2, 2013, p. 399-401. *See also* William A. Schabas, State Policy as an Element of International Crimes, (in) Journal of Criminal Law and Criminology, vol. 98, no. 3, 2008, p. 959-960.

The Trial Chamber in the *Kunarac case f*urther clarified that only the attack, and not an individual crime of rape, must be widespread and systematic.[97] Therefore, in theory, a single rape may be a crime against humanity if perpetrated within the context of a widespread and systematic attack.[98] However, it is important to mention that Kunarac committed rape as a direct perpetrator. Therefore, the difficulty of linking rapes on the ground with high level officials did not arise. In the *Gacumbitsi* case the Appeals Chamber explained that rapes committed against Tutsi women took place in the same area where Tutsi were subjected to widespread and systematic attacks against their ethnicity. Therefore, the Appeals Chamber concluded that the rapes were part of a widespread and systematic attack (along with other crimes) against the Tutsi population.[99] In this case, the Trial Chamber already established Gacumbitsi's intent to incite rape, as his statements were presented by the Prosecution. However, the Trial Chamber concluded that Gacumbitsi, as the highest authority and most important person in the Rusumo commune, did not know or did not have reason to know of the occurrence of rape due to the fact that evidence tendered covered only a few cases of rape. In other words, there was no evidence that rape was widespread.[100] Therefore, the no-policy-requirement established by the *ad hoc* tribunals still required that rape be committed in a widespread manner so the Chamber may recognize a pattern that could be linked with the knowledge of high level officials.

Finally, to set the standard, the International Criminal Court further clarified that the crime against humanity may not need to be committed during an armed conflict, considering the

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[97] ICTY, Prosecutor v. Kunarac and Others, Case Nos. IT-96-23-T&IT-96-23/1-TTrial Chamber, Judgment, 22 February 2001, para. 430.
[98] ICTR, Prosecutor v. Nahimana, Barayagwiza and Ngeze, Case No. ICTR-99-52-A, Appeals Chamber, Judgment, November 28, 2007, para. 924.
[99] ICTR, Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-2001-64-A, Appeal Chamber, Judgment, July 2006, paras. 101-102.
[100] *Ibid.*, para. 225.

crime may also be committed in peace.[101] However, it requires a specific state or organizational policy to be applied on systematic rapes. Rape as crime against humanity, therefore, must to be carried out as a deliberate policy.[102]

1.3.2.2. Rape as genocide

Schabas named genocide "crime of crimes" as its formula bears a particularly strong stigma for any conviction for this crime.[103] The stigma is associated with the historical event of "extermination of eight million persons, primarily because of their race, religion or ethnicity"[104] by the Nazis. From this stigma, we see that the genocide is focused on threats directed to the existence of a group.[105] The definition of genocide, which was transposed into the Statues of the ICTY and ICTR, originates in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter: Genocide Convention). The crime is defined in Article 2, prohibiting acts which intend to destroy a group of people based on nationality, ethnicity, race or religion.[106]

Rape is not explicitly listed as a criminal act in the Genocide Convention and, consequently, statues of *ad hoc* tribunals do not include it either. Nonetheless, rape and other acts of sexual violence are implicitly included in genocidal acts of "causing serious bodily or mental harm to members of the group"[107] or "imposing measures intended to prevent births within the

[101] The Rome Statue, Article 7.
[102] M. Cherif Bassiouni, Crimes against Humanity Historical Evolution and Contemporary Application, Cambridge University Press, 2011, Introduction, p. 32.
[103] *See* William A. Schabas, Genocide in International law, The Crime of Crimes, Cambridge University Press, Cambridge, 2000.
[104] Thomas Franck, oral pleading before the ICJ in the Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), CR 2006/5, 1 March 2006.
[105] Robert Cryer, International Criminal Law, (in) International Law, Evans, Malcom (eds.), fourth edition, Oxford; New York, Oxford University Press, 2014, p. 755.
[106] Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Article 2.
[107] In Rwandan cases the ICTR concluded that genocidal rape may be subsumed under "causing serious bodily or mental harm to members of the group", Sherrie L. Russell-Brown, Rape as an Act of Genocide, 21 Berkeley J. Int'l

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group."[108] The ICTR acknowledged that rape may be a fragment of the process of destruction and, therefore, recognized rape as an instrument of genocide. In other words, rape was used to commit genocide.[109] When rape is used as an instrument of genocide, it is usually implemented within a policy of ethnic cleansing. This policy of terrorizing the enemy includes "the use of gang rape, sexual torture, psychological torture, rape camps, and forced impregnation."[110] When such a policy is implemented, ethnic cleansing as an act of genocide becomes the destruction of a cultural group. Women's physical and psychological destruction is thus equated to the destruction of a group as a whole. "Raping women in a community can be seen as raping the body of the community, in doing so, undermining the entire fabric of that community."[111]

Genocidal rape was first recognized in the *Akayesu* judgment. The Tribunal's linkage between genocide and rape was unexpected because the Prosecution did not originally include the rape in the indictment. The testimony of a witness prompted the Prosecution to amend the indictment. The Tribunal's only woman judge, Navanethem Pillay, ensured that the new evidence was heard.[112] In this case, Akayesu was present during the rapes at the Bureau communal where rape occurred in a "frequent" manner.[113] The Trial Chamber further concluded that at that time a propaganda campaign existed geared at mobilizing the Hutu against the Tutsi. The campaign depicted Tutsi women as sexual objects.[114] When defining rape as an *actus reus* of genocide, the Trial Chamber in the *Akayesu* case "viewed rape not as sexual in nature but as a tool of war, as a

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Law. 350, 2003, p. 370.; ICTR, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber, Judgment, 2 October 1998, para. 733.

[108] In Bosnian cases the ICTY concluded that genocidal rape may be considered under "imposing measures intended to prevent births within the group", *Ibid.* (Russell-Brown), p. 355.

[109] Supra fn. 61 (Buss), p. 151.

[110] Supra fn. 88 (Ellis), p. 231.

[111] *Ibid*., p. 232., *see also* Tadeusz Mazowiecki, Pursuant to Commission Resolution 1992/S-1/1, E/CN.4/1993/50.

[112] Supra fn. 88 (Ellis), p. 232.

[113] ICTR, Prosecutor v. Akayesu, Case No. ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para.706.

[114] *Ibid.*, p. 732.

violent act perpetrated against a member of a group with the intent of destroying that group".[115] In line with the *Akayesu* Judgement, the Trial Chamber in the *Krstić* case explained that serious harm need not cause permanent suffering; however, it must include harm that goes beyond temporary feeling. It must result in severe long-term difficulty to a person's ability to lead a normal and constructive life.[116]

1.4. Critique of the "rape as weapon of war" concept

Feminists have been advocating for a connection between sexual violence and war in the same manner they fought to make sexual violence an issue of public concern in peace rather than a private matter.[117] According to Buss, a feminist legal scholar, connecting sexual violence and war created heightened visibility of wartime rape in the international sphere, while, at the same time, it resulted in "un-visibility" of rape within the record of prosecution.[118] A good example of such "un-visibility" is the ICTR's rape record. The tribunal convicted 61 individuals until its closure, out of which only six perpetrators have been found guilty of rape-related charges. Similarly, in the ICC's *Lubanga* case the prosecution did not include rape in the indictment despite its systematic occurrence, and therefore demonstrated "that the prosecution of sexual crimes has not been hindered by juridical constraints or restrictive precedents," but rather by the modes that courts, prosecutors, and scholars use to frame sexual crimes.[119]

Feminist instrumentality-weapon-of-war approach applied by the Office of the Prosecutor at the *ad hoc* tribunals is eloquently framed by Kirby as "modes." Modes are "assumptions and

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[115] *Ibid.*
[116] ICTY, Prosecutor v. Krstić, Trial Judgement, 2 August 2001, para. 510.
[117] Supra fn. 59 (Kirby), p. 800.
[118] Supra fn. 61 (Buss), p. 151.
[119] Douglas Irvin-Erickson, Sixty Years of Failing to Prosecute Sexual Crimes: From Raphaël Lemkin at Nuremberg to Lubanga at the International Criminal Court, in A Gendered Lens for Genocide Prevention 83, 83 (Mary Michele Connellan & Chistiane Fröhlich eds.,2018, pp. 83-84.

claims about the causes and character of wartime sexual violence."[120] The narrative of instrumentality sees rape as a self-conscious strategy applied by soldiers who are not limited by ethical boundaries.[121] The instrumentality frame puts sexual violence central, rather than tangential, as a practice of war, which has a functional or intentional component.[122] Such a universalistic approach preserves the idea of a conscious tactic seen as a short-term policy or strategy, and as such poorly reflects realities on ground [123]

However, talking about rape only from the instrumentalist perspective - a tool of organized violence - limits interpretations of weapon of war *per se* as well as excludes numerous causes of rape from the general storyline and, therefore, different subjects from its framing. For example, the dominant narrative during the Yugoslavian war has been on the rapes committed against Bosnian Muslim women, and therefore, excluding Croatian and Serbian victims of wartime rape. However, in the urgency to redress sexual violence, the instrumentality framework became universal.[124]

A paradigmatic example of limitations of universalistic-weapon-approach is recognition in the majority of the ICTR's sexual violence cases that women were largely raped as a part of genocide (conscious strategy). In that sense, few judgements talk about overall violence against Tutsi, which, consequently, rendered the rape of individual women absent from the record of convictions.[125] This use of rape as an instrument of genocide reduced sexual violence committed

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[120] Supra fn. 59 (Kirby), pp. 798-9.
[121] *Ibid.*
[122] *Ibid.* 148–149., *see also* J. Ann Tickner, You just don't understand: Troubled engagements between feminists and IR theorists, International Studies Quarterly 41(4): 611–632, 1997, p. 626.
[123] Supra fn. 59 (Kirby), p. 808.
[124] Supra fn. 3 (Baaz, Stern), p. 5.
[125] Supra fn. 61 (Buss), p. 153.

in the Rwandan war to uniform practice equal to Hutu violence against Tutsi rather than considering its variances and exceptions.[126]

Another example of limitations of such approach is the judgement rendered by the Extraordinary Chambers at the Courts of Cambodia (ECCC) on 16 November 2018 in *Case 002/2*. There, the co-investigating judges concluded that the high ranking Khmer Rouge cadres may be charged only with sexual crimes committed in the context of forced marriage, despite the fact that the scholarly record provides evidence that the regime used rape outside forced marriage while, at the same time, propagated laws and policies that outlaw rape.[127] In that sense, rapes committed outside the context of forced marriage could not be prosecuted as international crimes because the regime prohibited rape, which nominally meant that the Khmer Rouge had a policy *against* rape. In other words, prohibition of a certain behavior (rape) by the regime that was simultaneously committing that very offense (rape), according to co-investigating judges, denied the existence of a particular policy (endorsing rape) despite the reality on the ground (widespread rape).[128] The co-investigating judges stated in the indictment:

> Despite the fact that this policy did not manage to prevent rape […] it cannot be considered that rape was one of the crimes used by the CPK leaders to implement the common purpose.[129]

Irvin-Erickson, when criticizing this approach by the co-investigating judges, explained that "criminal liability should rest upon the actions of the state and groups that are set forth by individuals within government, not necessarily state policies."[130]

However, even if rape is widespread, as required by the weapon of war frame, Baaz and Stern argue that widespread occurrence of sexual violence does not automatically imply a

[126] Ibid., pp. 154-156.
[127] Supra fn. 119 (Irvin-Erickson), p. 585.
[128] Theresa de Langis, A Missed Opportunity, A Last Hope? Prosecuting Sexual Crimes Under the Khmer Rouge Regime, 3 Cambodian Law & Policy Journal 39, 2014, pp. 40-41.
[129] ECCC, Case 002, Case No. 002/19–9–2007-ECCC-OCIJ, Closing Order, 15 September 2010, para. 1429.
[130] *Ibid.*, p. 583.

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conscious strategy encouraged by commanders.[131] They give an example of the Vietnam War where dysfunctional chains of command limited the information flow. Therefore, in numerous cases rape may result from indiscipline rather than a conscious strategy.[132]

The "weapon of war" framing has definitely been a triumph of sexual and gender-based violence visibility. However, it raises certain concerns regarding justice. The chapter below will explore these concerns raised by different feminist scholars, in practice, more precisely, in prosecution of rape committed during the Syrian war. This critical analysis, however, is not intended to be disapproving, but rather a contribution to reflections of framing wartime sexual violence and future prosecution of those crimes.

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[131] Supra fn. 3 (Baaz, Stern), p. 74.
[132] *Ibid.*

CHAPTER 2: EVIDENTIARY STATUS QUO ON WARTIME RAPE IN SYRIA

Introduction

As "weapon of war" frame may be applied to the evidence collected before the adjudicative mechanism has been set, this chapter presents challenges faced during the pre-investigation-and-prosecution phase. It analyses evidence collected by various actors when framing rape as a weapon of war. It identifies actors involved in collecting evidence about sexual and gender based crimes and available evidence on rape. It also critically assesses actors collecting evidence and evidence itself. The actors may influence availability and credibility of evidence. Without credible and corresponding evidence there are no effective prosecutions. Following the prosecutorial technique of linking incidents with certain perpetrators, this chapter identifies perpetrators, types of rape committed, incidents and consequences of the rape on individuals and society.

2.1. Actors involved in evidence collection

Throughout the Syrian war, a multitude of actors expressed their concern about the large number of victims killed, raped, or disappeared, and about more and more years of conflict. As of today, the Syrian war has been ongoing for more than eight years, and there is still no effective adjudicative mechanism with jurisdiction over crimes committed in Syria. The UN Security Council's paralysis in ensuring accountability for sexual- and gender-based crimes in Syria prompted multiple innovative approaches to documenting evidence of these crimes.[133]

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[133] For example, in 2014, a French draft resolution calling for the referral of the situation in Syria to the International Criminal Court (ICC) was also vetoed, UN Doc. S/2014/348, S/PV.7481, 22 May 2014, *see also* Ingrid Elliott, 'A Meaningful Step towards Accountability'?: A View from the Field on the United Nations International, Impartial and

2.1.1 Independent International Commission of Inquiry on the Syrian Arab Republic

One of the innovative mechanisms tasked with documenting crimes in Syria is the Independent International Commission of Inquiry on the Syrian Arab Republic (hereinafter: The Commission of Inquiry). The Commission of Inquiry was established by the UN Human Rights Council with a mandate to investigate all violations of international human rights law in Syria since March 2011.[134]

Regardless of the fact that this investigative body is not fully judicial, commissions established by the Security Council have a positive history of serving as a base for future prosecutions.[135] For example, the findings of the 1992 Commission of Experts (hereinafter: Bassioni Commission) prompted the establishment of the ICTY that consequently successfully prosecuted mass atrocities on the basis of those facts. [136] The Bassioni Commission also contributed to the investigation and prosecution of international humanitarian law violations by finding that rape and other sexual crimes were used in widespread and systematic ways by combatants. This was the first step towards acknowledging rape as a weapon of warfare in situations where it was committed in systematic ways and used as a strategy to deteriorate the enemy.[137] Before the first prosecutions, the Bassioni Commission's Report already framed rape

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Independent Mechanism for Syria, Journal of International Criminal Justice, Volume 15, Issue 2, May 2017, Pages 239–256, available at https://academic.oup.com/jicj/article/15/2/239/3858263, last accessed on 3 September 2019.

[134] Human Rights Council, Resolution adopted by the Human Rights Council at its seventeenth special session, S-17/1, Situation of human rights in the Syrian Arab Republic, para. 13.

[135] For example, the ICTY statue do not include crime against cultural property, however the ICTY Trial Chamber followed the Bassioni Commission's framing in order to criminalize and prosecute crimes against cultural treasures, Micaela Frulli, Fact-Finding or Paving the Road to Criminal Justice: Some Reflections on United Nations Commissions of Inquiry, 10 Journal of International Criminal Justice 1323, 2012, pp. 1327-1328.

[136] Janine Natalya Clark, Peace, Justice and the International Criminal Court: Limitations and Possibilities, 9 , Journal of International Criminal Justice, 521, 2011, pp. 524-525; Supra fn. 10 (Frulli), pp. 1334-1336., p. 790.

[137] The 1992 United Nations Commission Of Experts, Initial Report Of The United Nations Commission Of Experts Established Pursuant To Security Council Resolution 780 (1992), Annex IX Rape and sexual assault, S/1994/674/Annex IX, p. 6.; *See also* United Nations, Security Council, Letter Dated 24 May 1994 from The Secretary-General to the President of The Security Council, S/1994/674, 27 May 1994, p. 58.

as a weapon of war and, therefore, prompted a series of prosecutions for rape against individuals in Yugoslavia, Rwanda, and, afterwards, the DRC.

Differently from the commissions established by the UN Security Council, the investigative commissions established by the Human Rights Council, such as the Commission of Inquiry, have been criticized either for their unbalanced and one-sided mandate or because they were not able to access countries under investigation.[138] The fact that victims of rape are reluctant to speak up and give testimony combined with no access to evidence on the ground makes it harder to prove the required elements of rape.[139]

Most commissions established by the Human Rights Council investigate both human rights law and international humanitarian law violations.[140] Namely, the Commission of Inquiry cognized that the conflict in Syria met the legal threshold for a non-international armed conflict; thus, humanitarian law may be applied.[141] Therefore, the Commission of Inquiry's aim is to identify those responsible and ensure that perpetrators of violations, including those that may constitute war crimes and/or crimes against humanity, are held accountable under international criminal law.[142]

Evidence of sexual violence established by the Commission of Inquiry's Reports demonstrates that rape as a weapon of war not only acquired legal significance for the

[138] Supra fn. 136 (Frulli), p. 1324.
[139] Supra fn. 5 (Syria-COI), p. 20.
[140] Supra fn. 136 (Frulli), p. 1333.
[141] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic stated: "The commission did not apply international humanitarian law for the purposes of the report and the period covered. International humanitarian law is applicable if the situation can be qualified as an armed conflict, which depends on the intensity of the violence and the level of organization of participating parties. While the commission is gravely concerned that the violence in certain areas may have reached the requisite level of intensity, it was unable to verify that the Free Syrian Army (FSA), local groups identifying themselves as such or. Other anti-Government armed groups had reached the necessary level of organization." *See*, Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc A/HRC/21/50, 16 August 2012, para. 12.; Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc, A/HRC/ 19/69, 22 February 2012, para. 13; Supra fn. 5 (Syria-COI), paras. 107-108.
[142] *Ibid.*

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Prosecutors' Offices but also for the actors involved in collecting evidence. Namely, the Commission of Inquiry's main storyline of rape committed during the Syrian war has been framed as weapon of warfare.[143] The Commission concluded that rape was committed in systematic ways and used as a strategy to deteriorate and humiliate the opposition, similarly to the framing of the Bassiouni Commission.[144]

The reports disproportionally focus on crimes committed by the governmental forces and ISIS due to the fact that their policy of rape could be identified within the available evidence.[145] For example, out of all crimes committed during the Syrian war ISIS' fighters committed only 1% of overall crimes.[146] Such framing leaves out evidence of rape committed in retaliation by the anti-governmental forces.[147] The Report also omits evidence rape committed, due to the severe stigma, as consequences rape of the actual sexual violence crimes.[148] Rape before conflict is mentioned only in one report,[149] evidencing a continuing lacuna in prosecuting rape under international criminal law.

As policy is mostly proved by deomnstrating the widespread nature of crimes, the Commission of Inquiry's reports predominantly focus on identifying patterns of sexual violence. In fact, out of fifteen analyzed reports only two reports mention actors other than the Governmental forces and ISIS committing rape and other forms of sexual violence. Furthermore,

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[143] See Supra fn. 5 (Syria-COI); see also Human Rights Council, the Independent International Commission of Inquiry on the Syrian Arab Republic, "They came to destroy": ISIS Crimes against the Yazidis, A/HRC/32/CRP.2, 15 June 2016.
[144] *Ibid.*
[145] Supra fn. 144 (Syria-COI), pp. 4-7.
[146] Syrian Accountability Project, Syracuse University College of Law, Looking through the Window Darkly, A Snapshot Analysis of Rape in Syria 2011-2015, p.12.
[147] Supra fn. 5 (Syria-COI), para. 52.
[148] The crime of rape was not committed by soldiers but by family members, Christine Chinkin, Madeline Rees, A Commentary on the Conference Room Paper of the Independent International Commission of Inquiry on the Syrian Arab Republic "I lost my dignity": Sexual and gender-based violence in the Syrian Arab Republic, May 2018), p. 5.
[149] *See* Syrian Justice and Accountability Center, Societal Attitudes towards Sexual and Gender-based violence in Syria, December 2015, SREO.

a very small number of reports mention rapes committed outside of the element of policy a policy required to prove all elements of the crime.[150] Nevertheless, despite selective framing and criticism it is more likely that domestic and international courts will admit evidence collected by the Commissions of Inquiry than evidence by other actors.[151] Therefore, the evidentiary gaps created by the commission's omissions ensure that a large number of rapes are never prosecuted.

2.1.2. Civil society evidence collectors

Other actors gathering evidence of sexual violence come from civil society. There is an increasing trend of NGOs, CSOs, and individual human rights defenders filling the accountability gap and gaining access to directly gather evidence and document crimes on the ground. However, there is a certain concern about the neutrality of these actors which affects the admissibility of evidence collected by civil society.[152] Namely, NGOs are funded for political goals rather than impartial, objective, and fair investigation/documentation, which may impact evidence they collect. As a result, the evidence they collect may suffer from the same biases.[153] Therefore, approaching rape as a weapon of war framed as a security issue becomes a political goal that prompts countries to fund and tackle this issue in biased ways.

The evidence of the scale and status of rape during the armed Syrian conflict presented below was gathered by various actors specifically by the Commission of Inquiry and civil society sector. Other actors were also charged with collecting evidence of human rights and humanitarian law violations in Syria. Nevertheless, their evidence has not been disclosed to the public.[154] The

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[150] *See* Supra fn. 5 (Syria-COI).
[151] Mark Kersten, What counts as evidence of Syria's war crimes?, Monkey Cage Blog, Washington Post, 28 October 2014, available at https://www.washingtonpost.com/news/monkey-cage/wp/2014/10/28/what-counts-as-evidence-of-syrias-war-crimes/, last accessed on 5 September 2019.
[152] *Ibid.*
[153] *Ibid.*
[154] For example, the International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab

criticism of impartiality combined with certain limitations on collecting evidence of sexual- and gender-based crimes rendered available evidence selective, incomplete and disproportionate.[155]

2.2. Publicly available evidence on wartime rape

This thesis analyzes the Commission of Inquiry's Reports on sexual violence and reports on sexual- and gender-based violence issued by several NGOs, such as the Syrian Accountability Project, Fraternity Foundation of Human Rights, EUROJUST, International Federation for Human Rights (FIDH), Euromed Rights, Syria Justice and Accountability Centre (SJAC) and Syrian Network for Human Rights. It also takes into account Country Reports compiled by the US Department of State from 2011 until 2015.

These organizations were chosen on the basis of transparency about their motivations and goals, as well as clear and coherent methodology of preparing reports. The facts produced by these organizations reflect the criticism mentioned above. Taking into account the general limitations and criticism listed above, the following paragraphs will exhibit factual findings on rape in Syria available in online sources with an aim to understand framing of the facts about the rape accessible to the public.

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Republic since March 2011, avaliable at https://iiim.un.org/#, last accessed on 7 September 2019; or The Commission of International Justice and Accountability (CIJA), available at https://www.csce.gov/international-impact/interview-chris-engels-director-investigations-and-operations-commission?page=7, last accessed on 7 September 2019.

[155] Limitations specific to the gathering of the SGBV evidence: (a) victims are reluctant to come forward due to feelings of guilt, shame, fear of societal stigma, and/or rejection from the community –there are vast social pressures placed on rape survivors (rape is a taboo subject and is seen as a source of shame and dishonor); (b) there are no reporting structures for victims and no reasonable prospect of prosecution giving victims little reason to come forward; (c) a lack of medical assistance also reduces the ability to evidence and document sexual violence in conflict, which precludes successful investigation and ultimately prosecution (d) focus on "big fish" perpetrators of large scale crimes rather than on sexual violence, *See* Abdulrahim, Raja, In Syria - struggling to shine a light on victims of sexual violence, LA Times, 18 November 2014; UN Secretary-General (UNSG), Conflict-related sexual violence: report of the Secretary-General, 13 January 2012, A/66/657*S/2012/33, para. 16.

2.3. Factual finding on rape framed as a "weapon of war"

2.3.1. Government and associated militias rape crimes committed in detention and during house raids

Because rape committed by governmental forces has been framed as a weapon of war, the majority of reports made by the aforementioned organizations emphasize that the government's regime is responsible for a wide number of incidents of rape. They report that the Assad regime has used rape as means of punishment of the opposition.[156] From the reports it is evident that the opposition was the target by the Government. For example, in cases where a pro-government individual was abducted by governmental forces, he or she was always released shortly after finding photos of Bashar al-Assad or pro-regime songs in their phones.[157]

Most of the reports list facts that detention centers were the most common place where rapes by the governmental forces occurred. The International Federation for Human Rights (FIDH) report even use social circumstances to prove widespread occurrence. Namely, the report states that widespread nature of crime may be seen from the "widespread suspicion" that women have been exposed to regular sexual abuse in detention.[158] Even victims, who were in detention but not raped, have been perceived by society as victims of rape and, therefore, burdened to carry that stigma. One of the victims stated:

> In Damascus, I was proposed to record my name in a list of supposed "rape victim" in order to be married with a voluntary man. I could not stand the fact that everybody believed that I had been raped during my detention. I even thought of suicide.[159]

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[156] Supra fn. 5 (Syria-COI), pp. 9-10.
[157] *Ibid*., p.6, *see also* International Federation for Human Rights (FIDH), Violence against Women in Syria: Breaking The Silence, Briefing Paper Based on an FIDH assessment mission in Jordan in December 2012, 2013, p. 11.
[158] *Ibid.* (FIDH), p. 13.
[159] Euro-Mediterranean Human Rights Network, Violence against Women, Bleeding Wound in the Syrian Conflict, November 2013, p. 12.

The widespread and cruel nature of rape by governmental forces is demonstrated by the fact that rape occurred at every stage of detention from the moment of arrest throughout the end of detention. In some cases, victims transferred between detention centers were raped in more than one location.[160] The Commission of Inquiry reported that rape of females occurred in 20 Government political and military intelligence branches, while rape of males was reported in 15 branches, which paints a picture covering a broad geographical area.[161] Differentiation by the Commission between rape committed against women and men was due to the fact that rape was committed differently against different genders. For example, men/boys were raped more often with "objects, including batons, wooden sticks, and pipes;" they were exposed to electrocution and beating of male genitals; and the were forced to have intercourse with other detainees.[162] On the contrary, women/girls have been subjected to searches that amounted to rape (male officers inserted their fingers into vaginas under the pretext of conducting a search), public rape combined with humiliation, and gang-rapes.[163] The common denominator of rape against both genders is that they were raped during or after interrogations for the purposes of extracting information, humiliation, and punishment.[164]

The aforementioned reports lead to the conclusion that the various groups collecting evidence of crimes committed during the Syria war were focused on framing rape as a weapon of war. Namely, the Commission of Inquiry concluded that the rape was committed in detention by governmental forces and Shabiha as a part of widespread and systematic attacks against the

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[160] Syrian Justice and Accountability Center, "Do You Know What Happens Here?", An Analysis of Survivor Accounts of SGBV in Syria, January 2019, p.8.
[161] Supra fn. 5 (Syria-COI),, pp. 8-13
[162] *Ibid.*, pp. 11-13.
[163] *Ibid.*, pp. 8-10., *see also* Supra fn. 161 (SJAC), p.8.
[164] *Ibid.* (Syria-COI), p. 10.

civilian population.[165] Furthermore, in order to link rape with the higher level officials, the Commission of Inquiry reports focus on the widespread nature of rape.[166] Reports by other actors also list the fact of rape being widespread by reporting the number of incidents of rape or, in other cases, reporting on societal circumstances, such as perception by the communities of the victims who were in detention but not raped.[167]

Reports also mention that the government and its associated militias committed rape during house raids and at checkpoints. Government forces primarily carried out home raids from April 2011 to 2015 relying heavy on Shabiha throughout 2011 and 2012.[168] Regarding checkpoints, women were not commonly searched in 2011; however, when the conflict escalated, so did searches, and governmental forces started using rape against, mostly, women and girls.[169]

In order to satisfy the requirement of the weapon of war framework, reports must show that rape was committed in furtherance of a certain objective, preferably in a cruel way. Therefore, the Commission of Inquiry emphasizes that the main objectives of house raids were to arrest men suspected to be members of opposition groups or who supported the opposition; to conscript men into the military; and to quell opposition in other ways than killing.[170] The Commission of Inquiry further stated that house raids consisted of arrests of men, sexual violence against women and girls, and killings of men, women, and, irregularly, children.[171] Thus, women and girls were not only exposed to the arrests and killings of male family members but also were victims of sexual violence meant to instill fear and humiliate the whole population. The most

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[165] Supra fn. 5 (Syria-COI), p. 25.
[166] Ibid., para. 40.
[167] See Supra fn. 160 (Euro-Mediterranean Human Rights Network), p.12.
[168] *Ibid.,* p. 6.
[169] *Ibid.,* p. 8.
[170] *Ibid.,* p.1.
[170] *Ibid.*,p. 10.
[171] *Ibid.,* p. 5.

common type of sexual violence committed during house raids was rape and gang-rape by multiple perpetrators who penetrated women and girls with penises, guns, or sharp objects.[172]

Regardless of the fact that rape at checkpoints have been framed as a weapon of war, actors other than the Commission of Inquiry do not often mention it, or, even if they do mention it, they do not give detailed explanation. Rape at checkpoints has been mostly frequently discussed in the US Department of State reports, which, however, refer back to the Commission of Inquiry's findings. Rape at checkpoints has also been mentioned in the SJAC's report, the purpose of which is to corroborate facts established by the Commission of Inquiry. The reason for the corroboration is that most of the analyzed reports use methodology to link crimes to high level perpetrators, and identification of perpetrators of rapes at checkpoints is more challenging and less reliable, particularly when the perpetrators wore civilian clothes. [173] The Commission of Inquiry stated, similarly to the rapes committed during house raids, that victims of sexual violence at checkpoints were mostly women and girls. Those exposed to sexual violence at checkpoints were from opposition-held areas. The 2013 US Department of State report states that some incidents occurred at the cross-border area. However, most of incidents of rape at checkpoints took place throughout 2012 and 2013 in Homs and Hama. There, women and girls were regularly sexually abused and harassed.[174] The Report labeled such incidents as mass rape used as a war tactics,[175] while the Commission of Inquiry on the Syrian Arab Republic's acknowledged rapes at checkpoints were part of widespread and systematic attack on civilian population.[176]

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[172] Supra fn. 161 (SJAC), p. 11.
[173] *Ibid.*, p. 7.
[174] Supra fn. 5 (Syria-COI), p. 8.
[175] The US Department of State Report, Syria 2013 Human Rights Report, p.2.
[176] Supra fn. 5 (Syria-COI), p. 1.

From that, it is visible that the Commission of Inquiry connected rape committed during house raids and at checkpoints with the political goal of the Assad regime to humiliate the enemy. The Commission of Inquiry stated that these rapes were committed in pursuance of a policy to target civilians who were associated with the opposition.[177] Similarly to the Commission of Inquiry's conclusion, the Syrian Justice and Accountability Center demonstrated a policy by showing the systematic manifestation of crimes across wide geographic areas.[178] It is also clear that due to the multiple conflict settings, the challenge of linking rape as a weapon of war with high ranking officials may sometimes be discouragingly difficult for actors collecting evidence on ground.

2.3.2. Islamic State of Iraq and Syria (ISIS) rape crimes

As mentioned earlier, actors have disproportionately focused on ISIS crimes when documenting sexual violence in Syria. However, the purpose of this argument is not to downsize horrendous crimes committed by ISIS but to criticize the selective framing that accompanies international criminal justice evidence collection that will later influence prosecutions.[179]

ISIS has targeted Yazidis, Christians, Turkmens, Sabea-Mandeans, Kaka'e, Kurds, Shias, and Sunnis perceived affiliated to the Iraqi Government. However, the majority of reports have focused only on violations against the Yazidi community, considering the security frame of crimes as an instrument of genocide applied to its context by the Commission of Inquiry.[180]

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[177] *Ibid.*, p. 120.
[178] Supra fn. 161 (SJAC), p.1.
[179] Supra fn. 137 (Clark), pp. 524-525
[180] Supra fn. 144 (Syria-COI), See also Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups, A/HRC/28/18, 13 March 2015

Regarding rape committed by ISIS in particular, no less attractive frame of "strategicness" has been applied by different actors in order to better guarantee convictions.[181]

The Yazidi families have been captured on Mount Sinjar while fleeing their home in fear of ISIS. Upon capturing Yazidi families, ISIS separated men and boys from women and children.[182] After capture at Sinjar, women and girls were transferred from primary sites, where there they were kept for 24 hours, to secondary holding sites.[183] The sites held hundreds to several thousands of Yazidi women and children, which led to severe overcrowding that impacted availability of food, water and other living conditions.[184] Upon arrival at secondary sites, a selection process of choosing which female to take as sex slaves started between ISIS fighters. Because women and girls were considered "spoils of war," they could not be sold to non-ISIS fighters. That behavior would be subject to punishment. [185]

As a result of this captivity, the life of Yazidi women was highly controlled by the fighters and, therefore, rape was easily perpetrated. In particular, ISIS created a system that viewed captive women as property of individual ISIS fighters and allowed or even encouraged rape if performed in a prescribed and authorized manner. As a result, while "owned" by fighters, women and girls were exposed to vicious sexual violence. Many of them even reported that they have been forced to take birth control.[186] Despite the fact that hundreds of Yazidi women and girls were imprisoned at the sites in Tel Afar and Mosul, surrounded by dozens of young, armed men, there have been no reports of rape on a mass scale there but only of isolated incidents of rape. The Commission of Inquiry concluded that this shows the strict system governing the life of

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[181] Supra fn. 3 (Baaz, Stern), p. 10.
[182] Supra fn. 144 (Syria-COI), pp. 4-7.
[183] *Ibid.,* p. 11.
[184] *Ibid.*
[185] *Ibid.,* p. 15.
[186] Supra fn. 144 (Syria-COI), p. 15.

Yazidi woman and girls as chattels and rigid control over the majority of fighters by higher ranking officials.[187]

From NGO reports, the media and ISIS' own official statements ISIS has been exposed as a specific perpetrator that did not hide the motives and intentions behind its actions. Namely, there is ample documentary evidence of the existence of an ISIS policy establishing a system of sexual slavery.[188] This documentary evidence encompasses policy measures regarding the treatment of Yazidi females, such as:

> the justification to take infidel women captives and to sell them as concubines and sex slaves; […] regulations on how to participate in the trade of sex slaves; detailed regulations on intercourse with sex slaves; regulation of the transmission of ownership over sex slaves as property; samples of marriage contracts with captive women; and medical forms for couples to be married.[189]

The reports state that ISIS even tried to justify sexual violence by asserting that Islam allows sex with non-Muslim "slaves," and it allows Muslims to beat and sell women and girls. However, Human Rights Watch disregarded such arguments and elaborated that such statements are supplementary "evidence of a widespread practice and a systematic plan of action by ISIS."[190] The Commission of Inquiry reports that the treatment of Yazidi women and girls at sites reflects the explicit ideological (and religious) policy by ISIS which does not permit the presence of Yazidism in the territory the group controls.[191] Namely, women and children have been treated as objects. They have been bought and sold, and general prices for women and girls have been set on the basis of age, marital status, beauty, and number of children. Unmarried women have been

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[187] *Ibid.*, p. 54.
[188] EUROJUST, The prosecution at national level of sexual and gender-based violence (SGBV) committed by the Islamic State in Iraq and the Levant (ISIL), July 2017, p.9.
[189] *Ibid.*
[190] Human Rights Watch, Iraq: ISIS Escapees Describe Systematic Rape Yezidi Survivors in Need of Urgent Care, 14 April 2015, available at https://www.hrw.org/news/2015/04/14/iraq-isis-escapees-describe-systematic-rape, last accessed on 19 September 2019.
[191] Supra fn. 144 (Syria-COI), para. 167.

targeted the most. They had been sold very quickly, while those women who had more than three children were held captive on sites for up to four months.[192]

The ISIS rape crimes are a textbook example of a weapon of war frame. They publicly announced a religious policy against the Yazidi women that prompted actions against ISIS by numerous actors. Some actors reported on crimes while others, such as the United States of America, deployed military action to stop mass atrocities.[193] This proves the success of using the weapon of war framework. States understand this language and, therefore, are willing to act. ISIS rape crimes reached international attention, similarly to crimes committed in Bosnia against the Muslim women during the Yugoslavian war.

2.4. Factual finding on rape framed differently than "weapon of war"

2.4.1. Rape committed by armed groups

Rape committed by the anti-governmental armed groups has been highly underreported compared to the rapes committed by the Government's regime or ISIS. The reason for this is twofold. Firstly, lack of access to Syria on the ground resulted in an evidentiary gap regarding those crimes.[194] Secondly, the Commission of Inquiry was not able to frame rape committed by armed groups as a weapon of war. Therefore, there was no international interest to fund NGOs' reporting about rape crimes committed by them. The NGOs rarely report or do not report about the crimes committed by the anti-governmental armed forces, including the Syrian Free Army or Faylaq ar-Rahman coalition. [195]

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[192] *Ibid.*, pp. 12-13.
[193] Aljazeera, World reacts to death of ISIL leader Abu Bakr al-Baghdadi, 29 Oct 2019, available at https://bit.ly/37lltv9, last accessed on 19 November 2020.
[194] Supra fn. 142 (HRC), para. 5.
[195] Only the Syrian Accountability Project's Repot "Looking through the Window Darkly" and Syrian Justice and Accountability Centre's Report "Do You Know What Happens Here?" mentions crimes committed by the anti-governmental forces. They do not provide evidence about crime of rape but only acknowledge that rapes have been committed by rebel groups.

The armed anti-governmental opposition consists of various groups that were formed during the conflict or joined from abroad that oppose the Assad regime.[196] The Free Syrian Army claims to be "the military wing of the Syrian people's opposition to the regime" and aims to bring down the government using force.[197]

However, regardless of the invisibility of crimes of rape committed by anti-governmental armed groups, the Commission of Inquiry acknowledges, with scarce evidence, that these crimes took place. Namely, between late 2011 and 2016 in Damascus and Aleppo governorates, incidents of rape of women by members of armed groups were reported.[198] Most rapes committed by non-governmental armed groups that were recorded by the Commission of Inquiry were committed by the Free Syrian Army.[199] According to the Syrian Accountability Project's Report, the rebel forces of the Free Syrian Army were responsible for 2% of crimes of rape committed until 2015, which is twice the number perpetrated by ISIS.[200]

Learned from the Case 002 the invisibility of rape crimes committed by armed groups contributes to possible impunity due to fact that the Free Syrian Army's code of conduct stipulates

> I pledge not to practice any form of torture, rape, mutilation, or degradation. I will preserve prisoners' rights and will not exercise any of the above practices in order to obtain confession. [201]

Namely, evidence of acts of rape combined with a policy that nominally outlaws rape would preclude the court from finding a policy or systematic implementation of rape as a weapon

[196] The Daily Star Lebanon, Challenges await new interim government, 14 November 2013, avaliable at http://www.dailystar.com.lb/News/Middle-East/2013/Nov-14/237847-challenges-await-new-interim-government.ashx, last accessed on 18 September 2019.
[197] Ruth Sherlok, 15,000 strong' army gathers to take on Syria, the Daily Telegraph, London, 3 November 2011, available at https://bit.ly/2lTfJ8J, last accessed on 18 September 2019.
[198] *Ibid.*
[199] Supra fn. 5 (Syria-COI), pp. 13-14.
[200] Supra fn. 147 (SAP), p. 12.
[201] ICRC, Syria, Code of Conduct of the Free Syrian Army, Article 4, avaliable at https://bit.ly/2kof1jv, last accessed on 18 September 2019.

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of war. Despite the code, armed forces committed crimes of rape against women and girls, similarly like in the Case 002 rendered by the ECCC. The framing by the Commission of Inquiry on the Syrian Arab Republic as "no evidence of a systematic practice or policy on the part of armed groups to use sexual and gender-based violence to instill fear, extract information, or enforce loyalty" would prompt investigations or prosecutions of these crimes.[202] On the contrary, those committed incidents rape perpetrated by armed groups have occurred in different contexts, such as involvement of elements of exploitation, sectarianism, or revenge.[203]

The Commission of Inquiry concluded that after February 2012 armed forces committed war crimes of rape and other forms of sexual violence despite the fact that no policy was found.[204] However, there has been no international prosecution only of rape-as-war-crimes without combination with other grave crimes, because they did not reach the required level of gravity for an international court to take jurisdiction.

2.4.2. Rape before the conflict

Regardless of the fact that international criminal law is clear that the widespread nature of crimes of sexual- and gender-based violence committed before the outbreak of war also constitutes crimes against humanity, crimes committed before conflict have not been included in the framing of weapon of war as the framework itself requires the armed conflict to be ongoing.[205] Therefore, irrespective of the reported frequency of pre-2011 sexual- and gender-based violence, there were reports of rapes occurring pre-conflict, but the reports did not document the details because it was pre-conflict.

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[202] *Ibid.,* p. 13.
[203] *Ibid.*
[204] *Ibid.,* p. 26.
[205] *See* Chapter I.

Only one report, "*Societal Attitude toward Sexual and Gender-Based Violence in Syria",* written by the Syrian Justice and Accountability Center confirms that sexual- and gender-based violence existed prior to the outbreak pf war which took place on March 2011. However, the report does not provide evidence useful for the criminal investigation. Respondents, who were interviewed for the report, provided a range of answers from "all kinds of sexual and gender based violence existed before the crisis" to sexual and gender based violence occurred far away in the countryside because of the "ideology and wrong traditions of these areas."[206] Even in discussions about sexual- and gender-based violence prior to the conflict, respondents very often associated SGBV crimes with the Syrian government or pro-government militias (Shabiha). According to one respondent, sexual- and gender- based violence "existed in regime prisons but not in the community."[207] Overall, the most common types of sexual- and gender- based violence that occurred before 2011 are forced marriage, rape, government violations, and domestic violence.[208] The widespread occurrence of pre-wartime rape is also evident from that fact that, in its 2007 review, the CEDAW Committee urged the Syrian government to give high priority to addressing violence against women and girls.[209]

2.4.3. Consequences of rape

Consequences of rape on women's and girls' lives, as well as lives of men and boys, have been tremendous. They reflect the status quo opinions on virginity, masculinity, women's roles, and talking about intimacy in conservative and religious Syria.

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[206] Supra fn. 150 (SJAC), p. 17.
[207] *Ibid.*
[208] *Ibid.*, p.18.
[209] CEDAW Committee, Concluding Observations: Syrian Arab Republic, U.N. Doc. CEDAW/C/SYR/CO/1, 2007, para. 20.

Although the consequences differ between genders, they have been the same across various "sects."[210] There is an enormous barrier for all survivors of sexual violence inhibiting their ability to speak up, seek justice, or return to their families. The social stigma for rape survivors is very strong in Syria. Female survivors expressed feeling of dishonoring their families, which, in many cases, leads to the abuse from their relatives. The notion of honor in Syrian society is connected to female virginity before marriage and sexual fidelity afterwards. In that sense, some of the interviewees reported that for a girl it is better to be killed than raped in Syria.[211] Social stigma and family pressure are so strong in Syria that female survivors have been rejected by their husbands and/or families. Such shame in some cases lead to suicide.[212] In addition, women and girls who become pregnant as a result of rape suffer extra burdens as abortion is illegal in Syria.[213] Such cultural and religious norms, particularly in rural and southern areas of Syria, also prohibit women and men to talk freely about intimate issues, such as rape.[214] After experiencing sexual violence men and boys expressed feelings of losing their masculinity and respect from other male relatives.[215]

Other consequences experienced by victims of sexual violence, such as honor killing by families, early marriage, or forced marriage (and rape committed within these marriages), are seen as "by-products" of war.[216] For example, FIDH reported that Syrian women refugees stated that "sometimes families forcibly marry women who have been raped, including to relatives, in

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[210] "Sect describes any social group whose members share a common identity and are able to create a strong solidarity link." In the Syrian context Balanche talks about ethno-religious groups to be considered as "sects", Fabrice Balanche, Sectarianism in Syria's Civil War, The Washington Institute for Near East Policy 2018, p. 94
[211] Supra fn. 5 (Syria-COI), p. 20.
[212] *Ibid.*
[213] *Ibid.*
[214] Supra fn. 161 (SJAC), p.1.
[215] *Ibid., see also "*Even some female respondents reported that coping would be harder for men "because we are part of an eastern community and this will affect his manliness", Supra fn. 150 (SJAC), p. 31.
[216] Supra fn 149 (Chinkin, Rees), p. 5.

order to 'end the matter.'"[217] Chinkin and Rees, in their commentary on the Commission of Inquiry on the Syrian Arab Republic's Conference Room Paper "I lost my dignity," situated those crimes under the section on family members' violence, which means that these crimes would not be prosecuted as weapon of war as they are not "war-related." [218]

2.5. Individual criminal responsibility

International crimes have a specific nature. Crimes framed as weapons of war, particularly rape, have even more specificity than other international crimes. They imply organized, collective wrongdoing; international criminality is precisely planned violence, in which crimes are permitted, ordered, or tolerated by an "intellectual" perpetrator and physically committed by its pawns. Hence, there are two different levels of perpetration - a senior/execution level of officials who stand trial and are punished but did not physically participate in the crime and physical perpetrators.[219]

The NGO reports do not indicate either perpetrators at the executional level or the specific names of the direct perpetrators. For example, no guards and officers responsible for the acts in question have been identified for crimes committed in detention. The Syrian Justice and Accountability Center's Report explained that interviewees mostly were able to identify the security division or specific branch that was in charge of their detention. However, they did not identify names of specific perpetrators. Even in cases when interviewees were familiar with the name of the perpetrator it was uncertain whether the name supplied was the perpetrator's real name or a pseudonym.[220] Identifying perpetrators of rape committed outside the detention

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[217] Supra fn. 158 (FIDH), p.15.
[218] Supra fn. 149 (Chinkin, Rees), p. 5.
[219] Elies van Sliedregt, The Curious Case of International Criminal Liability, Journal of International Criminal Justice 10, 2012, p. 4.
[220] Supra fn. 161 (SJAC), p.7.

centers, such as during home raids and checkpoints, is even harder and less reliable as the common practice of wearing plainclothes instead of their official uniforms by Syrian security forces.[221]

In that sense, there is a need for additional investigations of both personal identification and chain of command. Other actors than mentioned throughout the chapter, are responsible for that. For example, Chris Engels, a Deputy Director for Investigations and Operations of the Commission for International Justice and Accountability, stated that the Commission has "identified over 60 individual perpetrators, reaching up the hierarchy of the Syrian regime and the Islamic State, who are responsible for a wide array of atrocity crimes."[222] Nevertheless, previously conducted interviews could help to establish the factual finding in cases regarding the widespread and systemic nature of SGBV.[223]

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[221] *Ibid.*
[222] Written Testimony before The Commission on Security and Cooperation in Europe by Chris Engels Deputy Director for Investigations and Operations the Commission for International Justice and Accountability September 22, 2016, p.5.
[223] Supra fn. 59 (SJAC), p.1.

CHAPTER 3: CHALLENGE OF PROSECUTING RAPE AS A WEAPON OF THE SYRIAN WAR

Introduction

This chapter provides for a specific prosecutorial strategy within three different jurisdictions. It uses a comparative analysis of the ICC and Canadian Court systems with an aim of providing policy recommendations for the Syrian Public Prosecutorial Office. The recommendations are described in comparison to the two other analyzed jurisdictions. As the crime of rape has been framed selectively as a weapon of war by the international courts, these jurisdictional subchapters identify challenges to prosecuting rape as a "weapon of war" within the jurisprudence of the ICC and Canadian Courts. The identified challenges are then presented as guidelines for effective domestic prosecution on the ground in Syria.

3.1. Prosecuting rape in front of the International Criminal Court (ICC)

3.1.1. Prosecutorial strategies

The ICC is heavily influenced by the impact of investigations, interpretation of the crimes by prosecutors, and jurisprudence of the ICTY and ICTR on sexual violence. In addition, advocacy efforts coming from various feminist groups played a big role in creating the broadest enumeration of sexual and gender-based crimes within the Rome Statue.[224] In that sense, the ICC's Rome Statue is the most progressive international instrument to detach "sex" from "gender" and define the latter in the context of society.[225] Eliminating differential treatment of genders under the law, the ICC helps to quash the historical tendency for crimes against women

[224] ICTY and ICTR Statues had recognized rape only as a crime against humanity, Niamh Hayes, La Lutte Contine, Investigating and Prosecuting Sexual Violence at the ICC, in The Law and Practice of the International Criminal Court, Carsten Stahn (ed.), Oxford Scholarly Authorities on International Law, 1 May 2015, p. 803.
[225] The Rome Statue, Article 7(3).

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to have marginal importance within the prosecutorial frame.[226] The Statue also acknowledges the institutional barriers in addressing wartime rape, and thus, obliged the ice of the Prosecutor, for example, to prioritize investigation and prosecution of sexual and gender-based crimes.[227]

Despite such imposed prioritization and gender integration, the record of wartime rape and sexual violence has been very low due to numerous challenges. Namely, Moreno Ocampo's policy of targeting high officials only, heavily relying on open sources, such as NGOs reports, and hoping to find required evidence in the phases subsequent to the investigations, has been heavily criticized as it resulted in the court rejecting half of all rape charges at the pre-trial phase and only gaining two convictions at the trial phase.[228]

On the contrary, Moreno Ocampo's successor Fatou Bensuda has been widely praised for including sexual and gender-based crimes as a priority in the Prosecutor's policy paper.[229] She focused her strategies on the challenges prosecutors face when charging sexual violence as international crimes. For instance, she has moved the investigatory focus from witnesses to documentary evidence because victims of wartime rape are rarely willing to testify. [230] Further, she chose to build up cases from lower level perpetrators to those most responsible. This approach should assist in "addressing the challenge of establishing the individual criminal responsibility of persons at the highest levels."[231] Despite progress, charges of rape and sexual violence have continued to founder at the ICC. Due to problems with insufficiency of evidence

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[226] Rhonda Copelon, Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law, McGill Law Journal, 46(1), 217-240, 2000, p. 221.
[227] The Rome Statue, Article 49(9) and Article 54(1)(b).
[228] Supra fn. 224 (Hayes), pp. 813-824.
[229] See ICC OTP, Prosecutorial Strategy 2012-15, 11 October 2013, p. 27.
[230] ICC OTP, Strategic Plan 2012-15, para. 44.
[231] ICC OTP, Policy Paper on Sexual and Gender-based Crimes, June 2014, p.52.

underlying contextual elements, such as *cheapeau* requirement would lead to no prosecution of most appropriate modes of liability.[232]

3.1.2. Prosecutorial framing of wartime rape

In principle, the Prosecutors Office brings charges of rape explicitly as crimes *per se* as opposed to, for example persecution which does not require the gender element. In addition, where evidentiary and material elements allow, these crimes will be subsumed under other forms of violence within the jurisdiction of the Court, such as persecution, torture or genocide.[233] Regarding rape *per se* charged as a war crime, there have been no individual prosecutions at the ICC. However, it is important to note that there has been a prosecution of rape subsumed under the persecution "framing but not as rape *per se*. Namely, no individual has ever been prosecuted at the ICC only for a rape as a war crime but always in combination with crimes against humanity due to the gravity threshold.[234] A war crime, an isolated crime of rape *per se* does not meet the gravity threshold required to come before the court, despite the fact that the rape may be a war crime. Similarly, the *ad hoc* tribunals tried rapes as crimes against humanity because they were treated as a part of a larger scenario of widespread and systematic attacks and, therefore, satisfied any gravity requirement. Furthermore, because the ad hoc tribunals tried the rapes as crimes against humanity, no prosecutions or convictions of rape as war crimes were secured. That logic may be followed from the *ad hoc* tribunals where focus on rape as a weapon of war which required crimes to be widespread and systematic rendered no war crimes prosecutions and

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[232] *See* ICC, Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Trial Chamber, Judgment, 7 March 2014; ICC, Prosecutor v. Mudacumura, Case No. ICC-01/04-01/12, Decision on the Prosecutor's Application under Article 58, Pre-trial Chamber decision,13 July 2012; ICC; Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Roma Statue, 16 December 2011.
[233] Supra fn. 231 (OTP), para. 73.
[234] It is evident that the Prosecution Office would not file charges for single crime, because it would not fulfil the gravity requirement, *see* Megumi Ochi, Gravity Threshold Before The International Criminal Court: An Overview Of The Court's Practice, ICD Brief 19, January 2016, p. 4, available at https://bit.ly/2MkaCcg, last accessed on 15 October 2019.

conviction of rape as a war crime. The policy of the *ad hoc* tribunals was to pursue the highest ranking officials they could reach. However, seen from the case-law, where rape were prosecuted as persecution and not as rape *per se,* those convicted for violations of war and customs of war were the ones actually committing and ordering the crimes of rape.[235]

Regarding the high ranking officials, who did not directly committed crimes of rape, they may be prosecuted for crimes against humanity of rape only if rape were committed under their plans and policies; however, orders for rape rarely within the evidentiary findings.[236] Furthermore, crimes of rape by high ranking officials may also be prosecuted under ancillary responsibility as a failure to prevent or punish mass rape. However, the failure to prevent does not qualify as policy.[237] In other words, an affirmative policy of rape would be required as opposed to the passive act of failing to punish. Therefore, in many cases of command responsibility, a policy threshold also applies.

Despite the fact that war crimes include individual acts, the current international criminal law framework may not bring justice to victims of rape that fall out of the selective "weapon of war" or "policy" frame. Namely, the ICC's Prosecutorial Office in several cases framed rape *per se as* a war crime; however, no high ranking official, who had not directly ordered or committed rape, has been convicted for rape as a war crime.

Modes of liability (individual and command), which have been problematic to prove when prosecuting high ranking officials for wartime rape, are found in the Rome Statute under articles 25 and 28, while standards required to satisfy the *mens rea* element are enshrined in article 30. Under article 25 of the Rome Statute, individuals, such as military commanders or

[235] See ICTY, Prosecutor vs. Furundžija, Trial Chamber, Judgment, ICTY, Prosecutor vs. Kunarac, Trial Chamber, Judgment
[236] Supra fn. 231 (OTP), para. 78.
[237] Supra 226 (Copelon), p. 235.

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non-military superiors, may be held liable for wartime rape perpetrated as "individuals, or jointly with or through another person," or if they order, solicit, induce, aid, abet, otherwise assist in, or in any way contribute to, the commission or attempted commission of those crimes. They also may be held responsible under article 28 based on of command or superior responsibility.[238] The Prosecutors Office has used both Articles 25 and 28 when prosecuting rape at the ICC.

The experience of the ICC and *ad hoc* tribunals exhibits that there is often no evidence of orders to commit wartime rape. However, in the situation where rape had been prosecuted as crimes against humanity certain pattern of violence was required to prove for rape *per se* the most appropriate form of modes of liability the co-perpetratorship.[239]

3.1.3. Challenge of prosecuting Syrian wartime rape under the ICC's frame

Numerous cases before various international tribunals and the ICC prove that sexual and gender-based violence has been marginalized within the prosecutorial discourse. The marginalization followed all the way from *Akayesu, Karadžić* to the *Lubanga* case, where charges of sexual violence have been subsequently added by the prosecution or insistently refused to be included in the indictment despite high amount of evidence collected by NGOs and witnesses' testimonies of rape crimes taking place.[240]

In the case of Syria evidence gathered by the Commission of Inquiry, especially the report focused on sexual and gender-based crimes "*I lost my dignity*", gives enough reasonable proof for the Prosecution to include rape charges in the indictment. The Syrian rape record is even stronger due to the particular methods used in gathering evidence by the Commission of

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[238] Supra fn. 231 (OTP), para. 78.
[239] *Ibid.*, para. 81.
[240] Supra fn. 88 (Ellis), p. 223; ICTY, Prosecutor v. Karadžić and Mladić, Case No. IT-95-5/18, Amended Indictment, 11 October 2002, para. 34(b), ICTY, Prosecutor v. Karadžić and Mladić, Case No. , IT-95-5/18, Amended Indictment, 31 May 2000, para. 34(c); Olga Jurasz, Gender-based crimes at the ICC- where is the future?, In: 108th Annual Meeting of the American Society of International Law, 7-12 Apr 2014, pp. 429–432, p. 431.

Inquiry. Namely, the Report is based on "454 interviews with survivors, relatives of survivors, eyewitnesses, defectors, healthcare practitioners and medical personnel, lawyers, and members of affected communities", which could help to create a much stronger case already at the pre-trial stage.[241] The threshold of reasonable ground applied by the Commission of Inquiry would bypass criticism of the Pre-Trial Chamber, which condemned the Prosecutor's Office reliance on open sources, "as they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges".[242] Namely, the Pre-Trial Chamber may issue an arrest warrant if there are reasonable grounds to believe that the person has committed a crime within the Court's jurisdiction.[243]

The available evidence makes clear that charges could be brought against multiple actors for rape and other forms of sexual and gender-based violence in Syria. The evidence against Assad regime and ISIS is more extensive than that used to prosecute other perpetrators before the ICC. Still, when compared with the available evidence on other crimes, sexual violence committed by various perpetrators has been less documented and has not raised attention.[244] The evidence of crime of rape committed by the anti-government forces, consequential rape and rape committed before conflict has been scarce and no policy requirement has been proven to exist. Therefore, there crimes fall out of the "weapon of war" frame. For that reason, the sub-chapters do not analyze them as the international criminal law framework does not address rapes committed out of other purposes.

The Syrian system does not provide for an effective prosecution of the wartime rape. The Syrian Criminal Code only enshrines crime of "rape in peace". However, that frame has been

[241] Supra fn. 5 (Syria-COI), p. 25.
[242] ICC, The Prosecutor v. Gbagbo, ICC-02/11/01/11-432, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to the Article 61(7)(c)(i) of the Rome Statue, PTC II, 3 June 2013, para. 35.
[243] ICC, Pre-Trial Stage, available at https://www.icc-cpi.int/Pages/Pre-Trial.aspx, last accessed on 16 October 2019.
[244] Marie Forestier, "You Want Freedom? This is Your Freedom": Rape as a Tactic of the Assad Regime, LSE, Center for Women, Peace and Security, 2017, p.1.

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tainted with the unequal provisions which see women as an object. Therefore, the "weapon of war" frame applied to this situation may be the most effective one. Therefore, this sub-chapter identifies challenges of prosecuting wartime rape in front of the ICC. The will also assess whether these challenge may be applicable to the Syrian "weapon of war" evidentiary frame. The cases that are helpful in recognizing challenges include *Prosecutor v. Bemba Gombo, Prosecutor v. Katanga, Prosecutor v. Ntanga, Prosecutor v. Mudacumura* and *Prosecutor v. Mbarushimana.*

3.1.3.1. "Mode of liability" challenges

The Prosecutor v. Jean-Pierre Bemba Gombo was the first case where the ICC analyzed liability of an accused under superior responsibility for rape. The ICC's Trial Chamber convicted Bemba as a person responsible under article 28(a) of the Statute, who is effectively acting as a military commander, for the crimes of murder and rape as war crimes and crimes against humanity.[245] Unlike in other DRC cases, Bemba was convicted for using rape as a tool to terrorize the civilian population in the Central African Republic (CAR).[246] Regarding the *mens rea* the Trial Chamber found that Bemba as a commander-in-chief knew that MLC forces were committing rape crimes despite geographical. Moreover, the Chamber found that Bemba "failed to take necessary and reasonable measures […] or to submit the matter to competent authorities."[247]

Regardless of the fact that rape crimes were committed as a part of the policy implemented by the MLC soldiers who carried out attacks against civilians following the same pattern[248], the Appeal Chambers quashed the first instance judgment on modes of liability. Reflecting on its own concert with over-inculpation, the Appeals Chamber stated that the Trial

[245] ICC, Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61 (7) (a) and (b) (Confirmation of Charges), -Trial Chamber II, 15 June 2009, para. 697.
[246] *Ibid.*, para. 364.
[247] *Ibid.*, para. 59.
[248] *Ibid.*, para. 112.

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Chamber paid insufficient attention to the geographical remoteness seen from "the fact that the MLC troops were there in the CAR".[249] The Appeals Chamber explained that the number of crimes plays an important role in assessing measures taken by the commander. In the latter case the number of rapes committed beyond reasonable doubt has been low, therefore it is vague how widespread the criminal acts of the MLC troops were, therefore it was challenging to assess the proportionality of the measures taken.[250] On top of weakness of the evidence, the Appeal Chamber also found that Bemba, because of his remoteness, could not be held liable because he was not in a position to exercise effective command authority over the MLC.[251]

As of available evidence on wartime rape in Syria it is more likely that the Prosecution will bring charges against individuals who have been part of the Assad Regime or the Islamic State than against individuals affiliated with anti-government organizations. A hierarchy, within State military or an organization which publicly discloses records on identities of their fighters, is clearly established and documented. Available reports, which recognized a particular chain of command, suggest a proof of instructions or knowledge of the acts of sexual, despite the fact individuals have not been yet identified within evidence at this stage.[252]

In the case of the Assad regime, witnesses did not provide the specific names of perpetrators, but were most often able to identify specific security sector divisions or specific branches responsible for their detention and abuse, and least often at checkpoints.[253] In some situations these facts link rapes with the high-ranking officials accused for a war crimes and

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[249] *Ibid.,* para. 180.
[250] *Ibid,* para. 183.
[251] *Ibid.,* para. 191.
[252] Emily Cherto, Prosecuting Gender-Based Persecution: The Islamic State at the ICC, 126 Yale Law Journal, 2017, p. 109.
[253] Supra fn. 161 (SJAC), pp. 7-8.

crimes against humanity.[254] Assad and commanders under his control were representors and more or less ultimate authority in the military.

Regarding non-state actors, such as ISIS and anti-government, there is a need for certain level of organizational capacity.[255] Since Islamic State is both a military and a political organization with an established structure and an organizational capacity, multiple theories of liability could apply to its senior leaders. The application of the type of liability mode depends on that member's role in the organization.[256]

Furthermore, Assad and commanders under his control failed to take any measures to prevent the commission of war crimes and crimes against humanity.[257] According to the Commission of Inquiry the pattern of sexual violence was committed by the Government in so many branches, various checkpoints and during military operations nationwide. Such widespread nature indicates that acts were not isolated but rather tolerated by line superiors. Additionally, the Commission mentioned sexual violence in most of its reports, but the government never commenced an investigation by the competent body.[258] Even in situations where some kind of procedure for rape crimes has been initiated, the complaints have not been processed as judges had immediately received threats.[259]

For that, geographical distance tainted with the motivation argumentation will not be a challenge when prosecuting wartime rape committed by the Assad regime and ISIS in Syria as all of the perpetrators have been engaged within the country's borders. The only deployment of

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[254] ICC, Prosecutor v. Mabarushimana, Decision on the confirmation of charges, Pre Trial Chamber I, 16 December 2011, para. 206.
[255] William A. Schabas, Punishment of Non-State Actors in Non-International Armed Conflict, Fordham International Law Journal Volume 26, Issue 4, 2002, Article 3, p. 915.
[256] Emily Cherto, Prosecuting Gender-Based Persecution: The Islamic State at the ICC, 126 Yale Law Yournal, 2017, p. 1089.
[257] Supra fn. 5 (Syria-COI), para.52.
[258] Supra fn. 244 (Forestier), p.14.
[259] *Ibid.*, p. 13

troops in another country has been by ISIS in the Yazidi area in Iraq. However, the latter geographical-distance-argumentation cannot be used as ISIS has not deployed any measures to prevent or repress crimes of rape but on the contrary they have encouraged it. [260]

3.1.3.2. "Widespread" and "cruelty" challenge

Comparing cases of two adversaries, *Prosecutor v. Katanga* and *Prosecutor v. Ntanga,* out of which the former was acquitted for acts of sexual violence while the latter was convicted for using rape as a tool of war, shows how the "weapon of war" framing of widespread rape has been more successful than the others frameworks. This framing will impose challenges on prosecution of rape committed by the Assad regime during ground operation and at checkpoints as its widespread nature in these scenarios has not been identified within the available evidence.

In the *Katanga* case the ICC found Katanga guilty only for certain crimes, such as murder as a crime against humanity and war crime, as well as destruction of property and pillaging as war crimes. Higher standards for sexual violence led the Trial Chamber to acquit the perpetrator for rape as a crime against humanity and a war crime. Despite the fact that rape had been committed as a part of widespread and systematic attack [261] and "formed integral part of the militia's design to attack the predominantly Hema civilian population,"[262] the Trial Chamber found that rape did not form part of the Ngiti combatants' common purpose because no evidence was provided which would prove that these acts have been committed on the large scale.[263] Bearing in mind that the Trial Chamber heard the testimony of three witnesses, of which at least one mentions gang-rape, it is unclear whether the Trial Chamber refers to the number of victims

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[260] Women were sold online as a sole property, Supra fn. 83 (Syria-COI), para 161.
[261] ICC. Prosecutor v. Katanga, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, para. 967.
[262] *Ibid.*, para 1664.
[263] *Ibid.*, paras. 1663-1664.

of the number of perpetrators.[264] It further noted that rapes, contrary to the other crimes which formed part of the common purpose, did not occur before the attack on Bogoro, and the lives of those women who were raped were "spared" were spared because they claimed they weren't Hema.[265]

In the *Ntanga* case, on the contrary, the Trial Chamber found the perpetrator guilty of rape as a war crime and crime against humanity against the civilian population and female child soldiers. Ntanga was a Deputy Chief of UPC/FPLC, an organization that had a structural political and military force and "constituted an organised and hierarchical apparatus of power."[266] He had a coordinating role before and during the execution stage of the crimes, during the First Operation, and before the Second Operation and ordered his bodyguards to rape three Lendu nuns.[267] The Trial Chamber found that Ntanga used rape against the civilian population as a part of the common plan to assume control over Ituri, which was implemented by the UPC/FPLC soldiers. Namely, the Trial Chamber elaborated that the crime of rape was widespread itself,[268] statements, such as "using rape against the enemy of women as a means of waging the war,"[269] were referenced during meetings of various officials; and a particularly violent method was used for the rapes committed during the First and Second Operation.[270] Therefore, the Trial Chamber concluded that sexual violence was used as a tool to achieve their objective of destroying the Lendu community.[271]

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[264] The Women's Initiatives for Gender Justice, Gender Report Card on the International Criminal Court, 2018, p. 144,
[265] *Ibid*.
[266] *Ibid.,* para. 769.
[267] Ibid, paras. 766-767.
[268] ICC, Prosecutor v. Ntanga, Case No. ICC-01/04-02/06, Trial Chamber, Judgment 8 July 2019, para 694.
[269] *Ibid.,* paras. 293 and 799.
[270] [..] use of sticks to wound victims during the rapes and [...]forced victims to sexualy assault each other, *Ibid.*, para 805.
[271] *Ibid.*

Regardless of the fact that rape in Syria has been committed as a part of widespread and/or systematic attack against civilian population, for effective prosecution, evidence of widespread rape is necessary. Statements at meetings of high-ranking officials regarding a policy of rape as a war tactic combined with the particular cruelty of the rapes by soldiers should be sufficient to create liability for high-ranking officials.

In the Syrian case, some reports state that rape crimes by the Assad regime have been committed as a part of the widespread and systematic attack on the civilian population, while other reports state that only the attack was systematic and rape was not widespread.[272] Some of the reports, such as that of the Commission of Inquiry, recognized that rape *per se* in detention has been widespread.[273] Regardless of the fact that there is no need for perpetrator to commit multiple offences but only a crime that was part of widespread and systematic attack to prove crimes against humanity, the Trial Chamber continues to require widespread rape to link it with a common purpose/plan.[274] The widespread threshold requires "massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims."[275] The Commission of Inquiry on the Syrian Arab Republic found that in the context of the Syrian armed conflict,

> the number of civilians targeted with arbitrary detention and enforced disappearance and subsequent violations, in contravention of international humanitarian law and without any lawful military

[272] For example, The Commission of Inquiry on the Syrian Arab Republic's Report states that "Rape and sexual violence […] (Committed by the Government forces) formed part of a widespread and systematic attack directed against a civilian population, and amount to crimes against humanity.", p. 1.; US Department of State in their 2013 Country Report for Syria concluded that government-linked paramilitary groups have been engaged in the widespread violation and abuses, including perpetuating massacres..", p.2.; while Forestier found attack to be only systematic, Supra fn. 244 (Forestier), p. 12-14.; along with Syrian Network for Human Rights' Report on Violation and Abuse against Women, p. 13.
[273] Supra fn. 5 (Syria-COI), para. 40.
[274] ICC, Prosecutor v. Katanga, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-01/07, 7 March 2014, paras. 1663-1664.
[275] ICTR, Prosecutor v. Akayesu, Case No.ICTR-96-4, Trial Chamber, Judgment, 2 September 1998, para.580.

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> justification, suggests that the civilian population as such is the primary object of that attack.[276]

In cases where no evidence exists of a direct officer's involvement, the widespread nature of sexual violence proposes that it was "a practice sanctioned by higher levels" in facilities under government control.[277] Therefore, incidents in detention, such as at Military Security Branch 215, demonstrate that Assad and forces under his control were aware of and ordered sexual violence against women and girls or were themselves the perpetrators.[278]

The widespread nature was further reflected in several NGO reports stating that the prevalence of sexual violence in detention has been reflected in the view of the community towards women who returned from detention, regardless of whether she was, in fact, sexually abused.[279]

On the contrary, rapes at checkpoints and ground operations have been only labeled as "frequent." In other words, there was a pattern of violence which shows organized structure and its systematicity.[280] However, these crimes have not been found to be widespread. Therefore, the challenge identified in the *Katanga* case, where no evidence was provided which would prove that rapes have been committed on the large scale, may be applied to the rapes committed at checkpoints and ground operations. In this case, linking rapes with high ranking officials may not be successful when prosecuted under international criminal law.

Regarding rapes committed by ISIS against the Yazidi community. They have been committed as a part of widespread and systematic attack, including rape being committed in

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[276] Human Rights Council, Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic, A/HRC/31/CRP.1, 3 February 2016, para. 88.
[277] Supra fn. 5 (Syria-COI), para. 40.
[278] *Ibid.*
[279] Supra fn. 161 (SJAC), p.12.
[280] Supra fn. 5 (Syria-COI), para. 18.

hundreds of villages across the Sinjar region, and Mount Sinjar in Iraq.[281] The Commission of Inquiry recognized that Yazidi women and girls, who were captured by ISIS, have been subjected to organized sexual violence on a massive scale occurring in the context of sexual enslavement. Women and girls have undergone a large number, sometimes ranging in the hundreds, of rapes by their "owners."[282]Therefore, prosecuting these rapes as war crimes should not pose a problem.

3.1.3.3. A "policy" challenge

The cases of two high-ranking officials of the Democratic Forces for the Liberation of Rwanda (FDLR) at the ICTR – *Mudacumura*, the supreme commander of the FDLR, *and Mbarushimana*, executive secretary of the FDLR – shows that the requirement of policy is an essential element to successfully prosecute high-ranking military and non-military officials. However that frame excludes types of rapes committed for purposes outside of that policy.

In the *Mudacumura* case, the Pre-Trial Chamber concluded that the FDLR had no organizational policy to attack the civilian population and, therefore, refused to include all five charges of crimes against humanity, including rape. The Pre-Trial Chamber concluded that there was no policy from these facts: (i) attacks by the FDLR were retaliatory attacks against military positions, (ii) FDLR had policy not to attack civilians, (iii) a great deal of evidence point that FDLR leadership did not want crimes to be committed against civilians.[283] While explaining that common purpose (plan) and policy for the purpose of crimes against humanity are not the same, the Pre-Trial Chamber stated that when no prior or subsequent agreement or plan to attack the civilian population as a primary goal exists, there is insufficient evidence for rape as either a

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[281] Supra fn. 83 (Syria-COI), pp. 4-7.
[282] *Ibid.*, para. 140.
[283] ICC, Prosecutor v. Mudacumura, Decision on the Prosecutor's Application under Article 58, Pre-Trial Chamber II, ICC-01/04-01/12, 13 July 2012, para. 26.

crime against humanity or war crime charged under indirect co-perpetrator liability (Article 25(3)(a)).[284]

Finally, regardless of finding a lack of policy, the Pre-Trial Chamber confirmed charges of rape as a war crime under Article 25(3)(b) against *Mudacumura* as he directly ordered in early 2009, soldiers to create "a chaotic situation in Congo" or "humanitarian catastrophe," under which rape crimes were committed by the FDLR. [285]

Similarly to the *Mudacumura* case, the Pre-Trial Chamber concluded in the *Mbarushimana* case that there was no policy by the FDLR to attack the civilian population.[286] The Pre-Trial Chamber used the same reasoning as the *Mudacumura* case. However, the difference between these two cases is that the *Mbarushimana* court declined confirmation of charges of rape as either crimes against humanity or war crimes.[287] Regarding crimes against humanity under Article 25(3)(d) of the Rome Statue, the Pre-Trial Chamber concluded there has been no policy, and consequently, no common purpose for the attack.

While for war crimes, the Pre-Trial Chamber analyzed, under article 25(3)(d), the contribution by the FDLR to the commission of war crimes, despite the absence of the constitutive element of common purpose. As there was no evidentiary finding of a policy by the FDLR to attack civilian populations and Mbarushimana's functions within the organization were not substantial, the Chamber concluded that the perpetrator's contribution was less than "significant."[288]

In the *Mbarushimana* case, the presiding judge's dissenting opinion attacked the majority's argument of insufficient evidence to prove an FDLR policy to attack the civilian

[284] *Ibid.,* para. 62.
[285] *Ibid.,* para. 65.
[286] ICC, Prosecutor v. Mbarushimana, Decision on the confirmation of charges, Pre-Trial Chamber I, ICC-01/04-01/10, 16 December 2011, para. 263.
[287] *Ibid.,*
[288] *Ibid.,* para. 292.

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population. Namely, the judge criticized the Pre-Trial Chamber's Decision by stating that the order by Mudacumura issued in early 2009 should be considered as sufficient evidence of the policy to create a humanitarian catastrophe.[289] While the witnesses confirm the existence of an order to attack civilians, there is substantial evidence to prove that the FDLR's political objective was to put pressure on the Government of Rwanda by waging a war.[290] He also disagreed with majority's reliance on the FDLR's claim that they did not attack civilians. Attacks committed out of retaliatory purposes may not automatically exclude the possibility of to prove element of policy in cased where an order to attack civilians exists.[291]

Applying these cases to the conflict in Syria, we find sufficient evidence to charge rape. According to Forestier's[292] findings, "sexual crimes committed by Government's forces have been part of the policy of repression and display some common patterns and degree of organisation, which raises the issue of the responsibility of high-level officials."[293] The evidentiary finding of a pattern of crimes in Homs may be applied to other areas where rape was committed in a similar way. It is credible to conclude that that they took place as a part of a national repressive policy.[294] The Commission of Inquiry Report states that acts of sexual violence committed during the house raids were a pattern that can be observed nationwide rather than isolated cases.[295] According to the 2013 US Department of State Report, the Government forces also used rape as a war tactic, in particular during house raids and at checkpoints.[296]

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[289] ICC, Prosecutor v. Mbarushimana, Dissenting opinion of Judge Sanji Mmasenono Monageng, 16 December 2011, para. 2.
[290] *Ibid.*, para. 7.
[291] Ibid., para. 17.
[292] Marie Forestier, former vising fellow at Women, Peace and Security Center.
[293] Supra fn. 244 (Forestier), p.2.
[294] *Ibid.*, p. 14.
[295] Supra fn. 83 (Syria-COI), p.6.
[296] The US Department of State Report, Syria 2013 Human Rights Report, p.2.

The findings from the Homs Military Security Branch shows that the officials had been instructed "to do whatever they want," which meant that girls would be endangered, according to a military intelligence officer.[297]

Furthermore, humiliation is generally taken into account when assessing gravity, a prerequisite for criminal liability at the ICC.[298] The cruelty of rape committed by government forces has been reported by different actors stating that security personnel forced prisoners to watch rapes of relatives or other prisoners in order to extract information.[299] The Report of the Syrian Network on Human Rights states that rape sometimes happened in the presence of the victim's husband, father, or child in order for them to feel ashamed and devastated.[300] The cruelty is also evident from the fact that rape has been used as a weapon due to the importance of honor and chastity in Syria.[301]

Documents proving an organizational policy of ISIS have been made publically available by the ISIS authorities. They also provide detailed information on regulations of the system of sexual slavery of non-Muslim women in ISIS-controlled areas.[302] The Commission of Inquiry concluded that there is enough evidence to prove the rigid system and ideology governing the ISIS regime handling Yazidi women. ISIS fighters appear to be aware that rape is part of the attack against the civilian Yazidi population. Evidence suggests that ISIS authorities have expressed their intent to commit similar crimes against Yazidis.[303]

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[297] Supra fn. 244 (Forestier), p.14.
[298] ICTY, Prosecutor v. Češić, Case No. IT-95-10/1-S, Sentencing Judgment, 11 March 2004, paras. 35 and 53; ICTY, Prosecutor v. Zelenović, Case No. IT-96-23/2-S, Sentencing Judgment, 4 April 2007, para. 36.
[299] The US Department of State Report, Syria 2012 Human Rights Report, p.18.
[300] Syrian Network for Human Rights, Sexual Abuse: "A Scar of a Lifetime", Rape in Syrian Security Branches: Seven Raped Women in Hama Security Branch, 24 July 2015, p. 1.
[301] Supra fn. 161 (SJAC), p. 24
[302] Supra fn. 189 (EUROJUST), p.10.; *see also* ISIS Pamphlet on Slavery, Fatwa Issuing and Research Department, available at http://www.aymennjawad.org/2015/12/unseen-islamic-state-pamphlet-on-slavery, last accessed on 16 October 2019.
[303] Supra fn. 189 (EUROJUST), p.8.

The Syrian Accountability Project Report recognized rape as a weapon of war used by ISIS fighters.[304] However, within the publically available evidence individual perpetrators have not yet been identified. Also, the weapon of war framing will exclude rapes committed in the aftermath of crimes by ISIS fighters. For example, Chinkin's comment on the Commission of the Inquiry recognized consequential rape committed by family members. Namely, families have being forced to marry their daughters either to ISIS fighters or other men in order to avoid forced marriage to ISIS fighters.[305] In such cases, rapes committed within forced marriages do not fall under ISIS's policy and, therefore, "weapon of war" framing is not applicable.

Regarding the evidence of rapes committed by the anti-government forces, as mentioned earlier, the Commission of Inquiry concluded that there has been no evidence of a systematic attack or policy to "instill fear, extract information, or enforce loyalty."[306] But the Commission of Inquiry on the Syrian Arab Republic characterized rapes by non-governmental forces as "exploitation, sectarianism, or revenge."[307] The wording used by the Commission of Inquiry on the Syrian Arab Republic was sadly predictable following the Pre-Trial Chamber's conclusion that retaliatory (revenge) attacks cannot be considered part of the policy against the civilian population.[308] Furthermore, evidence suggests that the Syrian Free Army had a code of conduct stipulating a pledge not to commit rape.[309] A similar code of conduct was used by the Co-Investigating Judges in the ECCC *Case 002* to conclude the prohibition within the law proves, among others, that there was no rape policy.[310]

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[304] Supra fn. 147 (SAP), p.8.
[305] Supra fn. 149. (Chinkin, Rees), p. 5.
[306] Supra fn. 5 (Syria-COI), para. 52.
[307] Supra fn. 5 (Syria-COI), para. 52.
[308] *Ibid.*, para. 52.
[309] *Ibid.*, para. 7.
[310] ECCC, Case 002, Case No. 002/19–9–2007-ECCC-OCIJ, Closing Order, 1441,15 September 2010, para. 1429.

3.2. Prosecuting wartime rape in Canadian courts

After the logical jurisdiction of the ICC, the second jurisdiction this thesis analyzes is the prosecution of the Syrian wartime rape at Canadian courts. The Canadian Courts may prosecute wartime rape in Syria under the universal jurisdiction doctrine. The Canadian legislator had enacted the Crimes against Humanity and War Crimes Act in 2000, an implementing legislation of the Rome Statue. This change gives a positive light for future prosecutions of the wartime rape.[311] In that sense, this chapter sub-chapter analyzes challenges the Syrian rape wartime rape would encounter when prosecuted under Canadian law.

3.2.1 Sexual assault in Canada

One must define crimes of rape in order to prosecute either low lever or high ranking officials (or any other individuals). Therefore this sub-chapter provides the definition of rape under Canadian law.

Canada's 1983 rape law reform subsumed offences of "rape," "indecent assault," and "attempted rape" under one offence of "sexual assault," The argument by the government for such reform was to remove the stigma of rape from the perpetrators and victims equally.[312] Thus, today there is no exact definition of rape within the Canadian Criminal Code.[313]

The sexual assault under Canadian law also includes the controversial consent element.[314] Namely, assault is committed when "without the consent of another person, he [the perpetrator]

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[311] Crimes against Humanity and War Crimes Act, S.C. 2000, c. 24. An Act respecting genocide, crimes against humanity and war crimes which implements the Rome Statute of the International Criminal Court.
[312] Supra fn. 21 (Zawati), p. 38.
[313] Supreme Court of Canada, R. v. Chase, 2 SCR 293, 1987, para.11.
[314] The study conducted by the Canadian Centre for Justice Statistics in early 1990s found that only a small minority of the public is aware of the terminology change and the assaultive nature of the crime is not fully acknowledged. Canadian Centre for Justice Statistics, Criminal justice processing of sexual assault cases, Ottawa, Canada: Statistics Canada, 1994, p.10

applies force intentionally to that other person, directly or indirectly."[315] However, the defendant's view of the victim's state of mind is only relevant when the defense of honest but mistaken belief that consent was granted is raised within the *mens rea* phase of the examination.[316] The "mistaken belief in consent" has been limited by section 273.2 of the Canadian Criminal Code which states that consent as a defense is not available in situations, such as self-induced intoxication or where the accused's belief arose from his or her recklessness or willful blindness.[317]

3.2.2. Limitation to the Rome Statue implementation

The Crimes against Humanity and War Crimes Act (herainafter: the War Crimes Act) incorporates the obligations of the Rome Statute into its domestic laws.[318] The War Crimes Act offers different possibilities for applying the law. Under the War Crimes Act, most of the offences have their foundation in international law, while available defenses and justifications are based on both Canadian law and international law.[319] The modes of liability are exclusively based on Canadian law.[320] As this implementing legislation mentions the Rome Statue only as an interpretative device of customary international law, it is evident that Canadian case law will differ from the jurisprudence of the ICC. However, regarding the definition of the core international crimes, the legislation does not mention the Rome Statue at all. The definition in the War Crimes Act broadly expresses the core elements of the crimes, which are to be determined in

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[315] Canadian Criminal Code, R.S.C., 1985, c. C-46, s. 265(1).
[316] Supreme Court of Canada, R. v. Ewanchuk, 1 SCR 330, 1999, CanLII 711 (SCC).
[317] Canadian Criminal Code, R.S.C., 1985, c. C-46, s. 273.2.
[318] Crimes against Humanity and War Crimes Act, S.C. 2000, c. 24. An Act respecting genocide, crimes against humanity and war crimes which implements the Rome Statute of the International Criminal Court.
[319] The Crimes Against Humanity and War Crimes Act, s. 11.
[320] Fannie Lafontaine, Parties to Offences under the Canadian Crimes against Humanity and War Crimes Act: an Analysis of Principal Liability and Complicity, 50 Cahiers de droit, 2009, p.967.

accordance with customary international law.[321] Such non-precise definitions enshrined in the War Crimes Act, encourages the Canadian Courts to use international tribunals' jurisprudence during interpretation. However, Canadian Courts have placed more focus on the inconsistent jurisprudence of the *ad hoc* tribunals that an on the ICC's case law [322]

Similarly to the Rome Statue, the War Crimes Act does not define rape. However, the member states to the Rome Statue decided there is a need for interpretative guidelines – the Elements of Crimes, which explicitly requires coercion and disregards non-consent as an element of rape. However, those elements are not binding for the Canadian Courts.[323]

3.2.3. Definition of rape in the jurisprudence of the Canadian courts

When defining wartime rape in its first sexual violence case – *Munyaneza* – the Supreme Court of Canada focused on the coercion definition of rape established in the *Akayesu* case, noting in this regard that Canadian jurisprudence does not differ from international.[324] With this decision, the Supreme Court ignored the later decision of the Appeals Chamber in the *Kunarac* case where the Court stated that the correct requirement was lack of consent of the victim.[325] Thus, the Supreme Court clearly departed from customary international law, which is clearly stated in the War Crimes Act as an interpretive value.[326] To correctly apply customary international law in the future, it is very likely that the Canadian Courts will interpret sexual violence as defined in the *Kunarac* case. Such framing will unfortunately leave thousands of rape

[321] Fannie Lafontaine, Canada's Crimes against Humanity and War Crimes Act on Trial, An Analysis of the Munyaneza Case, Journal of International Criminal Justice 8, 2010, 269-288 p. 273.
[322] *See Munyaneza, Mugasrea, Mungwarere* cases.
[323] The Elements of Crime are created to help the court in its interpretation and application, but are not binding *per se*. *See* Supra fn. 21 (Zawati), p. 77
[324] Supreme Court of Canada, R. c. Munyaneza,QCCS 2201, 22 May 2009, para. 95.
[325] Prosecutor v. Kunarac and Others, Case No.I T-96-23&23/1, Judgment, Trial Chamber, 22 February 2001, para. 440.
[326] Max du Plessis, ICC Crimes, in Ben Brandon and Max du Plessis (eds), The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States, London: Commonwealth Secretariat, 2005, 35, p. 50.

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crimes in occupied cities and villages outside the jurisdiction of the Canadian Courts as it is very hard to prove consent under coercive circumstances.[327]

Despite factual findings often referring to rape the *Munyaneza* case did not provide for an explicit definition of rape.[328] Rather than mentioning "rape," the War Crimes Act lists "sexual violence" in its definition of crimes against humanity.[329] Such reluctance to use of the word "rape" gives more discretion to judges to apply different definitions to its concept which usually leads to inconsistent judgments. It also has been sending a wrong moral signal to the society as it does not deter rape *per se*. [330]

In order to be labeled as an international crime, rape must be subsumed under contextual elements of international crimes. This simply means that for rape to be considered a crime against humanity it must be committed "as part of a widespread or systematic attack against any civilian population" carried out as part of a state or organizational policy.[331] It must also fulfil the requirements of particular modes of liability (perpetrator and command). The following sub-chapter addresses the challenges that rapes in Syria framed as a "weapon of war" will face when prosecuted under the War Crimes Act.

3.2.4. Prosecuting Syrian wartime rape under the War Crimes Act

What is the common denominator among Léon Mugesera, Désiré Munyaneza, and Jacques Mungwarere? All three of them have been present at the Canadian territory and suspected for the involvement in international crimes committed abroad. Two of them have been criminally prosecuted at Canadian courts (*Munyaneza*, *Mungwarere*), while one (*Mugesera*) faced deportation in Canada. Furthermore, Munyaneza and Mugesera were convicted for

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328 *See* Supreme Court of Canada, R. c. Munyaneza, QCCS 2201, 22 May 2009.
329 Supra fn. 21 (Zawati), p. 43.
330 Ibid., p.38
331 The Rome Statue, Article 7.

international crimes and sentenced to life-imprisonment, while Mungwarere was acquitted on the basis of lack of evidence that he committed acts greatly facilitating the killing of Tutsis.[332] Only one of them, Munyaneza, has been convicted, among others, for rape as a crime against humanity and war crime.

3.2.4.1. The "modes of liability" challenge

The rules of liability are fundamental in determining the individual criminal responsibility of an accused for international crimes. Contrary to the legislation of other states, the Canadian War Crimes Act does not rely on international law when defining modes of liability.[333] The following analysis of the *Mugesera Mungwarere* cases presents the fundamental differences between criminal liability applied by international courts and domestic courts and whether this difference creates specific challenges to prosecuting Syrian rapes under Canadian laws when framed as "weapon of war."

In the *Mugasera* case, the Supreme Court used the international jurisprudence findings to interpret domestic principles of liability. From the Supreme Court's wording, it is evident that such international analysis may be applied only in situations when domestic laws are insufficient or unclear.[334] Even when such international analysis is applied, like in the *Mungwarere* case, differences between international and domestic liability still exist.[335]

Regarding the individual perpetration, co-perpetration, and perpetration though another person, there are certain similarities in modes of liability between international and Canadian courts.[336] However, the crucial difference exists regarding a co-perpetrator's contribution to the

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[332] *See* Supreme Court of Canada, R. c. Jacques Mungwarere, ONCS 4594. 5 July 2013.
[333] Supra fn. 319 (Lafontaine), p. 970.
[334] Supreme Court of Canada, Mugesera v. Canada (Minister of Citizenship and Immigration), 2 S.C.R. 100, par. 134, 2005 SCC 40, para. 134.
[335]Supreme Court of Canada, R. c. Jacques Mungwarere, ONCS 4594. 5 July 2013, paras. 45-62.
[336] The Rome Statue, article 25.

crime. Namely, in order to be considered a co-perpetrator by the Canadian law one must accomplish part of *actus reus*.[337] This requirement comes from domestic jurisprudence regarding co-perpetration, in particular *R. v. Pickton*. In this case the Supreme Court of Canada concluded that a co-perpetrator must physically commit the *actus reus o*f the offence for liability to attach.[338] This approach was rejected by the ICC's Pre-Trial Chamber in the *Lubanga* case in order to create a broader scope of liability.[339] As a result, the co-perpetratorship enshrined within Canadian law is more limited in the scope than under the Rome Statue. This scope excludes everyone who essentially (non-physically) contributes according to the common plan but does not perform any elements of the *actus reus*, including most leaders or masterminds.[340] Because no evidence was presented of actual physical acts committed by him, Mungwarere was acquitted of all charges.[341]

Syrian wartime rape prosecuted under such scope of liability might face additional challenges. As seen from the ICC analysis, most of the high ranking perpetrators were charged for wartime rape under co-perpetrator liability. In particular, everyone who non-physically contributes according to the common plan must be prosecuted as co-perpetrators.[342] Such framing would render impunity for rapes charged under co-perpetrator liability in Canadian courts. Therefore, aiding and abetting would play an important role in creating liability in Canadian courts for the core international crimes.[343] However, aiding and abetting liability has been rarely applied for perpetrators of sexual violence because of the nature of the crime. Therefore, the

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[337] Gisèle Côté-Harper, Pierre Rainville , Jean Turgeon, Traité de droit pénal canadien, 4th ed., Cowansville, Éditions Yvon Blais, 1998, p. 731.
[338] Supreme Court of Canada, R. c. Pickton, CSC 32, 2 R.C.S, 30 July 2010,para. 63.
[339] ICC, Prosecutor v. Lubanga, ICC-01/04/-01/06-803 (14-05-2007), Decision on the confirmation of charges,, Pre-Trial Chamber II, 29 January 2007, para. 321
[340] Supra fn. 319 (Lafontaine), p. 976-977.
[341] Supreme Court of Canada, R. c. Jacques Mungwarere, ONCS 4594. 5 July 2013, para. 1260.
[342] Supra fn. 319 (Lafontaine), p. 976-977.
[343] *Ibid.,* p.1007

Canadian system would create impunity for numerous rapes committed as a result of policies or orders of the high ranking officials of the Assad regime. ISIS' crimes were committed as part of widespread and systematic attacks. Because women were captured and enslaved in a widespread manner by ISIS fighters, it may be possible to apply direct-perpetrator liability to the leaders who ordered in Canadian courts.[344]

3.2.4.2. The "no-policy" challenge

The Canadian Courts have addressed the policy requirement very differently from the Rome Statue. Namely, Article 7 of the Rome Statue, describing crimes against humanity, clearly states that the attack against the civilian population must be committed pursuant to a policy or a plan.[345] Furthermore, the Elements of Crimes require an additional contextual element for genocide under the Rome Statute: "the conduct took place in the context of a manifest pattern of similar conduct directed against that group."[346] In contrast, the Canadian Courts followed the jurisprudence of the *ad hoc* tribunals, which found that the policy requirement is not part of customary international law. The "no-policy" requirement will be analyzed throughout two cases, the *Mugasera* case and the *Munyaneza* case, in order to identify differences in arguments and possible influences these differences will have on the prosecution of the Syrian wartime rape in Canadian courts.

Regarding both the crime of genocide and crimes against humanity, the judge, in the *Mugesera* case, concluded there is currently no requirement in customary international law of a policy behind the attack.[347] Similarly to the *ad hoc* tribunals, the Canadian judge explained that the existence of a policy or plan may be beneficial for evidentiary purposes but it does not

[344] Supra fn. 96 (EUROJUST), p.9.
[345] The Rome Statue, article 7.
[346] Elements of Crime, Article 6(a).
[347] Supreme Court of Canada, Mugesera v. Canada (Minister of Citizenship and Immigration), 2 S.C.R. 100, par. 134, 2005 SCC 40, para. 158.

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constitute a contextual element. In fact, the judge explicitly mentioned that the differences in definition of crimes against humanity are "not material to the discussion" on the issue.[348] However, the judge took into the account the further jurisprudential element of "the possibility that customary international law may evolve over time so as to incorporate a policy requirement."[349] Therefore, there is the possibility that when prosecuting future cases the Canadian courts realign their jurisprudence with the one established by the ICC. The act for which the accused has been charged must be linked with the attack against the civilian population. In principle, the act must further the attack or fit the pattern of the attack but it need not comprise an essential or officially sanctioned part of it.[350]

The Federal Court of Appeal in the *Mugesera* case broadly stated that "between October 1, 1990 and November 22, 1992, almost 2,000 Tutsi were massacred in Rwanda" and the "Rwandan government staged a military attack on Kigali which served to justify the arrest of and continued violence against Tutsi and against political opponents." The crimes committed during the massacre and military attacks formed part of the widespread and systematic attack.[351] The Court did not mention that specific crimes must be committed in a widespread manner in order to prove the incitement liability. [352] All the court required was that the crimes be committed as part of the widespread attacks.

The case of *Munyaneza,* a judgment of 200 pages which mainly concentrates on the evidence substantiating the indictment, refers to the *Kunarac* case in support of concluding that the attack need not be the result of state policy.[353] However, in the *Munyaneza* case the

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[348] *Ibid.*, para. 118.
[349] Ibid., para. 158.
[350] *Ibid.*
[351] Federal Court of Appeal, Mugesera v. Canada (Minister of Citizenship and Immigration), [2004] 1 FC 3, 2003 FCA 325, 8 September 2003, paras. 6 and 22.
[352] *Ibid.*, para. 122.
[353] Supreme Court of Canada, R. c. Munyaneza, 2009 QCCS 2201, 22 May 2009, para. 114.

perpetrator had been convicted for crimes of rape as a direct perpetrator. Therefore, issues that no-policy framing may bring to the prosecution of high ranking officials have not been addressed when analyzing this case.

Within the analyzed evidence, most of the wartime rape in Syria committed by the government forces has been framed by the Commission of Inquiry and NGOs as a weapon of war. The rapes committed by the Assad Regime and ISIS exhibit common patterns and degrees of organization, which makes them systematic and, therefore, a part of a national and organizational oppressive policy against political opponents.[354] For rape as a tactic of war, it is enough to prove at the Canadian courts that the act was committed in the context of an accumulation of acts of violence which individually may vary greatly in nature and gravity.[355] Therefore, the no-policy requirement within the Canadian jurisprudence would not change much about the prosecution of wartime rape committed by the government forces and ISIS fighters because the policy has already been established.

Regarding the rape crimes committed by the anti-governmental armed forces, most of which were committed for retaliatory purposes, they have not been considered part of the policy against the civilian population.[356] Despite falling outside of a policy of attacking the civilian population and despite having a code against rape, these individuals might still be liable as direct perpetrators.[357] However, for high ranking officials, this element of "no-policy" will not have a significant impact as there is still a need to prove a common purpose for criminal liability for a particular act to attach in Canadian courts.

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[354] Supra fn. 244 (Forestier), p.2
[355] ICTY, Prosecutor v. Kunarac and Others, Case No.I T-96-23&23/1, Judgment, Trial Chamber, 22 February 2001, para. 419.
[356] Supra fn. 5 (Syria-COI), para. 52.
[357] *Ibid.*, para 7,

3.2.4.3. "Lack of knowledge" challenge

As neither the State Prosecutorial Office nor Canadian courts apply international law in their everyday practice, the challenges they face are unique to prosecutions conducted domestically. The specific challenge the State Prosecutorial Office has faced when prosecuting international crimes in Canada has been "lack of knowledge" of international criminal law. There is a very high possibility that Syrian Prosecutorial Office may face the same or a similar challenge because it is also a domestic system with little experience prosecuting international crimes.

When comparing indictments at the Offices of the Prosecutor at international tribunals with the indictments made by the Crown in Canadian courts, this thesis concludes that indictments by the latter have been incomplete, lacking essential section of "the facts."[358] The counts brought by Canadian prosecutors in both the M*unyaneza* case and *Mugesera* indictments have been too broad. Namely, the indictments' charges range over a matter of months encompassing the complete period of genocide; they situate the crimes in wide areas with populations of approximately 500,000 to 750,000 people; they do not list any victims or co-perpetrators, and consequently they do not detail the alleged crimes with specificity. In general, when describing crimes the charges simply restate the broad language enshrined in the War Crimes Act, and not, what would be logical, the details of the alleged criminal acts of the accused.[359]

All of this reflects the lack of knowledge by the Canadian Prosecutorial Office regarding international criminal law. This lack of knowledge was subsequently mirrored in the reasoning

[358] Marc Nerenberg, Philippe Larochelle, We Were Sailing Into Uncharted Waters: Flaws In The Application Of Canada's Crimes Against Humanity And War Crimes Act, 27.2 Revue québécoise de droit international, 2014, p. 143.
[359] *Ibid.*

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found in the judges' opinions. When comparing the ICC jurisprudence with the Canadian Courts case law it is evident that judgments of Canadian Courts have not been sufficiently detailed or focused on analysis. The judgments do not explain application of law to the facts. Rather the judgments analyze them separately. Therefore, it is harder to identify standards required for certain elements of crimes.

3.3. Prosecuting wartime rape under Syrian jurisdiction

National courts remain the principal venue for holding individuals accountable for sexual violence.[360] If the national laws are aligned with international standards, domestic systems may provide for a comprehensive framework of prosecuting rape committed during the Syrian war. The Public Prosecutorial Office may even tackle the selective "rape as weapon of war" framing because the Public Prosecutorial Office could use both domestic and international criminal law simultaneously in order to eliminate any lacuna.

3.3.1. Definition of rape under the Syrian laws

This section examines wartime rape under the Penal Code of the Syrian Arab Republic. The Syrian Penal Code criminalizes rape in Article 489. However, the Syrian legislature did not integrate international crimes into the Syrian Penal Code. Therefore, it allowed impunity for wartime rape as it is impossible to prove peace-time rape with evidence available for high-ranking officials who did not directly committed crimes. Furthermore, the Constitution of the Syrian Arab Republic says no word about prevalence of international treaties over domestic laws or vice versa. This lacuna has rendered Syrian criminal law incompetent to adequately address wartime rape committed by all parties to the conflict.

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[360] UNSG Report on Sexual Violence inn Conflict pursuant paragraph 18 of the UNSC 1920 (14 March 2013), UN Doc A/67/792-S/2013/149, para. 111.

As international crimes also include non-contextual elements of crime, such as *actus reus* and *mens rea* of the material act, it is important to analyze the definition of rape within the Syrian Penal Code for the purpose of the future prosecutions of wartime rape in Syrian courts.

The Syrian Penal Code protects women against all forms of violence, including rape and abuse. Article 489 of the Syrian Penal Code stipulates:

> Whoever, with violence and threat, coerces a person/victim other than a spouse to sexual intercourse is punished with hard labor for no less than fifteen years, and no less than 21 years if the victim is 15 or younger.[361]

This definition has been amended by Law No. 11, which imposes harsher penalties for rapists. It increased punishment from fifteen years to life imprisonment, and from 21 years to death penalty if the victim is younger than 15.[362] In a contradictory manner, while raising the penalties, the legislator also facilitates impunity for rape. Namely, the Penal Code pressures victims of rape to marry their rapists. Article 508 provides for a reduced sentence by two years if a rapist marries his victim. The Penal Code also applies the consent element. Article 186 of the code allows for exoneration of the perpetrator if the crime as it would allow for the defense of consent before or during the act. Moreover, there are no laws against marital rape, domestic violence and gender-based violence.

Regardless of the fact that the Syrian Penal Code is gender neutral, the prosecution of rape usually involves a female victim who was penetrated by a male perpetrator for the purpose of forced copulation.[363] In cases of the male victim, for example, an attempt to rape of an

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[361] The Syrian Penal Code, 2013, article 508, avaliable at https://bit.ly/2Jygygb.
[362] Law No. 11 of 2013 amending the Legislative Decree No. 148 of 1949 concerning the Penal Code, article 2.
[363] Zouhair Ghazzal, The problem of recipiency in honor killings, in The Crime of Writing, Narratives and Shared Meanings in Criminal Cases in Baathist Syria, Presses de l'Ifpo, 31 March 2017, para.49, available at https://books.openedition.org/ifpo/9377, last accessed on 30 October 2019.

underage boy by an adult man, the Syrian courts refrain from using rape wording and consider it as "sodomization."[364]

Narrower than the international tribunals' definition of rape, the Syrian definition of rape focuses only on penetration with a penis (sexual intercourse), and, therefore, excludes rapes committed with objects against victims by government forces.[365] Furthermore, according to the consent requirement has been widely debated in the jurisprudence of *ad hoc* tribunals, with a final conclusion at the ICC that consent is not an element of rape.[366] The current framing of rape by the Syrian Penal Code would preclude prosecution in where coercive circumstances of rape made it impossible to find evidence of consent or non-consent because the victims were unable to resist or express non-consent.[367] In addition, the jurisprudence of the international tribunals provides equality under the law for male and female victims of sexual violence, which the Syrian system does not.[368]

To conclude, the Syrian Penal Code failed to promulgate international crimes in its provisions, while at the same time the definition of peace-time rape provided in Article 489 is insufficient for the effective prosecution of wartime rape. Therefore, for effective prosecution in Syrian courts, amendments to the Penal Code in accordance with international standards are necessary. As the Constitution of the Syrian Arab Republic says no word about prevalence of international treaties over domestic laws or vice versa, this is a way in for international criminal law to bypass the Penal code.

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[364] Zouhair Ghazzal, A danger to society: they must therefore all disappear, in The Crime of Writing, Narratives and Shared Meanings in Criminal Cases in Baathist Syria, Presses de l'Ifpo, 31 March 2017, para.3, available at https://books.openedition.org/ifpo/9379, last accessed on 30 October 2019
[365] Supra fn. 5 (Syria-COI), pp. 11-13.
[366] ICC, Prosecutor v. Bemba Gombo, ICC-01/0501/08. Trial Judgment, 21 March 2016, para. 105; ICC, Prosecutor v. Katanga, ICC-01/04-01/07-3436. Trial Judgment, 7 March 2014, para. 965.
[367] ICTY, Kunarac case, Case No.IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002, paras.130-133.
[368] The Trial Chamber have convicted Mr. Bemba equally for rapes of male and female victims, *see* ICC, Prosecutor v. Bemba Gombo, ICC-01/05-01/08-3343, Trial Judgment, 21 March 2016, para. 494.

3.3.2. Individual criminal responsibility under Syrian Penal Code

Modes of criminal responsibility are enshrined in Articles 209-250 of the Syrian Penal Code, which provides for liability of perpetrators, inciters, accomplices and concealers. As the Syrian Penal Code has not implemented international criminal law, it does not provide for the international mode of criminal responsibility - command or superior liability.[369]

Under Article 211 of the Penal Code a perpetrator is "anyone who brings into being the constituent elements of an offence or who contributes directly to its commission."[370] As seen from this definition, co-perpetrator liability under the Syrian Penal Code is narrower than that established by the Rome Statue. The word "directly" is interpreted similarly to the Canadian Criminal Code, where the perpetrator must physically commit the *actus reus* of the crime. This is clear from Articles 213 and 214 of the Syrian Penal Code which specifically defines a "joint principal" as perpetrator who committed offence by transmitted words. By explicitly adding into the Penal Code at Articles 213 and 214 liabilities for a person committing an offence by words rather than actions, it is evident that the Article 211 does not include non-psychical perpetration.

The Syrian Penal Code does not mention crimes of co-perpetrators committed under the common plan or purpose, as enshrined in Articles 25 (3)(a) and (d) of the Rome Statue. As such, the Syrian Penal Code excludes as perpetrators anybody who non-physically contributed to the crime, including most of the masterminds.[371] Regarding accomplice liability, the Syrian Penal Code is more detailed than the Rome Statue and the Canadian Criminal Code. It lists six situations when an individual may be an accessory or concealer to a felony or misdemeanor as opposed to only few under the.[372]

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[369] Supra fn. 219 (Sliedregt), p. 4.
[370] The Syrian Penal Code, article 211.
[371] Supra fn. 372 (Lafontaine), p. 976-977.
[372] The Syrian Penal Code, article 218.

Article 184 of the Penal Code is also problematic for criminal liability. The article provides for "superiors order" defense applicable to all crimes. The "superiors order" defense is a defense that the perpetrator was just following orders. This defense has been excluded, under Article 33 (2) of the Rome Statue, for genocide and crimes against humanity.

The modes individual criminal responsibility enshrined in the Syrian Penal Code are insufficient to prosecute wartime rape. The Code would exclude liability for large numbers of perpetrators in situations of war. Therefore, a need exists for Syria to amend its Penal Code in accordance with international norms.

3.3.3. Syria's obligation to prosecute wartime rape

The Rome Statue of the ICC does not require states to implement universal jurisdiction for core international crimes. Nevertheless, the Statue does demand that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." [373] The failure by the Syrian legislature to integrate crimes against humanity, genocide, and war crimes into the Syrian Penal Code leaves the country in a vacuum, which is most likely to produce disorder, injustice, and cycles of revenge. And it prevents redress for, among others, victims of wartime rape.

Regardless of such vacuum, Syria is obligated to investigate and prosecute individuals who allegedly committed core international crimes, whether they belong to the government's forces or to rebel forces. This obligation arises from provisions stipulated by different domestic, international humanitarian, and human rights law instruments.[374] Thus, the sub-chapter below

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[373] ICC, The Rome Statue, Preamble.

[374] "The right to conduct litigation and remedies, review, and the defense before the judiciary shall be protected by the law, and the state shall guarantee legal aid to those who are incapable to do so, in accordance with the law", The Constitution of the Syrian Arab Republic, article 51(3); "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault", the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War, article 27; and Convention on the

will focus on the policy recommendation to the Syrian Prosecutorial Office for prosecuting systematic and widespread rape committed during the Syrian war.

3.3.4. Policy recommendations on wartime rape to the Syrian Public Prosecutorial Office

This policy recommendation delineates a general strategy for the Syrian Public Prosecutorial Office, stresses the priority tasks to be performed, and determines a framework capable of effective prosecution of wartime rape in Syria. When defining these recommendations, the limited domestic legal framework and social implications towards rape in Syria have been taken into the account. In addition, challenges of prosecuting rape as a "weapon of war" identified in this thesis have been the guiding principles in defining effective prosecutions.

1) Locating witnesses and evidence of wartime rape within publicly available evidence

The evidence gathered by the Commission of Inquiry on the Syrian Arab Republic and NGOs provides credible leads for the Syrian Public Prosecutorial Office.[375] This evidence is not necessarily gathered in a way that would be admissible before a national court of law. However, the evidence may be used for locating witnesses and proof of wartime rape. The State Prosecutorial Office should assess the credibility of evidence available in open sources by comparing conducted interviews with statements obtained by NGOs. This will require the Public Prosecutorial Office to independently investigate each case study and re-interview victims and witnesses, if they can be located. The State Prosecutorial Office should also take into the account selectivity established by framing rape as a "weapon of war" within the publically available evidence. When bringing charges, the Prosecutor should fairly prosecute rape perpetrators by all sides.

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Elimination of All Forms of Discrimination against Women, UN DOC. A/34/46, 1979, article 15, acceded by Syria on 28 March 2003.

[375] Michelle Jarvis, Najwa Nabti, Policies and Institutional Strategies for Success of Sexual Violence Prosecutions, in Prosecuting conflict-related sexual violence at the ICTY, Serge Brammertz and Michelle Jarvis (eds.), Cambridge University Press, 2 October 2017, pp. 88-89.

These recommendations are important to explain as available evidence usually influences on how future prosecutions interpret crimes enshrined within the law. If an already established evidence frames certain crimes as a particular concept, prosecutor's offices must be introduced to it and recommended how to tackle with its selectivity.

2) Framing wartime rape as a severe and violent crime

The Syrian social and legal framework sees both peace-time and wartime rape as a matter of honor rather than a violent act. Such framing renders wartime rape as an opportunistic act rather than a serious tactic of war.[376] Historically, rape framed as a matter of honor played a significant role in impunity for wartime rape. Impunity explains the shame and isolation experienced by many Syrian wartime rape survivors.[377] For example, before developing a clear definition of rape, some prosecutors at the ICTY were reluctant to frame wartime rape as anything other than an isolated war crime.[378] This meant the victim was led to believe she was an isolated case rather than part of a larger group of victims.

To tackle the shame and ostracism associated with dishonor, the Public Prosecutorial Office should implement a policy of charging rape as a serious crime and viewing it as part of a larger pattern. That would encourage victims to speak up, and it would alleviate the negative social attitudes surrounding rape victims. The policy should be consistent, protective of victims, and firmly focused on motivating them to give testimony.

Approaching wartime rape as a matter of honor may not have direct impact on the prosecution of low ranking officials who actually commit rape. However, failure to connect rape with violent policy/patter may cause substantial problems when trying to link wartime rape

[376] *Ibid.*
[377] 1949 Geneva Convention sees rape as non-violent crime precieved as attack on honour that is incompatible with dignity of a woman.
[378] Michelle Jarvis, Kate Vigneswarn, Challenges to Successful Outcomes in Sexual Violence Cases, in Prosecuting conflict-related sexual violence at the ICTY, Serge Brammertz and Michelle Jarvis (eds.), Cambridge University Press, 2 October 2017, pp. 38-39.

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committed by low ranking soldiers to senior political or military leaders who were not direct perpetrators.[379] To eliminate this lacuna, the Public Prosecutorial Office should implement the progressive approach of framing rape as a violent policy or pattern. Accordingly, wartime rape could be prosecuted as a crime against humanity or genocide. For example, in suitable cases, the Office of the Prosecutor at the ICTY prosecutes sexual violence as persecution, involving violation of human dignity, and torture, in particular causing severe pain or suffering.[380]

3) Implementing progressive approach to the legal elements of rape

With the respect to the legal elements of rape enshrined in the Syrian Penal Code, not only Public Prosecutorial Office should adopt a progressive definition of rape but also the legislature should revise the codified definition.

As seen from *Case 002* at the ECC, the prosecution has power to frame and interpret laws and give limitations to courts when deciding a particular case. Therefore, in order to effectively prosecute wartime rape, the Syrian Public Prosecutorial Office should frame rape to include various acts of penetration (vaginally, orally, anally with penis, fingers, and objects) committed against the victims of both sexes.[381] Because the evidentiary record on rape as a "weapon of war" has been focused on crimes committed against women, the State Prosecutorial Office should change this to also include rape crimes against men in its policy. Regarding the consent defense codified in Article 186 of the Syrian Penal Code, the Public Prosecutorial Office should frame the Syrian Civil War as an inherently coercive environment for the purpose of eliminating impunity. By framing the war this way, defendants would not have recourse to claim they believed the victim gave consent because the inherently coercive environment precluded the possibility of consent."

[379] *Ibid.*
[380] Supra fn. 373 (Jarvis, Nabti), p. 91.
[381] *Ibid.*, p. 94.

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4) Creating a link between wartime rape and the broader campaign

As "weapon of war" has been the most successful framework for prosecuting Syrian wartime rape, the Public Prosecutorial Office should frame rape as a tool of political aims by using different modes of liability. Regardless of the selective nature of framing rape as a weapon of war, the analysis above has shown that this strategic framing is more effective at gaining convictions than peace-time-rape framing. That is evident from the pattern established by international tribunals where high-ranking officials have been convicted for rapes committed by their subordinates only if the crimes were committed under the higher officials' plans and policies.

Which mode of liability to apply depends on the role of perpetrator. To avoid defendants eluding conviction, such as in the *Katanga* case, the Public Prosecutorial Office should consider all modes before choosing one and ensure their consistent application across all cases.[382] Namely, the Public Prosecutorial Office should charge co-perpetrator responsibility only in situations when rape was committed on a widespread scale, while in all other situations, command responsibility should be charged, including the ancillary responsibility of failure to prevent or punish. This ancillary responsibility has been problematic only if the perpetrator was geographically distant from the higher ranking official, which was not the case for rape crimes committed in Syria. To tackle the selective "weapon of war" framework, the Public Prosecutorial Office should prosecute cases from lower level perpetrators up to those most responsible. This would establish an evidentiary trail of a policy or pattern before getting to the high ranking officials

In order to achieve a strategic framing, the Public Prosecutorial Office should integrate sexual violence into geographical and leadership-based investigations and contextualize wartime

[382] *Ibid.,* p. 93.

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rape within the broader campaign of crimes. Thematic investigations focused narrowly only on sexual violence may hinder proper contextualization of the *chapeau* elements of international crimes. The broader context promotes a greater understanding of the gender dimension of the conflict and situates rapes and other crimes within the policy and widespread attacks.[383]

Because there is a tendency to assume wartime rape an isolated act rather than a strategy, the Public Prosecutorial Office is recommended to give priority to sexual violence prosecutions. By expanding the number of cases charging crimes of sexual violence, courts and society would come to recognize how widespread these crimes actually are.

5) Prosecute "rape-in-peace" on an equal footing with "rape-in-war"

To further address the selective "weapon of war" frame, the Public Prosecutorial Office should prioritize cases of sexual violence whether committed in war or peace. The peace-time-rape framework can fill holes within the international "weapon of war" framing, which currently omits numerous victims raped for motives other than a strategy of war. Crimes considered as an isolated acts rather than a part of strategy, such as rapes committed before or after conflict, may be prosecuted under the current Syrian penal code. However, these rapes have traditionally fallen into a lacuna between domestic law and ICL. The prosecutor must begin charging these crimes.

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[383] *Ibid.,* p. 87.

CONCLUSION

As in other contemporary conflicts, wartime rape in Syria has predominantly been framed as a weapon of war. That is seen in media coverage, factual findings established by the Commission of Inquiry on the Syrian Arab Republic, and NGO reports describing atrocities on the ground. A majority of the open sources' factual findings have been focused on identifying widespread patterns of wartime rape within one or more battles over a large geographical area.

Framing sexual violence as a "weapon of war" has been essential in putting wartime rape on the security agenda of the global and national communities. No longer seen as a catastrophic byproduct of war, wartime rape is nowadays legally established as a crime against humanity, genocide, and war crime. In numerous recent conflicts, such as Bosnia, Rwanda and DRC, rape has been a systemic mass crime used as a tool of political oppression.[384]

However, conflict scenarios differ and crimes committed within the war cannot be described as unified pattern of violence. Labelling wartime rape in the Syria primarily as a weapon of war obfuscates other multilayered features and motives. From the factual finding available on Syrian wartime rape it is clear that motives and features have been different than only a certain policy. The absence of a specific military strategy to commit crimes of sexual violence against civilians tends to be more common within armed groups with unclear structure and uncertain accountability mechanisms, such as rapes committed by the anti-governmental groups in Syria. These crimes have been framed as opportunistic acts committed out of revenge. Traditionally, this would result in these crimes going unprosecuted. The Syrian sectarian war has even introduced new gender-based crimes, such as arbitrary marriage or "shame marriage", as a consequence of sexual violence which crimes also entail rape. These new crimes are

[384] *See* Chapter II.

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consequences of customs and domestic laws that preserve unequal provisions against women. The Syrian laws consider women as objects possessing societal honor rather as than autonomous human beings with rights. Consequently, raping a Syrian woman basically means condemning her to life-long suffering, stigmatization, and repeated victimization.[385] These consequential crimes, such as "shame marriage" or arbitrary marriage may not be prosecuted either as a "weapon of war" or within the frame of humanitarian law because these crimes were either not committed by soldiers against civilians or as a matter of policy. Laws of the wartime settings narrowly consider international crimes in order to differentiate them from crimes committed in peace. These consequential crimes, however, may be prosecuted within the general domestic laws as these "peace laws" allow for charges against perpetrators other than state and organized groups.

Based on this the analysis above, to successfully prosecute a large number of wartime rapes under currently available laws, the weapon of war concept has been the most effective solution. The concept has indeed diminished the passive atmosphere towards wartime rape and increased prosecutions in comparison to thirty years ago. In cases where the prosecutor presents evidence of an organized policy and employs a strategic use of modes of liability, the perpetrators have typically been convicted of wartime rape as a crime against humanity. The peacetime rape laws have proven inadequate when prosecuting large number of crimes due to (country specific) legal and societal limitations. However, these laws are invaluable for filling any lacuna that may result from the "weapon of war" framework.

The laws that exist in the international and domestic sphere have a capacity to provide justice to all victims of wartime rape in Syria. These laws must be employed strategically by the

[385] Hilmi M. Zawati, Sectarian War in Syria Introduced New GenderBased Crimes, The World Post, Huffington Post, 16 February 2016, avaliable at https://ssrn.com/abstract=2733359, last accessed on 7 November 2019.

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Prosecutorial Office in order to provide for non-selective justice. The focus on the "weapon of war" framing by the international community has had an immense consequence on public prosecution. For example, "weapon of war" framing at the ICTY meant that rape was not typically charged as a war crime as war crimes usually target individual acts. Rather, the framework led to charging rape as a CAH or genocide. Thus, the Prosecutorial Offices, whether under international, universal, or domestic jurisdiction developed a primary tool to frame crimes, including wartime rape. The rest of the justice process is in the Prosecutorial Offices' hands as they have the power to either limit or expand the reach of the victims' voices stories within the legal frame. Whichever frame the Prosecutorial Office chooses, the court must either follow it or reject it. Therefore, the Prosecutorial Offices (except the International Prosecutors which may not apply domestic "peace laws"), should equally focus on wartime rape committed by state, organized groups, or other individuals acting outside the policy framing. The same focus should be given to wartime rape committed as a consequence of the sexual violence as to the violence committed out of a certain policy. Such a broad focus and inclusive approach would address the problem of the instrumentalist approach, which excludes from prosecution crimes committed outside of a conscious tactic seen as a short-run policy or strategy. This instrumentalist approach poorly reflects realities on the ground. However, in order to develop the best strategy for the application of available laws to ensure justice for all, more research within the field is necessary.

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