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Forms of Sexual Violence in the Jurisprudence of *Ad Hoc* International Criminal Tribunals

Formy przemocy seksualnej w orzecznictwie międzynarodowych trybunałów karnych *ad hoc*

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Abstract: The identification and definition in contemporary international law of forms of sexual violence – rape, sexual slavery, forced prostitution, forced pregnancy and forced sterilization – is the result of many years of efforts by the international community to effectively prosecute and punish perpetrators of sexual violence in armed conflicts. A key stage in this process was the functioning of the criminal tribunals established to punish crimes committed during the conflict in the former Yugoslavia (1991–1995) and Rwanda (1994). As a result of the work of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), new legal forms of sexual violence (sexual slavery and forced pregnancy) have been developed, as well as the current definition of rape. The purpose of this article is to point out the main elements of the process of identifying and defining forms of sexual violence in the ICTY and ICTR, the key proceedings before the *ad hoc* criminal tribunals for the above process, and to screen the jurisprudential practice of the *ad hoc* criminal tribunals for the forms of sexual violence identified. The analysis of forms of sexual violence since the end of the Second World War to the time of the functioning of the ICTY and the ICTR is accompanied by the concept of the autonomy of forms of sexual violence, which for the purposes of this article is understood as the process of distinguishing both sexual violence and its forms of sexual violence from other, more general crimes of international law.

Keywords: sexual violence, International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda

Streszczenie: Identyfikacja i zdefiniowanie we współczesnym prawie międzynarodowym form przemocy seksualnej – zgwałcenia, niewolnictwa seksualnego, wymuszonej prostytucji, wymuszonej ciąży i wymuszonej sterylizacji – to skutek wieloletnich wysiłków społeczności międzynarodowej zmierzającej do skutecznego ścigania i karania sprawców przemocy seksualnej w konfliktach zbrojnych. Kluczowym etapem owego procesu było funkcjonowanie trybunałów karnych powołanych w celu ukarania zbrodni popełnionych w trakcie konfliktu w byłej Jugosławii (1991–1995) oraz w Rwandzie (1994 r.). W wyniku prac Międzynarodowego Trybunału Karnego dla byłej Jugosławii (MTKJ) i Międzynarodowego Trybunału Karnego dla Rwandy (MTKR) doszło do wypracowania nowych

w sensie prawnym form przemocy seksualnej (niewolnictwa seksualnego i wymuszonej ciąży), a także obowiązującej do dziś formuły definicyjnej zgwałcenia. Celem niniejszego artykułu jest wskazanie na główne elementy procesu identyfikacji i definiowania form przemocy seksualnej w MTKJ i MTKR, kluczowe dla powyższego procesu postępowania toczące się przed trybunałami karnymi *ad hoc*, jak i prześwietlenie praktyki orzeczniczej trybunałów karnych *ad hoc* pod kątem wskazanych form przemocy seksualnej. Analizie form przemocy seksualnej od momentu zakończenia II wojny światowej do czasów funkcjonowania MTKJ i MTKR towarzyszy koncepcja autonomizacji form przemocy seksualnej, która na użytek niniejszego artykułu rozumiana jest jako proces wyodrębniania zarówno przemocy seksualnej, jak i jej form przemocy seksualnej od innych, ogólniejszych zbrodni prawa międzynarodowego.

Słowa kluczowe: przemoc seksualna, Międzynarodowy Trybunał Karny dla byłej Jugosławii, Międzynarodowy Trybunał Karny dla Rwandy

The creation of the International Criminal Court (ICC) and Elements of Crimes adopted by ICC was a landmark moment in the history of prosecuting and punishing perpetrators of sexual violence in armed conflicts. For the first time, a number of forms of sexual violence were identified which, *primo*, were explicitly criminalised, *secundo*, precisely defined, and, *tertio*, explicitly classified as war crimes or crimes against humanity (Rzymski Statut 2003/78/708: point 9; Elements of Crimes 2010: 5–7, 19–20). The growing importance of the crime of sexual violence as a subject of international criminal law is specifically the result of the work of the *ad hoc* criminal tribunals: the International Tribunal for the former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR), whose jurisprudence has paved the way for naming and defining types of crimes of a sexual nature.[1] The role that the *ad hoc* tribunals have played in the above process by pointing out the forms of sexual violence resulting from their jurisprudence is the subject of this article.

[1] In 2010, the ICTY and the ICTR were formally disbanded, and the finalisation of the work carried out by the courts was transferred to a specially created International Residual Mechanism (see McIntyre 2011: 923–983).

1. Outline of the problem and objectives of the study

As late as the 20th century, sexual violence, although formally criminalised, was a phenomenon that was as common as it was unpunished. The change in the perception of sexual violence from a "side-effect of war" to one resulting in prosecution and punishment of a grave breach of international law did not come until the 1990s (Gardam, Charlesworth 2000: 152–155). At the same time, the ongoing debate around the definition of sexual violence and its various forms that appear in armed conflicts begins. In parallel with the creation by Security Council resolutions of the ICTY (1993) and the ICTR (1994), a process was set in motion that laid the foundations of the modern system of international criminal law with the ICC, established in 1998, at its head. This gave rise to the prospect of effective prosecution and punishment of perpetrators of human rights violations, especially sexual violence, which until the establishment of the ICTY and the ICTR had almost never appeared as a crime under international law.[2]

The recognition of sexual violence as a violation of international law, together with the specification of the types of crimes, appeared extremely late, because only after the Second World War in the Fourth Geneva Convention (Konwencje 1949/38/171). It was not until the statutes and then the case law and working documents of the Criminal Tribunals that more and more recent forms of sexual violence other than rape and sexual slavery were identified (Askin 2003: 288). Sexual violence in armed conflicts has only become – albeit not without obstacles – the focus of international institutions with the establishment of the ICTY and the ICTR. In the course of the work of both tribunals, particular attention is paid to initiating a discussion on the types of sexual violence and to trying to define different forms of sexual violations. Taking the above into account, the objectives of the article should be considered primarily: (a) to present the forms of sexual violence and their progressive introduction into the sources of international law; (b) to outline the definition of forms of sexual violence, together with an account of the evolution in the definition of these forms; (c) to point out the role of sexual violence in the jurisprudential practice of *ad hoc* criminal tribunals. The main hypothesis of the article refers to the relationship

[2] Indirectly, allegations of sexual violence appeared in the works of the International Military Tribunal for the Far East. The tribunal's ruling uses the phrase *violations of women* instead of pointing to specific violations of a sexual nature (Totani 2000: 160).

between the growing importance of the crime of sexual violence in jurisprudence and the autonomy of sexual violence understood as the separation and identification of new categories of prohibited acts as international crimes in themselves. This means a two-track process in which, firstly, the crime of sexual violence is identified and, secondly, the catalogue of forms of sexual violence expands.

The *ad hoc* tribunals' take on the issue of sexual violence in armed conflict has highlighted existing perceptual limitations and the need to develop ways of defining sexual violence that allow the diverse forms of sexual violence and its devastating effects (from the perspective of the victims of violence and the communities to which the victims belong) to be shown. Last but not least, a new perception of sexual violence would also facilitate the effective penalisation of violations of the law that have eluded previous imperfect legal qualifications.

One of the features of the 20th-century perception of sexual violence in armed conflicts as a violation of international law was its reduction to rape. Moreover, in the first half of the twentieth century, it is possible to speak of a lack of definition of sexual violence, as the Victorian formulations of the regulations attached to the Hague Convention operated with the general concept of "honour and family rights." Furthermore, for a number of decades in legal and academic, and especially journalistic discourse, the synonym for sexual violence was the so-called wartime rape (Isikozlu, Milard 2010: 16–18). This had multiple consequences. First, it involved ignoring a number of other sexual violations that may or may not be accompanied by rape. Secondly, the focus on the term "rape" using the classical 1990s (as non-consensual vaginal penetration with a male sexual organ) led to a dilemma as to whether violations that were undoubtedly sexual in nature (including penetration) but did not involve sexual intercourse involving *immisio penis* could be treated as rape (Eriksson 2010: 82). Thirdly, "wartime rape" involved sexual violence against women only, as further indicated by the Fourth Geneva Convention and the protocols adopted on June 8, 1977 (Protokoły dodatkowe 1992/41/175). This posed a difficult question about sexual violence against men and gender neutrality of definitions related to sexual violence. Awareness of the above dilemmas has resulted in the work of international institutions on the definition of sexual violence for almost 30 years and, consequently, the distinction between different forms of sexual violence. This task can hardly be considered complete, and the conceptualisation of forms of sexual violence continues to be the subject of the work of international tribunals (Altunjan 2021: 892–893).

2. Forms of sexual violence in international law until the 1990s

The precursors of the *ad hoc* criminal tribunals and the ICC were the international military tribunals established in Europe and the Far East (the so-called Nuremberg Tribunal and the Tokyo Tribunal). Perpetrators of sexual violence committed during the conflict were almost completely omitted, and only in the case of a few convicted by the Tokyo court were "rapes" in the territories occupied by the Japanese Army generally mentioned.[3] National authorities overseen by the Allies were much more likely to recognize sexual violence as a war crime. On December 20, 1945, The Allied Control Council for Germany adopted Act No. 10, art. 2 which allowed for the prosecution and punishment of perpetrators of acts such as "rape and other inhuman treatment" (not a single person was convicted on this basis). Only during the trial before the US Military Commission in Manila was General Tomoyuki Yamashita tried and convicted of, among other things, raping "a large number of women and female children" (US Military Commission 1945).

The Fourth Geneva Convention, adopted in 1949, replicated the prevailing view of forms of sexual violence at the time. Article 27 states that "women shall be particularly protected against any attack on their honour, in particular rape, forced prostitution and all forms of indecent assault" (Konwencje 1949/38/171). Still the central, but no longer the only, form of sexual violence in the convention was rape. Reflection on sexual violence inevitably leads to a widening of the catalogue of forms of sexual violence. After World War II, this process led to the definition of "enforced prostitution." Undoubtedly, this is a consequence of the creation of the so-called comfort women corps – the several hundred thousand women forced to provide sexual services to Japanese soldiers (Jørgensen, Friedmann 2014: 341–342). The explicit reference to women as the subject of violations seems not so much to be the result of a particular concern for women but above all of the taboo on sexual violence against men and the prevalence of violence against women. It is also worth highlighting the language used by the convention – it is

[3] The statutes of the international military tribunals did not directly refer to sexual violence as a basis for punishment and thus did not refer to forms of sexual violence. The indictment before the International Military Tribunal for the Far East (IMTFE) omitted the organizers of the so-called Comfort Women – a system of forced prostitution on a massive scale. In turn, the International Military Tribunal at Nuremberg prosecutors had access to sufficient material to charge the German commanders with sexual violence. The cause of this condition can be considered "prudishness or ignorance" (Askin 1997: 97–99; Henry 2013: 362–380).

considered a violation of the "attack on honour" of women. Contemporary formulations of sexual violence are much more precise linguistically, which has a positive impact on the penalization of violence and the interests of victims (Altunjan 2021: 881). It should be noted that general prudential terms referring to sexual violence can be a disguised indication of other forms of sexual violence, although it is difficult to clearly specify which ones. The provisions on sexual violence and its forms set out in the Fourth Geneva Convention have been transferred to the Additional Protocol (Protokoły dodatkowe 1992/41/175: art. 4 and art. 76). The above-mentioned progress in designating sexual violence as a war crime has been negligible in practice, as these prohibitions have not been enforced (Askin 1997: 19).

The statutes of the ICTY and the ICTR do not in themselves constitute a turning point in the identification of forms of sexual violence. The legal basis for the functioning of the ICTY and the ICTR were Security Council resolutions adopted on the basis of Chapter VII of the Charter of the United Nations, which was to improve the process of prosecution and punishment of the perpetrators of crimes. Each of these tribunals was granted a great deal of autonomy, which may have resulted in different conclusions on the forms of sexual violence and definitions of the forms of sexual violence identified. In fact, this took place in the early stages of the functioning of the ICTY and the ICTR, although over time there has been a synthesis of the definition. The process of unifying the definition was completed only by the ICC and the Elements of Crimes.

The statute of the ICTY pointed to one form of sexual violence – rape (art. 5 lit. g). In turn, the statute of the ICTR referred to rape as a form of sexual violence (art. 3 and art. 4) and forced prostitution and "any form of indecent assault" (art. 4). Thus, the statute of the ICTY duplicated the definitions adopted in the Fourth Geneva Convention and the Additional Protocol of 1977. It is worth noting the legal qualification of individual forms of sexual violence. While rape could be treated as a crime against humanity, forced prostitution and "any form of indecent assault" (i.e. *de facto* other forms of sexual attacks) could only be treated as violations of the laws and customs of war. An analysis of art. 4 of the ICTR Statute also points to the non-autonomous nature of crimes of sexual violence, as they are part of a more general violation of the convention: "assault on personal dignity and, in particular, degrading and humiliating treatment" (see art. 4 lit. e of the ICTR Statute; Luping 2009: 30). In this context, it is worth emphasizing that art. 3 of the ICTR Statute and art. 5 of the ICTY Statute, accepting rape as a crime against humanity, they do

not provide any additional commentary on it. This allows rape to be recognized as a crime under international law *per se*.

3. New forms of sexual violence covered by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda

The three successes of the ICTY and the ICTR in the context of the topic discussed in the article deserve to be highlighted. First, *ad hoc* tribunals emphasized in their jurisprudence that sexual violence is not limited to the forms indicated by previously adopted legal acts (including the statutes of these tribunals). Secondly, the tribunals were pioneers in defining forms of sexual violence. Thirdly, crimes of sexual violence have become a fact of life in judicial practice, resulting in the prosecution and conviction of dozens of people.

There is no doubt that without the efforts of the *ad hoc* tribunals, it would not have been possible for the ICC to prepare a catalogue of crimes of sexual violence. The presented conclusions and suggestions – in particular in the case of *Kunarac, Kovač, Vuković* (hereinafter: *Kunarac et al.*; Orzeczenie MTKJ 2001a) – resulted in the expansion of the catalogue of crimes to include "sexual enslavement" and "forced pregnancy" in the following years. Due to the statute's limited substantive jurisdiction, *ad hoc* criminal tribunals neither prosecuted nor punished directly the forms of sexual violence indicated above (Amnesty International 2020: 7–8).

In the case of *Kunarac et al.* (Orzeczenie MTKJ 2001a), apart from separately mentioning rape as a form of violence, it was important to present charges that concerned slavery and rape together. The judges shared this view, expressing the conviction that a certain category of acts constitutes a crime distinct from rape (Poprawiony akt oskarżenia MTKJ 1999: point 10.1–10.3 and 11.1; Orzeczenie Izby Odwoławczej MTKJ 2002: 57). They pointed to the sexual context of the enslavement of victims Dragoljub Kunarac and Radomir Kovač (including multiple rapes) while highlighting the economic exploitation of detained women. The result of the ICTY ruling was to accelerate the efforts of the international community to clearly distinguish between sexual slavery and highlight its exceptional brutality and traumatic consequences for victims. Already in 1998, The United Nations Commission on Human Rights adopted the report of the Special Rapporteur on sexual slavery, which emphasized

the autonomy of sexual slavery, separating it from slavery itself (Final Report 1998: point 30). These efforts made it a formality to formulate a clear definition of sexual slavery in the elements of the ICC's Elements of Crimes.

Forced pregnancy, like sexual slavery, does not appear directly as a form of violence in the ICTY and ICTR rulings, but undoubtedly the subsequent identification of this form of violence was facilitated by the conclusions in the cases of *Karadžić, Mladić* (Przegląd aktu oskarżenia MTRJ 1996), *Kunarac et al.* (Orzeczenie MTKJ 2001a), as well as in the *Akayesu* case (Orzeczenie MTKR 1998; see La Haye 2001: 184). In the first of the above-mentioned cases, the ICTY found already in 1996 that one of the objectives of the so-called rape camps was "forcing to give birth to Serbian offspring" and "enforced impregnation" (Przegląd aktu oskarżenia MTRJ 1996: point 64). During the proceedings in the case of *Kunarac et al.* the tribunal did not fail to note that the perpetrators of the violations announced their intention to rape the victims: "Now you will give birth to children to Serbs so that there will be no more Muslims in Foča" (Orzeczenie MTKJ 2001a: point 342, 583, 654). In the *Akayesu* judgment, the ICTR, considering the links between sexual violence and the crime of genocide, stated that "in patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group" (Orzeczenie MTKR 1998: point 507). The above conclusion indicates a potential impact on the composition of the group (ethnic, national, religious, etc.), which is indirectly attacked through rape, which over time has become a key component of the definition of forced pregnancy. It is noteworthy that both the ICTY and the ICTR used the term "forced insemination." It was only as a result of the negotiations on the ICC Statute that it was emphasised that the essence of the violation is not to cause pregnancy, but to seek to maintain pregnancy, as indicated by the intention of the perpetrators indicated in the cases of *Akayesu* or *Kunarac et al.* (Brouwer 2005: 143–144). The lack of a clear definition in the work of the ICTY and ICTR can be explained in part by the fact that the *ad hoc* tribunals did not identify forced pregnancy as a rationale for prosecuting and punishing the perpetrators and thus there was no prosecution for this crime.

4. Definition formula of rape in the jurisprudence of *ad hoc* tribunals

Another merit of the *ad hoc* tribunals was that they undertook to define the basic crime of sexual violence, rape. Until the *ad hoc* tribunals began their work, there was no internationally accepted definition of this act, hence its formalisation became a necessary and crucial step in the prosecution and punishment of perpetrators (Orzeczenie MTKR 1998: point 686). It can be argued that by defining rape, it has been brought back to life in a legal sense. Moreover, its *definiens* makes it possible to treat it as a new form of sexual violence.

The formal legal definition of rape has been a long process and over the years the concept of definition and the substantive content of the definition have been amended and supplemented. The result of the work was the establishment of a formula generally accepted in international criminal law, which was subsequently adopted by the ICC and included in its Elements of Crimes. In the *Akayesu* case (Orzeczenie MTKR 1998), a panel of judges of the tribunal considered that defining rape in the context of armed conflict requires abandoning the dominant previous perspective and viewing rape as non-consensual sexual intercourse defined by a set of specific genital penetrative acts. According to the judgment, rape is "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive" (Orzeczenie MTKR 1998: point 688).

The progressive, broad framing of the crime blurring the *de facto* line between rape and other sexual violence was primarily due to the specificity of sexual violence in Rwanda in 1994, involving a range of non-standard sexual practices such as penetration with instruments or genital mutilation (Eriksson 2010: 413–425). The Trial Chamber held that rape is primarily a form of aggression and, because of its degrading, destructive and degrading nature, it should be defined in a way similar to torture, that is, by the functions of the crime and its impact on the individual, rather than by the enumeratively indicated actions constituting it. Not without significance was the involvement of NGOs meticulously monitoring the prosecution and trial, as well as the presence on the bench of Navanethem Pillay paying particular attention to the crimes of sexual violence. The *Akayesu* case (Orzeczenie MTKR 1998) emphasised that rape under conditions of acute social conflict reduces the importance of non-consent on the part of the victim as a constitutive element of rape. According to the court, it is not necessary to investigate whether or not the victim consented to sexual acts in a situation of overwhelming coercion, such as the presence of military personnel or

militants (Chenault 2008: 224–225). A few months later, in the *Čelebići* case (Orzeczenie MTKJ 1998a), the tribunal applied the definition of rape from the *Akayesu* case (Orzeczenie MTKR 1998) but emphasised that international law still lacks an unambiguous formula to describe rape. He also adopted a similar concept of defining crime, pointing to its effects similar to those resulting from torture (Orzeczenie MTKJ 1998a: point 483–493; Fountain 2013: 251–262; Hayes 2010: 129–156; Szpak 2018: 115–129).

A change in philosophy in defining rape was brought about by the *Furundzija* proceedings (Orzeczenie MTKJ 1998b). The tribunal's judges assumed that the most useful definition would be one based on the classic *actus reus*, that is, citing the *Akayesu* judgment (Orzeczenie MTKR 1998), the "mechanical description" of actions and body parts. According to judges, the starting point in defining for practical reasons should be the criminal codes of states. During the trial, it was accepted that the "objective components" of the definition of rape are any "however slight sexual penetration of (a) the vaginal or anal opening of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the victim's mouth by the penis of the perpetrator using coercion, force or threat of force against the victim or a third person" (Orzeczenie MTKJ 1998b: point 176 and 185).

Defining rape based on the aforementioned *actus reus* continued in one of the key trials before the ICTY, namely *Kunarac et al*. (Orzeczenie MTKJ 2001a). While the first part of the definition of rape cited in the judgement is a copy of the definition in the *Furundzija* case, significant changes regarding the context of rape have become noticeable. In the *Furundzija* case, the tribunal focused on the coercion and force used against the victim, while in *Kunarac et al*. it was recognized that the essential constituent component of the prohibited act is the lack of voluntary consent to sexual intercourse. According to the Trial Chamber, the definition of rape used in the *Furundzija* case was deficient in that it ignored other "factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim" (Orzeczenie MTKJ 2001a: point 438). At the same time, the ICTY pointed out that "the will of the victim should be assessed in the context of the prevailing circumstances." Thus, despite their different conceptions of defining rape, the cases of *Akayesu* and *Kunarac et al.* were united by the theme of conditioning as a function of the existence of armed conflict, leading to the conclusion that consent to sexual intercourse in the circumstances of that conflict is *de facto* fictitious (Adams

2018: 755–769). The concept that resistance on the part of the victim is a necessary element of rape has also been strongly rejected.

An interesting formula was adopted by the ICTR in the *Muhimana* case (Orzeczenie MTKR 2005). The tribunal found that the definitions of rape recognised in the *Akayesu* and *Kunarac et al.* cases were not incompatible and adopted *de iure* the two definitions as valid: one conceptual, general definition in the *Akayesu* case and a second specific one based on the "mechanical" *actus reus* in the *Kunarac et al.* case (Orzeczenie MTKR 2005: point 551; Adams 2018: 460). The definition accepted in *Kunarac et al.* has become widely used and dominant in many subsequent *ad hoc* tribunal proceedings in the 21st century.[4] Consequently, in the works of the ICC, it was adopted as a basis and starting point for determining what rape is.

Rape as a form of violence must be seen in the context of the redefined gender-based nature of the crime. Before the development of international criminal law in the field of sexual crimes, the category of rape referred to women as victims. This is indicated by the provisions of the Fourth Geneva Convention (Konwencje 1949/38/171) and the Additional Protocol (Protokoły dodatkowe 1992/41/175). As a result of the work of the ICC, rape and sexual violence have become not only a crime against women but also against men.[5] The result of the case law and attention to this problem was the creation of a gender-neutral definition in the ICC, in which both the perpetrator and the victim could be representatives of any sex. The above means that, as a result of the work of *ad hoc* criminal tribunals, rape can be treated as essentially a new form of sexual violence. While violations (e.g., genital mutilation) committed against women were described as sexual, when men were the victims, the sexual dimension of the crime was overlooked (Grey 2019: 91). This may indicate that sexual violence against men is taboo.

A third noteworthy merit of the *ad hoc* tribunals is that they have effectively ended impunity for perpetrators of sexual violence in armed conflict. Despite many initial obstacles in the work of the ICTY and ICTR prosecutors

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[4] This includes the proceedings in *Kvočka* (Orzeczenie MTKJ 2001b), *Nikolić* (Orzeczenie MTKJ 2003), *Prlić et al.* (Orzeczenie MTKJ 2013b), *Semanza* (Orzeczenie MTKR 2003), *Gacumbitsi* (Orzeczenie MTKR 2004b), *Kamuhanda* (Orzeczenie MTKR 2004a), *Muhimana* (Orzeczenie MTKR 2005), *Nyiramasuhuko et al.* (Orzeczenie MTKR 2015).

[5] This conclusion follows from the judgments of the ICTY in the cases of *Tadić* (Orzeczenie MTKJ 1997), *Češić* (Orzeczenie MTKJ 2004), *Prlić et al.* (Orzeczenie MTKJ 2013b), *Stanišić and Župljanin* (Orzeczenie MTKJ 2013a). The charges in the above cases mainly concerned forced *fellatio*, sexual mutilation and forced homosexual intercourse.

related to the perception of sexual violence as a minor crime and doubts about obtaining evidence against the perpetrators, dozens of perpetrators of sexual violence were eventually convicted (Grey 2019: 74–89). Thus, sexual violence ceased to be an "inevitable by-product of war" and became a de facto prosecuted and punished war crime. Moreover, during the work of the *ad hoc* tribunals, there have been repeated judgments which emphasise that sexual violence was an instrument of terror or ethnic cleansing, exhausting the criteria of systematic or indiscriminate attack and thus constituting a crime against humanity, e.g., the judgments in *Kunarac et al.* (Orzeczenie MTKJ 2001a), *Muhimana* (Orzeczenie MTKR 2005), *Zelenović* (Orzeczenie MTKJ 2007), *Prlić et al.* (Orzeczenie MTKJ 2013b), *Nyiramasuhuko et al.* (Orzeczenie MTKR 2015).

Note the cases in which the ICTR has recognized that sexual violence and rape can constitute genocide. The *Akayesu* proceedings (Orzeczenie MTKR 1998), which are fundamental to the issue, unequivocally stated that sexual violence can be a manifestation of genocide. Referring to the Convention on the Prevention and Punishment of the Crime of Genocide, The Trial Chamber recognized that rape and sexual violence can be treated as "causing serious harm to the body or mental health of members of a group" and "imposing measures intended to prevent births within a group" (Konwencja 1949/2/9: art. 3). Finally, in the context of the charges against Jean-Paul Akayesu, the ICTR confirmed that the acts of sexual violence in the municipality of Taba under its jurisdiction, firstly, were part of a wide-ranging plan to exterminate the Tutsi group, "destroying its spirit, its will to live and of life itself," and secondly, constituted in themselves "the physical and psychological destruction of Tutsi women and the entire community" (Orzeczenie MTKR 1998: point 731 and 732). In the *Gacumbitsi* case (Orzeczenie MTKR 2004b), the tribunal confirmed the conclusions of the *Akayesu* case (Orzeczenie MTKR 1998). The tribunal has emphasised that the serious physical and mental harm caused by rape, accompanied by the intention to destroy an ethnic group, must be treated as genocide (Orzeczenie MTKR 2004a: point 291). Consequently, the accused Sylvestre Gacumbitsi was found guilty of genocide by, among other things, inciting the rape of Tutsi women and girls.

78 people have been charged with sexual crimes during the ICTY's operation, which means that 48% of all defendants have heard such allegations (Crimes of Sexual Violence in Numbers 2023). 32 perpetrators were convicted and charges were dropped against only 14 defendants. Less success in the context of prosecution and punishment of perpetrators was noted by

the ICTR Of the nearly 100 defendants, 53 have heard allegations of sexual violence, but only 12 have had sexual violence allegations confirmed and found guilty (Grey 2019: 85–86). Although the ICTR did not meet the expectations of victims and NGOs in prosecuting sexual violence, it is noteworthy for sending an unambiguous message to the perpetrators of sexual violence, which was most evident in the *Akayesu* case (Orzeczenie MTKR 1998) or *Gacumbitsi* (Orzeczenie MTKR 2004b). The questionable effectiveness of the ICTR may have been due to the specifics of the conflict, social conditions in Rwanda and prosecutorial errors, among other factors (van Schaack 2009: 362–367).

Conclusions

In the statutes of the ICTY and the ICTR, only those forms of sexual violence that were previously recorded by the Fourth Geneva Convention (rape and enforced prostitution) appeared. The jurisprudence of both tribunals, especially the ICTY, has had a positive impact on the identification of new crimes – sexual slavery and forced pregnancy. Defining the crime of rape has significantly expanded its conceptual scope, making it a *de facto* new form of sexual violence. While the Fourth Geneva Convention recognized sexual violence as directed against women, the legal solutions adopted by the ICTY and the ICTR made it a crime also potentially directed against men.

The identification of new forms of sexual violence in the work of *ad hoc* tribunals was strongly associated with the autonomy of these crimes. While it was also not uncommon for sexual violence to be categorised as "other inhuman acts," "inhuman or degrading treatment" or "assaults on personal dignity" during proceedings before the ICTY and ICTR, it has taken on concrete institutional shape over the dozen years of the *ad hoc* tribunals (Adams 2018: 752). Sexual violence has become a crime in itself. Already (or taking a different perspective – only) in *Kunarac et al.* ICTY stated unequivocally that rape acquires the status of an independent international crime (Orzeczenie MTKJ 2001a: point 436).

The process of autonomy and concretization of the crime of sexual violence initiated by the case law of the ICTY and the ICTR facilitated the formulation of the Rome Statute and the Elements of Crimes in the parts on sexual violence. Both documents emphasize the distinctiveness of sexual violence as a violation of international law, which distinguishes them from

the Fourth Geneva Convention and the statutes of *ad hoc* tribunals. The impetus for the indicated process of autonomy and concretization was also the at least partial (least visible in the case of sexual violence against men) de-tabooisation of the problem of sexual violence in armed conflicts. The growing awareness of sexual violence as a specific, destructive and degrading form of violation of humanitarian law, pressure from non-governmental organizations and, above all, trials before criminal tribunals, which clearly indicated in their rulings the need to identify further forms of sexual violence, also had a similar effect. The work of the *ad hoc* tribunals also resulted in the definition of all sexual violence (and not just rape) as crimes against humanity. One of the consequences of the ICTR's work is also the recognition of sexual violence as an act potentially constituting genocide. Showing the criminal potential of sexual violence is not without significance in contemporary conflicts, such as the war in Ukraine (post-2022). The systematic autonomisation and de-tabooisation of sexual violence mean that the resulting war crimes – unlike those of the 1990s in the former Yugoslavia and Rwanda – are widely documented and reported to authorities and NGOs in Ukraine. This gives a real prospect of bringing the perpetrators to criminal responsibility.

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