PRINCE ABUBAKAR AUDU UNIVERSITY, ANYIGBA, NIGERIA

INAUGURAL LECTURE

THE ANNIHILATOR'S SEXUAL INTENT: THE CRIME OF CRIMES AND THE DEMISE OF TOMORROW

BY

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PROFESSOR OF INTERNATIONAL CRIMINAL LAW

NATIONAL ANTHEM

Nigeria, we hail thee
Our own dear native land
Though tribe and tongue may differ
In brotherhood, we stand
Nigerians all, are proud to serve
Our sovereign Motherland

Our flag shall be a symbol
That truth and justice reign
In peace or battle honoured
And this we count as gain
To hand on to our children
A banner without stain

O God of all creation
Grant this our one request
Help us to build a nation_
Where no man is oppressed
And so with peace and plenty
Nigeria may be blessed

PRINCE ABUBAKAR AUDU UNIVERSITY ANYIGBA, ANTHEM

Prince Abubakar Audu University, you stand in strength and pride
Showing the way for all who yearn
Standing firm in wisdom and truth
In unity we grow
Committed in imparting knowledge, skills and learning
To all who long for excellence
Prince Abubakar Audu University, the pride of the world
We honour your virtue

Preceding Inaugural Lectures of Prince Abubakar Audu University, Anyigba

S/N	Inaugural Lecturers	Title	Date
1	Professor Sunday S. Arogba	Phenolics: A Class of Nature's Chemical Weapons of Self-Preservation	Tuesday, 26th August 2008
2	Professor Zacchaeus O. Apata	Unburdening the Colonial Burden: Lessons from History	Tuesday 17th August 2010
3	Professor Steve Metiboba, JP	Matrimony between two Healthcare Systems: An Unholy Wedlock?	Monday, 27th June 2014
4	Professor Stephen I. Ocheni	Accounting for Public Funds: The Leviathan of Government Bureaucracy	Monday, 25th June 2018
5	Professor Eniolorunda A. Tai Oluwagbemi	Scientific Elegance and Political Naivety of Food and Wood Sufficiency In Nigeria: The Take of An Agroforester	Thursday, 28th June 2018
6	Professor Charles I. Oyewole	Coroner's Inquest: An autopsy of the Man with the Hoe	15th August 2019
7	Professor Odin Eboh	Insanity and Life	24th August, 2019

	Monday	Pain Two Ancestral Curses: The Role of Village Herbalist	
8	Professor Jimoh Habibat Isah	The Geography of Erosion in Nigeria: An Explanation	30th August, 2019
9	Professor Marietu Ohunene Tenuche	Neoliberalism: Forecasting Nigeria's Ungodly Romance with the East	29th September, 2020
10	Professor James Omale	Remedy or Poison? 354555Double – Edge Sword PARADOX OF Alternative Medicine: The concern of Toxicologist.	11th March, 2021
11	Prof. Stephen Jimoh Ibitoye	If Agricultural Revolution is the Answer, What is the Question?	20th September, 2022
12	Prof. Enejo Simon Attah	Intercropping: That there may be Enough Food	19th February, 2025
13	Prof. Cornelius Ojo Orishagbemi	Food Research Innovations As Panacea For Post-Harvest Losses, Food Security And Safety: Renown Contributions Of A Certified Food Scientist	7th August, 2025

DEDICATION

To Prof. Kharisu Sufiyan Chukkol, my teacher, mentor and academic father who died on the 9th of March, 2025, the day I wrote this dedication.

To all victims of genocide, war crime and crimes against humanity world over.

PROTOCOL

The Vice Chancellor
The Deputy Vice Chancellor (Administration)
The Deputy Vice Chancellor (Academic)
The Registrar
The Bursar
The Head of Library
Members of the University Governing Council
The Provost, College of Health Science
Deans and Directors
Heads of Department and Heads of Units
Top Government Functionaries
Members of Senate of the University
Judicial Officers
Past Inaugural Lecturers
Royal Fathers
Chairman and members of the Inaugural Lectures Committee
My Wife and my Children
My family members
My Friends and Well Wishers
My learned friends
Staff and Students of the Faculty of Law
Staff and Students of the University
Members of the Fourth Estate of the Realm
Distinguished Ladies and Gentlemen.

PREAMBLE

The Vice Chancellor Ma, my joy is without bounds today, for granting me another rare opportunity to make history as the 14th inaugural lecturer of the university. I am so excited by this privilege, because it shall go down in the annals of history that this is the first inaugural lecture from our prestigious Faculty of Law. Mr Chairman, Distinguished Ladies and Gentlemen, permit me to most humbly state that, in my opinion, the greatest thing that happened to learning and scholarship in our dear State is the establishment of Kogi State University, Anyigba, in 1999 by the administration of Prince Abubakar Audu of blessed memory. This positive development no doubt created a formidable platform for academic expression and human capital development. I am a great beneficiary, because I joined the university a year after the mandatory NYSC programme in 2006, as an Assistant Lecturer in the defunct Department of Public and International law. I rose through the ranks and became a Professor in the Department of Public Law in 2021.

My Service

Mr Chairman, Distinguished Ladies and Gentlemen, this university is dear to my heart because it created the "me" in "me". Like the biblical school of the great teacher Gameliel, it afforded me opportunity of learning the rudiments of university administration, research and service. Consequently, I have served in the following capacity from my appointment in 2006 to date:

1.	Examination Officer	2006 - 2011
2.	Screening Officer	2011 - 2013
3.	Chairman Examination Committee	2011 - 2014
4.	PG Coordinator	2014 - 2016
5.	Deputy Dean of Law	2015 - 2018
6.	Acted as Dean of Law	2017 - 2018
7.	Head of Public Law Department	2019 - 2020
8.	Ag Deputy Vice Chancellor ***(Academic)***	2020 - 2021
9.	Deputy Vice Chancellor (Academic)	2021 - 2025
10.	Dean of law	2024 - Date

11. I have served in numerous committees at Departmental, Faculty and University levels

Distinguished Ladies and Gentlemen, as I stand before you today, basking in the euphoria and splendor of academic achievements - will I be wrong if I say I AM A CREATURE OF THIS UNIVERSITY?

The Making of a Professor of International Criminal Law

Mr Chairman, Distinguished Ladies and Gentlemen, with the greatest humility, I crave your indulgence to embark on a voyage, sailing back to some shores of memory that ignited the blazing furnace which brought forth a Professor of Law.

Mr Chairman, Distinguished Ladies and Gentlemen, I WAS A RADIO BOY - My up-bringing in northern Nigeria,

particularly in Zaria made me very acquainted with small pocket size radios for listening to news across the globe. I was an ardent listener of the following radios stations:

- ★ BBC - Radio London
- ★ VOA - Voice of America
- ★ Radio Beijing China
- ★ Radio Deutsche welle - The Voice of Germany

I always tuned to both their English and Hausa news programmes. As a teenager, it was in listening to news that I began to know that, even our supposed modern world is characterised by some elements of the Hobbesian state of nature. In the news, I listened to endless tales of cruelty, reckless impunity and man's inhumanity to man of same human family. It was in the news that I learnt about the almost total annihilation of the Bosinian Muslims by the Serbian forces of the territory of the former Yugoslavia, using rape as a tool of annihilation of the victim group with the intent to cause the demise of their tomorrow. It was still in the news that I learnt about Rwanda Genocide where aggravated sexual assault (rape) was used as a tool of genocide, to cause the demise of the *Tutsis* with a potent intent to extinguish their tomorrow and to perpetrate the population of the *Hutus*.

Mr Chairman, Distinguished Ladies and Gentlemen, I WAS A READING TEENAGER, from my listening to news that were characterized by man's calamitous disposition towards infinite evil, I began to read about the almost total annihilation of the Armenian population who were Christians by the young Turks government of the old Ottoman Empire (present day Turkey). It was at this time that I read about the Ukraine Holodomor, where Russia under Starling perpetrated genocide against Ukrainians, using starvation as a tool of war. It was as a teenager that I also read about the Nazi solution - The Holocaust, where six million Jews were exterminated. Mr

Chairman, Distinguished Ladies and Gentlemen, all these incidences shook me to my bone marrows and evoked the conscience of humanity in me. The pictures continue to play on my mind, as I consistently wonder on man's reckless fantasies towards infinite evil, as epitomized by the pronouncement of King Agamemnon in the Troyjan war - "Destroy all of them, men, women and children, don't leave anyone to shed tears for them".

My Chairman, Distinguished Ladies and Gentlemen, I HAD A SACRED 20 LEAVES EXERCISE BOOK. After my O'level examination in 1993, I decided that studying law will better provide me with the requisite legal teeth and claws to join in the fierce combat against the hydra-headed monster of impunity, whose passion, craving and yearning is to ravage the dignity of man. In that 20 leaves exercise book, at the subject column, I wrote: "Vision and Mission". Then I was awaiting my O'level result. In the body of the exercise book at the first page I wrote: "Daniel F Atidoga LL.B, LL.M, Ph.D, BL, Professor of Law" at a time I had not even known my O'level grades.

As the first son of my father, I clothed myself with the imaginative powers to think for my younger ones. So, subsequent pages of the sacred book were for them, with each page allotted to one of my siblings. At all their individual pages, I arrogated and decorated them with degrees, even though they were in primary schools and junior secondary schools. The last born who now holds BSc Industrial Chemistry was a toddler at that time. Today, twenty eight (28) years after the demise of our father, 95% content of the sacred 20 leaves exercise book has crystalised at the domain of reality. This made real the popular saying of Bishop David Oyedipo of the Living Faith Church, "Picture a future, for you cannot feature in a future that you had not pictured". Mr Chairman,

Distinguished Ladies and Gentlemen, now standing before you as a Professor of Law, I can only say that I am living my dreams.

The Sad Tales of Owo - Ondo State

Mr Chairman, Distinguished Ladies and Gentlemen, kindly permit this voyage of memory to sail to the Sad Sandy shores of death. My father Police Inspector Daniel Ochumonu Atidoga (1949 - 1997) was a lover of education and learning. He had no privilege of furthering beyond primary seven (7) at the demise of his father Atidoga Ajeka of the Aju - Akwu ruling house of Igala Kingdom in 1963.

After my 'A' level at SBS (SRS) Makurdi in 1995, I travelled to Owo to see my father for the purpose of procuring Direct Entry Form, which I could not find in Makurdi and Anyigba. He rushed to get the Form. But the price was inflated because of scarcity. He had to drop his wrist watch and collected the Form with a promise to pay back later, which he did. Over a year later, I left for Zaria and waited for the admission, which was signed on the 25th October, 1997. I picked the admission letter and rushed back to Anyigba to prepare for school fee and registration. On reaching Anyigba, because our house is behind the market square, I had to go home through the market. On that fateful market day, everyone was unusually looking at me and whispering to themselves. Getting close home, I heard the wailing of my mother "... *Oooh Óko Odudumi - oooh Óko Obomi...*" (Ooh the husband of my youth, the husband of my innocence – a wailing in Igala language on the demise of ones husband of youth). I had to travel to Owo immediately to bring my young father's corpse home. Back to Anyigba, I photocopied my admission letter and put in his pocket and told him that the letter was signed the day he died. I made two promises to him that because of his passion for learning (1) I was going to lead and ensure that all my siblings get degrees.

(2) That I will keep to his passion and study and earn certificates and academic laurels.

Mr Chairman, Distinguished Ladies and Gentlemen, I now hold LL.B, LL.M, Ph.D (ABU), BL (NLS), PGDE (Sokoto) PGD - DIV (WHBC - Calabar). As an icing on the cake, for the sake of capacity building, I did about twenty eight (28) certificate courses across prominent universities in the world, paying in dollars with our limited resources in this clime. University of London, University of Moscow, University of Copenhagen, University of Michigan, University of Geneva, Open University of U.K, University of Scotland and University of Leiden. Now, I stand before you as a Professor of International Criminal Law, presenting the first inaugural lecture of Faculty of Law.

Mr Chairman, Distinguished Ladies and Gentlemen, permit me to ask another question - twenty eight (28) years have passed that I made the afore-stated promises to the lying corpse of my father. HAVE I KEPT MY PROMISES?

So was this professor standing before you made I can only say - *Soli Deo Gloria*, *Alhamdulillahi*, *Ojō ki nojima*, *Ogoni fun Oluwa*, *Omorihi ya kuwavo* and *Daukaka ga ubangiji*.

NOW THE LECTURE

1.1 INTRODUCTION

The evolution of international criminal law (ICL) has emerged as a pivotal response to the atrocities that have plagued humanity throughout history.[1] As societies struggle with the aftermath of conflicts, the need for a robust legal framework to address heinous crimes has become increasingly evident. International criminal law serves not only as a mechanism for accountability but also as a deterrence against future violations of human rights.[2] This lecture seeks to explore the complexities of ICL, particularly focusing on the crimes of rape and genocide, which are often intertwined in their implications for victims and communities.

Rape, as a form of sexual violence, has been universally condemned and recognized as a serious crime in both domestic and international law. Its prosecution as a war crime, genocide and a crime against humanity reflects the severe impact it has on individuals and society at large. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have played significant roles in shaping the legal definitions and frameworks surrounding sexual violence, establishing precedents that have influenced contemporary understandings of these crimes.[3]

[1] D.F. Atidoga, 'From Impunity to Accountability; Individual Criminal Responsibility under International Law: A Historical Survey' (2010) 1(1) *Human Rights Review,* p.195.

[2] ibid, p.199.

[3] *Prosecutor v Kunarac* (Judgment) IT-96-23-T (ICTY, 22 February 2001).

Similarly, genocide stands as one of the most egregious violations of international law, often referred to as the "crime of crimes."[4] The legal definition of genocide, as articulated in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, emphasises the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group[5]. This definition reflects the systematic nature of genocide and the necessity for international legal mechanisms to prevent and punish such acts.

The intersection of rape and genocide further complicates the discourse on international criminal law. Rape is not only a tool of war but can also constitute an act of genocide when committed with the intent to destroy a particular group[6]. This duality highlights the urgent need for comprehensive legal frameworks that address both crimes effectively, ensuring justice for victims and accountability for perpetrators.

The evolution of international criminal law is a reflection of the international community's growing recognition of the need to address crimes that threatens global peace and security. From its early foundations in the laws of war to the establishment of modern international tribunals and the creation of the ICC, international criminal law has developed into a robust legal framework aimed at holding individuals accountable for the most serious violations of international law. As this area of law continues to evolve, it faces new challenges

[4] D.F. Atidoga, 'An Analysis of the Darfur Crisis in the Context of the Crime of Genocide" (2010) 1 (2) *Ife Juris Review* p.22

[5] Ibid, see also *Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948*, United Nations Treaty Series, vol 78, 277, art. 2.

[6] *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (ICTR, 2 September 1998) para 688.

and opportunities, particularly in addressing emerging forms of criminality.

1.2 AGGRAVATED SEXUAL ASSAULT

Rape, as one of the most egregious forms of sexual violence,[7] is universally condemned and is considered a serious crime in both Nigerian and international laws. The crime of rape not only violates the physical integrity of the victim but also inflicts deep psychological harm, often leaving long-lasting effects. In international criminal law, rape has been prosecuted as a war crime, a crime against humanity, and a form of genocide, reflecting its severe impact on victims and communities. Below is an examination of the various elements that constitute the crime of rape.

1.2.1 Elements of the Crime of Rape

The crime of rape is generally defined as non-consensual sexual intercourse, with the perpetrator using force, threats, or coercion to achieve this objective.[8] For a successful prosecution, the crime of rape must satisfy certain elements, which include the physical act (*actus reus*), the mental element (*mens rea*),[9] and the concurrence of the two. Each of these elements must be proven beyond reasonable doubt in order to secure a conviction.

[7] D.F. Atidoga, "Nature of Corroboration in Establishing the Offence of Rape: A Commentary on the Supreme Court Decision in *Iko v. State* (2001) 7 NSCQR 277" (2007) 1(1) *Zaria Bar Journal,* pp.209-2010.

[8] D.F. Atidoga and O. Atidoga, "Fundamental Ingredients of the Crime of Rape: An Expose" (2009) 1(1) *Confluence Journal of Private and Public Property Law,* p.234.

[9] ibid., p.235.

1.2.1.1 *Physical Act (Actus Reus)*

The *actus reus* of rape involves the physical conduct of the perpetrator. It is the unlawful sexual penetration of the victim's body, which may occur through vaginal, anal, or oral means. The penetration, however slight, is sufficient to constitute the physical element of rape. The use of force, threats, or other forms of coercion to overcome the victim's resistance is typically required to demonstrate the lack of consent, which is a crucial aspect of *actus reus*. In some jurisdictions, the mere fact of penetration without consent is enough to establish this element, while in others, the prosecution must also prove the use of physical force or the presence of threats or intimidation.[10]

In international criminal law, in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the definition of rape has been broadened to include any non-consensual sexual act, recognising that the use of force is not always necessary for establishing the crime. This was notably seen in the case of *Prosecutor v. Akayesu*,[11] where the ICTR defined rape as a "physical invasion of sexual nature, committed on a person under circumstances which are coercive." This definition expands the understanding of *actus reus* to include situations where the victim's ability to give consent is compromised due to coercion, fear, or intimidation, even in the absence of physical force.

In Nigeria, the definition of rape is outlined in Section 357 of the Criminal Code Act, which states:

[10] *Prosecutor v Akayesu,* (n 6), para 595.
[11] ibid., para 596.

> "Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape."[12]

This definition however is notably gender-specific, unlike some international definitions which are gender-neutral.

1.2.1.2 *Mental Element (Mens Rea)*

The *mens rea* of rape involves the perpetrator's intention to commit the act and their awareness of the lack of consent from the victim. In legal terms, the *mens rea* is the guilty mind accompanying the physical act. To establish *mens rea* in the crime of rape, it must be proven that the perpetrator acted intentionally, knowing that the victim did not consent, or with reckless disregard for the victim's consent, pursuant to seeking sexual gratification

In cases where the perpetrator claims a mistaken belief in the victim's consent, the courts often apply an objective standard to assess whether such a belief was reasonable under the circumstances. This standard was emphasized in the case of *R*

[12] Criminal Code Act, Cap 77, Laws of the Federation of Nigeria 1990, s 357.

v. Morgan,[13] where the House of Lords held that a belief in consent must be reasonable and that it is not enough for the defendant to simply claim that they believed the victim consented. The application of this standard helps to ensure that the perpetrator's mental state is scrutinized in line with societal norms and expectations regarding consent.

In the context of international criminal law, the *mens rea* for rape has been established in several landmark cases. The ICTY, in *Prosecutor v. Kunarac*,[14] held that the perpetrator must have intended to engage in the sexual act and must have known that the victim was not consenting or must have acted in reckless disregard of the lack of consent.[15] This case further clarified that the intent and knowledge required for rape in international law are consistent with the requirements in domestic jurisdictions, ensuring that perpetrators cannot escape liability by claiming ignorance of the victim's non-consent.

1.2.1.3 *Concurrence of Actus Reus and Mens Rea*[16]

For the crime of rape to be established, there must be a concurrence of both *actus reus* and *mens rea*. This means that the perpetrator must have the requisite guilty mind (*mens rea*) at the time they committed the unlawful sexual act (*actus reus*). The simultaneous existence of these elements is essential to proving that the crime of rape has occurred.[17]

[13] [1976] AC 182 (HL).
[14] (Appeal Judgment) IT-96-23 & IT-96-23/1-A (ICTY, 12 June 2002) para 127.
[15] *Prosecutor v Kunarac,* Supra, (n 3), para 127.
[16] D.F. Atidoga and S. Shaba, "The Act of Euthanasia and the Right to Life: The Nigerian Human Rights and Criminal Law Perspectives" ii(2) *Frontier of Nigerian Law Journal* p.332.
[17] ibid.

In some legal systems, the failure to demonstrate the concurrence of these elements can lead to a reduction of charges or even acquittal. For example, if the prosecution cannot prove that the perpetrator knew or was reckless regarding the lack of consent at the time of the sexual act, the charge of rape may not stand, even if the physical act of penetration is proven. This principle is crucial to upholding the integrity of the criminal justice process, ensuring that only those who possess both the intent and the guilty action are held accountable for the crime of rape.

1.2.3 Spousal Rape

Spousal rape, also known as marital rape, refers to non-consensual sexual intercourse between spouses.[18] Historically, many legal systems did not recognize spousal rape as a crime, operating under the doctrine that a wife gave irrevocable consent to sexual relations upon marriage. However, this view has evolved significantly, and many jurisdictions now recognize spousal rape as a criminal offense, reflecting the principle that consent must be ongoing and can be withdrawn at any time.[19]

The recognition of spousal rape as a crime is an important advancement in both domestic and international law. It affirms that marriage does not diminish an individual's right to bodily autonomy and that all individuals, regardless of their marital status, have the right to control their own bodies. This shift in legal thinking is reflected in international human rights instruments, such as the Convention on the Elimination of All

[18] D.F. Atidoga, 'The Jurisprudence of Criminalization of Spousal Rape: Nigeria and English Law in Perspectives' (2010) 1 *EBSU Journal of International Law and Juridical Review,* p.271.

[19] ibid., pp.271-272.

Forms of Discrimination Against Women (CEDAW), which advocates the protection of women's rights in all areas of life, including within marriage.[20]

The criminalisation of spousal rape is particularly significant in cases of domestic violence, where the perpetrator may use sexual violence as a tool of control and domination. Courts have increasingly recognized the seriousness of spousal rape, treating it with the same gravity as rape committed by a stranger. For example, in the case of *R v. R*, the House of Lords in the United Kingdom held that a husband could be convicted of raping his wife, effectively abolishing the marital rape exemption in English law.[21] This landmark decision set a precedent for other jurisdictions to follow, reinforcing the principle that all individuals have the right to be free from sexual violence, regardless of their marital status.

The Nigerian legal position on spousal rape remains ambiguous. The Criminal Code Act does not explicitly recognize spousal rape, as evidenced by the wording in Section 357 which refers to 'unlawful carnal knowledge', implying that sexual intercourse within marriage is always lawful [22]. This stance differs from the trend in international law towards recognising spousal rape.

[20] Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979, art 16.

[21] *R v R* [1991] UKHL 12.

[22] Cheluchi Onyemelukwe, 'Legislating on Violence Against Women: A Critical Analysis of Nigeria's Recent Violence Against Persons (Prohibition) Act, 2015' (2016) 5 *DePaul Journal of Women, Gender & Law* 1.

1.2.4 De-sexualization of the Crime of Rape

The de-sexualization of the crime of rape refers to the recognition that rape is not merely a sexual act, but an act of violence, power, and control. This perspective shifts the focus from the sexual nature of the act to its violent and coercive aspects, emphasising the harm inflicted on the victim and the violation of their autonomy and dignity.[23]

This approach has been increasingly adopted in both domestic and international law, where rape is understood not only as a violation of sexual integrity but also as a serious infringement of human rights.[24] The de-sexualization of rape is crucial in ensuring that the crime is prosecuted and understood in a way that fully acknowledges its impact on the victim. By framing rape as an act of violence rather than a sexual encounter gone wrong, legal systems can better address the power dynamics and coercion that are central to the crime.

International criminal tribunals have played a key role in this shift. For instance, the ICTR in the *Prosecutor v. Akayesu* case[25] emphasized that rape is an act of aggression and a form of violence rather than a sexual act. This understanding has influenced subsequent legal interpretations and has been

[23] Beyond the violation of the autonomy and dignity of women, Atidoga argued that desexualization of rape in the context of making rape Law gender neutral and not gender specific - see D.F. Atidoga, "A Case for Rape shield Law and Desexualization of the Crime of Rape" (2009) 1(3) *Journal of Public and International Law* p.144.

[24] D.F. Atidoga, 'A Comparative Assessment of the Legal Framework for the Crime of Rape in Nigeria' (2009) 1(1) *Kogi State University Bi - Annual Journal of Public Law*, p.113.

[25] *Prosecutor v. Akayesu*, Supra, (n 6), para 687. See also, D.F. Atidoga, 'The Law of Rape - A Critical Analysis of the Law of Rape in Nigeria" (Germany: VDM, 2010) pp.64-65.

instrumental to the prosecution of rape as a war crime and a crime against humanity. The de-sexualization of rape has also facilitated a more comprehensive approach to victim support, recognizing the broader social and psychological impacts of the crime.

While the de-sexualization of rape is a concept gaining traction in international criminal law, its explicit recognition in Nigerian jurisprudence is still evolving. However, recent developments in Nigerian legislation, such as the Violence Against Persons (Prohibition) Act of 2015, suggest a shift towards viewing rape as an act of violence rather than merely a sexual offense.[26] This Act broadens the definition of rape and emphasizes the violent nature of the crime, aligning more closely with international perspectives

1.3 LEGAL REGIME ON THE CRIME OF RAPE

The legal framework governing the crime of rape in Nigeria is multi-dimensional, comprising various statutes at both the federal and state levels.

1.3.1 Domestic Regime

Nigeria's domestic legal regime on rape is primarily based on statutory law, with some influence from common law principles. The key statutes that address rape include the Criminal Code (applicable in Southern Nigeria), the Penal Code (applicable in Northern Nigeria), the Administration of Criminal Justice Act (ACJA), and various state-specific laws such as the Kogi State Penal Code.[27]

[26] Violence Against Persons (Prohibition) Act, 2015, Laws of the Federation of Nigeria.

[27] The Kogi State Penal Code Law, 2019, s 284(1).

1.3.1.1 *Rape in the Nigeria Criminal Code*

The Criminal Code Act, which applies in Southern Nigeria, provides the primary statutory definition of rape in this region.[28] The Criminal Code states:

> "Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape."[29]

This definition, while comprehensive in some aspects, has been the subject of significant critique in legal scholarship and practice. Let us examine its key components and implications:

i. 1. Gender-Specific Nature:
The Criminal Code's definition of rape is notably gender-specific, recognizing only females as potential victims and males as potential perpetrators. This narrow approach has been widely criticized for failing to acknowledge male victims of rape and female

[28] D.F. Atidoga, (n 24), p113.
[29] Criminal Code Act, s 357.

perpetrators.[30] In an era where gender equality is increasingly recognized in legal frameworks, this limitation stands out as particularly problematic.

ii. "Unlawful Carnal Knowledge":
The use of the term "unlawful carnal knowledge" is significant and controversial. This phrasing implies that there can be "lawful carnal knowledge," which has been interpreted to exclude the possibility of marital rape.[31] This stance has been widely criticized for failing to protect married women from sexual violence within marriage, reflecting outdated notions of women's autonomy and marital rights.

iii. Consent and Its Vitiation:
The Criminal Code recognizes various circumstances under which consent may be vitiated, including:
a) Force
b) Threats or intimidation of any kind
c) Fear of harm
d) False and fraudulent representations as to the nature of the act
e) In the case of a married woman, by impersonating her husband
This comprehensive list acknowledges that consent can be negated by a wide range of coercive circumstances, not just physical force.[32] However, the specific mention of impersonating a husband for married women has

[30] Rita Anyogu, 'The Gender Conundrum on the Offence of Rape in Nigeria' (2016) 1 *African Journal of Criminal Law and Justice Studies* 131.

[31] Ngozi Ezeilo, 'Laws and Practices Relating to Women's Inheritance Rights in Nigeria: An Overview' (2001) *Women's Aid Collective* 23.

[32] Itoro Eze-Anaba, "Domestic Violence and Legal Reforms in Nigeria: Prospects and Challenges" (2007) 14 *Cardozo Journal of Law & Gender* 30.

been criticized as reinforcing patriarchal notions of women's sexuality and autonomy.

iv. Penetration Requirement:
While not explicitly stated in Section 357, Nigerian case law has established that penetration is a necessary element of rape under the Criminal Code. In *Jegede v. The State,*[33] the Supreme Court held that "the slightest penetration of the vulva by the penis with or without emission of semen or rupture of the hymen" is sufficient to constitute carnal knowledge. This interpretation has been criticized for being overly restrictive, as it excludes other forms of sexual violence that may be equally traumatic for victims.

v. Absence of Marital Rape Recognition:
A major criticism of the rape provision in the Criminal Code is its exclusion of marital rape as a criminal offense, except under certain conditions. This limitation arises from the marital exemption doctrine enshrined in both the Criminal Code and the Penal Code. The doctrine is based on the presumption that marriage implies ongoing consent to sexual relations; however, this notion has faced growing opposition for being outdated and inequitable.[34]

vi. Proof of Resistance:
While not explicitly required by the statute, Nigerian courts have often looked for evidence of physical resistance as proof of non-consent. In *Posu & Anor v. The State,*[35] the Supreme Court stated that "in a charge of rape, the prosecution must prove that the act was done without the consent or against the will of the

[33] [2001] CLR 7(d) (SC).
[34] Rita Anyogu, (n 30) p. 131.
[35] [2011] CLR 2(a) (SC).

woman... Where no evidence of resistance is adduced, it may lead to the conclusion that the victim consented to the act." This approach has been criticized for placing an undue burden on victims and failing to recognize that fear or other circumstances may prevent a victim from physically resisting.

vii. Corroboration Requirement:

Although not stipulated in the Criminal Code itself, Nigerian courts have historically required corroboration of a rape victim's testimony. In *Iko v. The State,*[36] the Supreme Court held that "in sexual offences, and particularly in rape cases, it is settled law that the evidence of the prosecutrix alone is not sufficient to ground a conviction...there must be corroboration." This requirement has been criticized for making rape convictions difficult to secure and for perpetuating harmful stereotypes about the credibility of rape victims. However, the practical application of this law by judicial decision is that corroboration is only required as a matter of good practice.[37]

viii. Punishment:

Section 358 of the Criminal Code prescribes the punishment for rape:

"Any person who commits the offence of rape is liable to imprisonment for life, with or without caning."[38]

[36] [2001] CLR 7(f) (SC).

[37] D.F. Atidoga, "Rape: The Jurisprudence of its Proof in Nigeria" *Confluence Journal of Jurisprudence and International Law* (2009) vol.2, pt1, p.234. See also, K.S Chukkol, The Law of Crimes in Nigeria (Zaria: ABU Press, 1988) p.191

[38] Criminal Code Act, Cap 77, Laws of the Federation of Nigeria 1990, s 358.

This severe penalty reflects the gravity with which the law views the crime of rape.[39] However, the inclusion of caning as a potential punishment has been criticized by human rights advocates as cruel and degrading treatment, inconsistent with international human rights standards.[40]

ix. Evidentiary Challenges:

The prosecution of rape cases under the Criminal Code faces significant evidentiary challenges. The requirement for proof of penetration, often coupled with expectations of physical evidence of struggle, can be particularly problematic in cases where there is a delay in reporting or where the victim was unconscious or incapacitated. In *Ogunbayo v. The State*,[41] the Court of Appeal emphasized that "in a charge of rape, medical evidence, though desirable, is not essential if other evidence is cogent, compelling and conclusive." However, in practice, the absence of medical evidence often weakens the prosecution's case significantly.

x. Age of Consent:

The Criminal Code sets the age of consent at 14 years, as per Section 357, which states that "carnal knowledge of a girl under the age of fourteen years is unlawful." This low age of consent has been criticized as inadequate for protecting minors from sexual

[39] D.F. Atidoga, "An Assessment of the Philosophical Basis of the Punishment for Rape in Nigeria" (2009) 2(2) *Kogi State University Bi - Annual Journal of Public Law,* p.259. Where Prof. K.S Chukkol and A.O Alubo had an opposing view on the strictness or otherwise of the punishment for rape.

[40] Amnesty International, 'Nigeria: Time for Justice and Accountability' (2020) 45.

[41] [2007] 8 NWLR (Pt 1035) 157, 178.

exploitation.[42] It is worth noting that this conflicts with the Child Rights Act of 2003, which sets the age of consent at 18, creating legal ambiguity.[43]

xi. Attempted Rape:
Section 359 of the Criminal Code criminalises attempted rape, stating: "Any person who attempts to commit the offence of rape is guilty of a felony, and is liable to imprisonment for fourteen years, with or without caning." This provision ensures that even unsuccessful attempts at rape are punishable, reflecting the law's recognition of the serious nature of such attempts.

xii. Recent Developments and Calls for Reform:
The limitations of the Criminal Code's approach to rape have led to increasing calls for reform. Scholars and activists have advocated for a gender-neutral definition of rape, explicit recognition of marital rape, removal of the corroboration requirement, and a more comprehensive understanding of consent. The Violence Against Persons (Prohibition) Act (VAPPA) of 2015 represents a significant step towards addressing some of these issues at the federal level. VAPPA provides a more inclusive definition of rape, recognizes male victims, and explicitly criminalizes marital rape. However, VAPPA only applies in the Federal Capital Territory, reflecting the need for comprehensive reform of the Criminal Code itself. The Criminal Code's provisions on rape, while groundbreaking at the time of their enactment, now reflect outdated understandings of sexual violence, gender roles, and consent. The narrow, gender-specific definition, the failure to recognize marital rape, and the evidentiary challenges posed by judicial interpretations have created significant barriers to justice for rape victims in Southern

[42] UNICEF Nigeria, 'Child Protection Report' (2019) 23.
[43] Child Rights Act, 2003, s 31.

Nigeria. As Nigeria continues to evolve its legal framework to meet international standards and address contemporary realities, reform of these provisions remains a critical imperative for ensuring justice and protection for all victims of sexual violence.

1.3.1.2 Rape in The Nigeria Penal Code

The Penal Code, which applies in Northern Nigeria, provides a different legal framework for the crime of rape compared to the Criminal Code used in Southern Nigeria. This distinction reflects the historical and cultural differences between the two regions, as well as the influence of Islamic law in the North. A comprehensive analysis of rape under the Penal Code reveals several key aspects and issues:

i. Definition of Rape: Section 282(1) of the Penal Code defines rape as follows:

"A man is said to commit rape who, except in the case referred to in subsection (2), has sexual intercourse with a woman in any of the following circumstances:

(a) against her will;

(b) without her consent;

(c) with her consent, when her consent has been obtained by putting her in fear of death or of hurt;

(d) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;

(e) with or without her consent, when she is under fourteen years of age or of unsound mind."[44]

This definition, while more detailed in some respects than the Criminal Code, maintains a gender-specific approach and explicitly addresses several scenarios that vitiate consent.

[44] Penal Code Act, Laws of Northern Nigeria 1963, s 282(1).

ii. Gender Specificity: Like the Criminal Code, the Penal Code's definition of rape is gender-specific, recognizing only females as potential victims and males as potential perpetrators. This approach is often criticized for failing to acknowledge male victims of rape and female perpetrators, reflecting outdated gender norms and limiting the law's ability to address the full spectrum of sexual violence.

iii. Age of Consent: The Penal Code explicitly states that sexual intercourse with a girl under 14 years of age constitutes rape, regardless of consent. This provision aims to protect minors from sexual exploitation, recognizing their inability to provide meaningful consent. However, the age of 14 is considered low by international standards, and there have been calls to raise it to align with the Child Rights Act, which sets the age of consent at 18.

iv. Consent and Its Vitiation: The Penal Code provides a more refined approach to consent compared to the Criminal Code. It explicitly outlines scenarios where consent is considered invalid, including:

a) When obtained by putting the woman in fear of death or hurt

b) When the woman believes the man to be her lawful husband

c) When the woman is under 14 years of age or of unsound mind

This detailed enumeration provides clearer guidance to courts in assessing cases where consent may have been compromised.

v. Marital Rape Exemption: One of the most controversial aspects of the Penal Code's rape provision is its explicit exemption of marital rape. Section 282(2) states:

"Sexual intercourse by a man with his own wife is not rape if she has attained puberty."[45]

This exemption has been heavily criticized by human rights advocates and legal scholars as a violation of women's rights and bodily autonomy. It reflects outdated notions of marital rights and fails to protect women from sexual violence within marriage.[46] The provision's reference to puberty, rather than a specific age, has also been criticized for its potential to justify child marriage and sexual abuse of minors.

vi. Proof of Penetration: Similar to the Criminal Code, the Penal Code requires proof of penetration to establish the crime of rape. In *Musa v. The State*,[47] the Court held that "to constitute the offence of rape, there must be penetration, however slight, of the female sexual organ by the male organ." This requirement can present evidentiary challenges, particularly in cases where there is delay in reporting or lack of medical evidence.

vii. Resistance and Use of Force: While not explicitly required by the statute, courts applying the Penal Code have often looked for evidence of resistance or use of force as proof of lack of consent. In *Ibrahim v. The State*,[48] the Court of Appeal stated that "in proving lack of consent in rape cases, evidence of struggle or resistance by the victim is highly material." This approach has been criticized for placing an undue burden on victims and failing to recognize that fear, coercion, or other circumstances may prevent a victim from physically resisting.

[45] ibid., s 282(2).
[46] Itoro Eze-Anaba, (n 32) p. 33.
[47] [2013] CLR 3(b) (SC).
[48] [2014] LPELR-22306(CA).

viii. Corroboration Requirement: Although not stipulated in the Penal Code itself, courts in Northern Nigeria have historically required corroboration of a rape victim's testimony. In *Isa v. The State*,[49] the Court held that "in sexual offences, particularly rape, the evidence of the prosecutrix must be corroborated." This requirement has been widely criticized for making rape convictions difficult to secure and perpetuating harmful stereotypes about the credibility of rape victims.

ix. Punishment: Section 283 of the Penal Code outlines the punishment for rape:
"Whoever commits rape shall be punished with imprisonment for life or for any less term and shall also be liable to fine."[50]
While this provision allows for severe punishment, reflecting the gravity of the offense, it also provides courts with discretion to impose lesser sentences. This flexibility has been both praised for allowing consideration of case-specific factors and criticized for potentially leading to inconsistent sentencing.

x. Attempted Rape: Section 284 of the Penal Code criminalizes attempted rape:
"Whoever attempts to commit rape shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine."[51]
This provision ensures that even unsuccessful attempts at rape are punishable, reflecting the law's recognition of the serious nature of such attempts. However, the maximum sentence for attempted rape (14 years) is significantly less than that for completed rape (life imprisonment), which has been a point of debate among legal scholars.

[49] [2016] LPELR-40011(SC).
[50] Penal Code Act, Laws of Northern Nigeria 1963, s 283.
[51] Ibid., s 284.

xi. False Accusation of Rape: Uniquely, the Penal Code includes a specific provision addressing false accusations of rape. Section 285 states:
"Whoever, intending to hurt or injure the reputation of any person, falsely charges that person with having committed rape, shall be punished with imprisonment for a term which may extend to two years and shall also be liable to fine."[52]
While this provision aims to protect individuals from false accusations, it has been criticized for potentially deterring legitimate rape complaints due to fear of prosecution if the case cannot be proven.[53]

xii. Evidentiary Challenges: The prosecution of rape cases under the Penal Code faces significant evidentiary challenges. The requirement for proof of penetration, often coupled with expectations of physical evidence of struggle and the corroboration requirement, can be particularly problematic in cases where there is delay in reporting or where the victim was unconscious or incapacitated.

xiii. Influence of Islamic Law: The Penal Code's approach to rape is influenced by Islamic law, particularly in its treatment of marital rape and its emphasis on witness testimony. Some Sharia courts in Northern Nigeria have applied additional evidentiary requirements derived from Islamic law, such as the need for four male witnesses to prove rape, which has been heavily

[52] Ibid., s 285.

[53] Arome Abu, False Accusation of Rape, Penalty Thereof, (*TheNigeriaLawyer*, 26 November 2020) https://thenigerialawyer.com/false-accusation-of-rape-penalty-thereof/ accessed 9 August 2024.

criticized for making convictions nearly impossible to secure.[54]

xiv. Recent Developments and Calls for Reform: The limitations of the Penal Code's approach to rape have led to increasing calls for reform. Scholars, activists, and some lawmakers have advocated for:

a) A gender-neutral definition of rape
b) Explicit recognition of marital rape
c) Removal of the corroboration requirement
d) Raising the age of consent
e) A more comprehensive understanding of consent that doesn't rely on proof of force or resistance.

Some Northern states have enacted state-level legislation to address these issues. For example, the Kaduna State Penal Code (Amendment) Law 2020 provides a more inclusive definition of rape and explicitly criminalizes marital rape.[55] However, comprehensive reform of the Penal Code itself remains a critical need.

The Penal Code's provisions on rape, while more detailed in some respects than the Criminal Code, still reflect outdated understandings of sexual violence, gender roles, and consent. The explicit marital rape exemption, the narrow gender-specific definition, and the evidentiary challenges posed by judicial interpretations have created significant barriers to justice for rape victims in Northern Nigeria. As Nigeria continues to evolve its legal framework to meet international standards and address contemporary

[54] Suleiman Kumo, 'The Application of Islamic Law in Northern Nigeria: Problems and Prospects' (1977) 7 *Journal of Islamic and Comparative Law* 21–30.

[55] Kaduna State Penal Code (Amendment) Law, 2020, ss 2-4.

realities, reform of these provisions remains a critical imperative for ensuring justice and protection for all victims of sexual violence.

1.3.1.3 *Rape in Kogi State Violence Against Person(s) (Prohibition) Law (VAPPL)*

The Kogi State Violence Against Persons (Prohibition) Law (VAPPL), 2021 represents a significant advancement in rape legislation within Nigeria, addressing many of the criticisms leveled against federal criminal codes. This state-level legislation offers a more contemporary and comprehensive approach to defining and punishing the crime of rape.

Definition of Rape: Section 4 of the Violence Against Persons (Prohibition) Law (VAPPL), 2021 provides a modern, expansive definition of rape:

"(1) A person commits the offence of rape if:

(a) He or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else;

(b) The other person does not consent to the penetration; or

(c) the consent is obtained by force or by means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse."[56]

This definition is noteworthy for several reasons:

[56] Kogi State Violence Against Persons (Prohibition) Law (VAPPL), 2021, s.4.

1. Gender-Neutral Language: Unlike the Criminal Code and Penal Codes, which define rape in gender-specific terms, the Kogi State Violence against Persons (Prohibition) Law (VAPPL), 2021 employs gender-neutral language. This approach recognizes that both men and women can be victims or perpetrators of rape, aligning with contemporary understanding of sexual violence.[57]

2. Expanded Scope of Penetration: The law broadens the concept of rape beyond traditional definitions by including penetration of the vagina, anus, or mouth with any body part or object. This comprehensive approach reflects a more refined understanding of sexual violence and its various forms.[58]

3. Consent and Coercion: While emphasizing the importance of consent, similar to federal laws, the Kogi State legislation provides a more detailed examination of circumstances that may invalidate consent. This includes not only force and threats but also false representations and the use of substances that may impair the victim's will.[59]

4. Marital Rape: Notably, the absence of a marital rape exemption in the Kogi State Violence Against Persons (Prohibition) Law (VAPPL), 2021 suggests that spousal rape could be prosecuted under this legislation. This is a significant departure from the federal Criminal Code, which implicitly

[57] Chinyere Onyemelukwe, 'Legislating on Violence Against Women: A Critical Analysis of Nigeria's Recent Violence Against Persons (Prohibition) Act, 2015' (2018) 5(2) *DePaul Journal of Women, Gender and the Law* 13.

[58] ibid., p. 14.

[59] Kogi State Violence Against Persons (Prohibition) Law (VAPPL), 2021 s.4

excludes marital rape through its use of the term "unlawful carnal knowledge."[60]

5. Punishment for Rape: The Kogi State Violence Against Persons (Prohibition) Law (VAPPL), 2021 prescribes severe punishment for rape, reflecting the gravity with which the law views this offense. Section 284(2) states:

"A person convicted of an offence under subsection (1) of this section is liable to imprisonment for life."[61]

This mandatory life sentence aligns with international trends towards harsher penalties for sexual offenses. It's worth noting that unlike the federal Criminal Code, which allows for caning as an additional punishment, the Kogi State Violence Against Persons (Prohibition) Law (VAPPL), 2021 focuses solely on imprisonment. This approach avoids potential human rights concerns associated with corporal punishment.[62]

6. Protection of Victims and Witnesses: A notable feature of the Kogi State Violence Against Persons (Prohibition) Law (VAPPL) is its provisions for protecting victims and witnesses during legal proceedings:

"(1) In any proceeding relating to an offence under this Part, the Court may, on its own or on an application made by either the complainant or the prosecution, exclude from the proceedings any person other than the parties to the case and their legal representatives.

[60] Onyemelukwe (n 22) 15.

[61] Kogi State Penal Code Law, 2019, s 284(2).

[62] Amnesty International, 'Nigeria: "Pragmatic Policing" Through Extra-Judicial Executions and Torture' (16 May 2008) AI Index AFR 44/006/2008, 7.

(2) In criminal proceedings relating to an offence under this Part, the Court may direct that the victim or witness testified behind a screen or by means of a video link."[63]

These provisions demonstrate a victim-centered approach, aiming to protect the privacy and dignity of rape victims during legal proceedings. This aligns with international best practices in handling sexual violence cases, as recommended by the United Nations Office on Drugs and Crime.[64]

The option for testimony behind a screen or via video link is particularly significant. It recognizes the potential for re-traumatization during court proceedings and offers measures to minimize this risk. This approach is consistent with the practices of international criminal tribunals, such as the International Criminal Tribunal for Rwanda, which have employed similar protective measures for victims of sexual violence.[65]

Implications and Challenges:

1. Legal Pluralism: The progressive nature of the Kogi State Violence Against Persons (Prohibition) Law (VAPPL) compared to federal legislation creates a situation of legal pluralism within Nigeria. This can lead to inconsistent application of rape laws across the country, potentially violating the principle of equal protection under the law.

[63] Kogi State Violence Against Persons (Prohibition) Law (VAPPL), 2021, s.4

[64] United Nations Office on Drugs and Crime, *Handbook on Effective Prosecution Responses to Violence Against Women and Girls* (Criminal Justice Handbook Series, 2014) 77.

[65] Anne-Marie, de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005) 231.

2. Implementation Challenges: While the law is progressive on paper, its effective implementation may face challenges. These could include cultural barriers, lack of resources for law enforcement, and limited awareness among the population.

3. Potential for National Reform: The Kogi State Violence Against Persons (Prohibition) Law (VAPPL) could serve as a model for national reform. It demonstrates the possibility of modernizing rape laws within the Nigerian legal context and could influence future federal legislation.

The Kogi State Violence Against Persons (Prohibition) Law (VAPPL) treatment of rape is a significant advancement in Nigerian criminal law. Its gender-neutral language, comprehensive definition of rape, and victim protection measures align closely with international standards and best practices. However, the disparity between this state law and federal legislation highlights the need for comprehensive reform at the national level to ensure consistent and effective protection against sexual violence across Nigeria.

This progressive approach by Kogi State could potentially serve as a catalyst for broader legal reform in Nigeria, addressing longstanding criticisms of the Nigerian rape laws and moving towards a more victim-centered, gender-inclusive legal framework for addressing sexual violence.

1.3.2 International Regime

The international legal regime addressing the crime of rape has evolved significantly over the past few decades, reflecting a growing recognition of sexual violence as a serious violation of human rights[66] and international humanitarian law. This section

[66] Human Rights represent laws that are seen as sacred, which primary aim is to safeguard the dignity of man irrespective of and affliction. See: D.F.

examines how rape is treated in various international statutes and tribunals, reflecting the progression in its definition, prosecution, and punishment on the global stage.

1.3.2.1 *Rape in the Statute of International Court of Justice*

The International Court of Justice (ICJ), established in 1945[67] as the principal judicial organ of the United Nations, plays a crucial role in the development and interpretation of international law. While the ICJ Statute does not explicitly address rape as a specific crime, the Court's jurisdiction and the sources of law it applies provide a framework within which issues related to sexual violence, including rape, can be addressed in the context of disputes between states.

The ICJ's jurisdiction, as outlined in Articles 34-36 of its Statute, is limited to contentious cases between states and advisory opinions requested by UN organs and specialized agencies[68]. This jurisdictional constraint means that the ICJ cannot directly prosecute individuals for rape or other crimes. Instead, it adjudicates on state responsibility for violations of international law, which may include state failures to prevent, investigate, or punish acts of rape.

Article 38(1) of the ICJ Statute outlines the sources of international law that the Court shall apply:

"a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

Atidoga, "The Nigerian Police, Human Rights Violations and Corruption: The Need for Re-orientation" (2009) 8(2) *University of Jos Law Journal* p.140.

[67] D.F. Atidoga and Inedu Opaluwa, "The Evolving Jurisprudence of International Court of Justice in Armed Conflict: Issues and Prospect for Africa" (2025) pp.1-2 (unpublished).

[68] Statute of the International Court of Justice, arts 34-36.

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[69]

Under this framework, the ICJ can consider rape in several contexts:

1. Treaty Law: The Court may interpret and apply international treaties that explicitly or implicitly address sexual violence. These could include human rights treaties like the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) or international humanitarian law treaties like the Geneva Conventions[70] and International Convention on Economic, Social and Cultural Rights (ICESCR).[71]

2. Customary International Law: The ICJ can consider whether the prohibition of rape has attained the status of customary international law. This involves examining state practice and opinio juris regarding the treatment of rape in various contexts[72].

3. General Principles of Law: The Court may draw upon general principles of law recognized across legal systems, which could

[69] ibid., Article 38(1).

[70] Convention on the Elimination of All Forms of Discrimination against Women, 1979, United Nations Treaty Series, vol 1249, 13; Geneva Conventions of 1949 and their Additional Protocols.

[71] A. Hannafi and D.F. Atidoga, "Judicial Approach for Realisation of Economic, Social and Cultural Rights in Africa: Challenges of Enforcement in Nigeria" (2021) 7(5) *International Journal of Law*, p.25.

[72] Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 6-12.

include principles related to the protection of bodily integrity and the prohibition of sexual violence[73].

4. Judicial Decisions and Scholarly Writings: While these are subsidiary means, the ICJ can refer to decisions of other international tribunals (such as the ICTY or ICTR) that have dealt with rape, as well as scholarly writings on the subject[74].

ICJ Jurisprudence Related to Sexual Violence:

While the ICJ has not dealt extensively with cases directly focused on rape, it has addressed issues of sexual violence in the context of broader violations of international law. A significant example is the case concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*),[75] where the Court considered allegations of widespread sexual violence as part of its assessment of violations of international human rights and humanitarian law.

In this case, the Court held that:

> "…there is sufficient evidence of a reliable quality to support the DRC's allegation that the UPDF [Uganda People's Defence Force] failed to protect the civilian population and to distinguish between combatants and non-combatants in the course of fighting against other

[73] *Prosecutor v Furundžija*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), Judgment (10 December 1998) para 183.

[74] Statute of the International Court of Justice, art 38(1)(d).

[75] Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda*), Judgment, ICJ Reports 2005, 168.

> combatants... [T]here is also persuasive evidence that the UPDF incited ethnic conflicts and took no action to prevent such conflicts in Ituri district... The Court therefore finds that it has been proven that the UPDF failed to take measures to ensure respect for human rights and international humanitarian law in Ituri district."[76]

While this finding did not specifically mention rape, it included the broader category of human rights violations, which includes sexual violence.

State Responsibility for Sexual Violence:

The ICJ's focus on state responsibility means that it can hold states accountable for failing to prevent, investigate, or punish acts of rape. This approach was evident in the *Bosnia and Herzegovina v. Serbia and Montenegro case*[77] (also known as the Bosnian Genocide case), where the Court, while not specifically addressing rape, discussed state responsibility for failing to prevent and punish acts of genocide. The principles established in this case could potentially be applied to state responsibility for widespread or systematic rape.

The ICJ's Influence on the Development of International Law Regarding Sexual Violence:

[76] ibid., para. 211.

[77] Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, *ICJ Reports* 2007, 43.

While the ICJ does not have criminal jurisdiction over individuals, its jurisprudence contributes significantly to the development of international law regarding state responsibility for sexual violence. The Court's interpretations of international treaties and customary law can influence how states understand their obligations to prevent and punish rape under international law[78].

For instance, in the Armed Activities case, the Court's emphasis on state responsibility for failing to protect civilians and prevent human rights violations has implications on how states should address sexual violence in conflict situations. This approach aligns with the evolving understanding of rape as not just an individual crime, but also a matter of state responsibility when it occurs systematically or is left unpunished[79].

Challenges and Limitations:

The ICJ's approach to issues related to rape and sexual violence is not without challenges:

1. Evidentiary Standards: The Court's high evidentiary standards can make it difficult to prove state responsibility for sexual violence, especially in conflict situations where documentation may be scarce.

2. State-Centric Focus: The ICJ's jurisdiction over state-to-state disputes means it cannot directly address individual criminal

[78] Marten Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2015) 33(1) *Netherlands Quarterly of Human Rights* 39.

[79] A.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia, 2005) 207.

responsibility for rape, which is often crucial in sexual violence cases[80].

3. Limited Scope: The Court can only address rape in the context of broader violations of international law, potentially limiting its ability to develop detailed jurisprudence specifically on sexual violence[81].

Future Prospects:

Despite these limitations, the ICJ's role in shaping international law suggests potential for future development in addressing rape and sexual violence:

1. Interpretation of Treaties: The Court could be called upon to interpret treaties related to human rights or humanitarian law in ways that clarify state obligations regarding sexual violence[82].

2. Customary Law Development: Through its judgments, the ICJ could contribute to the solidification of prohibitions against rape as norms of customary international law[83].

3. Advisory Opinions: The Court's capacity to issue advisory opinions could be utilized to address legal questions related to

[80] William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2017) 89.

[81] Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006) 151.

[82] Laurence Boisson de Chazournes, *Fresh Water in International Law* (Oxford University Press 2013) 177.

[83] Brian D Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press, 2010) 98.

state responsibilities in preventing and punishing sexual violence[84].

In conclusion, while the ICJ Statute does not explicitly address rape, the Court's broad jurisdiction over international law provides a framework for addressing sexual violence in the context of state responsibility. As international law continues to evolve, the ICJ's role in interpreting and applying legal principles related to rape and sexual violence remains crucial in shaping state obligations and international norms.

1.3.2.2 *Rape in the Statute of International Criminal Court*

The Rome Statute of the International Criminal Court (ICC), adopted in 1998 and entered into force in 2002, represents a watershed moment in the international legal framework[85] for prosecuting rape and other forms of sexual violence. This statute not only explicitly recognizes rape as both a war crime and a crime against humanity but also provides a comprehensive legal basis for its prosecution at the international level[86].

Rape as a Crime Against Humanity:

Article 7(1) (g) of the Rome Statute lists rape as a crime against humanity "when committed as part of a widespread or systematic attack directed against any civilian population, with

[84] Alexander Orakhelashvili, 'The International Court and its Freedom to Select the Ground upon Which It Will Base Its Judgment' (2006) 55(1) *International and Comparative Law Quarterly* 171.

[85] D.F. Atidoga and S.O Akobe, 'Russian-Ukraine War: Addressing the Questions of International Crimes and Right to Self - Defence' (2025) (14) (1) *International Journal of Law and Policy Review*, p.5.

[86] *Rome Statute of the International Criminal Court*, UN Doc A/CONF.183/9 (17 July 1998), entered into force 1 July 2002.

knowledge of the attack."[87] This classification is significant for several reasons:

1. It recognises the gravity of rape when used as a tool of widespread or systematic violence.

2. It does not require a connection to armed conflict, allowing for prosecution of rape in peace time situations where it forms part of a broader attack on civilians.

3. The "widespread or systematic" requirement distinguishes these acts from isolated incidents, focusing on rape as a deliberate strategy or policy[88].

The inclusion of rape as a crime against humanity builds upon the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). For instance, in the *Akayesu case*, the ICTR recognized rape as a crime against humanity, setting a precedent that the Rome Statute codified.

Rape as a War Crime:

The Rome Statute also classifies rape as a war crime in both international and non-international armed conflicts. Article 8(2)(b)(xxii) applies to international armed conflicts, while Article 8(2)(e)(vi) covers non-international armed conflicts[89]. This dual classification ensures that rape can be prosecuted regardless of the nature of the conflict, addressing a gap in earlier international humanitarian law instruments.

[87] Ibid., art 7(1)(g).

[88] Valerie Oosterveld, 'Sexual Slavery and the International Criminal Court: Advancing International Law' (2011) 25(3) *Michigan Journal of International Law* 609.

[89] *Rome Statute* (n 88), arts 8(2)(b)(xxii), 8(2)(e)(vi).

Definition of Rape in the Elements of Crimes:

The Elements of Crimes, a document that supplements the Rome Statute, provides a detailed definition of rape. This definition is crucial as it guides the ICC in interpreting and applying the Statute. According to the Elements of Crimes, rape occurs when:

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

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."[90]

This definition is notable for several reasons:

1. Gender Neutrality: Unlike many national laws, including some in Nigeria, this definition is gender-neutral. It recognizes that both men and women can be victims or perpetrators of rape, reflecting a more comprehensive understanding of sexual violence[91].

[90] *International Criminal Court, Elements of Crimes* (2011) ISBN No 92-9227-232-2, 8, 28.
[91] Valerie Oosterveld, (n 88) 65.

2. Broad Concept of Penetration: The definition goes beyond traditional understandings of rape by including various forms of penetration, not limited to penile penetration of the vagina[92].

3. Recognition of Coercive Circumstances: The definition acknowledges that rape can occur not only through physical force but also through threats, coercion, or taking advantage of a coercive environment. This is particularly important in conflict situations where explicit force may not be necessary due to the overall coercive context[93].

4. Consent: The definition focuses on the coercive circumstances rather than requiring the prosecution to prove lack of consent. This approach recognizes the inherent coerciveness of situations involving crimes against humanity or war crimes[94].

5. Other Sexual Violence Crimes: The Rome Statute also recognizes other forms of sexual violence of comparable gravity to rape as both war crimes and crimes against humanity. Article 7(1) (g) and Article 8(2) (b) (xxii) list "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" alongside rape[95]. This inclusive approach allows for the prosecution of a wide range of sexual offenses that may not fit the strict definition of rape but are equally severe in their impact on victims.

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[92] Wolfgang Schomburg and Ines Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law' (2007) 101(1) *American Journal of International Law* 128.

[93] Supra, (n 3), para 129.

[94] Kiran Grewal, 'International Criminal Law as a Site for Enhancing Women's Rights? Challenges, Possibilities, Strategies' (2015) 23(2) *Feminist Legal Studies* 156.

[95] *Rome Statute*, arts 7(1)(g), 8(2)(b)(xxii).

6. Contextual Elements: For rape to be prosecuted as a crime against humanity under the ICC, it must be committed as part of a widespread or systematic attack directed against a civilian population. This requirement distinguishes isolated acts from those that form part of a larger policy or plan[96]. When prosecuted as a war crime, the act must be committed in the context of and associated with an armed conflict[97].

7. Modes of Liability: The Rome Statute provides for various modes of individual criminal responsibility in Article 25, which can be applied to rape cases. These include direct perpetration, ordering, soliciting, inducing, aiding, abetting, or otherwise assisting in the commission of the crime[98]. Importantly, Article 28 also provides for command or superior responsibility, allowing military commanders and civilian superiors to be held accountable for rape crimes committed by their subordinates under certain circumstances[99].

8. Procedural Protections: The Rome Statute includes several provisions aimed at protecting victims and witnesses in sexual violence cases. Article 68 requires the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, particularly in cases of sexual violence[100]. The Statute also provides for in camera proceedings and allows for the presentation of evidence by electronic or other special means[101].

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[96] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2016) 193.
[97] ibid, 253.
[98] *Rome Statute* (n 88), art 25.
[99] ibid, art 28.
[100] ibid, art 68.
[101] ibid, art 68(2).

9. Challenges and Criticisms: Despite its comprehensive approach, the ICC's treatment of rape has faced some challenges and criticisms:

i. Proving the contextual elements of crimes against humanity or war crimes can be difficult, potentially limiting the ICC's ability to address 'everyday' rape not connected to broader attacks or conflicts[102].
ii. The requirement of gravity and the ICC's limited resources mean that not all instances of rape, even in conflict situations, will be prosecuted by the Court[103].
iii. Some scholars argue that the gender-neutral language, while inclusive, may obscure the gendered nature of many sexual violence crimes[104].

In conclusion, the Rome Statute's treatment of rape represents a significant advancement in international criminal law. Its comprehensive definition, gender-neutral language, and recognition of various forms of sexual violence provides a robust framework for addressing these crimes at the international level. However, challenges remain in the implementation and in addressing the full spectrum of sexual violence in conflict and post-conflict situations.

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[102] Margaret M deGuzman, 'An Expressive Rationale for the Thematic Prosecution of Sex Crimes' in Morten Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic EPublisher, 2012) 35.

[103] Susana SáCouto and Katherine Cleary, 'The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court' (2009) 17(2) *American University Journal of Gender, Social Policy & the Law* 339.

[104] Janet Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' (2008) 30(1) *Michigan Journal of International Law* 99.

1.3.2.3 *Rape in the Statute of International Criminal Tribunal for Former Yugoslavia*

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by the United Nations Security Council in 1993 to prosecute serious crimes committed during the Yugoslav Wars in the 1990s.[105] The ICTY's treatment of rape as a war crime and crime against humanity marked a significant development in international criminal law, particularly in the prosecution of sexual violence in armed conflicts.

The ICTY Statute, while not providing a specific definition of rape, explicitly recognizes rape as a crime against humanity in Article 5(g) [106]. This inclusion was a crucial step in acknowledging the gravity of sexual violence in conflict situations. However, the absence of a detailed definition in the Statute left the task of defining and elaborating on the elements of rape to the Tribunal's jurisprudence.

The ICTY's approach to rape evolved through its case law. In the early cases, the Tribunal Struggled with defining rape in the context of international criminal law. The Furundžija case (1998) provided one of the first detailed considerations of rape by the ICTY. The Trial Chamber in this case defined rape as:

"(i) the sexual penetration, however slight:

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

[105] D.F. Atidoga, "International Legal Regime for the Crime of Genocide: Prescription for Reinvigoration" (2019) 6(1), *Islamic University in Uganda- Comparative Law Journal*, pp.158-159.

[106] Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc S/RES/827 (1993), art 5(g).

(b) of the mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person."[107]

This definition focused on the physical acts constituting rape and the element of coercion or force, setting a foundation for future cases to build upon.

The most significant development in the ICTY's approach to rape came with the *Kunarac case* in 2001. This case provided a comprehensive definition of rape in international law and addressed crucial issues related to consent and coercion. The Trial Chamber defined the *actus reus* of rape as:

"the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim."[108]

Importantly, the *Kunarac* judgment elaborated on the concept of consent, stating that consent must be given voluntarily "as a result of the victim's free will, assessed in the context of the surrounding circumstances."[109] This definition moved away from the requirement to prove force or threat of force, focusing instead on the absence of consent.

The Appeals Chamber in *Kunarac* affirmed this approach, emphasizing that the circumstances in which genuine consent is possible are narrowly restricted in the context of armed

[107] *Prosecutor v Furundžija*, Case No IT-95-17/1-T, Judgment (10 December 1998) para 185.
[108] *Prosecutor v Kunarac*, supra, (n 3) para 460.
[109] Ibid, para 461.

conflict[110]. This recognition of the coercive circumstances of war and their impact on consent was a significant advancement in the prosecution of wartime sexual violence.

Subsequent ICTY cases further developed the Tribunal's approach to sexual violence. In *Prosecutor v. Kvočka et al.*,[111] the Trial Chamber recognized that rape and other forms of sexual violence could constitute torture when the elements of torture are met. This decision reflects the severity of sexual violence and its potential to be prosecuted under multiple categories of international crimes.

The ICTY's jurisprudence also marked a shift towards a gender-neutral approach to rape. While early definitions focused on female victims, later cases recognized that men could also be victims of rape and sexual violence. This was evident in cases like *Česić*,[112] where the accused was convicted for forcing two Muslim brothers to perform fellatio on each other.

The ICTY's cases indicate the use of rape as a tool of ethnic cleansing during the Yugoslav conflicts. In the *Krstić case*,[113] the Trial Chamber found that rape was used as part of a campaign of terror against the Bosnian Muslim population. This recognition of the strategic use of rape in conflict situations was crucial in understanding the broader context of sexual violence in war.

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[110] *Prosecutor v Kunarac*, supra, (n 3), para 130.

[111] Case No IT-98-30/1-T, Judgment (2 November 2001) para 561.

[112] *Prosecutor v Česić*, Case No IT-95-10/1-S, Sentencing Judgment (11 March 2004) para 14.

[113] *Prosecutor v Krstić*, Case No IT-98-33-T, Judgment (2 August 2001) para 46.

The ICTY also made significant procedural advancements in handling rape cases. Rule 96 of the ICTY Rules of Procedure and Evidence provided special evidentiary rules for cases of sexual assault. These rules stated that no corroboration of the victim's testimony was required, consent could not be used as a defense if the victim was subjected to or threatened with violence or detention, and the victim's prior sexual conduct was not admissible as evidence.[114]

The ICTY's treatment of rape has had a lasting impact on international criminal law. Its jurisprudence influenced the definitions and approaches adopted by other international tribunals, including the International Criminal Tribunal for Rwanda and the International Criminal Court. The Tribunal's work contributed significantly to the recognition of rape and sexual violence as serious international crimes, deserving of prosecution at the highest levels.

1.3.2.4 *Rape in the Statute of International Criminal Tribunal for Rwanda*

The International Criminal Tribunal for Rwanda (ICTR) was established by the United Nations Security Council in November 1994 in response to the genocide and other systematic, widespread violations of international humanitarian law committed in Rwanda[115]. The ICTR played a pivotal role in developing international criminal law, particularly concerning the crime of rape in the context of genocide and armed conflict.[116]

[114] *ICTY Rules of Procedure and Evidence*, IT/32/Rev.50 (8 July 2015), Rule 96.

[115] *UN Security Council, Statute of the International Criminal Tribunal for Rwanda* (as last amended 13 October 2006), 8 November 1994.

[116] D.F. Atidoga, 'The Law of Rape - A Critical Analysis of the Law of Rape in Nigeria' (2010) *VDM,* p.64. See also, J.A. Adeyeye and D.F. Atidoga,

The ICTR Statute, like that of the ICTY, explicitly includes rape as a crime against humanity under Article 3(g)[117]. This inclusion reflects the international community's growing recognition of the severity of sexual violence in conflict situations. However, similar to the ICTY Statute, the ICTR Statute does not provide a specific definition of rape, leaving this task to the Tribunal's jurisprudence.

The ICTR's most significant contribution to the jurisprudence on rape in international criminal law came through the case of *Prosecutor v. Jean-Paul Akayesu*. This case marked the first time an international court punished sexual violence in a warfare context and the first time rape was found to be an act of genocide[118].

In its groundbreaking judgment, the Trial Chamber provided a broad, conceptual definition of rape:

"[A] physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive."[119]

This definition was groundbreaking for several reasons:

1. Conceptual Approach: Unlike previous definitions that focused on specific body parts, the Akayesu definition adopted a conceptual approach. This allowed for a more

'African Union Peace Keeping Operations: Challenges and Emerging Issues' (2021) 4(8) *Scholars International Journal of Law, Crime and Justice*, p.502.

[117] ICTR Statues, art 3(g).

[118] Kelly D Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status' (1999) 93(1) *American Journal of International Law* 107.

[119] Akayesu's case, (n 6), para 598.

comprehensive understanding of rape that could include various forms of sexual violence[120].

2. Focus on Coercive Circumstances: The definition emphasized the coercive circumstances under which rape occurs, rather than requiring proof of non-consent. This was particularly relevant in the context of genocide and armed conflict, where the overall coercive environment could negate the possibility of genuine consent[121].
3. Gender-Neutral Language: The definition used gender-neutral language, recognizing that both men and women could be victims of rape[122].

Perhaps most significantly, the *Akayesu* judgment recognized that rape could constitute an act of genocide. The Trial Chamber held that rape and sexual violence could be acts of genocide in so far as they were committed with the specific intent to destroy, in whole or in part, a particular group[123]. The Chamber stated:

"Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."[124]

This finding was revolutionary in international criminal law, explicitly linking sexual violence to the crime of genocide and

[120] A. M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005) 107.

[121] Kelly, (n 120) p. 316.

[122] Valerie Oosterveld, 'Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court' (2005) 12(1) *New England Journal of International and Comparative Law* 127.

[123] *Prosecutor v. Akayesu*, (n 6), para 731.

[124] ibid, para 731.

recognizing its use as a tool of destruction against a specific group.

Following *Akayesu*, the ICTR continued to develop its jurisprudence on rape. In *Prosecutor v. Musema*,[125] the Trial Chamber affirmed the *Akayesu* definition of rape and further elaborated on the coercive circumstances that negate the possibility of genuine consent.

In *Prosecutor v. Semanza*,[126] the Trial Chamber adopted a more mechanistic definition of rape, closer to that used by the ICTY in the Kunarac case. This definition focused on the non-consensual penetration of the victim. However, the Semanza approach was not universally adopted in subsequent ICTR cases, with some chambers preferring the broader *Akayesu* definition.[127]

The ICTR also made significant procedural advancements in handling rape cases. Rule 96 of the ICTR Rules of Procedure and Evidence, mirroring that of the ICTY, provided special evidentiary rules for cases of sexual assault. These rules stated that no corroboration of the victim's testimony was required, consent could not be used as a defense in certain circumstances, and the victim's prior sexual conduct was not admissible as evidence.[128]

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[125] *Prosecutor v Musema*, Case No ICTR-96-13-A, Judgment and Sentence (27 January 2000) paras 220–229.

[126] *Prosecutor v Semanza*, Case No ICTR-97-20-T, Judgment and Sentence (15 May 2003) para 345.

[127] Laura Bianchi, 'The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR' in A.M. de Brouwer and others (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 131.

[128] *ICTR Rules of Procedure and Evidence*, adopted on 29 June 1995 (as amended), Rule 96.

Despite these advancements, the ICTR faced challenges in prosecuting rape and sexual violence. Critics noted that sexual violence charges were often dropped or given less priority compared to other crimes[129]. The Tribunal also faced difficulties in encouraging victims to testify, given the stigma associated with sexual violence in Rwandan society.[130]

The ICTR's jurisprudence on rape, particularly the Akayesu judgment, has had a lasting impact on international criminal law. Its recognition of rape as a potential act of genocide influenced subsequent international tribunals and the International Criminal Court (ICC). The Rome Statute of the ICC, for instance, explicitly includes various forms of sexual violence as war crimes and crimes against humanity[131].

The ICTR's treatment of rape represented a significant advancement in international criminal law. From its initial recognition in the Statute to the groundbreaking Akayesu judgment and subsequent cases, the Tribunal played a crucial role in developing the legal understanding of rape as a war crime, crime against humanity, and potential act of genocide. While challenges remained in the prosecution of these crimes, the ICTR's work laid important groundwork for future international criminal proceedings dealing with sexual violence in conflict situations.

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[129] Binaifer Nowrojee, '"Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?' (United Nations Research Institute for Social Development, Occasional Paper 10, 2005) 15.

[130] Gabrielle Breton-Le Goff, 'Analysis of Trends in Sexual Violence Prosecutions in Indictments by the International Criminal Tribunal for Rwanda (ICTR) from November 1995 to November 2002' (Coalition for Women's Human Rights in Conflict Situations, 2002) 28.

[131] *Rome Statute of the International Criminal Court*, A/CONF.183/9 (17 July 1998, entered into force 1 July 2002), arts 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

1.4 THE CRIME OF CRIMES (GENOCIDE)

1.4.1 Meaning of Genocide

The term "genocide" represents one of the most severe crimes under international law, often referred to as the "crime of crimes" due to its gravity and far-reaching implications.[132] The concept of genocide, while rooted in historical atrocities, only gained legal recognition in the mid-20th century. Its definition and understanding have since evolved, shaped by international conventions, tribunal decisions, and scholarly discourse.[133]

The term "genocide" was coined by Polish-Jewish lawyer Raphael Lemkin in 1944, combining the Greek word "genos" (race or tribe) with the Latin suffix "-cide" (killing).[134] Lemkin developed this concept in response to the systematic extermination of European Jews during the Holocaust and the Armenian massacre by the Ottoman Empire during World War I. His work was instrumental in bringing international attention to the need for legal mechanisms to prevent and punish such atrocities.

The most widely accepted legal definition of genocide is found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Article II of the Convention defines genocide as:

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[132] Schabas, supra, (n 96) p. 1.

[133] D.F. Atidoga, 'Conceptualization of Genocide and its Evolution in International Law: Some Preliminary Issues and Dilemmas' (2016) 8, *Kogi State University Law Journal*, pp30-40.

[134] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace, 1944) 79.

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

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group."[135]

This definition has been incorporated verbatim into the statutes of subsequent international criminal tribunals, including the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Rome Statute of the International Criminal Court (ICC).[136]

1.4.2 Nature of Genocide

Genocide, often described as the "crime of crimes," possesses a unique nature that sets it apart from other international crimes. Its distinctive characteristics stem from its devastating impact on human groups, its complex legal and sociological dimensions, and its profound implications for international peace and security. Understanding the nature of genocide is

[135] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations Treaty Series, vol 78, 277, art II.

[136] *Rome Statute of the International Criminal Court*, 17 July 1998 (as amended on 11 June 2010), ISBN No 92-9227-227-6, art 6.

crucial for effective prevention, prosecution, and reparation efforts.

1. Collective Victimization:

Unlike many other crimes that target individuals, genocide is fundamentally a crime against a collectivity. The victims are targeted not for their individual identities but for their membership in a specific group.[137] This collective nature of victimization has significant implications for both the perpetration and the impact of genocide.

2. Intent to Destroy:

The hallmark of genocide is the specific intent (dolus specialis) to destroy a protected group, in whole or in part. This intent distinguishes genocide from other mass atrocities and crimes against humanity.[138] The emphasis on intent rather than outcome means that genocide can be committed even if the destruction is not fully achieved, as long as the intent to destroy the group exists.[139]

3. Systematic and Organized:

Genocide is typically a systematic and organized crime, often involving state machinery or powerful non-state actors. It requires planning, resources, and a sustained effort to carry out. This organized nature distinguishes genocide from spontaneous outbursts of violence or isolated incidents of discrimination.[140]

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[137] *Prosecutor v. Akayesu*, supra, (n 6) para 521.

[138] Schabas, supra, (n 96) p.241.

[139] *Prosecutor v Krstić*, Case No IT-98-33-A, Appeal Judgment (19 April 2004) para 32.

[140] Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Cornell University Press 2006) 7.

4. Multifaceted Destruction:

While killing is often the most visible aspect of genocide, its nature comprises of a broader range of destructive acts. These include causing serious bodily or mental harm, imposing conditions of life calculated to bring about physical destruction, preventing births, and forcibly transferring children.[141] This multifaceted approach to destruction shows the comprehensive threat genocide poses to a group's existence.

5. Cultural Annihilation:

Although not explicitly included in the legal definition, cultural destruction is often an integral part of genocide's nature. The annihilation of a group's cultural identity, language, traditions, and historical memory frequently accompanies physical destruction.[142] Some scholars, including Lemkin himself, argued for the inclusion of cultural genocide in the legal definition, recognizing its central role in the nature of genocidal acts.[143]

6. Dehumanization Process: A key aspect of genocide's nature is the process of dehumanization that often precedes and accompanies the physical acts of destruction. Perpetrators frequently employ propaganda and rhetoric to depict the targeted group as subhuman, evil, or a threat to society. This

[141] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations Treaty Series, vol 78, 277, art II.

[142] David L Nersessian, 'Rethinking Cultural Genocide Under International Law' (2005) 2(12) *Human Rights Dialogue* 7–8.

[143] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944) 91.

dehumanization serves to rationalize the violence and overcome moral barriers to mass killing.[144]

7. Long-term Consequences:

The nature of genocide extends beyond the immediate acts of violence to include long-lasting effects on survivors, their descendants, and society as a whole. Genocide survivors often experience severe trauma, loss of cultural identity, and difficulties in rebuilding their communities. The intergenerational transmission of trauma can affect subsequent generations, even those born after the genocide.[145]

8. Challenge to International Order:

Genocide, by its very nature, poses a fundamental challenge to the international legal and moral order. It violates the basic principles of human dignity and equality that underpin international human rights law. The prevention and punishment of genocide have thus become matters of international concern, reflected in the concept of universal jurisdiction for this crime.[146]

9. Complexity in Prevention and Prosecution:

The nature of genocide presents unique challenges in both prevention and prosecution. Early warning signs can be subtle and easily overlooked, making prevention difficult. In prosecution, proving the specific intent to destroy a group can

[144] Gregory H Stanton, 'The 8 Stages of Genocide' (Genocide Watch, 1998) http://www.genocide-watch.com/images/8StagesBriefingpaper.pdf accessed 06 August 2024.

[145] Yael Danieli, *International Handbook of Multigenerational Legacies of Trauma* (Springer 1998) 43.

[146] Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003) 286.

be challenging, often requiring extensive evidence of planning and systematic implementation.[147]

10. Intersection with Other International Crimes:

While genocide is distinct in its nature, it often intersects with other international crimes such as crimes against humanity and war crimes. Acts that constitute genocide may simultaneously qualify as these other crimes, reflecting the complex nature of mass atrocities.[148]

11. Gender Dimensions:

Some scholarship, has highlighted the gendered nature of genocide. Sexual violence, for instance, is often used as a tool of genocide, targeting not only individuals but aiming to destroy the social fabric of the group. The nature of genocide thus includes specific gender-based harms and experiences.[149]

1.4.3 Elements of Genocide

The crime of genocide, often referred to as the "crime of crimes," is composed of two primary elements: the physical element (*actus reus*) and the mental element (*mens rea*). These elements must be present simultaneously for an act to be considered genocidal under international law. This section will focus on the various elements of genocide, exploring their manifestations and legal interpretations.

[147] Schabas, supra, (n 96) p. 222.

[148] Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press 2006) 191.

[149] Elisabeth von Joeden-Forgey, 'The Devil in the Details: "Life Force Atrocities" and the Assault on the Family in Times of Conflict' (2010) 5(1) *Genocide Studies and Prevention* 1-19.

1.4.3.1 *Physical Element of Genocide*

*The ph*ysical element of genocide, also known as the *actus reus*, refers to the actual conduct or acts that constitute the crime. Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) enumerates five specific acts that, when committed with the requisite intent, amount to genocide[150]:

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

Each of these acts represents a distinct form of the physical element of genocide and warrants detailed examination:

1. Killing members of the group:
This is perhaps the most straightforward and commonly understood form of genocide. The term "killing" is interpreted to mean "homicide" or causing death[151]. In the Akayesu case, the International Criminal Tribunal for Rwanda (ICTR) defined killing as "homicide committed with the intent to cause death"[152].

[150]*Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations Treaty Series, vol 78, 277, art II.
[151] Schabas, supra, (n 96) p. 179.
[152] *Prosecutor v. Akayesu*, supra, (n 6) para 500.

It's important to note that the number of killings is not specified in the definition. As clarified in the Krstić case before the International Criminal Tribunal for the former Yugoslavia (ICTY), "the killing of a single person could constitute genocide if committed with the intent to destroy a protected group in whole or in part"[153]. However, in practice, genocide typically involves mass killings.

2. Causing serious bodily or mental harm to members of the group:

This provision includes a wide range of non-fatal acts that result in significant harm to members of the protected group. The term "serious" implies that the harm must go beyond temporary unhappiness, embarrassment, or humiliation and result in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life[154].

Bodily harm refers to physical injuries, while mental harm includes psychological damage. The ICTR in the Akayesu case provided examples of acts that could cause serious bodily or mental harm, including "torture, rape, sexual violence, and persecution"[155]. The inclusion of mental harm recognizes that genocide can be perpetrated through means other than physical violence.

In the case of *Prosecutor v. Blagojević and Jokić*,[156] the ICTY further elaborated that serious harm need not be permanent or irremediable, but "it must be harm that results in a grave and

[153] *Prosecutor v Krstić*, Case No IT-98-33-T, Judgment (2 August 2001) para 584.
[154] ibid, para 513.
[155] *Prosecutor v. Akayesu*, (n 6), para 504.
[156] Case No IT-02-60-T, Judgment (17 January 2005) para 645.

long-term disadvantage to a person's ability to lead a normal and constructive life".

3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part:

This provision addresses situations where the perpetrator does not immediately kill group members but creates conditions aimed at ultimately bringing about the group's physical destruction. The ICTR in Akayesu described this as "methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction"[157]. Examples of such conditions may include:

- Subjecting the group to a subsistence diet
- Systematic expulsion from homes
- Reduction of essential medical services below minimum requirements
- Denial of sufficient living accommodation for a reasonable period[158]

The Rome Statute's Elements of Crimes specifies that such conditions "may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes"[159].

4. Imposing measures intended to prevent births within the group:

[157] *Prosecutor v. Akayesu*, (n 6), para 505.
[158] ibid., para 506.
[159] *International Criminal Court, Elements of Crimes* (2011) art 6(c), Element 1.

This provision addresses acts aimed at preventing the biological reproduction of the targeted group. The ICTR in Akayesu provided a broad interpretation of such measures, stating that they may be physical, biological, or psychological[160]. Examples include:

- Sexual mutilation
- Sterilization
- Forced birth control
- Separation of sexes
- Prohibition of marriages

The Tribunal also recognized that in patriarchal societies, measures intended to prevent births could include the deliberate rape of a woman with the intent to impregnate her with a child who will consequently not belong to its mother's group[161].

It's important to note that the measures must be imposed; voluntary birth control measures adopted by members of a group do not constitute genocide[162].

5. Forcibly transferring children of the group to another group: This final act in the enumeration of genocidal acts focuses on the forced removal of children from their group. The term "forcibly" is not limited to physical force but may include threat of force or coercion, such as that caused by fear of

[160] *Akayesu's case*, (n 6), para 507.
[161] ibid, paras 507-508.
[162] Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 201.

violence, duress, detention, psychological oppression or abuse of power, or by taking advantage of a coercive environment[163].

The ICTR in Akayesu noted that the objective of this provision is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another[164].

The age limit for "children" is not specified in the Genocide Convention. However, the Convention on the Rights of the Child defines a child as a person under the age of 18, unless national laws recognize an earlier age of majority[165].

1.4.3.2 *Mental/Intent Element of Genocide (Dolus Specialis)*
The mental element, or *mens rea*, of genocide is often referred to as *dolus specialis*, which translates to "special intent" or "specific intent." This special intent is what distinguishes genocide from other international crimes and is considered the hallmark of the crime of genocide. The concept of *dolus specialis* in genocide is complex and has been the subject of extensive legal and academic discourse.

1. Definition and Significance
The *dolus specialis* of genocide is explicitly stated in Article II of the Genocide Convention as the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[166] This specific intent requirement elevates genocide

[163] *International Criminal Court, Elements of Crimes* (2011) art 6(e), Element 1.
[164] *Akayesu's case*, (n 6), para 509.
[165] *Convention on the Rights of the Child*, 20 November 1989, United Nations Treaty Series, vol 1577, 3, art 1.
[166] *Convention on the Prevention and Punishment of the Crime of Genocide* (n X) art II.

above other serious crimes against human rights, making it the "crime of crimes."[167]

The significance of this special intent cannot be overstated. As noted by William Schabas, "Genocide is a crime of intentional destruction of a national, ethnic, racial and religious group, not a crime of intentional destruction of civilians with a national, ethnic, racial or religious dimension."[168] This distinction is crucial for understanding the unique nature of genocide and its prosecution.

2. Components of *Dolus Specialis*

The *dolus specialis* of genocide can be broken down into several key components:

i. Intent to Destroy: The perpetrator must intend to destroy the targeted group. Mere discrimination or persecution, no matter how severe, does not constitute genocide without this intent.[169]

ii. In Whole or In Part: The intent may be to destroy the entire group or a substantial part of it. The ICTY Appeals Chamber in the Krstić case clarified that the part must be "substantial" enough to have an impact on the group as a whole.[170]

iii. The intent must be directed at one of the four groups protected under the Genocide Convention: national, ethnical, racial, or religious groups.[171]

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[167] *Prosecutor v Kambanda*, Case No ICTR 97-23-S, Judgment and Sentence (4 September 1998) para 16.

[168] Schabas, supra, (n 96) p. 241.

[169] *Prosecutor v Jelisić*, Case No IT-95-10-A, Appeal Judgment (5 July 2001) para 66.

[170] *Prosecutor v Krstić*, Case No IT-98-33-A, Appeal Judgment (19 April 2004) para 8.

[171] *Convention on the Prevention and Punishment of the Crime of Genocide* (n X) art II.

iv. As Such: The group must be targeted because of its national, ethnic, racial, or religious character, not for any other reason.[172]

3. Proving *Dolus Specialis*

Proving the special intent of genocide is often one of the most challenging aspects of genocide prosecution. Direct evidence of such intent is rare, and courts have had to rely on various forms of circumstantial evidence to infer genocidal intent.

i. Inferring Intent from Actions: The ICTR in the *Akayesu case* stated that "intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact."[173] These presumptions can be drawn from the general context of the perpetration of other culpable acts systematically directed against the same group.[174]

ii. Scale of Atrocities: The scale and systematic nature of atrocities committed against a group can be indicative of genocidal intent. In the *Kayishema and Ruzindana case*,[175] the ICTR noted that "intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action."

iii. Deliberate and Systematic Manner: The methodical planning of the destruction can be evidence of special

[172] *Prosecutor v Niyitegeka*, Case No ICTR-96-14-A, Judgment (9 July 2004) para 53.

[173] *Prosecutor v Akayesu*, supra, (n 6) para 523.

[174] ibid, para 524.

[175] *Prosecutor v Kayishema and Ruzindana*, Case No ICTR-95-1-T, Judgment (21 May 1999) para 93.

intent. The ICJ in the *Bosnia v. Serbia case*[176] stated that *dolus specialis* might be inferred from "the deliberate and systematic targeting of victims on account of their membership of a particular group while excluding the members of other groups."

4. Motive vs. Intent

It's crucial to distinguish between motive and intent in the context of genocide. The jurisprudence of international criminal tribunals has consistently held that motive is irrelevant to criminal intent. As stated by the ICTR Appeals Chamber in *Kayishema and Ruzindana*,[177] "The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide."

This means that even if the perpetrator's primary motive is economic gain or political power, they can still be found guilty of genocide if the specific intent to destroy a protected group is present. This distinction is vital for understanding and prosecuting genocide, as it focuses on the intended outcome rather than the reasons behind it.

1.4.3 Cultural Genocide

Cultural genocide, also known as ethnocide, refers to the deliberate destruction of the cultural heritage, practices, and identity of a particular group. This concept, while not explicitly included in the legal definition of genocide under the 1948 Genocide Convention, has been a subject of significant debate and concern in international law and human rights discourse.

[176] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, *ICJ Reports* 2007, 43, para 376.

[177] Kayishema, (n 175) para 161.

The notion of cultural genocide recognizes that the destruction of a group's culture can be as devastating as physical annihilation, potentially leading to the group's disappearance as a distinct entity.

The concept of cultural genocide can be traced back to Raphael Lemkin, the Polish-Jewish lawyer who coined the term "genocide" in 1944. Lemkin's original conception of genocide was broader than what was ultimately adopted in the Genocide Convention, including not only physical destruction but also the annihilation of essential foundations of group life[178]. He argued that genocide had two phases: "one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor"[179].

During the drafting of the Genocide Convention, there were extensive debates about whether to include cultural genocide. Some delegates argued for its inclusion, recognizing the devastating impact of cultural destruction on group identity. However, others, particularly colonial powers, opposed its inclusion, fearing it could be used to challenge their policies towards indigenous populations[180]. Ultimately, cultural genocide was excluded from the final text of the Convention, focusing instead on physical and biological destruction.

Elements of Cultural Genocide

While there is no universally accepted legal definition of cultural genocide, scholars and human rights advocates have

[178] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944) 79.
[179] ibid., 79.
[180] Schabas, (n 96) pp. 207–212.

identified several key elements that characterize this phenomenon:

1. Destruction of cultural symbols: This includes the deliberate destruction of monuments, holy sites, museums, libraries, and other places of cultural significance[181].
2. Prohibition of cultural practices: Banning traditional ceremonies, rituals, languages, or customs that are integral to a group's identity[182].
3. Forced assimilation: Policies aimed at forcibly integrating a group into the dominant culture, often through education systems or legal measures[183].
4. Displacement from ancestral lands: Forcibly removing groups from territories that hold cultural or spiritual significance[184].
5. Suppression of language: Prohibiting the use of a group's native language or imposing the use of the dominant group's language[185].
6. Destruction of social institutions: Dismantling traditional forms of social organization, governance, or economic systems that are central to a group's cultural identity[186].

[181] Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford University Press 2016) 28–30.

[182] ibid, 31–33.

[183] Andrew Woolford, 'Ontological Destruction: Genocide and Canadian Aboriginal Peoples' (2009) 4(1) *Genocide Studies and Prevention* 81–97.

[184] Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (Transnational Publishers 2006) 115–120.

[185] Stephen Mako, 'Cultural Genocide and Key International Instruments: Framing the Indigenous Experience' (2012) 19(2) *International Journal on Minority and Group Rights* 175–194.

[186] Berber Bevernage, 'The Making of the Congo Question: Truth-Telling, Denial and "Colonial Science" in King Leopold's Commission of Inquiry' (2018) 22(2) *Rethinking History* 203–238.

Legal Status and International Recognition

Although cultural genocide is not explicitly recognized in the Genocide Convention, elements of cultural destruction are addressed in various international legal instruments:

1. The UN Declaration on the Rights of Indigenous Peoples (2007) recognizes indigenous peoples' right to practice and revitalize their cultural traditions and customs, and prohibits any form of forced assimilation[187].

2. The International Criminal Court's (ICC) Rome Statute includes as a war crime the intentional direction of attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and the wounded are collected[188].

3. The UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and its protocols provide for the protection of cultural property during armed conflicts[189].

Case Studies and Contemporary Relevance

Several historical and contemporary situations have been characterized as cultural genocide:

1. Indigenous peoples in settler colonial states: The forcible removal of indigenous children from their families in Australia (the "Stolen Generations") and Canada (the

[187] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007), arts 8, 11.

[188] *Rome Statute of the International Criminal Court*, arts 8(2)(b)(ix), 8(2)(e)(iv).

[189] *UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, 249 UNTS 240.

residential school system) has been described as cultural genocide[190].

2. Tibet under Chinese rule: China's policies in Tibet, including restrictions on religious practices and the promotion of Mandarin over Tibetan language, have been criticized as cultural genocide[191].
3. Uyghurs in Xinjiang: Recent reports of mass detention, forced labor, and cultural suppression of Uyghurs in China's Xinjiang region have raised concerns of cultural genocide[192].
4. The destruction of cultural heritage in Mali: The intentional destruction of ancient shrines in Timbuktu by extremist groups in 2012 was prosecuted as a war crime by the ICC[193].

Debates and Controversies

The concept of cultural genocide remains controversial in international law and policy:

1. Legal recognition: There are ongoing debates about whether cultural genocide should be recognized as a distinct crime under international law[194].

[190] David Short, 'Cultural Genocide and Indigenous Peoples: A Sociological Approach' (2010) 14(6) *The International Journal of Human Rights* 833–848.

[191] Barry Sautman, 'Cultural Genocide and Tibet' (2003) 38 *Texas International Law Journal* 173–246.

[192] Sean Roberts, *The War on the Uyghurs: China's Internal Campaign against a Muslim Minority* (Princeton University Press 2020) 198–220.

[193] *Prosecutor v Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence (27 September 2016).

[194] Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford University Press 2016) 167–190.

2. Scope and definition: Determining what constitutes cultural genocide and distinguishing it from legitimate cultural change or assimilation remains challenging[195].
3. Reparations: Questions arise about appropriate remedies and reparations for cultural genocide, particularly in cases of historical injustices[196].
4. Intersection with other rights: The concept of cultural genocide intersects with debates about cultural rights, minority rights, and indigenous rights[197].

Implications for Nigeria

In the Nigerian context, the concept of cultural genocide has relevance in several areas:

1. Ethnic conflicts: Nigeria's history of ethnic conflicts raises questions about cultural preservation and the protection of minority cultures[198].
2. Language policy: The promotion of English and major Nigerian languages in education and public life has implications for linguistic diversity and cultural preservation[199].

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[195] Leora Bilsky and Rachel Klagsbrun, 'The Return of Cultural Genocide?' (2018) 29(2) *European Journal of International Law* 373–396.

[196] Ana Filipa Vrdoljak, 'Genocide and Restitution: Ensuring Each Group's Contribution to Humanity' (2011) 22(1) *European Journal of International Law* 17–47.

[197] Patrick Macklem, 'Indigenous Peoples and the Ethos of Legal Pluralism in Canada' in Patrick Macklem and Douglas Sanderson (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (University of Toronto Press 2015) 17–34.

[198] Eghosa E Osaghae and Rotimi T Suberu, *A History of Identities, Violence, and Stability in Nigeria* (CRISE Working Paper No 6, University of Oxford 2005) 19-25.

[199] Efurosibina Adegbija, 'Language Policy and Planning in Nigeria' (2004) 5(3) *Current Issues in Language Planning* 181-246.

3. Religious freedoms: Tensions between different religious groups and concerns about religious extremism intersect with issues of cultural identity and preservation[200].
4. Development projects: Large-scale development projects that displace communities from ancestral lands can have significant cultural impacts[201].

In conclusion, while cultural genocide is not yet recognized as a distinct crime under international law, the concept highlights the significant importance of cultural identity and the devastating impact of its systematic destruction. As international law continues to evolve, the protection of cultural rights and the prevention of cultural genocide remain crucial challenges in ensuring the survival and flourishing of diverse human cultures.

1.5 SOME INSTANCES OF GENOCIDE

Genocide, often referred to as the "crime of crimes," has a long and tragic history that predates its legal definition. This section will examine several significant instances of genocide that occurred before and during the establishment of the contemporary international legal order, which began with the adoption of the Genocide Convention in 1948. These historical cases not only illustrate the devastating impact of genocidal acts but also provided the impetus for the development of international law to prevent and punish such crimes.

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[200] Isaac Terwase Sampson, 'Religion and the Nigerian State: Situating the de facto and de jure Frontiers of State-Religion Relations and Its Implications for National Security' (2014) 3(2) *Oxford Journal of Law and Religion* 311-339.

[201] Bogumil Terminski, 'Development-Induced Displacement and Resettlement: Theoretical Frameworks and Current Challenges' (2013) 10 *Development* 101-135.

1.5.1 Before the Contemporary Legal Order

Prior to the codification of genocide as an international crime, several mass atrocities occurred that would later be recognized as genocides. These events shaped our understanding of the nature and scope of genocidal acts and influenced the development of international criminal law.

i. Heroro Genocide[202]
ii. Armenian Genocide[203]
iii. Ukraine - Halolomor
iv. Nazi - Holocaust

1.5.2 During the Contemporary Legal Order

The post-World War II era saw the establishment of a new international legal order aimed at preventing atrocities like those witnessed during the Holocaust. The adoption of the Genocide Convention in 1948 marked a significant milestone in this effort. However, despite these legal frameworks, the world continued to witness genocides in various parts of the globe. This section examines five major genocides that occurred during this contemporary legal order, highlighting the challenges in preventing and addressing such atrocities even with international legal mechanisms in place.

i. Cambodian Genocide
ii. Bosnian Genocide
iii. Rwandan Genocide
iv. Rohingyan Genocide

[202] See: D.F. Atidoga and O. Atidoga, 'Echoe From the Past: The Annihilation of the Heroro People in the Erstwhile and Contemporary International Law - War Crime or Genocide? (2024) 1(1) *East African Journal of Law, Policy and Globalization* pp.1-133

[203] See: D.F. Atidoga, 'Genocide and Human Rights Violation: Examination of Armenian Genocide' (2011) 2(2) *Human Rights Review*, pp.50-76.

1.6 LEGAL REGIME ON GENOCIDE

The legal regime governing genocide has evolved significantly since the mid-20th century, encompassing international conventions, statutes of international tribunals, and domestic legislation. This section examines the key legal instruments that form the foundation of genocide law and their application in various contexts.

1.6.1 Convention for the Prevention and Punishment of the Crime of Genocide, 1948

The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948, stands as the cornerstone of international law on genocide. This landmark treaty not only provides the first internationally recognized definition of genocide but also establishes genocide as a crime under international law.

Key provisions of the Genocide Convention include:

1. Definition of Genocide: Article II of the Convention defines genocide as specific acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. These acts include:
   a) Killing members of the group
   b) Causing serious bodily or mental harm to members of the group
   c) Deliberately inflicting conditions of life calculated to bring about the group's physical destruction
   d) Imposing measures intended to prevent births within the group

e) Forcibly transferring children of the group to another group[204]

2. Punishable Acts: Article III outlines the acts that shall be punishable under the Convention:

a) Genocide
b) Conspiracy to commit genocide
c) Direct and public incitement to commit genocide
d) Attempt to commit genocide
e) Complicity in genocide[205]

3. Obligation to Prevent and Punish: Article I affirms that genocide is a crime under international law and obliges contracting parties to prevent and punish it.[206]

4. Universal Jurisdiction: Article VI provides that persons charged with genocide shall be tried by a competent tribunal of the State in whose territory the act was committed, or by an international penal tribunal with accepted jurisdiction.[207]

5. Non-Political Nature: Article VII establishes that genocide shall not be considered a political crime for the purpose of extradition.[208]

The Genocide Convention has been ratified by 152 states as of 2024, making it one of the most widely accepted international treaties. Its provisions have been incorporated into the statutes of various international

[204] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations Treaty Series, vol 78, 277, art II.
[205] ibid, art III.
[206] ibid., art I.
[207] ibid, art VI.
[208] ibid, art VII.

criminal tribunals and have influenced domestic legislation worldwide.

However, the Convention has faced criticism for its limited definition of protected groups, excluding political and social groups. Additionally, the absence of an enforcement mechanism within the Convention itself has led to challenges in its practical application.[209]

Despite these limitations, the Genocide Convention remains a crucial instrument in international law, providing a legal basis for prevention, prosecution, and punishment of what is often termed the "crime of crimes."

1.6.2 Rome Statute of International Criminal Court

The Rome Statute of the International Criminal Court (ICC), adopted in 1998 and entered into force in 2002, marks another significant development in the legal regime on genocide. The Statute establishes the ICC as a permanent international court with jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression.

Key aspects of the Rome Statute's treatment of genocide include:

1. Definition of Genocide: Article 6 of the Rome Statute adopts verbatim the definition of genocide from the 1948 Genocide Convention, maintaining consistency in international law.[210]
2. Elements of Crimes: The Rome Statute is supplemented by the Elements of Crimes document, which provides detailed guidance on interpreting and applying the definition of

[209] Schabas, (n 96) p.75.

[210] *Rome Statute of the International Criminal Court*, 17 July 1998 (as amended on 11 June 2010), ISBN No 92-9227-227-6, art 6.

genocide. This document elaborates on the contextual elements and specific acts constituting genocide.[211]

3. Individual Criminal Responsibility: Article 25 establishes various modes of individual criminal responsibility for genocide, including direct commission, ordering, soliciting, inducing, aiding, abetting, and contributing to the commission of genocide by a group acting with a common purpose.[212]

4. Irrelevance of Official Capacity: Article 27 stipulates that official capacity as a head of state or government, member of government or parliament, elected representative, or government official shall not exempt a person from criminal responsibility under the Statute.[213]

5. Command Responsibility: Article 28 extends criminal responsibility to military commanders and other superiors for crimes committed by forces under their effective command and control.[214]

6. Non-Applicability of Statute of Limitations: Article 29 ensures that the crimes within the Court's jurisdiction, including genocide, are not subject to any statute of limitations.[215]

The Rome Statute represents a significant advancement in the prosecution of genocide by establishing a permanent international court with the capacity to try individuals for this crime. It builds upon the foundation laid by the Genocide

[211] *International Criminal Court, Elements of Crimes* (2011) ISBN No 92-9227-232-2, 2-4.
[212] *Rome Statute* art 25.
[213] ibid, art 27.
[214] ibid, art 28.
[215] Ibid, art 29.

Convention and incorporates lessons learned from the *ad hoc* tribunals for the former Yugoslavia and Rwanda.

However, the ICC's effectiveness in prosecuting genocide has been limited by several factors, including the principle of complementarity (which gives priority to national courts), the lack of universal ratification (notably, countries like the United States, China, and Russia are not parties), and challenges in securing state cooperation for arrests and evidence collection.[216]

Despite these challenges, the Rome Statute and the ICC play a crucial role in the evolving legal regime on genocide, providing a permanent forum for its prosecution and contributing to the development of international criminal law jurisprudence on this grave crime.

1.6.3 Statute of International Criminal Tribunal for Former Yugoslavia

The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), established by UN Security Council Resolution 827 in 1993, represents a significant milestone in the development of international criminal law, particularly concerning genocide. The ICTY was the first international criminal tribunal created by the United Nations and the first international war crimes tribunal since the Nuremberg and Tokyo tribunals following World War II.

[216] Schabas, (n 96) pp.197-200.

Key aspects of the ICTY Statute relating to genocide include:

1. Jurisdiction over Genocide: Article 4 of the ICTY Statute grants the Tribunal jurisdiction over the crime of genocide, adopting the definition from the 1948 Genocide Convention.[217]

2. Individual Criminal Responsibility: Article 7 establishes individual criminal responsibility for those who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of crimes under the Statute, including genocide.[218]

3. Command Responsibility: The Statute also recognizes the principle of command responsibility, holding superiors responsible for the acts of their subordinates if they knew or had reason to know about such acts and failed to prevent them or punish the perpetrators.[219]

4. Non-Applicability of Statute of Limitations: The ICTY Statute does not include any provisions on statutes of limitations, implying that prosecution for genocide can occur regardless of when the crime was committed.[220]

The ICTY's jurisprudence has made significant contributions to the interpretation and application of genocide law. Notable cases include:

[217] *Statute of the International Criminal Tribunal for the Former Yugoslavia*, UN Doc S/RES/827 (1993), art 4.
[218] ibid, art 7(1).
[219] ibid, art 7(3).
[220] William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006) 528.

Prosecutor v. Krstić[221]: This case, relating to the Srebrenica massacre, was the first conviction for genocide by the ICTY. The Appeals Chamber's judgment provided important clarifications on the definition of the protected group and the meaning of "destroy" in the context of genocide.[222]

Prosecutor v. Jelisić[223]: This case explored the concept of genocidal intent, emphasizing that genocide is characterized by the specific intent to destroy a protected group.[224]

The ICTY's work has been crucial in developing the legal understanding of genocide, particularly in the context of the complex, multi-ethnic conflicts in the former Yugoslavia. Its jurisprudence has influenced subsequent international tribunals and domestic courts dealing with cases of genocide.

1.6.4 Statute of International Criminal Tribunal for Rwanda

The Statute of the International Criminal Tribunal for Rwanda (ICTR), established by UN Security Council Resolution 955 in 1994, closely mirrors the ICTY Statute in its provisions related to genocide. The ICTR was created in response to the genocide in Rwanda, where an estimated 800,000 to 1 million Tutsis and moderate Hutus were killed in a span of 100 days.

[221] Case No IT-98-33-A, Appeal Judgment (19 April 2004) paras 6-22.
[222] *Prosecutor v Krstić*, Case No IT-98-33-A, Appeal Judgment (19 April 2004) paras 6-22.
[223] Case No IT-95-10-A, Appeal Judgment (5 July 2001) paras 45-46.
[224] *Prosecutor v Jelisić*, Case No IT-95-10-A, Appeal Judgment (5 July 2001) paras 45-46.

Key aspects of the ICTR Statute concerning genocide include:

1. Jurisdiction over Genocide: Article 2 of the ICTR Statute grants the Tribunal jurisdiction over genocide, again adopting the definition from the 1948 Genocide Convention.[225]

2. Individual Criminal Responsibility: Like the ICTY Statute, the ICTR Statute establishes individual criminal responsibility for various forms of participation in genocide.[226]

3. Temporal Jurisdiction: The ICTR's jurisdiction was limited to crimes committed between 1 January 1994 and 31 December 1994, focusing specifically on the period of the Rwandan genocide.[227]

The ICTR's jurisprudence has made significant contributions to international criminal law, particularly in relation to genocide. Notable cases include:

Prosecutor v. Akayesu[228]: This landmark case provided the first interpretation of the definition of genocide by an international court. It expanded the understanding of genocidal acts to include sexual violence and broadened the definition of protected groups.[229]

[225] *Statute of the International Criminal Tribunal for Rwanda*, UN Doc S/RES/955 (1994), art 2.
[226] ibid, art 6.
[227] ibid, art 1.
[228] Case No ICTR-96-4-T, Judgment (2 September 1998) paras 495–523.
[229] *Prosecutor v Akayesu*, Supra, (n 6), paras 495–523.

Prosecutor v. Kayishema and Ruzindana[230]: This case further elaborated on the elements of genocide, particularly the concept of intent to destroy a group "in part."[231]

The ICTR's work has been instrumental to the development of a more comprehensive understanding of genocide, particularly in the context of internal armed conflicts and in situations where the violence is swift and intense. Its jurisprudence has had a lasting impact on how genocide is understood and prosecuted in international criminal law.

1.6.5 Statute of International Court of Justice

While the International Court of Justice (ICJ) is not a criminal court and does not have jurisdiction over individuals, its Statute and jurisprudence have contributed significantly to the legal regime on genocide, particularly in terms of state responsibility.

Key aspects of the ICJ's role in genocide law include:

1. Jurisdiction: Article 36 of the ICJ Statute provides the basis for the Court's jurisdiction in disputes between states, including those related to the interpretation and application of the Genocide Convention.[232]

2. Advisory Opinions: Article 65 empowers the ICJ to give advisory opinions on legal questions, which has been relevant in clarifying aspects of genocide law.[233]

[230] Case No ICTR-95-1-T, Judgment (21 May 1999) paras 91–98.
[231] *Kayishema*, supra, (n 175).
[232] *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993, art 36.
[233] ibid, art 65.

The ICJ has made important contributions to genocide law through its judgments and advisory opinions:

Bosnia and Herzegovina v. Serbia and Montenegro[234] (2007): This landmark case was the first in which a state was held accountable under the Genocide Convention. The Court clarified the obligation of states to prevent genocide, even outside their own territories.[235]

Croatia v. Serbia[236] (2015): This case further elaborated on the elements of genocide, particularly the requirement of specific intent (dolus specialis).[237]

Advisory Opinion on Reservations to the Genocide Convention (1951): This opinion affirmed the universal character of the condemnation of genocide and the cooperation required to liberate mankind from this "odious scourge".[238]

1.7 SOME NIGERIA INCIDENCES IN THE CONTEXT OF GENOCIDE

While Nigeria has not experienced events that have been legally classified as genocide in international law, there have been several incidents of mass violence that have raised concerns about potential genocidal acts or patterns. It's important to examine these events critically to understand their

[234] Judgment, *ICJ Reports* 2007, 43.
[235] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, *ICJ Reports* 2007, 43.
[236] Judgment, *ICJ Reports* 2015, 3.
[237] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment, *ICJ Reports* 2015, 3.
[238] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, *ICJ Reports* 1951, 15.

nature, causes, and consequences, as well as to consider their implications for preventing future atrocities.

1.7.1 *Odi* Massacre

The *Odi* massacre occurred in November 1999 in *Odi*, a predominantly Ijaw town in Bayelsa State, Nigeria. This incident represents one of the most severe cases of military brutality in Nigeria's recent history and has been widely condemned by human rights organizations.

The massacre took place in the context of ongoing tensions between local communities in the Niger Delta and multinational oil companies operating in the region. These tensions were fueled by environmental degradation, economic marginalization, and disputes over resource control.[239]

The immediate trigger for the military action was the killing of twelve policemen by a local militia group. In response, then-President Olusegun Obasanjo ordered a military intervention, ostensibly to apprehend those responsible for the killings.[240]

On November 20, 1999, Nigerian troops from the 76th Regular Battalion led by Colonel Agbabiaka entered Odi. Over the next two days, the soldiers engaged in widespread destruction and killing. According to reports, virtually every building in the town, except for a church, a bank, and a health center, was destroyed.[241]

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[239] Iyabrade Ikporukpo, 'The State and Massacres in Nigeria' (2023) 7(1) *IIPRDS* https://internationalpolicybrief.org/wp-content/uploads/2023/10/ARTICLE3-183.pdf accessed 19 August 2024.

[240] Human Rights Watch, 'The Destruction of Odi and Rape in Choba' (22 December 1999) 3.

[241] Environmental Rights Action, *A Blanket of Silence: Images of the Odi Genocide* (2003) 11.

Human Rights Watch reported that hundreds of unarmed civilians were killed in the attack. The exact death toll remains disputed, with estimates ranging from 43 (according to a government white paper) to over 2,500 (according to some local sources).[242]

While the *Odi* massacre does not meet the legal definition of genocide as outlined in the UN Genocide Convention, it raises serious concerns about the use of disproportionate force against civilian populations and potential crimes against humanity.

The attack on *Odi* violated several principles of international humanitarian law, including:

1. The principle of distinction between combatants and civilians
2. The principle of proportionality in the use of force
3. The prohibition on indiscriminate attacks

In 2013, a Federal High Court in Port Harcourt ruled that the attack on *Odi* was unconstitutional and a gross violation of the fundamental human rights of the victims. The court ordered the federal government to pay 37.6 billion naira in compensation to the *Odi* community.[243]

Legacy and Significance:

The *Odi* massacre remains a dark chapter in Nigeria's recent history and serves as a stark reminder of the potential for state-sanctioned violence against civilian populations. It reflects the need for:

[242] Human Rights Watch, 'Update on Human Rights Violations in the Niger Delta' (Dec 2000) 5.

[243] Vanguard, 'Odi Invasion: Court Orders FG to Pay N37.6bn' (Vanguard, Lagos, 19 February 2013) https://www.vanguardngr.com/2013/02/odi-invasion-court-orders-fg-to-pay-n37-6bn/ accessed 18 August 2024.

1. Stricter adherence to the principles of international humanitarian law by security forces
2. More effective mechanisms for civilian oversight of military operations
3. Addressing the root causes of conflicts in the Niger Delta region

While not classified as genocide, the *Odi* massacre demonstrates how quickly military interventions can escalate into mass atrocities, underscoring the importance of conflict prevention and peaceful resolution of disputes.[244]

1.7.2 *Zaki Biam* Massacre

The *Zaki Biam* massacre occurred in October 2001 in Benue State, Nigeria. This incident, like the *Odi* massacre, represents another troubling example of excessive military force against civilians and has raised questions about potential crimes against humanity.

The massacre took place against the backdrop of long-standing ethnic tensions between the Tiv people and their neighbors, particularly the *Jukun* and *Fulani*. These tensions often revolved around land disputes and political representation.[245]

The immediate trigger for the military action was the killing of 19 soldiers who had been deployed to the area to quell ethnic clashes. Their bodies were discovered in the village of *Zaki Biam*, and this led to a severe military reprisal.[246]

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[244] Ukoha Ukiwo, 'Violence, Identity Mobilization and the Reimagining of Biafra' (2009) XXXIV(1) *Africa Development* 18.

[245] Human Rights Watch, 'The Attack on Zaki-Biam - Military revenge in Benue' (2002) https://www.hrw.org/reports/2002/nigeria/Nigeria0402-02.htm accessed 15 August 2024.

[246] Human Rights Watch, 'Military Revenge in Benue: A Population Under Attack' (April 2002) 3.

On October 22, 2001, Nigerian troops entered several Tiv communities in Benue State, including *Zaki Biam*, *Gbeji*, *Vaase*, and *Agbayin*. Over the next few days, the military engaged in widespread destruction and killing.

According to human rights organizations, hundreds of civilians were killed during the operation. Reports indicate that soldiers used automatic weapons, grenades, and even armored vehicles against unarmed civilians. Many buildings, including homes, schools, and healthcare facilities, were destroyed.[247]

The Nigerian government initially denied any wrongdoing, claiming that the operation was a necessary response to the killing of the soldiers. However, eyewitness accounts and subsequent investigations painted a different picture of indiscriminate violence against civilians.

While the *Zaki Biam* massacre, like the *Odi* incident, does not meet the legal definition of genocide, it raises serious concerns about potential crimes against humanity and violations of international humanitarian law. The attack violated several key principles:

1. The principle of distinction between combatants and civilians
2. The prohibition on collective punishment
3. The principle of proportionality in the use of force

In 2007, the ECOWAS Community Court of Justice ruled that the Nigerian government had violated the human rights of the victims of the *Zaki Biam* massacre. The court ordered the

[247] Amnesty International, 'Nigeria: Security Forces: Serving to Protect and Respect Human Rights?' (December 2002) 12.

government to investigate the killings and prosecute those responsible, as well as to provide reparations to the victims.[248]

The *Zaki Biam* massnacre, coming just two years after the *Odi* incident, further reflected the ongoing issues with the use of military force in civilian areas in Nigeria. It raised several critical points:

1. The need for more effective mechanisms to address inter-communal conflicts without resorting to military force
2. The importance of holding security forces accountable for human rights violations
3. The potential for military interventions to exacerbate, rather than resolve, underlying tensions

1.7.3 *Boko Haram* Insurgency

The Boko Haram insurgency, ongoing since 2009, represents one of the most severe security challenges in Nigeria's recent history. While not officially classified as genocide, the actions of *Boko Haram* have led to widespread loss of life, displacement, and destruction that have prompted discussions about potential genocidal intent.

Boko Haram, whose name roughly translates to "Western education is forbidden,"[249] emerged in the early 2000s in northeastern Nigeria. The group initially focused on opposing

[248] *ECOWAS Community Court of Justice*, Judgment in Suit No ECW/CCJ/APP/12/06 (June 2007).

[249] D.F. Atidoga, Social - Religious Crisis in Nigeria: "The Subsisting Challenge of Boko Haram Insurgency and Joint Task Force (J.T.F) Counter Insurgency Measures in the Context of Crimes Against Humanity" (Conference Proceedings, International Conference on Law, Order and Criminal Justice ICCOCJ, Kaula Lumpur, 19-20 November, 2014) pp.228-229.

Western education, which it saw as un-Islamic, but gradually evolved into a violent insurgency.[250]

The conflict intensified in 2009 following a government crackdown that resulted in the death of the group's founder, Mohammed Yusuf. Since then, *Boko Haram* has engaged in a campaign of violence that has spread to neighboring countries.[251]

Nature of Violence:
Boko Haram's tactics have included:

1. Mass killings of civilians, particularly those perceived as non-supporters or "infidels"
2. Abductions, including the high-profile kidnapping of 276 schoolgirls from *Chibok* in 2014
3. Suicide bombings and other attacks on civilian targets like markets, schools, and places of worship
4. Forced recruitment, including the use of child soldiers
5. Sexual violence and forced marriages[252]

The group's actions have led to thousands of deaths and the displacement of millions of people in the Lake Chad region.[253]

[250] Andrew Walker, *'Eat the Heart of the Infidel': The Harrowing of Nigeria and the Rise of Boko Haram* (Hurst Publishers 2016) 23.

[251] Alexander Thurston, *Boko Haram: The History of an African Jihadist Movement* (Princeton University Press, 2018) 45.

[252] Michael Nwankpa, 'The Politics of Amnesty in Nigeria: A Comparative Analysis of the Boko Haram and Niger Delta Insurgencies' (2014) 5(1) *Journal of Terrorism Research* 67.

[253] D.F. Atidoga, A.Y. Umoru and R.L. Owuda, 'Proliferation of Small Arms and Light Weapons in Nigeria: Implications for Security of Human Lives' (2024) 1(1) *Tanzanian Journal of Multidisciplinary Studies* p.3

The United Nations has described the situation as one of the world's worst humanitarian crises.[254]

Potential Genocidal Elements:

While the Boko Haram insurgency has not been officially classified as genocide, some scholars and human rights advocates have argued that certain aspects of the group's actions may constitute genocidal acts:

1. Intent to destroy: *Boko Haram* has explicitly stated its aim to establish an Islamic caliphate and eliminate those who do not conform to its extremist interpretation of Islam.[255]
2. Targeting of specific groups: The group has often targeted Christians and non-extremist Muslims, as well as ethnic groups perceived as opposed to their ideology.[256]
3. Systematic nature: The attacks have been sustained over a long period and demonstrate a level of organization and planning consistent with systematic violence.[257]

However, the lack of a clear intent to destroy a specific national, ethnical, racial, or religious group in whole or in part - as required by the UN Genocide Convention - has prevented a formal classification of the insurgency as genocide.

The Nigerian government's response to *Boko Haram* has been criticized as inadequate and, at times, counterproductive. Human rights organizations have accused security forces of

[254] United Nations Office for the Coordination of Humanitarian Affairs, 'Lake Chad Basin: Crisis Overview' (June 2019).

[255] Jacob Zenn, *Unmasking Boko Haram: Exploring Global Jihad in Nigeria* (Lynne Rienner Publishers 2020) 78.

[256] Hussaini Onapajo, 'Has Nigeria Defeated Boko Haram? An Appraisal of the Counter-Terrorism Approach under the Buhari Administration' (2017) 41(1) *Strategic Analysis* 61-73.

[257] Olajide Akinola, 'Boko Haram Insurgency in Nigeria: Between Islamic Fundamentalism, Politics, and Poverty' (2015) 8(1) *African Security* 1-29.

extrajudicial killings, arbitrary detentions, and other abuses in their counter-insurgency efforts.[258]

The *Boko Haram* insurgency highlights several critical issues:

1. The challenge of addressing extremist ideologies and preventing radicalization
2. The need for a comprehensive approach to counter-insurgency that respects human rights
3. The importance of regional cooperation in addressing transnational security threats
4. The long-term impact of conflict on civilian populations, including issues of displacement, trauma, and economic disruption[259]

1.7.4 Nigeria Civil War

The Nigerian Civil War, also known as the Biafran War, took place from July 6, 1967, to January 15, 1970.[260] This conflict, which resulted in the deaths of an estimated 1-3 million people, primarily from starvation, has been a subject of debate regarding its potential classification as genocide.

The war was precipitated by political, economic, ethnic, and religious tensions in the newly independent Nigeria. The immediate trigger was the declaration of independence by the southeastern provinces of Nigeria as the Republic of Biafra, led

[258] Human Rights Watch, 'Nigeria: Events of 2018' (World Report 2019).

[259] Alexander Thurston, *Boko Haram: The History of an African Jihadist Movement* (Princeton University Press 2018) 296.

[260] D.F. Atidoga, 'Was Genocide Committed Against the Igbos Nation of South East Nigeria During the Civil War?: The Law of Genocide on Trial' (2018) 1(1)*The Gambia Law Review*, p.227.

by Colonel *Ojukwu*, following a series of coups and counter-coups.[261]

The war was characterised by:

1. Military confrontations between Nigerian federal forces and Biafran separatists
2. A blockade of Biafra by Nigerian forces, leading to widespread famine
3. International involvement, with various countries supporting different sides
4. Massive civilian casualties, primarily due to starvation and disease[262]

While the Nigerian Civil War is not officially recognized as genocide, some scholars and activists have argued that certain aspects of the conflict, particularly the blockade and resulting famine, could be considered genocidal:

1. Intent to destroy: Some argue that the Nigerian government's blockade of Biafra, which led to mass starvation, demonstrated an intent to destroy the Igbo people.[263]
2. Targeting of a specific group: The Igbo people, who formed the majority in Biafra, were disproportionately affected by the conflict and its aftermath.[264]

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[261] Lasse Heerten and A Dirk Moses, 'The Nigeria–Biafra War: Postcolonial Conflict and the Question of Genocide' (2014) 16(2–3) *Journal of Genocide Research* 169–203.

[262] Chinua Achebe, *There Was a Country: A Personal History of Biafra* (Penguin Press, 2012) 227.

[263] Chima J Korieh, 'Biafra and the Discourse on the Legality of Self-Determination in International Law' (2013) 48(5) *Journal of Asian and African Studies* 582–597.

[264] Arthur A Nwankwo, *Nigeria: The Challenge of Biafra* (Rex Collings, 1972) 132.

3. Use of starvation as a weapon: The deliberate use of famine as a military tactic has been argued to constitute an act of genocide.[265]

However, the classification of the war as genocide remains contentious. Critics argue that the Nigerian government's primary intent was to preserve national unity rather than to destroy the Igbo people as a group.

The Nigerian Civil War left a profound impact on the country:
1. It resulted in long-lasting ethnic tensions and suspicions
2. It highlighted the challenges of nation-building in a multi-ethnic state
3. It raised questions about the international community's responsibility in preventing mass atrocities
4. It led to changes in Nigeria's federal structure and resource allocation policies[266]

The war and its aftermath demonstrate the importance of addressing root causes of conflict, including issues of political representation, resource distribution, and ethnic tensions. It also shows the potential for political crises to escalate into large-scale humanitarian disasters.

While none of these incidents - the *Odi* and *Zaki Biam* massacres, the *Boko Haram* insurgency, and the Nigerian Civil War - have been officially classified as genocide under international law, they all raise important questions about mass violence, the use of force against civilians, and the potential for conflicts to escalate into atrocities. These events reflects the need for robust mechanisms to prevent mass violence, protect

[265] Alex de Waal, *Mass Starvation: The History and Future of Famine* (Polity Press, 2018) 108.

[266] Chibuike Uche, 'Oil, British Interests and the Nigerian Civil War' (2008) 49(1) *Journal of African History* 111-135.

civilian populations, and address the root causes of conflict in Nigeria and beyond.

1.8 RAPE AS GENOCIDE

Rape as genocide is a concept that has gained significant recognition in international criminal law over the past few decades. It acknowledges that systematic sexual violence can be used as a tool to destroy, in whole or in part, a national, ethnical, racial, or religious group. This section explores the legal framework, landmark cases, and historical instances that have shaped our understanding of rape as an act of genocide.

1.8.1 General Intent Requirement in Rape (*Dolus*)

The general intent requirement in rape, also known as *dolus*, refers to the perpetrator's mental state when committing the act. In the context of international criminal law, this typically involves:

1. The intent to engage in sexual penetration
2. The knowledge that the act is occurring without the victim's genuine consent

The Rome Statute of the International Criminal Court defines rape as an act where:

"The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body."[267]

[267] *Rome Statute of the International Criminal Court*, art 7(1)(g)-1, Elements of Crimes.

Furthermore, the act must be committed:

"by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."[268]

The general intent requirement ensures that the perpetrator was aware of and intended to commit the physical act constituting rape, regardless of any broader goals or motivations.

1.8.2 Special Intent Requirement in Rape

When considering rape as an act of genocide, a special intent requirement comes into play. This is known as *dolus specialis*, or genocidal intent. According to Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, genocide requires:

"intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[269]

For rape to be considered an act of genocide, it must be committed with this specific intent. This means that the perpetrator must intend not just to commit rape, but to do so as part of a broader plan to destroy the targeted group. This special intent distinguishes genocidal rape from other forms of sexual violence in conflict.

[268] ibid.

[269] *Convention on the Prevention and Punishment of the Crime of Genocide*, art II.

The special intent requirement presents unique challenges in prosecution, as it requires proving the perpetrator's mental state and connecting individual acts to a larger genocidal campaign. Evidence of this intent can include:

1. Statements by the accused
2. Overall patterns of violence
3. Systematic targeting of a specific group
4. Scale and repetition of destructive and discriminatory acts[270]

1.8.3 Rape as Genocide in *Prosecutor v. Jean-Paul Akayesu*

The case of *Prosecutor v. Jean-Paul Akayesu*,[271] tried before the International Criminal Tribunal for Rwanda (ICTR), marked a watershed moment in the recognition of rape as an act of genocide. *Akayesu*, a former Mayor of *Taba* community in Rwanda, was convicted of genocide, including through acts of sexual violence.

Key aspects of the *Akayesu* judgment include:

1. Expanded definition of rape: The Tribunal defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[272] This broadened the understanding of rape beyond traditional definitions.

2. Recognition of rape as genocide: The judgment explicitly recognised that rape and sexual violence can constitute genocide when committed with the intent to destroy a particular group. The Tribunal stated: "Sexual violence was an integral part of the process of destruction, specifically targeting

[270] *Prosecutor v. Akayesu*, supra, (n 6) paras 523–524.
[271] Case No ICTR-96-4-T, Judgment (2 September 1998) paras 523–524.
[272] *Prosecutor v Akayesu*, supra, (n 6) para 598.

Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."[273]

3. Establishing genocidal intent: The Tribunal found that the rapes in *Taba* were committed as part of a systematic attack against *Tutsi* civilians, demonstrating the special intent required for genocide.

4. Command responsibility: *Akayesu* was held responsible for rapes he did not personally commit but had encouraged or allowed to happen under his authority.

This landmark case set a precedent for prosecuting rape as an act of genocide, influencing subsequent international criminal proceedings and expanding the global understanding of sexual violence in conflict.

1.8.4 Rape as Genocide in *Prosecutor v. Milomir Stakić*

The case of *Prosecutor v. Milomir Stakić*,[274] tried before the International Criminal Tribunal for the former Yugoslavia (ICTY), further developed the jurisprudence on rape as genocide. Stakić, a former municipal leader in Prijedor, Bosnia and Herzegovina, was initially charged with genocide, including through sexual violence.

Key points from the Stakić case include:

1. Contextual consideration: The Trial Chamber emphasised the importance of considering the overall context in which acts of sexual violence occurred to determine genocidal intent.[275]

[273] ibid., para 731.
[274] Case No IT-97-24-T, Judgment (31 July 2003) para 517.
[275] *Prosecutor v Stakić*, Case No IT-97-24-T, Judgment (31 July 2003) para 517.

2. Evidentiary challenges: While the Chamber acknowledged that rape and sexual violence occurred in detention facilities, it found insufficient evidence to conclude that these acts were committed with genocidal intent specifically attributable to *Stakić*.[276]

3. Rape as a crime against humanity: Although *Stakić* was not convicted of genocide, the case reinforced the recognition of rape as a crime against humanity.

4. Importance of specific intent: The case emphasized the challenges in proving the special intent required for genocide, particularly in cases of command responsibility.

While the *Stakić* case did not result in a genocide conviction for acts of sexual violence, it contributed to the evolving jurisprudence on rape in international criminal law.

1.8.5 Rape as Genocide in Darfur

The conflict in Darfur, Sudan, which began in 2003, has been characterized by widespread and systematic sexual violence. While the classification of these acts as genocide remains contested, numerous reports and investigations have documented the use of rape as a weapon of war with potentially genocidal implications.

Key aspects of the Darfur situation include:

1. Systematic nature: The United Nations Commission of Inquiry on Darfur found that rape and sexual violence were

[276] Ibid., paras 545-546.

used as a "deliberate strategy" by Janjaweed militias and government forces.[277]

2. Targeting of specific groups: Sexual violence predominantly targeted women and girls from non-Arab ethnic groups, particularly the *Fur*, *Masalit*, and *Zaghawa*.[278]

3. International response: In 2009, the International Criminal Court (ICC) issued an arrest warrant for Sudanese President *Omar al-Bashir* on charges of genocide, including through acts of rape.[279]

4. Evidentiary challenges: Proving genocidal intent in the Darfur context has been complicated by issues of access, documentation, and the complex nature of the conflict.

While the situation in Darfur has not yet resulted in a successful prosecution for rape as genocide, it has contributed significantly to international discourse on sexual violence in conflict and the potential for such acts to constitute genocide.

1.8.6 Rape as Genocide in Cambodia

The *Khmer Rouge* regime in Cambodia (1975-1979) was responsible for numerous atrocities, including widespread sexual violence. While rape was not initially a focus of genocide charges, recent scholarship and legal proceedings have begun to examine these acts through the lens of genocide.

[277] *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (2005) 94.

[278] Human Rights Watch, 'Sexual Violence and Its Consequences among Displaced Persons in Darfur and Chad' (2005) 8.

[279] *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Second Warrant of Arrest (12 July 2010).

Key considerations include:

1. Forced marriages: The Khmer Rouge implemented a policy of forced marriages, often accompanied by rape, which some scholars argue was intended to destroy the Khmer people's cultural and social fabric.[280]

2. Targeting of minorities: Sexual violence was particularly prevalent against ethnic and religious minorities, such as the *Cham* Muslims and Vietnamese.[281]

3. Legal proceedings: The Extraordinary Chambers in the Courts of Cambodia (ECCC) has addressed sexual violence, including forced marriage, as a crime against humanity. However, its treatment as genocide remains limited.[282]

4. Evolving understanding: Recent academic work has argued for a broader interpretation of the Khmer Rouge's sexual violence as potentially genocidal, particularly when considering its impact on group continuity and cultural destruction.[283]

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[280] Katrina Natale, 'I Could Feel My Soul Flying Away from My Body': A Study on Gender-Based Violence During Democratic Kampuchea in Battambang and Svay Rieng Provinces (Cambodian Defenders Project, November 2011) 34.

[281] Edward Kissi, 'Rwanda, Ethiopia and Cambodia: Links, Faultlines and Complexities in a Comparative Study of Genocide' (2004) 6(1) *Journal of Genocide Research* 115–133.

[282] *Extraordinary Chambers in the Courts of Cambodia*, Case 002/02 Judgment (2018) paras 3686–3694.

[283] James A Tyner, 'Ideologies of Khmer Rouge Family Policy: Contextualizing Sexual and Gender-Based Violence during the Cambodian Genocide' (2013) 13(2) GSI https://utppublishing.com/doi/full/10.3138/gsi.13.2.03 accessed 19 August 2024.

The case of Cambodia illustrates the challenges in retrospectively applying evolving legal standards to historical atrocities and highlights the need for a nuanced understanding of how sexual violence can contribute to genocidal processes.

1.8.7 Rape as Genocide in Armenian Massacre

The Armenian Genocide, which occurred primarily between 1914 and 1923, included widespread sexual violence as part of the Ottoman Empire's campaign against the Armenian population. While the concept of genocide had not yet been legally defined at the time, retrospective analysis has considered these acts within the framework of genocide.

Key aspects include:

1. Systematic nature: Reports and survivor testimonies indicate that rape and sexual slavery were systematic and widespread, targeting Armenian women and girls.[284]

2. Forced conversion and marriage: Many Armenian women and girls were forced to convert to Islam and marry Turkish men, which can be seen as an attempt to destroy the Armenian group's cultural and religious identity.[285]

3. Impact on group continuity: The targeting of women and girls through sexual violence had long-term impacts on the

[284] Katharine Derderian, 'Common Fate, Different Experience: Gender-Specific Aspects of the Armenian Genocide, 1915–1917' (2005) 19(1) *Holocaust and Genocide Studies* 1–25.

[285] Matthias Bjørnlund, 'A Fate Worse Than Dying: Sexual Violence during the Armenian Genocide' in Dagmar Herzog (ed), *Brutality and Desire: War and Sexuality in Europe's Twentieth Century* (2009) 16–58.

ability of the Armenian community to reproduce and maintain its cultural cohesion.[286]

4. Legal recognition: While several countries have recognized the Armenian Genocide, including the sexual violence component, there have been no international criminal proceedings specifically addressing rape as genocide in this context.

5. Historical documentation: Efforts to document and analyze the role of sexual violence in the Armenian Genocide have contributed to broader understanding of how rape can function as a tool of genocide.[287]

The case of the Armenian Genocide demonstrates the importance of historical analysis in understanding the genocidal potential of sexual violence, even in instances predating the legal definition of genocide.

1.8.8 The Demise of Tomorrow in the Context of Rape and Cultural Genocide

The concept of "the demise of tomorrow" in the context of rape as genocide and cultural genocide refers to the long-term, intergenerational impacts of systematic sexual violence on targeted groups. This perspective emphasises that the effects of genocidal rape extend far beyond the immediate physical and psychological trauma to the victims.

Key considerations include:

[286] Elisa von Joeden-Forgey, 'Gender and Genocide' in Donald Bloxham and A Dirk Moses (eds), *The Oxford Handbook of Genocide Studies* (Oxford University Press 2010) 61–80.

[287] Taner Akçam, *The Young Turks' crime against humanity: the Armenian genocide and ethnic cleansing in the Ottoman Empire.* (Princeton University Press, 2012) 287–317.

1. Intergenerational trauma: Children born of rape may face stigma and rejection within their communities, leading to ongoing cycles of trauma and social disruption.[288]

2. Cultural destruction: Rape as genocide often aims to destroy the social and cultural fabric of the targeted group, impacting traditional family structures and communal bonds.[289]

3. Demographic impact: Systematic rape can lead to forced pregnancies or impact fertility rates, altering the demographic composition of the targeted group over time.[290]

4. Psychological warfare: The fear and trauma induced by widespread sexual violence can lead to the displacement and dispersal of communities, contributing to cultural genocide.[291]

5. Economic consequences: The long-term physical and psychological effects of rape can impact victims' ability to participate fully in economic activities, affecting the group's overall development and prosperity.[292]

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[288] R Charli Carpenter (ed), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones* (Kumarian Press, 2007) 31–52.

[289] Robin May Schott, 'What is the Sex Doing in the Genocide? A Feminist Philosophical Response' (2015) 22(4) *European Journal of Women's Studies* 397–411.

[290] Doris E Buss, 'Rethinking "Rape as a Weapon of War"' (2009) 17(2) *Feminist Legal Studies* 145–163.

[291] Christopher W Mullins, '"We Are Going to Rape You and Taste Tutsi Women": Rape During the 1994 Rwandan Genocide' (2009) 49(6) *The British Journal of Criminology* 719–735.

[292] Myriam Denov, 'Wartime Sexual Violence: Assessing a Human Security Response to War-Affected Girls in Sierra Leone' (2006) 37(3) *Security Dialogue* 319–342.

6. Legal challenges: Recognising these long-term impacts presents challenges in legal proceedings, as they may not be immediately apparent at the time of prosecution.[293]

The concept of "the demise of tomorrow" reflects the need for a comprehensive approach to understanding, preventing, and addressing rape as genocide. It highlights the importance of long-term support for survivors and their communities, as well as the need for legal frameworks that can account for the extended temporal scope of genocidal acts.

To conclude this comprehensive exploration of rape as genocide, it's important to synthesize the key themes and consider their implications for international law, policy, and societal responses. This final section summarizes the main points and offer some forward-looking perspectives.

Summary of Key Points:

1. Legal Evolution: The recognition of rape as a potential act of genocide represents a significant evolution in international criminal law. From the groundbreaking *Akayesu* case to ongoing proceedings, there has been a growing understanding of how sexual violence can be used as a tool of genocide.

2. Intent Requirements: The distinction between the general intent (*dolus*) required for rape and the special intent (*dolus specialis*) required for genocide is crucial. Proving genocidal intent in cases of sexual violence remains a significant challenge in many legal proceedings.

[293] Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005) 207–232.

3. Case Studies: Examining instances of mass rape in various conflicts - from Rwanda and the former Yugoslavia to Darfur, Cambodia, and the Armenian Massacre – provides understanding of the patterns and impacts of sexual violence as a genocidal act.

4. Long-term Impacts: The concept of "the demise of tomorrow" highlights the enduring, intergenerational effects of genocidal rape on targeted communities, extending beyond immediate physical and psychological trauma.

5. Intersectionality: The use of rape as a genocidal tool often intersects with other forms of oppression and discrimination, particularly targeting women and girls from specific ethnic, racial, or religious groups.

Implications and Future Directions:

1. Legal Frameworks: There is a need for continued refinement of legal frameworks to better address the complexities of rape as genocide, particularly in establishing genocidal intent and accounting for long-term impacts.

2. Evidence Collection: Improved methods for collecting and preserving evidence of sexual violence in conflict situations are crucial for successful prosecutions and historical documentation.

3. Survivor Support: Comprehensive, long-term support for survivors of genocidal rape and their communities is essential, addressing not only immediate needs but also intergenerational impacts.

4. Prevention Strategies: Understanding the role of sexual violence in genocide can inform more effective prevention

strategies, including early warning systems and targeted interventions.

5. Education and Awareness: Increased public awareness and education about the use of rape as a tool of genocide can contribute to prevention efforts and support for survivors.

6. Interdisciplinary Approach: Addressing rape as genocide requires collaboration across legal, medical, psychological, and social science fields to fully understand and respond to its complexities.

7. Gender Perspectives: While women and girls are disproportionately affected, it's important to recognize that men and boys can also be victims of sexual violence in genocidal contexts. A nuanced understanding of gender dynamics is crucial.

The recognition of rape as a potential act of genocide represents both a significant advancement in international law and a sobering acknowledgment of the depths of human cruelty. As our understanding of this issue continues to evolve, it is imperative that legal systems, policymakers, and societies as a whole work towards more effective prevention, prosecution, and healing strategies. The ultimate goal must be to create a world where sexual violence is no longer weaponized as a tool of destruction against any group.

1.9 CONCLUSION/PRESCRIPTIONS

19.1 Conclusion

Rape as a tool of genocide is a heinous and devastating crime that has been perpetrated throughout history, leaving deep scars on individuals, communities, and societies. This lecture has examined the evolution of international criminal law in recognizing and prosecuting rape as a tool of genocide.

The analysis has demonstrated that rape is a deliberate and systematic tactic employed to destroy, in whole or in part, national, ethnical, racial, or religious groups. The physical and emotional harm inflicted on victims, combined with the cultural and social stigma attached to rape, perpetuate the destructive goals of genocide.

International criminal law has made significant strides in addressing rape as a tool of genocide. The establishment of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) marked a turning point in the prosecution of rape as a war crime and crime against humanity. The Rome Statute of the International Criminal Court (ICC) further solidified the recognition of rape as a tool of genocide.

However, despite these advances, significant challenges persist. The prosecution of rape as a tool of genocide remains fraught with difficulties, including the collection of evidence, the protection of witnesses, and the overcoming of cultural and social barriers. Moreover, the stigma and trauma associated with rape continues to affect victims and their communities long after the conflict has ended.

This lecture underscores the imperative of continued efforts to prevent, investigate, and prosecute rape as a tool of genocide. It emphasizes the need for a multifaceted approach that incorporates

legal, social, and cultural strategies to address the root causes of sexual violence in conflict. Ultimately, the eradication of rape as a tool of genocide requires a sustained commitment to upholding the principles of international criminal law, protecting human rights, and promoting gender equality.

1.9.2 **Prescriptions**

In light of the discussions, certain key prescriptions can be made to enhance the framework and effectiveness of genocide prevention, recognition, and reparation. These prescriptions aim to address gaps in the existing legal instruments and suggest modifications that would lead to a more inclusive and comprehensive understanding of genocide in both international and domestic contexts.

1.9.2.1 *Case for the Expansion of the Victim Base in the Law of Genocide*

The current legal framework for genocide, as defined in the 1948 Genocide Convention, limits the victim base to specific groups: national, ethnic, racial, and religious groups. This categorisation, while historically significant, has been criticised for its narrow scope, which excludes other vulnerable populations that may be subject to genocidal acts. For example, groups defined by political beliefs, gender, sexual orientation, or socio-economic status are not protected under the current definition, despite evidence that these groups can also be targeted for systematic destruction.[294]

Expanding the victim base would require amending the Genocide Convention to include these additional groups. Such an expansion would acknowledge the diverse forms of genocide that have occurred since 1948 and provide legal protection to all groups

[294] D.F. Atidoga and Yahaya Adeyi, 'Revisiting the Legal Framework for the Crime of Genocide: A Case for the Expansion of the Victim Base' (2025) *Ahmadu Bello University Law Journal*, (unpublished).

susceptible to genocidal violence. This amendment would also harmonise the Convention with other international human rights instruments that recognize and protect these groups.

1.9.2.2 *Reintroduction of Cultural Genocide*

The concept of cultural genocide, initially included in early drafts of the Genocide Convention, was ultimately excluded from the final text. Cultural genocide refers to the systematic destruction of a group's cultural heritage, language, religion, and identity, which can be as devastating as physical destruction. The omission of cultural genocide from the Convention has left a significant gap in international law, particularly in cases where the primary objective of genocidal acts is to eradicate a culture rather than its people.

Reintroducing cultural genocide into the legal framework is necessary for several reasons. Firstly, it would provide a legal basis for prosecuting acts aimed at eradicating cultural identities. Secondly, it would offer a more comprehensive protection of vulnerable groups whose cultural existence is threatened. Lastly, it would send a strong message that the international community recognises the importance of cultural diversity and is committed to its preservation. To achieve this, it would be necessary to revisit the debates surrounding the definition of genocide and to advocate the inclusion of cultural genocide in both international and domestic legal instruments.

1.9.2.3 *Domestication of Treaties on Genocide*

The effectiveness of international treaties, including the Genocide Convention, is heavily dependent on their domestication within national legal systems.[295] Domestication implies the process by which international treaties are incorporated into domestic law, enabling local courts to apply international legal standards directly. Without domestication, treaties like the Genocide Convention remain unenforceable within a country, limiting their impact on preventing and prosecuting genocide.

In many countries, the Genocide Convention has not been fully domesticated, creating a legal vacuum that allows perpetrators of genocide to act with impunity. To address this, it is crucial that all state parties to the Genocide Convention take concrete steps to incorporate its provisions into their national laws. This includes not only adopting the definition of genocide but also ensuring that domestic laws provide for the prosecution of genocide, protection of victims, and mechanisms for reparation.

Furthermore, the domestication process should be accompanied by public awareness campaigns and training for judicial and law enforcement officials to ensure that the legal provisions are effectively implemented. By domesticating the Genocide Convention and related treaties, states can strengthen their legal frameworks against genocide and contribute to the global effort to eradicate this heinous crime.

1.9.2.4 *Noting Early Precursors to Genocide*

Genocide is often the culmination of a series of actions that escalate over time, beginning with less severe violations of human rights and progressing to more systematic and widespread atrocities. Early warning systems that can detect these precursors

[295] D.F. Atidoga, 'A Birds Eye View Examination of Application of Treaties in Nigeria: A Convention Against Tactical Ambush' (2019) 2(2) *University of the Gambian Law Review*, p.261.

are essential for preventing genocide before it occurs. These precursors may include hate speech, discrimination, the formation of militias, and the gradual erosion of civil liberties for targeted groups.

To effectively note and act on these early precursors, several measures should be put in place. First, the international community must develop more sophisticated and comprehensive monitoring systems that can identify the warning signs of genocide. These systems should integrate data from multiple sources, including human rights reports, media coverage, and intelligence gathering, to provide a holistic view of the situation on the ground.

Second, there should be clear and binding international protocols for responding to early warnings of genocide. This includes diplomatic interventions, sanctions, and, if necessary, military action to prevent the escalation of violence. By recognizing and addressing the early signs of genocide, the international community can intervene before it reaches the point of mass extermination, thereby saving countless lives.

1.9.2.5 *Reparation for Past Genocide*

Reparation for past genocides is a critical aspect of justice and reconciliation. It acknowledges the suffering of victims and their descendants, and it provides a tangible means of restoring dignity and repairing the harm caused by genocidal acts. Reparation can take various forms, including financial compensation, restitution of property, official apologies, and measures to preserve the memory of the victims.

The process of securing reparation for genocide is complex and often fraught with challenges. One significant challenge is the time that may have elapsed since the genocide occurred, which can make it difficult to establish liability or trace the descendants of victims. Additionally, the political will to provide reparation

may be lacking, especially if the perpetrators or their allies remain in power.

To address these challenges, it is essential to establish clear international guidelines on reparation for genocide. These guidelines should outline the types of reparation that are appropriate and the procedures for claiming them. Furthermore, international bodies such as the United Nations should take an active role in facilitating reparation processes, including providing support to victims' groups and pressuring states to fulfill their obligations.

Reparation should also be accompanied by efforts to ensure that the truth about past genocides is fully acknowledged and documented. This includes the creation of memorials, educational programs, and historical records that preserve the memory of the victims and the lessons learned from these tragic events. By providing reparation and ensuring that the past is not forgotten, the international community can contribute to healing and preventing future genocides.

1.9.2.6 *Addressing Root Causes*

Implement programs addressing the social, cultural, and economic factors contributing to sexual violence in conflict.

Rape as a tool of genocide is a grave threat to human dignity, security, and justice. This lecture serves as a reminder of the urgent need for collective action to prevent and prosecute this heinous crime. By working together, we can create a world where sexual violence is no longer used as a weapon of war and genocide.

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